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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

The Honorable Joan H. Toal
Acting Circuit Court Judge

Appellate Case No. 2023-000727

Lenora Childers, Individually and as Personal Representative of the
Estate of Lewis C. Childers, ...

Plaintiff,

v.

Davis Mechanical Contractors, Inc.; Flame Refractories, Inc.;
General Boiler Casing Company, Inc.; HEFCO, Inc.; J.R. Dean
Company, Inc.; Payne & Keller Company; SFB, Incorporated;
Stafford Insulation Company; Standard Insulation Company of
N.C., Inc.; Systra Engineering, Inc.; United Construction Co. of
Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-
Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., ...

Defendants,

Flame Refractories, Inc., United Construction Co. of Rome, Inc.,
Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe &
Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.,
Payne & Keller Company, and PBI QSF, LLC, By and Through
Their Duly Appointed Receiver Peter D. Protopapas, ...

Third-Party
Plaintiffs,

v.

Zurich American Insurance Company (Individually and as
Successor to Northern Insurance Company of New York, Maryland
American General Insurance Company, and Maryland Casualty
Company); Allstate Insurance Company; John Tighe; Sean
Anthony Beatty; Dennis William Cahill; Catherine Ann Carlino;
Andre Lefebvre; David Dean Shumway; Gil Chandler, Michael
Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel
Robert Keddie; Julie Ann Fortune; Michael John Crall; James
Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.;
Arrowpoint Capital Corp.; Admiral Insurance Company;
Continental Insurance Company (Individually and as Successor in
interest to Harbor Insurance Company); Hartford Accident and

Indemnity Company, Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company, National Union Fire Insurance Company of Pittsburgh, PA, Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc., Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company, Lexington Insurance Company, First State Insurance Company, Birmingham Fire Insurance Company, Certain Underwriters at Lloyd's of London and various London Market Companies, South Carolina Property and Casualty Insurance Guaranty Association, R.L. Jarrett (Underwriting) Agency, Inc., U.S. Risk, L.L.C., Rexel USA, Inc., Compass Risk Services, LLC, SKRLA, LLC, Century Indemnity Company, in its own capacity and as successor to CCI Insurance Company, as successor to Insurance Company of North America, United States Fire Insurance Company, and Fireman's Fund Insurance Company,

Third-Party
Defendants,

of which

Payne & Keller Company, by and through its Receiver Peter D. Protopapas, is the Respondent,

and

AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company f/k/a Stonewall Insurance Company, individually and as successor in interest to Stonewall Surplus Lines Insurance Company; Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company are the Appellants.

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CLARIFY AND ENFORCE RULE 205 - VOLUME I**

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**Clerk I N
Corporations Section**

DATED this the 27 day of October, 1986.

By: [Signature]
Bernard Gautier
Its President

By: [Signature]
John J. King
Its Secretary

STATE OF TEXAS

§
§
§

COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this the 27 day of October, 1986, personally appeared Bernard Gautier, who being by me first duly sworn, declared that he is the President of the above corporation, that he signed the foregoing document as such officer of said corporation, and that the statements contained therein are true and correct.

[Signature]
Notary Public in and for
the State of Texas

[Signature]
Printed Name of Notary

My commission expires: _____

STATE OF TEXAS

§
§
§

COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this the 27 day of October, 1986, personally appeared John J. King, who being by me first duly sworn, declared that he is the Secretary of the above corporation, that he signed the foregoing document as such officer of said corporation, and that the statements contained therein are true and correct.

[Signature]
Notary Public in and for
the State of Texas

[Signature]
Printed Name of Notary

My commission expires: MELINDA WINN

My Commission Expires: 4/24/90

850:33dr

CONSENT ACTION OF THE SOLE SHAREHOLDER OF
FRENTEX ENTERPRISES COMPANY OF TEXAS

The undersigned, constituting the sole shareholder of Frentex Enterprises Company of Texas, formerly known as "Payne & Keller Company", a Texas corporation (the "Company"), acting pursuant to Article 9.10A of the Texas Business Corporation Act, as amended, hereby consents to the adoption of and does hereby adopt the resolutions hereinafter set forth with the same force and effect as if said resolutions were duly adopted by a unanimous vote of the shareholder of the Company at a meeting thereof duly and regularly called for those purposes, to-wit:

RESOLVED, that the resolutions of the Board of Directors recommending that the Company be dissolved and liquidated, be and the same are hereby adopted and approved in all respects; and be it

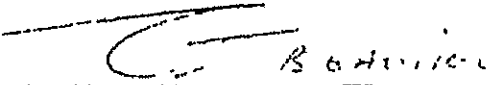
FURTHER RESOLVED, that the dissolution and liquidation of the Company be consummated as soon as practicable; and be it

FURTHER RESOLVED, that when and as assets of the Company are reduced to cash, provision having been made for the debts and liabilities of the Company, distribution may be made to the shareholders of the Company from time to time, as partial distributions on account of the complete liquidation of the Company, in such amounts as the Board of Directors may from time to time determine; and be it

FURTHER RESOLVED that the proper officers of the Company be and they hereby are authorized and directed to take all such action as they may deem necessary or appropriate to consummate the liquidation and dissolution of the Company, including the execution and delivery of all documents necessary to effectuate the liquidation and dissolution of the Company.

DATED: 10-27, 1986

FRENTEX ENTERPRISES CORPORATION
(formerly known as
"Payne & Keller Corporation"),
SOLE SHAREHOLDER

By: 

Title: President

850:33



BOB BULLOCK
Comptroller

COMPTROLLER OF PUBLIC ACCOUNTS
STATE OF TEXAS
AUSTIN, 78774

NOVEMBER 25, 1986

MELINDA WINN, SULLIVAN KING AND SABOM
5005 WOODWAY
HOUSTON, TX 77056

THE STATE OF TEXAS

COUNTY OF TRAVIS

I, Bob Bullock, Comptroller of Public Accounts of the State of Texas
DO HEREBY CERTIFY that according to the records of this office
FRENTEX ENTERPRISES COMPANY OF TEXAS
is, as of this date, in good standing with this office, for the
purpose of dissolution, merger or withdrawal having filed the
required franchise tax reports and having paid the franchise tax
computed to be due thereunder through April 30, 1987.

GIVEN UNDER MY HAND AND SEAL OF OFFICE
in the City of Austin, this 25th day
of November, 1986, A.D.

BOB BULLOCK
COMPTROLLER OF PUBLIC ACCOUNTS

05-329-3(3-84)

Charter/COA No. 172882-0

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT

LENORA CHILDERS, individually	)	C/A NO. 2021-CP-40-_____
and as Personal Representative of the Estate of	)	
LEWIS C. CHILDERS,	)	
	)	
Plaintiff,	)	In Re:
v.	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
DAVIS MECHANICAL CONTRACTORS,	)	
INC.	)	
	)	
FLAME REFRACTORIES, INC.	)	<u>SUMMONS</u>
	)	
GENERAL BOILER CASING COMPANY,	)	
INC.	)	
	)	
HEFCO, INC.	)	
	)	
J. R. DEANS COMPANY, INC.	)	
	)	
PAYNE & KELLER COMPANY	)	
	)	
SFB, INCORPORATED	)	
	)	
STAFFORD INSULATION COMPANY	)	
	)	
STANDARD INSULATION COMPANY OF	)	
N. C., INC.	)	
	)	
UNITED CONSTRUCTION CO. OF ROME,	)	
INC.	)	
	)	
Defendants.	)	
_____	)	

SUMMONS

TO DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action,
a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint

upon the Plaintiff's counsel, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service. If you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Respectfully submitted,

s/Theile B. McVey

Theile B. McVey (SC Bar No. 16682)

Jamie D. Rutkoski (SC Bar No. 103270)

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and

Charles W. Branham, III (TX Bar No. 24012323)

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ATTORNEYS FOR PLAINTIFF

July 14, 2021

Columbia, South Carolina.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT

LENORA CHILDERS, individually) C/A NO. 2021-CP-40-_____
and as Personal Representative of the Estate of)
LEWIS C. CHILDERS,)
)
Plaintiff,) In Re:
v.) Asbestos Personal Injury Litigation
) Coordinated Docket
DAVIS MECHANICAL CONTRACTORS,)
INC.) Deceased Lung Cancer
)
FLAME REFRACTORIES, INC.)
)
GENERAL BOILER CASING COMPANY,) **COMPLAINT**
INC.)
)
HEFCO, INC.)
) (Jury Trial Demanded)
J. R. DEANS COMPANY, INC.)
)
PAYNE & KELLER COMPANY)
f/k/a PAYNE AND KELLER INC.)
)
SFB, INCORPORATED)
f/k/a FORD, BACON & DAVIS)
INCORPORATED)
)
STAFFORD INSULATION COMPANY)
)
STANDARD INSULATION COMPANY OF)
N. C., INC.)
)
UNITED CONSTRUCTION CO. OF ROME,)
INC.)
)
Defendants.)
_____)

PLAINTIFF'S ORIGINAL COMPLAINT

Plaintiff, LENORA CHILDERS, individually and as Personal Representative of the Estate of LEWIS C. CHILDERS, sues the named Defendants for compensatory and punitive damages, by and through her attorneys, and come before this court and alleges as follows:

GENERAL ALLEGATIONS

1. This action is brought pursuant to the Wrongful Death Act, S.C. Gen. Stat. 15-51-10 *et seq.*, for the wrongful death of the Decedent, Lewis C. Childers, on behalf of all persons entitled to recover damages.

2. This Court has personal jurisdiction over Defendants because Plaintiff's claims arise from Defendants' conduct in:

- (a) Transacting business in this State, including the sale, supply, purchase, and/or use of asbestos and/or asbestos-containing products, within this State;
- (b) Contracting to supply services or things in the State;
- (c) Commission of a tortious act in whole or in part in this State;
- (d) Having an interest in, using, or possessing real property in this State; and/or
- (e) Entering into a contract to be performed in whole or in part by either party in this State.

3. Each Defendant, or its predecessors in interest, that manufactured, sold, and/or distributed asbestos-containing products or raw asbestos materials for use in South Carolina and other states at times relevant to this action are referred to herein as "Product Defendants." At all times relevant to this action, the Product Defendants and the predecessors of the Product Defendants for whose actions the Product Defendants are legally responsible, were engaged in the manufacture, sale and distribution of asbestos-containing products and raw materials. Defendants that owned and/or controlled the work sites where Decedent Lewis C. Childers experienced

occupational exposure as a result of working with asbestos-containing equipment in his immediate vicinity are referred to herein as the “Premises Defendants.”

4. Plaintiff’s claims against the Product Defendants, as defined herein, arise out of Defendants’ purposeful efforts to serve directly or indirectly the market for their asbestos and/or asbestos-containing products in this State, either through direct sales or through utilizing an established distribution channel with the expectation that their products would be purchased and/or used within South Carolina.

5. Plaintiff’s claims against the Premises Defendants, as defined herein, arise out of Defendants’ ownership and/or control of real property located in South Carolina and North Carolina, and the purchase and use of asbestos-containing products on their premises located in South Carolina and North Carolina, and/or contracting with the employer of Decedent Lewis C. Childers in South Carolina and North Carolina for Decedent and others to cross state lines to work on Defendant’s premises.

6. All of the named Defendants are corporations who purposefully availed themselves of the privilege of doing business in this State, and who’s substantial and/or systematic business in South Carolina exposed Decedent Lewis C. Childers to asbestos in this State, subjecting them to the jurisdiction of the South Carolina courts pursuant to the South Carolina Long-Arm Statute and the United States Constitution.

7. Decedent Lewis C. Childers’ cumulative exposure to asbestos as a result of acts and omissions of Defendants and their defective products, individually and together, was a substantial factor in causing Decedent Lewis C. Childers’ lung cancer and other related injuries and therefore under South Carolina law, is the legal cause of Decedent’s injuries and damages.

8. Decedent was not aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury and/or disease.

9. Decedent Lewis C. Childers worked with, or in close proximity to others who worked with, asbestos-containing materials including but not limited to asbestos-containing products and other asbestos-containing materials manufactured and/or sold by Defendants identified above.

10. Each of the named Defendants is liable for damages stemming from its own tortious conduct or the tortious conduct of an “alternate entity” as hereinafter defined. Defendants are liable for the acts of their “alternate entity” and each of them, in that there has been a corporate name change, Defendant is the successor by merger, by successor in interest, or by other acquisition resulting in a virtual destruction of Plaintiff’s remedy against each such “alternate entity”; Defendants, each of them, have acquired the assets, product line, or a portion thereof, of each such “alternate entity”; such “alternate entities” have acquired the assets, product line, or a portion thereof of each such Defendant; Defendants, and each of them, caused the destruction of Plaintiff’s remedy against each such “alternate entity”; each such Defendant has the ability to assume the risk-spreading role of each such “alternate entity;” and that each such defendant enjoys the goodwill originally attached to each “alternate entity.”

DEFENDANT	ALTERNATE ENTITY
PAYNE & KELLER COMPANY	PAYNE AND KELLER INC.
SFB, INCORPORATED	FORD, BACON & DAVIS INCORPORATED

11. Plaintiff has been informed and believes, and thereon alleges, that at all times herein mentioned, Defendants or their “alternate entities” were or are corporations, partnerships, unincorporated associations, sole proprietorships and/or other business entities organized and existing under and by virtue of the laws of the State of South Carolina, or the laws of some other state or foreign jurisdiction, and that said Defendants were and/or are authorized to do business in

the State of South Carolina, and that said Defendants have regularly conducted business in the State of South Carolina.

12. Plaintiff has been informed and believes, and thereon alleges, that progressive lung disease, lung cancer and other serious diseases are caused by inhalation of asbestos fibers without perceptible trauma and that said disease results from exposure to asbestos and asbestos-containing products over a period of time.

13. As a direct and proximate result of the conduct as alleged within, Decedent Lewis C. Childers suffered permanent injuries, including, but not limited to, lung cancer and other lung damage, as well as the mental and emotional distress attendant thereto, from the effect of exposure to asbestos fibers, all to his damage in the sum of the amount as the trier of fact determines is proper.

14. As a direct and proximate result of the conduct as hereinafter alleged, Decedent Lewis C. Childers incurred liability for physicians, surgeons, nurses, hospital care, medicine, hospices, x-rays and other medical treatment, the true and exact amount thereof being unknown to Plaintiff at this time. Plaintiff requests leave to supplement this Court and all parties accordingly when the true and exact cost of Decedent Lewis C. Childers' medical treatment is ascertained.

15. As a further direct and proximate result of the conduct as hereinafter alleged, Decedent Lewis C. Childers incurred, and will incur, loss of profits and commissions, a diminishment of earning potential, and other pecuniary losses, the full nature and extent of which are not yet known to Plaintiff. Plaintiff prays leave to supplement this Court and all parties accordingly to conform to proof at the time of trial.

16. Plaintiff hereby disclaims each and every claim or cause of action which does or may arise from any United States Marine Corps service or on any federal enclave. This disclaimer is not related solely to actions taken by or at the direction of a federal officer, but is, rather broader.

Plaintiff is not making any claims and are not alleging any causes of action against any entity for any asbestos exposure of any kind which occurred as a result of Decedent Lewis C. Childers' United States Marine Corps service. Moreover, Plaintiff is further disclaiming each and every claim or cause of action arising from any exposure to asbestos as a result of Lewis C. Childers' presence on or at any federal enclave. Plaintiff further disclaims each and every claim or cause of action arising under the United States Constitution and under any Federal Law or Regulation. Finally, Plaintiff disclaims each and every claim or cause of action which may be asserted under federal admiralty or maritime law. Courts across the Country have found that such disclaimers are proper and within the province of the Plaintiff to disclaim. Any removal by any defendant on the basis of the disclaimed claims will result in a motion for sanctions and seeking attorneys' fees.

THE PARTIES

17. Plaintiff Lenora Childers is currently a resident of the State of North Carolina. Decedent Lewis C. Childers was exposed to asbestos during the course of his career at various job sites, including but not limited to, locations in South Carolina and North Carolina.

18. The Plaintiff was appointed as the Personal Representative of the Estate of Lewis C. Childers (deceased) by the Probate Court of Cherokee County, South Carolina on or about June 18, 2020.

19. Defendant, **DAVIS MECHANICAL CONTRACTORS, INC.**, was a South Carolina corporation with its principal place of business in North Carolina. At all times material hereto, DAVIS MECHANICAL CONTRACTORS, INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. DAVIS MECHANICAL

CONTRACTORS, INC. is sued as a Product Defendant. DAVIS MECHANICAL CONTRACTORS, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against DAVIS MECHANICAL CONTRACTORS, INC. arise out of this Defendant's business activities in the State of South Carolina.

20. Defendant, **FLAME REFRACTORIES, INC.**, was a Florida corporation with its principal place of business in North Carolina. At all times material hereto, FLAME REFRACTORIES, INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. FLAME REFRACTORIES, INC. is sued as a Product Defendant. FLAME REFRACTORIES, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against FLAME REFRACTORIES, INC. arise out of this Defendant's business activities in the State of South Carolina.

21. Defendant, **GENERAL BOILER CASING COMPANY, INC.**, was a North Carolina corporation with its principal place of business in North Carolina. At all times material hereto, GENERAL BOILER CASING COMPANY, INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials

at numerous jobsites throughout the southeastern United States. GENERAL BOILER CASING COMPANY, INC. is sued as a Product Defendant. GENERAL BOILER CASING COMPANY, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against GENERAL BOILER CASING COMPANY, INC. arise out of this Defendant's business activities in the State of South Carolina.

22. Defendant, **HEFCO, INC.**, was a South Carolina corporation with its principal place of business in South Carolina. At all times material hereto, HEFCO, INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. HEFCO, INC. is sued as a Product Defendant. HEFCO, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against HEFCO, INC. arise out of this Defendant's business activities in the State of South Carolina.

23. Defendant, **J. R. DEANS COMPANY, INC.**, was a South Carolina corporation with its principal place of business in South Carolina. At all times material hereto, J. R. DEANS COMPANY, INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. J. R. DEANS COMPANY, INC. is sued as a Product Defendant.

J. R. DEANS COMPANY, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against J. R. DEANS COMPANY, INC. arise out of this Defendant's business activities in the State of South Carolina.

24. Defendant, **PAYNE & KELLER COMPANY** f/k/a PAYNE AND KELLER INC., was a Texas corporation with its principal place of business in Texas. At all times material hereto, PAYNE & KELLER COMPANY manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. PAYNE & KELLER COMPANY is sued as a Product Defendant. PAYNE & KELLER COMPANY is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against PAYNE & KELLER COMPANY arise out of this Defendant's business activities in the State of South Carolina.

25. Defendant, **SFB, INCORPORATED** f/k/a FORD, BACON & DAVIS INCORPORATED, was a New Jersey corporation with its principal place of business in Texas. At all times material hereto, SFB, INCORPORATED manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. SFB, INCORPORATED is sued as a Product Defendant. SFB, INCORPORATED is also sued for the work it did at the various

industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against SFB, INCORPORATED arise out of this Defendant's business activities in the State of South Carolina.

26. Defendant, **STAFFORD INSULATION COMPANY**, was a South Carolina corporation with its principal place of business in South Carolina. At all times material hereto, STAFFORD INSULATION COMPANY manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. STAFFORD INSULATION COMPANY is sued as a Product Defendant. STAFFORD INSULATION COMPANY is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against STAFFORD INSULATION COMPANY arise out of this Defendant's business activities in the State of South Carolina.

27. Defendant, **STANDARD INSULATION COMPANY OF N.C., INC.**, was a North Carolina corporation with its principal place of business in North Carolina. At all times material hereto, STANDARD INSULATION COMPANY OF N.C., INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. STANDARD INSULATION COMPANY OF N.C., INC. is sued as a Product Defendant.

STANDARD INSULATION COMPANY OF N.C., INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against STANDARD INSULATION COMPANY OF N.C., INC. arise out of this Defendant's business activities in the State of South Carolina.

28. Defendant, **UNITED CONSTRUCTION CO. OF ROME, INC.**, was a North Carolina corporation with its principal place of business in North Carolina. At all times material hereto, UNITED CONSTRUCTION CO. OF ROME, INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. UNITED CONSTRUCTION CO. OF ROME, INC. is sued as a Product Defendant. UNITED CONSTRUCTION CO. OF ROME, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against UNITED CONSTRUCTION CO. OF ROME, INC. arise out of this Defendant's business activities in the State of South Carolina.

BACKGROUND FACTS

29. Decedent Lewis C. Childers brings this action for monetary damages as a result of contracting an asbestos-related disease.

30. Decedent Lewis C. Childers was diagnosed with lung cancer on or about April 2, 2020.

31. Decedent Lewis C. Childers' lung cancer was caused by his exposure to asbestos during the course of his employment.

32. During his work history, Decedent was exposed to Defendants' asbestos-containing products through his work as an insulator and maintenance technician from approximately 1960s to 2000s at various commercial and industrial jobsites located primarily in South Carolina and North Carolina. Decedent performed a variety of tasks throughout the facilities where he worked, including but not limited to, the removal and installation of asbestos-containing insulation and materials, construction and/or repair of boilers. Additionally, the maintenance technicians inspected, tested and adjusted various equipment including pumps, turbines, heat exchangers, pumps, fans and similar equipment. They coordinated their work with other maintenance personnel and worked in confined spaces. All of these activities exposed Decedent to asbestos and asbestos-dust.

33. During his work history, Decedent was further exposed through his work around other trades including carpenters, mechanics, pipefitters, boilermakers, insulators, and electricians. Decedent worked near and closely to a variety of tradesmen working on asbestos-containing pipe insulation, generators, turbines, boilers, valves, steam traps, pumps, furnaces, and other equipment, as well as tradesmen mixing, cutting, and installing asbestos-containing insulation and other products. All of these activities exposed Decedent to asbestos and asbestos-dust.

34. Decedent was exposed to Defendants' asbestos-containing products while employed as an insulator and maintenance technician for Duke Energy Corporation (Duke Power) at various industrial locations, including but not limited to the following:

- Oconee Nuclear plant – Seneca, SC
- Lee Steam plant – Pelzer, SC
- Catawba Nuclear Plant – York, SC
- Dan River Steam plant – Eden, SC
- Belews Creek plant – Walnut Cove, NC
- Riverbend Steam plant – Mount Holly, NC
- Cliffside Steam plant – Cliffside, NC
- Allen Steam plant – Belmont, NC

- Marshall Steam plant – Terrell, NC
- McGuire Nuclear plant – Huntersville, NC

35. Decedent was exposed to Defendants' asbestos-containing products while employed as an insulator for Daniels Construction at various industrial locations, including but not limited to the following:

- Bowater paper mill – Catawba, SC
- Hoechst Celanese a/k/a Fiber Industries – Darlington, SC
- Hoechst Celanese a/k/a Fiber Industries – Greenville, SC
- Hoechst Celanese a/k/a Fiber Industries – Spartanburg – SC
- Hoechst Celanese a/k/a Fiber Industries – Salisbury, NC

36. Decedent was exposed to Defendants' asbestos-containing products while employed as an insulator for Presnell Insulation Co. Inc. at various industrial locations, including but not limited to the following:

- Bowater paper mill – Catawba, SC
- Cannon Mills – Kannapolis, NC
- Cone Mills – Concord, NC
- Cone Mills, Kannapolis, NC
- various cotton mills in SC and NC

37. Decedent was exposed to Defendants' asbestos-containing products while employed as an insulator for Cooks Insulation Co. Inc. at various industrial locations, including but not limited to the following:

- Milliken – Cypress plant – Blacksburg, SC
- Milliken – Gerrish plant – Pendleton, SC
- various cotton mills in SC and NC

38. During the course of Decedent Lewis C. Childers' employment at the location(s) mentioned above, during other occupational work projects, and in other ways, Decedent was exposed to and inhaled, ingested, or otherwise absorbed asbestos fibers emanating from certain products he was working around.

39. Decedent Lewis C. Childers' cumulative exposure to asbestos as a result of acts and omissions of Defendants and their defective products, individually and together, was a substantial factor in causing Decedent Lewis C. Childers' lung cancer and other related injuries and therefore under South Carolina law, is the legal cause of Decedent's injuries and damages.

40. Decedent Lewis C. Childers was not aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury and/or disease.

41. Decedent has been informed and believes, and thereon alleges, that progressive lung disease, lung cancer and other serious diseases are caused by inhalation of asbestos fibers without perceptible trauma and that said disease results from exposure to asbestos and asbestos-containing products over a period of time.

42. As a direct and proximate result of the conduct as alleged within, Decedent Lewis C. Childers suffered permanent injuries, including, but not limited to, lung cancer and other lung damage, as well as the mental and emotional distress attendant thereto, from the effect of exposure to asbestos fibers, all to his damage in the sum of the amount as the trier of fact determines is proper.

43. As a direct and proximate result of the conduct as hereinafter alleged, Decedent Lewis C. Childers incurred liability for physicians, surgeons, nurses, hospital care, medicine, hospices, x-rays and other medical treatment, the true and exact amount thereof being unknown to Plaintiff at this time. Plaintiff requests leave to supplement this Court and all parties accordingly when the true and exact cost of Decedent Lewis C. Childers' medical treatment is ascertained.

44. As a further direct and proximate result of the conduct as hereinafter alleged, Decedent incurred loss of profits and commissions, a diminishment of earning potential, and other pecuniary losses, the full nature and extent of which are not yet known to Plaintiff. Plaintiff

requests leave to supplement this Court and all parties accordingly to conform to proof at the time of trial.

FOR A FIRST CAUSE OF ACTION
(Product Liability: Negligence)

Plaintiff Complains of Defendants for a Cause of Action for Negligence Alleging as Follows:

45. Plaintiff incorporates herein by reference, as though fully set forth herein, each and every paragraph of the General Allegations above.

46. At all times herein mentioned, each of the named Defendants was an entity and/or the successor, successor in business, successor in product line or a portion thereof, assign, predecessor, predecessor in business, predecessor in product line or a portion thereof, parent, subsidiary, or division of an entity, hereinafter referred to collectively as “alternate entities,” engaged in the business of researching, studying, manufacturing, fabricating, designing, modifying, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, re-branding, manufacturing for others, packaging and advertising a certain product, namely asbestos, other products containing asbestos, and products manufactured for foreseeable use with asbestos products.

47. At all times herein mentioned, Defendants, and/or their “alternate entities” singularly and jointly, negligently and carelessly researched, manufactured, fabricated, designed, modified, tested or failed to test, abated or failed to abate, inadequately warned or failed to warn of the health hazards, failed to provide adequate use instructions for eliminating the health risks inherent in the use of the products, labeled, assembled, distributed, leased, bought, offered for sale, supplied, sold, inspected, serviced, installed, contracted for installation, repaired, marketed, warranted, rebranded, manufactured for others, packaged and advertised, a certain product, namely

asbestos, other products containing asbestos, and products manufactured for foreseeable use with asbestos products, in that said products caused personal injuries to Decedent Lewis C. Childers and others similarly situated, (hereinafter collectively called “exposed persons”), while being used for their intended purpose and in a manner that was reasonably foreseeable.

48. The asbestos and asbestos-containing products were defective and unsafe for their intended purpose in that there was an alternative for asbestos that could have been used as the product or as a component instead of asbestos within a normally asbestos-containing/utilizing product. Said alternatives would have prevented Defendants’ asbestos and asbestos-containing products from causing Decedent Lewis C. Childers’ lung cancer, due to an inability of any asbestos-alternative to penetrate the pleural lining of Decedent Lewis C. Childers’ lung, even if inhaled. Said alternatives came at a comparable cost to each of the Defendants and/or their “alternate entities.” Said alternatives were of comparable utility to the asbestos or asbestos-containing products of Defendants and/or their “alternate entities.” The gravity of the potential harm resulting from the use of Defendants’ asbestos or asbestos-containing products, and the likelihood such harm would occur to users of its products, far outweighed any additional cost or marginal loss of functionality in creating and/or utilizing an alternative design, providing adequate warning of such potential harm, and/or providing adequate use instructions for eliminating the health risks inherent in the use of their products, thereby rendering the same defective, unsafe and dangerous for use by Decedent Lewis C. Childers. Defendants and/or their “alternate entities” had a duty to exercise due care in the pursuance of the activities mentioned above and Defendants, each of them, breached said duty of due care.

49. Defendants and/or their “alternate entities” knew or should have known, and intended that the aforementioned asbestos and asbestos-containing products would be transported by truck, rail, ship and other common carriers, that in the shipping process the products would

break, crumble or be otherwise damaged; and/or that such products would be used for insulation, construction, plastering, fireproofing, soundproofing, automotive, aircraft and/or other applications, including, but not limited to grinding, sawing, chipping, hammering, scraping, sanding, breaking, removal, “rip-out,” and other manipulation, resulting in the release of airborne asbestos fibers, and that through such foreseeable use and/or handling by exposed persons, including Decedent Lewis C. Childers, would use or be in proximity to and exposed to said asbestos fibers.

50. At all times relevant, Defendants and/or their “alternate entities” were aware of their asbestos and asbestos-containing products’ defect but failed to adequately warn Decedent Lewis C. Childers, Decedent’s family members or others in their vicinity, as well as failed to adequately warn others of the known hazards associated with their products and/or failed to recall or retrofit their products. A reasonable manufacturer, distributor, or seller of Defendants’ products would have, under the same or similar circumstances, adequately warned of the hazards associated with their products.

51. Decedent Lewis C. Childers, Decedent’s family members and others in their vicinity used, handled or were otherwise exposed to asbestos and asbestos-containing products referred to herein in a manner that was reasonably foreseeable. Decedent’s exposure to asbestos and asbestos-containing products occurred at various locations as set forth in this Complaint.

52. Decedent Lewis C. Childers suffers from lung cancer, a cancer related to exposure to asbestos and asbestos-containing products. Decedent Lewis C. Childers was not aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury or disease.

53. Defendants’ conduct and defective products as described in this cause of action were a direct cause of Decedent Lewis C. Childers’ injuries, and all damages thereby sustained by

Decedent Lewis C. Childers. Plaintiff therefore seeks all compensatory damages in order to make them whole, according to proof.

54. Furthermore, the conduct of Defendants and/or their “alternate entities” in continuing to market and sell products which they knew were dangerous to Decedent Lewis C. Childers and the public without adequate warnings or proper use instructions was done in a conscious disregard and indifference to the safety and health of Decedent Lewis C. Childers and others similarly situated.

55. In researching, manufacturing, fabricating, designing, modifying, testing or failing to test, warning or failing to warn, failing to recall or retrofit, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, rebranding, manufacturing for others, packaging and advertising asbestos and asbestos-containing products or products manufactured for foreseeable use with asbestos products, Defendants and/or their “alternate entities” did so with conscious disregard for the safety of “exposed persons” who came in contact with asbestos and asbestos-containing products, in that Defendants and/or their “alternate entities” had prior knowledge that there was a substantial risk of injury or death resulting from exposure to asbestos, asbestos-containing products or products manufactured for foreseeable use with asbestos products, including, but not limited to, asbestosis, lung cancer, lung cancer, and other lung damages. This knowledge was obtained, in part, from scientific studies performed by, at the request of, or with the assistance of Defendants and/or their “alternate entities.”

56. Defendants and their “alternate entities” were aware that members of the general public and other “exposed persons,” who would come in contact with their asbestos and asbestos-containing products, had no knowledge or information indicating that asbestos, asbestos-containing products, or products manufactured for foreseeable use with asbestos products, could

cause injury, and Defendants, and their “alternate entities,” each of them, knew that members of the general public and other “exposed persons,” who came in contact with asbestos and asbestos-containing products or products manufactured for foreseeable use with asbestos products, would assume, and in fact did assume, that exposure to asbestos and asbestos-containing products was safe, when in fact said exposure was extremely hazardous to health and human life.

57. The above-referenced conduct of Defendants, and their “alternate entities,” was motivated by the financial interest of Defendants, their “alternate entities,” and each of them, in the continuing, uninterrupted research, design, modification, manufacture, fabrication, labeling, instructing, assembly, distribution, lease, purchase, offer for sale, supply, sale, inspection, installation, contracting for installation, repair, marketing, warranting, rebranding, manufacturing for others, packaging and advertising of asbestos, asbestos-containing products and products manufactured for foreseeable use with asbestos products. Defendants, their “alternate entities,” and each of them consciously disregarded the safety of “exposed persons” in pursuit of profit. Defendants were consciously willing and intended to permit asbestos and asbestos-containing products to cause injury to “exposed persons” without warning them of the potential hazards and further induced persons to work with and be exposed thereto, including Decedent Lewis C. Childers.

58. Decedent Lewis C. Childers and other exposed persons did not know of the substantial danger of using Defendants’ asbestos, asbestos containing-products, and products manufactured for foreseeable use with asbestos products. The dangers inherent in the use of these products were not readily recognizable by Decedent Lewis C. Childers or other exposed persons. Defendants and/or their “alternate entities” further failed to adequately warn of the risks to which Decedent and others similarly situated were exposed.

59. Defendants and/or their “alternate entities” are liable for the fraudulent, oppressive, and malicious acts of their “alternate entities,” and each Defendant's officers, directors and managing agents participated in, authorized, expressly and impliedly ratified, and had full knowledge of, or should have known of, the acts of each of their “alternate entities” as set forth herein.

60. The herein-described conduct of Defendants, and their “alternate entities,” was and is willful, malicious, fraudulent, and outrageous and in conscious disregard and indifference to the safety and health of persons foreseeably exposed. Plaintiff, for the sake of example and by way of punishing said Defendants, seeks punitive damages according to proof against all defendants.

FOR A SECOND CAUSE OF ACTION

(Product Liability: Strict Liability - S.C. Code Ann. § 15-73-10, et seq.)

As a Second and Distinct Cause of Action for Strict Liability, Plaintiff Complains of Defendants, and Alleges as Follows:

61. Plaintiff incorporates herein by reference, as though fully set forth herein, each of the preceding paragraphs.

62. Decedent Lewis C. Childers suffered from lung cancer, a cancer related to exposure to asbestos, asbestos-containing products and products manufactured for foreseeable use with asbestos products. Decedent Lewis C. Childers was not aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury and/or disease.

63. The Defendants’ conduct and defective products as described above were a direct cause of Decedent Lewis C. Childers’ injuries, and the injuries and damages thereby sustained by Plaintiff.

64. Furthermore, the Defendants’ conduct and that of their “alternate entities” in continuing to market and sell products which they knew were dangerous to Decedent Lewis C. Childers and the public without adequate warnings or proper use instructions, was done in a

conscious disregard and indifference to the safety and health of Decedent Lewis C. Childers and others similarly situated.

65. Defendants and/or their “alternate entities” knew or should have known, and intended that the aforementioned asbestos and products containing asbestos would be transported by truck, rail, ship and other common carriers, that in the shipping process the products would break, crumble or be otherwise damaged; and/or that such products would be used for insulation, construction, plastering, fireproofing, soundproofing, automotive, aircraft and/or other applications, including, but not limited to grinding, sawing, chipping, hammering, scraping, sanding, breaking, removal, “rip-out,” and other manipulation, resulting in the release of airborne asbestos fibers, and that through such foreseeable use and/or handling, “exposed persons,” including Decedent, would use or be in proximity to and exposed to said asbestos fibers.

66. Decedent Lewis C. Childers, Decedent’s family members, and others in their vicinity used, handled or were otherwise exposed to asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products, referred to herein in a manner that was reasonably foreseeable. Decedent Lewis C. Childers’ exposure to asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products occurred at various locations as set forth in this Complaint.

67. Defendants and/or their “alternate entities” knew and intended that the above-referenced asbestos and asbestos-containing products would be used by the purchaser or user without inspection for defects therein or in any of their component parts and without knowledge of the hazards involved in such use.

68. The asbestos and asbestos-containing products were defective and unsafe for their intended purpose in that there was an alternative for asbestos that could have been used as the product or as a component instead of asbestos within a normally asbestos-containing/utilizing

product. Said alternatives would have prevented Defendants' asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products from causing Decedent Lewis C. Childers' lung cancer, due to an inability of any asbestos-alternative to penetrate the pleural lining of Decedent Lewis C. Childers' lung, even if inhaled. Said alternatives came at a comparable cost to each of the Defendants and/or their "alternate entities." Said alternatives were of comparable utility to the asbestos or asbestos-containing products or products manufactured for foreseeable use with asbestos products of Defendants and/or their "alternate entities." The gravity of the potential harm resulting from the use of Defendants' asbestos or asbestos-containing products, and the likelihood such harm would occur, far outweighed any additional cost or marginal loss of functionality in creating and/or utilizing an alternative design, providing adequate warning of such potential harm, and/or providing adequate use instructions for eliminating the health risks inherent in the use of their products, thereby rendering the same defective, unsafe and dangerous for use.

69. The defect existed in the said products at the time they left the possession of defendants, and/or their "alternate entities," and each of them. Said products were intended to reach the ultimate consumer in the same condition as it left defendants. Said products did, in fact, cause personal injuries, including lung cancer, asbestosis, other lung damage, and cancer to "exposed persons," including Decedent Lewis C. Childers herein, while being used in a reasonably foreseeable manner, thereby rendering the same defective, unsafe and dangerous for use.

70. Decedent Lewis C. Childers and other exposed persons did not know of the substantial danger of using Defendants' asbestos, asbestos-containing products, or products manufactured for foreseeable use with asbestos products. The dangers inherent in the use of these products were not readily recognizable by Decedent or other exposed persons. Said Defendants

and/or their “alternate entities” further failed to adequately warn of the risks to which Decedent Lewis C. Childers and others similarly situated were exposed.

71. Defendants’ defective products as described above were a direct cause of Decedent Lewis C. Childers’ injuries, and the damages thereby sustained.

72. In researching, manufacturing, fabricating, designing, modifying, testing or failing to test, warning or failing to warn, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, rebranding, manufacturing for others, packaging and advertising asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products, Defendants, and/or their “alternate entities,” and each of them, did so with conscious disregard for the safety of Decedent Lewis C. Childers and other exposed persons who came in contact with the asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products, in that Defendants and/or their “alternate entities” had prior knowledge that there was a substantial risk of injury or death resulting from exposure to asbestos or asbestos-containing products or products manufactured for foreseeable use with asbestos products, including, but not limited to, lung cancer, asbestosis, other lung damages and cancers. This knowledge was obtained, in part, from scientific studies performed by, at the request of, or with the assistance of Defendants and/or their “alternate entities.”

73. Defendants and/or their “alternate entities” were aware that members of the general public and other exposed persons, who would come in contact with their asbestos and asbestos-containing products, had no knowledge or information indicating that asbestos or asbestos-containing products or products manufactured for foreseeable use with asbestos products could cause injury. Defendants and/or their “alternate entities” further knew that members of the general public and other exposed persons, who came in contact with asbestos, asbestos-containing

products, and products manufactured for foreseeable use with asbestos products would assume, and in fact did assume, that exposure to asbestos and asbestos-containing products was safe, when in fact exposure was extremely hazardous to health and human life.

74. The above-referenced conduct of Defendants and/or their “alternate entities” motivated by the financial interest of Defendants, their “alternate entities,” and each of them, in the continuing and uninterrupted research, design, modification, manufacture, fabrication, labeling, instructing, assembly, distribution, lease, purchase, offer for sale, supply, sale, inspection, installation, contracting for installation, repair, marketing, warranting, rebranding, manufacturing for others, packaging and advertising of asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products. Defendants and/or their “alternate entities” consciously disregarded the safety of “exposed persons” in their pursuit of profit and in fact consciously intended to cause injury to Decedent Lewis C. Childers and other exposed persons and induced persons to work with, be exposed to, and thereby injured by asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products.

75. Defendants are liable for the fraudulent, oppressive, and malicious acts of their “alternate entities,” and each Defendant's officers, directors and managing agents participated in, authorized, expressly and impliedly ratified, and knew, or should have known of, the acts of each of their “alternate entities” as set forth herein.

76. The conduct of said defendants, their “alternate entities,” and each of them as set forth in this Complaint, was and is willful, malicious, fraudulent, outrageous and in conscious disregard and indifference to the safety and health of exposed persons. Plaintiff, for the sake of example and by way of punishing said Defendants, seeks punitive damages according to proof against all Defendants.

77. At all times herein mentioned, each of the named Defendants was an entity and/or the successor, successor in business, successor in product line or a portion thereof, assign, predecessor, predecessor in business, predecessor in product line or a portion thereof, parent, subsidiary, or division of an entity, hereinafter referred to collectively as “alternate entities,” engaged in the business of researching, studying, manufacturing, fabricating, designing, modifying, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, re-branding, manufacturing for others, packaging and advertising a certain product, namely asbestos, other products containing asbestos and products manufactured for foreseeable use with asbestos products.

FOR A THIRD CAUSE OF ACTION
(Vicarious Liability of Defendants Based upon Respondeat Superior)

As a Third Distinct Cause of Action Against Defendants, Plaintiff Brings this Third Cause of Action for Vicarious Liability of Product and Premises Defendants Based upon Respondeat Superior and Alleges as Follows:

78. Plaintiff incorporates herein by reference, as though fully set forth herein, each of the preceding paragraphs.

79. Prior to and during all relevant times Defendants and/or their “alternate entities” employed workers (hereinafter “employees”) in areas where defendants owned, maintained, controlled, managed and/or conducted business activities where Decedent worked and/or spent time as alleged above.

80. At all times herein mentioned, Defendants’ employees frequently encountered asbestos-containing products, materials, and debris during the course and scope of their employment, and during their regular work activities negligently disturbed asbestos-containing materials to which Decedent Lewis C. Childers was exposed.

81. Employees handling and disturbing asbestos-containing products in Decedent Lewis C. Childers' vicinity were the agents and employees of defendants and at all times relevant were subject to the control of Defendants with respect to their acts, labor, and work involving (a) the removal, transport, installation, cleaning, handling, and maintenance of asbestos-containing products, materials, and debris, and (b) the implementation of safety policies and procedures. Defendants controlled both the means and manner of performance of the work of their employees as described herein.

82. Employees handling and disturbing asbestos-containing products in Decedent Lewis C. Childers', Decedent's family members and others' vicinity received monetary compensation from Defendants in exchange for the work performed and these employees performed the work in the transaction and furtherance of Defendants' businesses.

83. Harmful asbestos fibers were released during Defendants' employees' use, handling, breaking, or other manipulation of asbestos-containing products and materials.

84. Once released, the asbestos fibers contaminated the clothes, shoes, skin, hair, and body parts of those exposed, including Decedent Lewis C. Childers, who also inhaled those fibers, and on the surfaces of work areas, where further activity caused the fibers to once again be released into the air and inhaled by Decedent Lewis C. Childers.

85. The asbestos and asbestos-containing materials were unsafe in that handling and disturbing products containing asbestos causes the release of asbestos fibers into the air onto surrounding surfaces, and onto persons in the area. The inhalation of asbestos fibers can cause serious disease and death.

86. Defendants' employees' use, handling and manipulation of asbestos-containing materials, as required by their employment and occurring during the course and scope of their

employment, did in fact, cause personal injuries, including lung cancer and other lung damage, to exposed persons including Decedent Lewis C. Childers.

87. Defendants' employees were negligent in their use, handling and manipulation of said products in that they failed to isolate their work with asbestos and/or to suppress asbestos fibers from being released into the air and surrounding areas. They also failed to take appropriate steps to learn how to prevent exposure to asbestos, failed to warn and/or adequately warn Decedent that he was being exposed to asbestos, failed to adequately warn Decedent Lewis C. Childers of the harm associated with his exposure to asbestos, and provide him with protection to prevent his inhalation of asbestos.

88. Defendants' employees knew or should have known that failure to take such steps would result in exposure to bystanders including Decedent Lewis C. Childers.

89. Defendants' employees owed Decedent Lewis C. Childers a duty to exercise due care and diligence in their activities while he was lawfully on the premises so as not to cause him harm.

90. Defendants' employees breached this duty of care as described above.

91. At all times mentioned, Decedent Lewis C. Childers was unaware of the dangerous condition and unreasonable risk of personal injury created by Defendants' employees' use of and work with asbestos-containing products and materials.

92. As a direct result of the Defendants' employees conduct, Decedent Lewis C. Childers' exposure to asbestos, asbestos-containing materials, and products manufactured for foreseeable use with asbestos products, each individually and together, caused severe and permanent injury to Decedent Lewis C. Childers and the damages and injuries as complained of herein by Plaintiff.

93. The risks herein alleged, and the resultant damages suffered by the Decedent Lewis C. Childers were typical of or broadly incidental to Defendants' business enterprises. As a practical matter, the losses caused by the torts of Defendants' employees as alleged were sure to occur in the conduct of Defendants' business enterprises. Nonetheless, Defendants engaged in, and sought to profit by, their business enterprises without exercising due care as described in this Complaint, which, on the basis of past experience, involved harm to others as shown through the torts of employees.

94. Based on the foregoing, Defendants as the employers of said employees are vicariously liable under the doctrine of respondeat superior for all negligent acts and omissions committed by their employees in the course and scope of their work that caused harm to Decedent Lewis C. Childers.

FOR A FOURTH CAUSE OF ACTION
(Premises Liability: Negligence as to Premises Owner/Contractor)

As a Fourth Distinct Cause of Action for General Negligence, Plaintiff Complains of Premises Defendants, and Alleges as Follows:

95. Plaintiff incorporates by reference, the preceding paragraphs as if fully set forth herein.

96. Prior to and during all relevant times, the Defendants and/or their "alternate entities" employed workers in areas where Defendants owned, maintained, controlled, managed and/or conducted business activities where Decedent Lewis C. Childers worked and/or spent time.

97. At all times herein mentioned, Defendants selected, supplied, and distributed asbestos-containing materials to their employees for use during their regular work activities, and said employees disturbed those asbestos-containing materials.

98. Defendants were negligent in selecting, supplying, distributing and disturbing the asbestos-containing products and in that said products were unsafe. Said products were unsafe

because they released asbestos fibers and dust into air when used which would be inhaled by Decedent Lewis C. Childers and settled onto his clothes, shoes, hands, face, hair, skin, and other body parts thus creating a situation whereby workers and by-standers including Decedent Lewis C. Childers would be exposed to dangerous asbestos dust beyond the present.

99. The asbestos, asbestos-containing materials, and products manufactured for foreseeable use with asbestos products described herein were unsafe in that handling and disturbing products containing asbestos causes the release of asbestos fibers into the air, and the inhalation of asbestos fibers causes serious disease and death. Here, the handling of the above-described asbestos-containing materials by Defendants' employees, as required by their employment and occurring during the course and scope of their employment, did, in fact, cause personal injuries, including lung cancer and other lung damage, to exposed persons, including Decedent.

100. At all times herein mentioned, Defendants knew or should have known that its employees and bystanders thereto, including Decedent Lewis C. Childers, frequently encountered asbestos-containing products and materials during the course and scope of their work activities.

101. At all times herein mentioned, Defendants knew or should have known that the asbestos-containing materials encountered by its employees and bystanders thereto including Decedent Lewis C. Childers, were unsafe in that harmful asbestos fibers were released during the use, handling, breaking, or other manipulation of asbestos-containing products and materials, and that once released, asbestos fibers can be inhaled, and can alight on the clothes, shoes, skin, hair, and body parts of those exposed, where further activity causes the fibers to once again be released into the air where they can be inhaled, all of which causes serious disease and/or death.

102. At all times herein mentioned, Defendants, in the exercise of reasonable diligence, should have known that absent adequate training and supervision, their employees and bystanders

thereto including Decedent Lewis C. Childers were neither qualified nor able to identify asbestos-containing products nor to identify the hazardous nature of their work activities involving asbestos-containing products.

103. At all times herein mentioned, Decedent Lewis C. Childers was unaware of the dangerous condition and unreasonable risk of personal injury created by the presence and use of asbestos-containing products and materials.

104. At all times herein mentioned, Defendants, in the exercise of reasonable diligence, should have known that workers and bystanders thereto, would bring dangerous dust home from the workplace and contaminate their family cars and homes, continuously exposing and potentially causing injury to others off the premises.

105. At all times herein mentioned, Defendants had a duty to use due care in the selection, supply, distribution and disturbance of asbestos-containing products and materials to its employees, to adequately instruct, train, and supervise their employees and to implement adequate safety policies and procedures to protect workers and persons encountering those workers, including Decedent Lewis C. Childers, from suffering injury or death as a result of the asbestos hazards encountered and created by the work of Defendants' employees.

106. Defendants' duties as alleged herein exist and existed independently of Defendants' duties to maintain their premises in reasonably safe condition, free from concealed hazards.

107. Defendants negligently selected, supplied, and distributed the asbestos-containing materials and failed to adequately train or supervise their employees to identify asbestos-containing products and materials; to ensure the safe handling of asbestos-containing products and materials encountered during the course of their work activities; and to guard against inhalation of asbestos fibers and against the inhalation of asbestos fibers by those who would come into close

contact with them after they had used, disturbed, or handled, said asbestos-containing products and materials during the course and scope of their employment by Defendants.

108. Defendants failed to warn its employees and bystanders thereto, including Decedent Lewis C. Childers, of the known hazards associated with asbestos and the asbestos-containing materials they were using and/or disturbing.

109. As a direct and proximate result of the conduct of Defendants in selecting, supplying, distributing and disturbing asbestos-containing materials or products manufactured for foreseeable use with asbestos products and failing to adequately train and supervise their employees and failing to adopt and implement adequate safety policies and procedures as alleged herein, Decedent Lewis C. Childers became exposed to and inhaled asbestos fibers, which was a substantial factor in causing Decedent Lewis C. Childers to develop asbestos-related disease lung cancer, and to suffer all damages attendant thereto.

FOR A FIFTH CAUSE OF ACTION
(Negligence Per Se)

As a Fifth Distinct Cause of Action for Negligence Per Se, Plaintiff Complains of Defendants, and Alleges as Follows:

110. Plaintiff incorporates herein by reference, as though fully set forth herein, each of the preceding paragraphs.

111. The actions of Defendants also constituted negligence per se.

112. Defendants violated federal and state regulations relating to asbestos exposure. Such violations constitute negligence per se or negligence as a matter of law. Further, each such violation resulted in dangerous and unlawful exposures to asbestos for Decedent Lewis C. Childers. Plaintiff is not making any claims under federal law; instead, Plaintiff is simply using the violation of federal standards as proof of liability on her state-law theories. Further, the reference to Federal regulations does not create a federal question. *See Merrell Dow Pharms., Inc.*

v. Thompson, 478 U.S. 804 (1986). Any removal on this basis will be met with an immediate motion for remand and for sanctions.

113. The negligence per se of Defendants was a proximate cause of Decedent's injuries.

FOR A SIXTH CAUSE OF ACTION

(Product Liability: Breach of Implied Warranties - S.C. Code Ann. § 36-2-314)

As a Sixth Distinct Cause of Action for Breach of Implied Warranties, Plaintiff Complains of Defendants and Alleges as Follows:

114. Plaintiff incorporates herein by reference, as though fully set forth herein, each of the preceding paragraphs.

115. Each of the Defendants and/or their "alternate entities" impliedly warranted that their asbestos materials or asbestos-containing products were of good and merchantable quality and fit for their intended use.

116. The implied warranty made by the Defendants and/or their "alternate entities" that the asbestos and asbestos-containing products were of good and merchantable quality and fit for the particular intended use, was breached. As a result of that breach, asbestos was given off into the atmosphere where Decedent Lewis C. Childers carried out his duties and was inhaled by Decedent Lewis C. Childers.

117. As a direct and proximate result of the breach of the implied warranty of good and merchantable quality and fitness for the particular intended use, Decedent Lewis C. Childers was exposed to Defendants' asbestos, asbestos-containing products, and/or products manufactured for foreseeable use with asbestos products and consequently developed lung cancer, causing Decedent to suffer all damages attendant thereto.

FOR A SEVENTH CAUSE OF ACTION
(Fraudulent Misrepresentation)

For a Seventh Distinct Cause of Action for Fraudulent Misrepresentation, Plaintiff Complains of Defendants, and Alleges as Follows:

118. Plaintiff repeats and re-alleges the portions of the above paragraphs where relevant.

119. That during, before and after Decedent Lewis C. Childers' exposure to asbestos products manufactured by Defendants and/or their "alternate entities", the Defendants and/or their "alternate entities" falsely represented facts, including the dangers of asbestos exposure to Decedent Lewis C. Childers in the particulars alleged in the paragraphs above, while Defendants each had actual knowledge of said dangers of asbestos exposure to persons such as Decedent Lewis C. Childers. At the same time of these misrepresentations, Defendants each knew of the falsity of their representations and/or made the representations in reckless disregard of their truth or falsity.

120. The foregoing representations were material conditions precedent to Decedent Lewis C. Childers' continued exposure to asbestos-containing products. Defendants and/or their "alternate entities" each intended that Decedent Lewis C. Childers act upon the representations by continuing his work around, and thereby exposure to, the asbestos products. Decedent Lewis C. Childers was ignorant of the falsity of Defendants' representations and rightfully relied upon the representations.

121. As a direct and proximate result Decedent Lewis C. Childers' reliance upon Defendants' false representations, Decedent has suffered injury and damages as described herein.

FOR AN EIGHTH CAUSE OF ACTION
(Wrongful Death Action, S.C. Code Ann. § 15-51-10, et seq.)

For an Eighth Distinct Cause of Action for Wrongful Death, Plaintiff Complains of Defendants, and Alleges as Follows:

122. Plaintiff incorporates herein by reference, as though fully set forth herein, each of the preceding paragraphs, where relevant.

123. Plaintiff brings this cause of action for Lewis C. Childers' wrongful death pursuant to S.C. Code Ann. § 15-51-10, for the benefit of Lenora Childers, as the widow of Decedent, and on behalf of the heirs of Lewis C. Childers, as defined by S.C. Code § 15-51-20.

124. As a direct and proximate result of the negligence, recklessness, carelessness, and intentional actions of Defendants as described above, Lewis C. Childers died on May 13, 2020, and his wife and heirs have and will endure pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, loss of love, loss of society with the Decedent, loss of guidance from the Decedent, loss of his companionship and deprivation of the use and comfort of the Decedent's experience, knowledge and judgment in managing the affairs of himself and his beneficiaries, and they have been otherwise seriously damaged. Moreover, reasonable funeral expenses were incurred, and Plaintiff prays for judgment against Defendants in such amount of actual and punitive damages as the trier of fact may determine.

FOR A NINTH CAUSE OF ACTION
(Loss of Consortium)

For a Ninth Distinct Cause of Action for Loss of Consortium, Plaintiff Lenora Childers Complains of Defendants, and Alleges as Follows:

125. Plaintiff incorporates by reference, the preceding paragraphs, where relevant.

126. Decedent Lewis C. Childers and Plaintiff Lenora Childers were married on or about April 19, 2014, and at all times relevant to this action were husband and wife.

127. Prior to his injuries as alleged, Decedent Lewis C. Childers was able and did perform his spousal duties. As a proximate result thereof, subsequent to the injuries, Decedent

Lewis C. Childers has been unable to perform his spousal duties and the work and service usually performed in the care, maintenance and management of the family home. As a proximate result thereof, Plaintiff Lenora Childers was deprived of the consortium of her spouse, including the performance of duties, all to Decedent's damages, in an amount presently unknown to Plaintiff but which will be proven at time of trial.

128. As a direct and proximate result of the acts of Defendants and/or their "alternate entities" and the severe injuries caused to Decedent Lewis C. Childers as set forth herein, Decedent's spouse and Plaintiff Lenora Childers suffered loss of consortium, including but not by way of limitation, loss of services, marital relations, society, comfort, companionship, love, and affection of her spouse, and has suffered severe mental and emotional distress and general nervousness. Plaintiff prays judgment against Defendants, their "alternate entities" and each of them, as hereinafter set forth.

FOR A TENTH CAUSE OF ACTION
(Survival Action, S.C. Code Ann. § 15-5-90)

For a Tenth Distinct Cause of Action, known statutorily as a Survival Action, Plaintiff Complains of Defendants, and Allege as Follows:

129. Plaintiff incorporates herein by reference, as though fully set forth herein, each of the preceding paragraphs, where relevant.

130. Plaintiff, Lenora Childers, is the wife of Decedent Lewis C. Childers. Plaintiff, Lenora Childers, as Executor of the Estate of Lewis C. Childers, deceased, brings this survival action as allowed under S.C. Code Ann. § 15-5-90.

131. Plaintiff brings this cause of action for Decedent's medical, surgical and hospital bills, as well as for Decedent's conscious pain and suffering prior to his untimely death, as well as for the mental distress of Decedent due to knowledge of his impending death from his incurable disease.

132. As a direct and proximate result of the negligence, recklessness, carelessness, and in some cases intentional actions of Defendants as described, Decedent Lewis C. Childers endured conscious pain, suffering, mental anguish and distress until his untimely death, and Plaintiff prays for judgment against Defendants in such amount of actual and punitive damages as the trier of fact may determine is just.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays judgment, joint and several, against Defendants and/or their “alternate entities” in an amount to be proved at trial, as follows:

1. For Decedent’s actual damages according to proof, including pain and suffering, mental distress, as well as medical, surgical and hospital bills;
2. For loss of income or earnings according to proof;
3. For loss of care, comfort and society;
4. For pecuniary loss of the beneficiaries/heirs including but not limited to funeral and burial costs, for mental shock and suffering of the beneficiaries/heirs, for wounded feelings of the beneficiaries/heirs, for grief and sorrow of the beneficiaries/heirs, loss of his companionship and deprivation of the use and comfort of the Decedent’s experience, knowledge and judgment in managing the affairs of himself and his beneficiaries;
5. For punitive damages according to proof;
6. For Plaintiff’s cost of suit herein;
7. For damages for breach of implied warranty according to proof;
8. For damages for fraudulent misrepresentation according to proof;
9. All economic and non-economic damages allowed pursuant to the Survival and Wrongful Death Act; and

10. For such other and further relief as the Court may deem just and proper, including costs and prejudgment interest as provided by South Carolina law.

A JURY IS RESPECTFULLY DEMANDED TO TRY THESE ISSUES.

Respectfully submitted,

s/Theile B. McVey

Theile B. McVey (SC Bar No. 16682)

Jamie D. Rutkoski (SC Bar No. 103270)

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and

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To Be Admitted *Pro Hac Vice*

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ATTORNEYS FOR PLAINTIFF

July 14, 2021

Columbia, South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
LENORA CHILDERS , Individually and as	)	C/A NO. 2021-CP-40-03484
Personal Representatives of the Estate of	)	
LEWIS C. CHILDERS ,	)	<i>In Re:</i>
	)	Asbestos Personal Injury Litigation
Plaintiff,	)	Coordinated Docket
	)	
v.	)	
	)	
DAVIS MECHANICAL	)	
CONTRACTORS, INC. , et al.	)	
	)	
Defendants.	)	

**PLAINTIFF'S MOTION TO APPOINT A RECEIVER OVER PAYNE & KELLER
COMPANY PURSUANT TO S.C. CODE §15-65-10(4)**

Plaintiff, pursuant to S.C. Code §15-65-10(4), moves this Court to appoint a receiver over Payne & Keller Company. This entity is a defendant in the above-captioned action and the Plaintiff would respectfully show the Court as follows:

BACKGROUND

Payne & Keller Company ("Payne & Keller"), was a supplier and installers of asbestos insulation in the southeastern United States during the 1960s, 1970s, 1980s and 1990s. Payne & Keller is a dissolved Texas corporation.¹ With its dissolution, Payne & Keller leaves its creditors, namely the thousands of men and women it exposed to asbestos, without any meaningful entity to proceed against and, apparently, disposed of its assets without regards to those creditors. Now, apparently, all that remains of Payne & Keller is its insurance coverage.

Plaintiff requests that this Court appoint Peter Protopapas as the Receiver over Payne & Keller to determine what assets, including insurance coverage, is available Payne & Keller and

¹ See South Carolina Secretary of State business entities search information attached as Exhibit A.

that the receiver be granted such further and other powers as may be appropriate, including, but not limited to, the acceptance of service of claims, retaining counsel, making claims against insurance policies which may exist and otherwise wholly administrate all of the assets and attendant business of Payne & Keller .

LAW AND ARGUMENT

South Carolina Code §15-65-10(4) state states that a receiver may be appointed by a judge of the circuit court, either in or out of court:

. . . . (4) When a corporation has been dissolved, is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights, and in like cases, of the property within this state of foreign corporations . . .

It is undisputed that Payne & Keller, because of its dissolution/suspension, has forfeited their rights to do business in South Carolina.

Section 15-65-20 requires that notice of this application be provided to the party to the action whose property is sought to be put in the hands of a receiver. Plaintiff, concurrently herewith, has served copies of this motion on the South Carolina Secretary of State.²

CONCLUSION

For the foregoing reasons, the appointment of a receiver for Payne & Keller for all purposes, including, but not limited to taking possession of and disposing of any remaining assets of Payne & Keller is appropriate. Plaintiff requests that this Court issue an order appointing a receiver as soon as practicably possible and for such other and further relief to which they may be entitled. Plaintiff respectfully suggests that Peter Protopapas be appointed the receiver over Payne & Keller.

² Plaintiff served the South Carolina Secretary of State. *See* Affidavit of Charles W. Branham, III, Confirmation of Service Attached as Exhibit A.

Respectfully submitted,

s/Theile B. McVey

Theile B. McVey (SC Bar No. 16682)

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ATTORNEYS FOR PLAINTIFF

August 23, 2021

Columbia, South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
LENORA CHILDERS , Individually and as	)	C/A NO. 2021-CP-40-03484
Personal Representatives of the Estate of	)	
LEWIS C. CHILDERS ,	)	<i>In Re:</i>
	)	Asbestos Personal Injury Litigation
Plaintiff,	)	Coordinated Docket
	)	
v.	)	
	)	<u>ORDER</u>
DAVIS MECHANICAL	)	
CONTRACTORS, INC. , et al.	)	
	)	
Defendants.	)	

CAME ON _____, 2021, to be heard the Plaintiff's Motion to Appoint a Receiver Over Payne & Keller Company, pursuant to S.C. Code §15-65-10(4). This Court finds that the application is meritorious under the applicable statute because Payne & Keller Company ("Payne & Keller") dissolved and Payne & Keller, a Texas Corporation, has forfeited its charter and has further failed to answer this case and therefore, Plaintiff requests for an expedited ruling on this motion is appropriate and also granted.

Therefore, this Court hereby appoints Peter Protopapas be and hereby is appointed Receiver in this case pursuant to the South Carolina Law with the power and authority fully administer all assets of Payne & Keller, accept service on behalf of Payne & Keller, engage counsel on behalf of Payne & Keller and take any and all steps necessary to protect the interests of Payne & Keller whatever they may be. This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Payne & Keller as well as any claims related to the actions or failure to act of Payne & Keller'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.

Based on the Court's experience in other receivership matters, and in an effort to streamline these proceedings, the Court expects the Receiver to investigate the existence of all insurance coverages potentially available to the company in receivership. The Receiver will provide potential insurers with lists of work sites, contractors, and insurance brokers and agents to facilitate

the insurers' searches for coverage (specifically including coverage provided to any related or subsidiary companies of the company in receivership or any company for whom the company in receivership did work as an "additional insured" under coverage written to another entity). The Court expects all insurers to comply with subpoenas issued by this Court and its Receiver in effectuating these thorough searches.

The Court further orders that, as the Receiver Court, that the Receiver or Payne & Keller Insulation, Inc. may not be sued outside this Court without obtaining the Receiver's consent or an order of this Court prior to doing so.

AND IT SO ORDERED this ____ day of _____ 2021.

Jean Hoefer Toal, Chief Justice of the Supreme Court of
South Carolina (Retired), acting as Circuit Court Judge



Richland Common Pleas

Case Caption: Lenora Childers , plaintiff, et al vs Davis Mechanical Contractors ,
defendant, et al

Case Number: 2021CP4003484

Type: Order/Appointment of Receiver

So Ordered

Jean H. Toal

Electronically signed on 2021-08-27 08:31:22 page 4 of 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LENORA CHILDERS, Individually and as
Personal Representative of the Estate of LEWIS
C. CHILDERS,

2021-CP-40-03484

Plaintiff, In Re:

v.

Asbestos Personal Injury Litigation Coordinated
Docket

Davis Mechanical Contractors, Inc., Flame
Refractories, Inc., General Boiler Casing
Company, Inc., HEFCO, Inc., J.R. Deans
Company, Inc., Payne & Keller Company, SFB,
Incorporated, Stafford Insulation Company,
Standard Insulation Company of N.C., Inc.,
Systra Engineering, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co.,

SECOND AMENDED SUMMONS

Defendants.

Flame Refractories, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., Payne & Keller Company, and
PBI QSF, LLC, By and Through Their Duly
Appointed Receiver Peter D. Protopapas,

Third-Party Plaintiffs,

v.

Zurich American Insurance Company
(Individually and as Successor to Northern
Insurance Company of New York, Maryland
American General Insurance Company, and
Maryland Casualty Company); Allstate
Insurance Company; John Tighe; Sean Antony

Beatty; Dennis William Cahill; Catherine Ann Carlino; Andre Lefebvre; David Dean Shumway; Gil Chandler, Michael Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel Robert Keddie; Julie Ann Fortune; Michael John Crall; James Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital Corp.; Admiral Insurance Company; Continental Insurance Company (Individually and as Successor in interest to Harbor Insurance Company); Hartford Accident and Indemnity Company, Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company, National Union Fire Insurance Company of Pittsburgh, PA, Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc., Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company, Lexington Insurance Company, First State Insurance Company, Birmingham Fire Insurance Company, Certain Underwriters at Lloyd's of London and various London Market Companies, South Carolina Property and Casualty Insurance Guaranty Association, R.L. Jarrett (Underwriting) Agency, Inc., U.S. Risk, L.L.C., Rexel USA, Inc., Compass Risk Services, LLC, SKRLA, LLC, Century Indemnity Company, in its own capacity and as successor to CCI Insurance Company, as successor to Insurance Company of North America, United States Fire Insurance Company, and Fireman's Fund Insurance Company,

Third-Party Defendants.

TO THE ABOVE-NAMED THIRD-PARTY DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Third Amended Third-Party Complaint in this action, a copy of which is hereby served on you, and to serve a copy of your Answer to the said Third Amended Third-Party Complaint upon the subscribers at 2110 N. Beltline Blvd., Columbia, South Carolina 29204, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Third Amended Third-Party Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in such Third Amended Third-Party Complaint.

Respectfully submitted,

Dated: July 14, 2022

RIKARD & PROTOPAPAS, LLC

By: s./ Brian M. Barnwell

Brian M. Barnwell (SC Bar 78249)
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Attorney for Third-Party Plaintiffs

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LENORA CHILDERS, Individually and as
Personal Representative of the Estate of LEWIS
C. CHILDERS,

2021-CP-40-03484

Plaintiff,

v.

In Re:
Asbestos Personal Injury Litigation Coordinated
Docket

Davis Mechanical Contractors, Inc., Flame
Refractories, Inc., General Boiler Casing
Company, Inc., HEFCO, Inc., J.R. Deans
Company, Inc., Payne & Keller Company, SFB,
Incorporated, Stafford Insulation Company,
Standard Insulation Company of N.C., Inc.,
Systra Engineering, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co.,

**SECOND AMENDED THIRD-PARTY
COMPLAINT**

Defendants.

Flame Refractories, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., Payne & Keller Company, and
PBI QSF, LLC, By and Through Their Duly
Appointed Receiver Peter D. Protopapas,

Third-Party Plaintiffs,

v.

Zurich American Insurance Company
(Individually and as Successor to Northern

Insurance Company of New York, Maryland American General Insurance Company, and Maryland Casualty Company); Allstate Insurance Company; John Tighe; Sean Antony Beatty; Dennis William Cahill; Catherine Ann Carlino; Andre Lefebvre; David Dean Shumway; Gil Chandler, Michael Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel Robert Keddle; Julie Ann Fortune; Michael John Crall; James Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital Corp.; Admiral Insurance Company; Continental Insurance Company (Individually and as Successor in interest to Harbor Insurance Company); Hartford Accident and Indemnity Company, Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company, National Union Fire Insurance Company of Pittsburgh, PA, Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc., Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company, Lexington Insurance Company, First State Insurance Company, Birmingham Fire Insurance Company, Certain Underwriters at Lloyd's of London and various London Market Companies, South Carolina Property and Casualty Insurance Guaranty Association, R.L. Jarrett (Underwriting) Agency, Inc., U.S. Risk, L.L.C., Rexel USA, Inc., Compass Risk Services, LLC, SKRLA, LLC, Century Indemnity Company, in its own capacity and as successor to CCI Insurance Company, as successor to Insurance Company of North America, United States Fire Insurance Company, and Fireman's Fund Insurance Company,

Third-Party Defendants.

COMES NOW Flame Refractories, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co., Payne & Keller Company, and PBI QSF, LLC (collectively, “Third-Party Plaintiffs”) by and through their duly appointed receiver Peter D. Protopapas (the “Receiver”), complaining of the third-party defendants Zurich American Insurance Company (Individually and as Successor to Northern Insurance Company of New York, Maryland American General Insurance Company, and Maryland Casualty Company); Allstate Insurance Company; John Tighe; Sean Antony Beatty; Dennis William Cahill; Catherine Ann Carlino; Andre Lefebvre; David Dean Shumway; Gil Chandler, Michael Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel Robert Keddie; Julie Ann Fortune; Michael John Crall; James Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital Corp.; Admiral Insurance Company; Continental Insurance Company (Individually and as Successor in interest to Harbor Insurance Company); Hartford Accident and Indemnity Company, Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company, National Union Fire Insurance Company of Pittsburgh, PA, Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc., Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company, Lexington Insurance Company, First State Insurance Company, Birmingham Fire Insurance Company, Certain Underwriters at Lloyd’s of London and various London Market Companies, South Carolina Property and Casualty Insurance Guaranty Association, R.L. Jarrett (Underwriting) Agency, Inc., U.S. Risk, L.L.C., Rexel USA, Inc., Compass Risk Services, LLC, SKRLA, LLC, Century Indemnity Company, in its own capacity

and as successor to CCI Insurance Company, as successor to Insurance Company of North America LLC, United States Fire Insurance Company, Fireman's Fund Insurance Company (collectively, "Third-Party Defendants"), who through undersigned counsel respectfully show unto the Court as follows:

PARTIES

1. The Third-Party Plaintiffs appearing by and through their duly appointed Receiver, who maintains his principal place of business in Richland County, South Carolina, bring this Third Amended Third-Party Complaint. This Court appointed the Receiver to undertake actions to administer all assets of the Third-Party Plaintiffs, including, without limitation, their insurance policies. *See* Ex. A, Flame Refractories Receivership Order; Ex. B, United Construction Receivership Order; Ex. C, Pipe & Boiler Receivership Order, Ex. D, Payne & Keller Receivership Order, and Ex. E, Payne & Keller Order Granting Payne & Keller Motion to Clarify.
2. The Receiver was appointed over Payne & Keller and entities related to the historic operations of Payne & Keller Company, including Payne & Keller, Inc.; Payne & Keller of Louisiana, Inc.; Bayou Maintenance, Inc.; Bayou Maintenance and Constructors, Inc.; Payne & Keller Gulf Coast, Inc.; Frentex Enterprises Company; and Frentex Enterprises Company of Texas (collectively "Payne & Keller"). This Court appointed the Receiver to administer all assets of Payne & Keller, including without limitation its insurance policies. (*See* Ex. D at 1–2 ("This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Payne & Keller as well as any claims related to the actions, or failures to act, of Payne & Keller's insurance carriers."); *see also* Ex. E.

3. PBI QSF, LLC, a Delaware limited liability company (the “QSF”), is the intended transferee and assignee of insurance proceeds and subrogation, contribution, “other insurance,” and similar rights (“Contribution Rights”) pursuant to a settlement reached with one of Pipe & Boiler’s insurance carriers since this case was filed. The QSF has its principal place of business in South Carolina. The QSF asserts its Contribution Rights against the remaining Third-Party Defendants. The Third-Party Defendants take the position that these Contribution Rights are assertable on a pro-rata basis in accordance with the South Carolina Supreme Court’s decision in *Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), and, to the extent the QSF must advance funds or defend itself against the assertion of claims by the Third-Party Defendants, the QSF is an appropriate party to this action.
4. The Receiver is informed and believes that Third-Party Defendant Zurich American Insurance Company (Individually and as Successor to Northern Insurance Company of New York, Maryland American General Insurance Company, and Maryland Casualty Company) is a corporation organized under the laws of New York, with its principal place of business located in Illinois.
5. The Receiver is informed and believes that Third-Party Defendant Allstate Insurance Company is a corporation organized under the laws of Illinois, with its principal place of business located in Illinois.
6. The Receiver is informed and believes the following with regard to the individual Third-Party Defendants named in the complaint, all of whom hold roles at Arrowood, or held roles at Arrowood at relevant times (collectively, the “Individual Arrowood Third-Party Defendants”):

- a. John Tighe (“Tighe”) is, and at all relevant times has been, the President and Chief Executive Officer, and Chairman of the Board of Arrowood. Tighe owns 20% of Arrowpoint Capital.
- b. Sean Anthony Beatty (“Beatty”) is, and at all relevant times has been, a Senior Vice President and the Chief Financial Officer, as well as a director of Arrowood. Beatty owns 12.8% of Arrowpoint Capital.
- c. Dennis William Cahill (“Cahill”) is, and at all relevant times has been, a Senior Vice President and Planning Governance Executive, as well as director of Arrowood. Cahill owns 12.8% of Arrowpoint Capital.
- d. Catherine Ann Carlino (“Carlino”) is, and at all relevant times has been, a Senior Vice President, a Planning & Governance Executive, and a director of Arrowood.
- e. Andre Lefebvre (“Lefebvre”) is, and at all relevant times has been, a Senior Vice President and Financial Risk Officer, as well as a director of Arrowood.
- f. David Dean Shumway (“Shumway”) is, and at all relevant times has been, a Senior Vice President and Chief Investment Officer, as well as a director of Arrowood.
- g. Gil Chandler (“Chandler”) is, and at all relevant times has been, a Vice President and Assistant Corporate Secretary, as well as a director of Arrowood.
- h. Michael Davenport (“Davenport”) is, and at relevant times has been, a Vice President and Controller, as well as a director of Arrowood.
- i. Linda Young Pettigrew (“Pettigrew”) is, and at all relevant times has been, the Corporate Secretary of Arrowood.

- j. Gwyn Wallace Fuller (“Fuller”) is, and at all relevant times has been, the Treasurer of Arrowood.
 - k. Daniel Robert Keddie (“Keddie”) is a director, and all relevant times has been a Vice President and Chief Actuary (as well as the Appointed Actuary) of Arrowood.
 - l. Julie Ann Fortune (“Fortune”) at relevant times was a Senior Vice President and Chief Claims Officer, as well as a director of Arrowood.
 - m. John Crall (“Crall”) at relevant times was a director of Arrowood.
 - n. James Francis Meehan (“Meehan”) was at relevant times a Senior Vice President and the General Counsel, as well as a director of Arrowood.
 - o. Larry Gene Simmons (“Simmons”) was at relevant times a director of Arrowood.
- 7. The Receiver is informed and believes that Arrowpoint Group, Inc. is a Delaware corporation with its principal place of business in North Carolina.
 - 8. The Receiver is informed and believes that Arrowpoint Capital Corporation is a Delaware corporation with its principal place of business in North Carolina.
 - 9. The Receiver is informed and believes that Admiral Insurance Company is a corporation organized under the laws of the state of Delaware with its principal place of business in New Jersey.
 - 10. The Receiver is informed and believes that Continental Insurance Company (Individually and as Successor in interest to Harbor Insurance Company), is a corporation organized under the laws of the state of Illinois with its principal place of business in Pennsylvania.

11. The Receiver is informed and believes that Hartford Accident and Indemnity Company is organized under the laws of the state of Connecticut with its principal place of business in Connecticut.

12. Plaintiff is informed and believes that defendant First State Insurance Company (“First State” or “Hartford”) is a corporation organized under the laws of the State of Connecticut, with its principal place of business located in the Commonwealth of Massachusetts. Further, First State agreed that “in any suit instituted against it upon this contract this Company will abide by the final decision of such Court or any Appellate Court in the event of an appeal.” Moreover, by including the “service of suit clause” in its contract of insurance with Payne & Keller, Hartford has consented to the jurisdiction of this Court. In pertinent part, the Hartford Policies contain the following service of suit clause:

It is agreed that in the event of the failure of this Company to pay any amount claimed to be due hereunder, this Company, at the request of the Insured, will submit to the jurisdiction of any Court of Competent Jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

By virtue of the foregoing service of suit clause, First State agreed to comply with all requirements necessary to give this Court jurisdiction, and further agreed that all matters pertinent to the instant dispute shall be determined by this Court. The portion of the “service of suit” clause which states that “all matters arising hereunder shall be determined in accordance with the law and practice of such Court” is a valid “choice of forum” clause. First State has consented to the jurisdiction of this Court and, accordingly, this action may not be removed or transferred to any other court.

13. Plaintiff is informed and believes that defendant Birmingham Fire Insurance Company

("Birmingham Fire") is a corporation organized under the laws of New York with its principal place of business in New York.

14. Plaintiff is informed and believes that defendants Certain Underwriters at Lloyd's, London ("Lloyd's Underwriters"), and any and all London Market Insurers that participated in any of the policies at issue in this action ("London Market Insurers"), are an association of underwriters and individual insurance companies existing under the laws of the United Kingdom or another foreign sovereign with their principal place of business in London, England, that sold or subscribed to insurance policies covering plaintiff (generally referred to herein as "Lloyd's Underwriters and London Market Insurers"). At all times relevant hereto, Lloyd's Underwriters and London Market Insurers were authorized, through their respective agents, to underwrite insurance policies covering risks in the State of South Carolina and elsewhere. Lloyd's Underwriters and London Market Insurers agreed further that "in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal." Moreover, Lloyd's Underwriters and London Market Insurers, and those defendant insurers which issued follow form policies or otherwise incorporate the "service of suit" language in the Lloyd's Underwriters and London Market Insurer policies by the terms of the policies issued and subscribed by them, have consented to the jurisdiction of this Court. In pertinent part, the Lloyd's Underwriters and London Market Insurer policies, and those defendant insurers that issued follow form coverage policies to the same, contain the following service of suit clause:

It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured, will submit to the jurisdiction of any Court of competent jurisdiction

within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

By virtue of the foregoing service of suit clause, Lloyd's Underwriters and London Market Insurers, and the following form defendant insurers agreed to the jurisdiction of the court of Payne & Keller's choosing, agreed to comply with all requirements necessary to give such court jurisdiction, and further agreed that all matters pertinent to the instant dispute shall be determined by such court. The portion of the "service of suit" clause which states that "all matters arising hereunder shall be determined in accordance with the law and practice of such Court" is a valid "choice of forum" clause. The financial responsibility for Lloyd's Underwriters and certain of the London Market Insurers currently rests with National Indemnity Company ("NICO"), a subsidiary of Berkshire Hathaway, Inc., the largest insuring organization in the United States as measured by total admitted assets (in excess of \$135 billion) and by policyholder surplus (in excess of \$65 billion). Resolute Management, Inc., another Berkshire Hathaway subsidiary, makes claims decisions for Lloyd's Underwriters and certain of the London Market Insurers. The term "Lloyd's Underwriters" when used in this complaint includes its agent and reinsurers including without limitation NICO, Resolute Management, and Equitas Limited, a successor to Lloyd's Underwriters. On information and belief, NICO is also financially responsible for the obligations of defendants National Union, Lexington, Birmingham Fire, Continental and Stonewall, all of whose claims decisions are also made by Resolute Management.

15. Plaintiff is informed and believes that the Guaranty Association is an association formed under the laws of South Carolina.

16. Plaintiff is informed and believes that R.L. Jarrett Underwriting Agency, Inc. is a corporation organized under the laws of the State of Texas, with its principal place of business located in the State of Texas.
17. Plaintiff is informed and believes that U.S. Risk LLC is a limited liability company organized under the laws of the State of Delaware, with its principal place of business located in the State of Texas.
18. The Receiver is informed and believes that Rexel USA, Inc. is a corporation organized under the laws of Delaware with its principal place of business in the State of Texas.
19. The Receiver is informed and believes that Compass Risk Services, LLC is a limited liability company organized under the laws of Texas with its principal place of business in the State of Texas.
20. The Receiver is informed and believes that SKRLA LLC ("SKRLA") is a limited liability company organized under the laws of Texas with its principal place of business in the State of Texas.
21. The Receiver is informed and believes that Century Indemnity Company ("Century Indemnity") is a corporation organized under the laws of Pennsylvania with its principal place of business in Pennsylvania.
22. The Receiver is informed and believes that United States Fire Insurance Company ("U.S. Fire") is a corporation organized under the laws of Delaware with its principal place of business in the State of New Jersey.
23. The Receiver is informed and believes that Fireman's Fund Insurance Company ("Fireman's Fund") is a corporation organized under the laws of Illinois with its principal place of business in the State of Illinois.

24. The Receiver believes that one or more additional insurance companies issued or may have issued policies of insurance to one or more of the Third-Party Plaintiffs that are responsive to the losses described herein (“Additional Third-Party Defendants”). Such Additional Third-Party Defendants may include one or more insurance companies managed by organizations located in New Hampshire, Massachusetts, or other jurisdictions. When the identities of these Additional Third-Party Defendants become known to Third-Party Plaintiffs, this Complaint may be amended *nunc pro tunc* to state the true identity of such Additional Third-Party Defendants.

JURISDICTION

25. 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 Peter D. Protopapas as Receiver of Third-Party Plaintiffs.

VENUE

26. 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

27. Third-Party Plaintiffs’ historic operations, and the historic operations of their predecessors, 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 or personal injury (the “Asbestos Allegations”). The alleged bodily injury or personal injury resulting from the Asbestos Allegations has resulted in suits against Third-Party Plaintiffs (“Asbestos Suits”), including the instant suit filed by Lenora Childers, Individually and as Personal Representative of the Estate of Lewis C. Childers.

THIRD-PARTY PLAINTIFF CAROLINA INDUSTRIAL INSULATION

A. The Zurich Policies

28. Third-Party Defendant Zurich American Insurance Company (as Successor to Northern Insurance Company of New York) issued primary general liability policies (“The Zurich Policies”) to Carolina Industrial Insulation Co. (“Carolina Industrial”).¹ The Zurich Policies have standard terms and conditions. The Zurich Policies have a duty to defend or to reimburse defense costs on behalf of Carolina Industrial against any and all Carolina Industrial Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. The Zurich Policies require Zurich fully to defend any Carolina Industrial Asbestos Suit alleging bodily injury during any Zurich Policy period. The Zurich Policies have a separate duty fully to indemnify Carolina Industrial from and against any and all Carolina Industrial Asbestos Suits with bodily injury taking place during any Zurich Policy period. It is the burden of Zurich to prove any limitation on or exclusion of coverage. Specifically, Zurich

¹ Pipe & Boiler merged with Carolina Industrial on September 15, 1983. The merged entity continued operating under the name “Pipe & Boiler Insulation, Inc.”

issued primary general liability coverage to Carolina Industrial for at least the three policy periods from January 1, 1973 – January 1, 1976.

29. The Receiver for Carolina Industrial continues to require all pertinent parties to conduct a diligent search for additional policies issued by Zurich or any of its predecessors, successors, subsidiaries, or affiliates. Should additional policies be located, this Third Amended Third-Party Complaint may be amended to include such additional Zurich Policies.
30. Zurich has failed fully to acknowledge or accept its insuring obligations under the Zurich Policies. An actual and justiciable dispute exists between these parties.

B. The Allstate Policies

31. Third-Party Defendant Allstate issued primary general liability policies to Carolina Industrial (“The Allstate Policies”). The Allstate Policies have standard terms and conditions. The Allstate Policies have a duty to defend or to reimburse defense costs on behalf of Carolina Industrial against any and all Carolina Industrial Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false or fraudulent. The duty to defend is joint, several, indivisible and supplemental. The Allstate Policies require Allstate fully to defend any Carolina Industrial Asbestos Suit alleging bodily injury during any Allstate Policy period. The Allstate Policies have a separate duty fully to indemnify Carolina Industrial from and against any and all Carolina Industrial Asbestos Suits with bodily injury taking place during any Allstate Carolina Industrial Policy Period. It is the burden of Allstate to prove any limitation on or exclusion of coverage. Specifically, Allstate issued primary general liability coverage to Carolina Industrial for at least the three policy periods January 1, 1970 – January 1, 1973.

32. The Receiver for Carolina Industrial continues to require all pertinent parties to conduct a diligent search for additional policies issued by Allstate or any of its predecessors, successors, subsidiaries or affiliates. Should additional policies be located, this Third Amended Third-Party Complaint will be amended to include such additional Allstate Policies.
33. Allstate has failed fully to acknowledge or accept its insuring obligations under the Allstate Policies. An actual and justiciable dispute exists between these parties.

C. The Continental Policies

34. On information and belief, Third-Party Defendant Continental issued general liability policies to Carolina Industrial (“The Continental Carolina Industrial Policies”). The Continental Carolina Industrial Policies have standard terms and conditions. The Continental Carolina Industrial Policies have a duty to defend or to reimburse defense costs on behalf of Carolina Industrial against any and all Carolina Industrial Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. The Continental Carolina Industrial Policies require Continental fully to defend any Carolina Industrial Asbestos Suit alleging bodily injury during any Continental Carolina Industrial Policy period. The Continental Carolina Industrial Policies have a separate duty fully to indemnify Carolina Industrial from and against any and all Carolina Industrial Asbestos Suits with bodily injury taking place during any Continental Carolina Industrial Policy period. It is the burden of Continental to prove any limitation on or exclusion of coverage. Specifically, upon information and belief, Continental issued primary general liability coverage to Carolina Industrial for multiple policy periods between January 1, 1978 and January 1, 1983.

35. The Receiver for Carolina Industrial continues to require all pertinent parties to conduct a diligent search for additional policies issued by Continental or any of its predecessors, successors, subsidiaries or affiliates. Should such additional policies be located, this Third Amended Third-Party Complaint will be amended to include such additional Continental Carolina Industrial Policies.

36. Continental has failed, or will fail, fully to acknowledge or accept its insuring obligations under the Continental Carolina Industrial Policies. An actual and justiciable dispute exists between these parties.

D. The U.S. Fire Policies

37. On information and belief, Third-Party Defendant U.S. Fire issued standard excess liability policies to Carolina Industrial at least between 1976 and 1983 (“The U.S. Fire Carolina Industrial Policies”). The U.S. Fire Carolina Industrial Policies contain standard terms and conditions. It is the burden of U.S. Fire to prove any limitation on or exclusion of coverage.

38. The Receiver for Carolina Industrial continues to require all pertinent parties to conduct a diligent search for additional policies issued by U.S. Fire or any of its predecessors, successors, subsidiaries or affiliates. Should additional policies be located, this Third Amended Third-Party Complaint will be amended to include such additional U.S. Fire Carolina Industrial Policies.

39. U.S. Fire has repudiated its insurance contracts as respects to all of the Carolina Industrial Asbestos Suits and as respects to all of the asbestos suits ever to be filed against Carolina Industrial by asserting that the “products hazard” exclusion in its policies bars coverage for any suit alleging liability based on Carolina Industrial’s use of “products” containing asbestos.

Every asbestos suit alleges the plaintiff's injurious exposure to asbestos via one or more "products." At least one "actual and justiciable dispute" therefore exists between U.S. Fire and Carolina Industrial.

THIRD-PARTY PLAINTIFF FLAME REFRACTORIES

A. The Admiral Policies

40. Third-Party Defendant Admiral Insurance Company issued general liability policies to Flame Refractories for at least two policy periods: from April 1, 1985 to April 1, 1986 and from April 1, 1986 to April 1, 1987 ("The Admiral Flame Refractories Policies"). The Admiral Flame Refractories Policies have standard terms and conditions. The Admiral Flame Refractories Policies have a duty to defend or to reimburse defense costs on behalf of Flame Refractories against any and all Flame Refractories Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. The Admiral Flame Refractories Policies require Admiral fully to defend any Flame Refractories Asbestos Suit alleging bodily injury during any Admiral Flame Refractories Policy period. The Admiral Flame Refractories Policies have a separate duty fully to indemnify Flame Refractories from and against any and all Flame Refractories Asbestos Suits with bodily injury taking place during any Admiral Flame Refractories Policy period. It is the burden of Admiral to prove any limitation on or exclusion of coverage. Specifically, upon information and belief, Admiral issued primary general liability coverage to Flame Refractories for multiple policy periods between 1970 and April 1, 1987.

41. The Receiver for Flame Refractories continues to require all pertinent parties to conduct a diligent search for additional policies issued by Admiral or any of its predecessors, successors, subsidiaries or affiliates. Should such additional policies be located, this Third Amended Third-Party Complaint will be amended to include such additional Admiral Flame Refractories Policies.

42. Admiral has failed to fully acknowledge or accept its insuring obligations under the Admiral Flame Refractories Policies. An actual and justiciable dispute exists between these parties.

B. The Hartford Policy

43. Third-Party Defendant Hartford Accident and Indemnity Company issued an excess liability policy to Flame Refractories² for at least one policy period from April 1, 1985 to April 1, 1986 (“The Hartford Flame Refractories Policy”). The Hartford Flame Refractories Policy has standard terms and conditions. It is the burden of Hartford to prove any limitation on or exclusion of coverage.

44. The Receiver for Flame Refractories continues to require all pertinent parties to conduct a diligent search for additional policies issued by Hartford or any of its predecessors, successors, subsidiaries or affiliates. Should additional policies be located, this Third Amended Third-Party Complaint may be amended to include such additional Hartford Flame Refractories Policies.

45. Hartford has failed, or will fail, fully to acknowledge or accept its insuring obligations under the Hartford Policy. An actual and justiciable dispute exists between these parties.

² Flame Refractories and United Construction Co. of Rome, Inc. merged in 1986, leaving Flame Refractories as the surviving entity.

C. The First State Policies

46. Third-Party Defendant First State Insurance Company issued an excess liability policy to Flame Refractories for at least two policy periods: from April 1, 1978 to April 1, 1979 and from April 1, 1979 to June 1, 1979 (“The First State Flame Refractories Policy”). The First State Flame Refractories Policy has standard terms and conditions. It is the burden of Hartford to prove any limitation on or exclusion of coverage.
47. The Receiver for Flame Refractories continues to require all pertinent parties to conduct a diligent search for additional policies issued by First State or any of its predecessors, successors, subsidiaries or affiliates. Should additional policies be located, this Third Amended Third-Party Complaint may be amended to include such additional First State Flame Refractories Policies.

D. The Century Indemnity Policies

48. Upon information and belief, Third-Party Defendant Century Indemnity issued primary general liability insurance policies to Flame Refractories for at least the policy periods, January 1, 1979 to January 1, 1980 and January 1, 1980 to January 1, 1981 (“The Century Indemnity Flame Refractories Primary Policies”). The Century Indemnity Flame Refractories Primary Policies have standard terms and conditions. The Century Indemnity Flame Refractories Primary Policies have a duty to defend or to reimburse defense costs on behalf of Flame Refractories against any and all Flame Refractories Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. The Century Indemnity Flame Refractories Primary Policies require Century Indemnity to fully defend any Flame

Refractories Asbestos Suit alleging bodily injury during any Century Indemnity Flame Refractories Primary Policy period. The Century Indemnity Flame Refractories Primary Policies have a separate duty to fully indemnify Flame Refractories from and against any and all Flame Refractories Asbestos Suits with bodily injury taking place during any Century Indemnity Flame Refractories Primary Policy period. It is the burden of Century Indemnity to prove any limitation on or exclusion of coverage.

49. Century Indemnity also issued excess liability policies to Flame Refractories at least for the policy period January 1, 1979 to January 1, 1980. (“The Century Indemnity Flame Refractories Excess Policies”). The 1979–80 policy is immediately excess of the primary policy identified above for the January 1, 1979 to January 1, 1980 period. The Century Indemnity Flame Refractories Excess Policies have standard terms and conditions. It is the burden of Century Indemnity to prove any limitation or exclusion of coverage.
50. The Receiver for Flame Refractories continues to require all pertinent parties to conduct a diligent search for additional policies issued by Century Indemnity or any of its predecessors, successors, subsidiaries or affiliates. Should additional policies be located, this Third Amended Third-Party Complaint may be amended accordingly.
51. Century Indemnity has failed, or will fail, to fully acknowledge or accept its insuring obligations under the Century Indemnity Flame Refractories Policies. An actual and justiciable dispute exists between these parties.

E. The Continental Policies

52. Third-Party Defendant Continental issued excess liability policies to Flame Refractories for at least the January 1, 1983 to January 1, 1984 policy period (“The Continental Flame

Refractories Policies”). The Continental Flame Refractories Policies have standard terms and conditions. It is the burden of Continental to prove any limitation or exclusion of coverage.

53. The Receiver for Flame Refractories continues to require all pertinent parties to conduct a diligent search for additional policies issued by Continental or any of its predecessors, successors, subsidiaries or affiliates. Should additional policies be located, this Third Amended Third-Party Complaint may be amended accordingly.

54. Continental has failed, or will fail, to fully acknowledge or accept its insuring obligations under the Continental Flame Refractories Policies. An actual and justiciable dispute exists between these parties.

F. The Fireman’s Fund Policies

55. Third-Party Defendant Fireman’s Fund issued excess liability policies to Flame Refractories for at least the January 1, 1984 to January 1, 1985 policy period (“The Fireman’s Fund Flame Refractories Policies”). The Fireman’s Flame Refractories Policies have standard terms and conditions. It is the burden of Fireman’s Fund to prove any limitation on or exclusion of coverage.

56. The Receiver for Flame Refractories continues to require all pertinent parties to conduct a diligent search for additional policies issued by Fireman’s Fund or any of its predecessors, successors, subsidiaries or affiliates. Should additional policies be located, this Third Amended Third-Party Complaint may be amended to include such additional Fireman’s Fund Flame Refractories Policies.

THIRD-PARTY PLAINTIFF PIPE & BOILER INSULATION COMPANY

A. The Arrowood Policies

57. Arrowood Indemnity Company, formerly known as Security Insurance Company of Hartford, issued general liability policies to Pipe & Boiler (“The Arrowood Policies”). Specifically, Arrowood issued primary general liability coverage to Pipe & Boiler for at least the five policy periods January 1, 1981 – January 1, 1986, and issued umbrella coverage to Pipe & Boiler for at least the three policy periods January 1, 1983 – January 1, 1986.
58. Arrowood has failed fully to acknowledge or accept its insuring obligations under the Arrowood Policies. An actual and justiciable dispute exists between the Receiver and Arrowood.

i. The ownership and control of Arrowood³

59. Arrowood, formerly Royal Indemnity Company, was previously a member of the Royal & Sun Alliance USA, Inc. (“RSAUSA”) insurance group, whose ultimate parent was RSA Insurance Group plc. Arrowood is licensed to sell insurance in all 50 states.
60. In September 2003, RSAUSA announced a strategic change that resulted in the sale of the majority of its businesses under various renewal rights transactions. In 2004, RSAUSA also implemented a Plan of Reorganization and Consolidation that reduced the number of its insurance companies in the United States.
61. On March 3, 2007, Arrowpoint Capital, which was formed in 2006 and owned by Arrowood’s management and independent directors, purchased 100% of the interests of Arrowpoint

³ The following allegations pertain specifically to the acts and omissions of the Individual Arrowood Third-Party Defendants, Arrowpoint Group, Inc., and Arrowpoint Capital Corp., herein collectively referred to as “the Arrowood Defendants.”

General Partnership, the U.S. holding entity which owned all of the RSAUSA businesses. The approval of the transaction by the Delaware Department of Insurance (“DOI”) resulted in the Delaware Insurance Commissioner’s Order (“Order”) which subjected Arrowood to certain requirements. Those requirements included that Arrowood’s then parent, RSAUSA, provide Arrowood with a stop loss reinsurance agreement. According to a 2014 financial examination report for Arrowood issued by the Delaware DOI, by then, the RSAUSA stop loss reinsurance agreement had already become fully incurred, and there are no remaining limits of liability under the stop loss reinsurance agreement available for unpaid claims.

62. In addition, in accordance with the Order, Arrowood cannot pay dividends or sell or distribute assets in the ordinary course of business without the Delaware DOI’s approval (which the Individual Arrowood Third-Party Defendants have wrongfully circumvented or violated the order by paying themselves exorbitant salaries and benefits far outside the norm for insurance companies actively engaged in business, much less companies in runoff whose only business is adjusting claims).
63. The ownership structure of Arrowood has, and the officers and directors of Arrowood have, changed very little since 2007.
64. The Individual Arrowood Third-Party Defendants, in their capacities for Arrowood and as officers and directors of Arrowood’s parent companies (Arrowpoint Group and Arrowpoint Capital), have maintained absolute control of Arrowood over the relevant years. Maintenance of such total control has been central to the Arrowood Third-Party Defendants’ ability to engage in the wrongful conduct set forth in this complaint.

65. A critical component of the application of RSAUSA to spin off what is now Arrowood was the commitment of RSAUSA to infuse an additional \$287.5 million into the insurance companies for the specific stated purposes of payment of policyholder claims. As the then Delaware Insurance Commissioner concluded:

[I]n the event of continued adverse development beyond that projected by the Applicants (but consistent with the stressed financial conditions considered by the Department in its financial analysis, the British parent's \$287.5 million capital infusion may be barely sufficient to cover all outstanding claims.

In the Matter of The Proposed Acquisition of Royal Indemnity Company, Insurance Department of the State of Delaware, Docket No. 313, Decision and Final Order at 6 (Feb. 20, 2007).

66. Little did the (non-Delaware) insurance regulators know that the plan was or morphed into one to use a substantial part of that \$287.5 million not to pay policyholder claims but, instead, to wrongfully pay exorbitant salaries to Arrowood management and “management fees” to Arrowpoint.

ii. *Insurance companies are regulated to protect policyholders, and their officers, directors, and ultimate control persons owe the insurance companies' policyholders a duty of care.*

67. Insurance companies are regulated to protect consumers. As the National Association of Insurance Commissioners (“NAIC”) has written:

The fundamental reason for government regulation of insurance is to protect American consumers. Insurance is more heavily regulated than other types of business because of the complexity of the insurance contracts, the lack of sufficient information for insurance consumers to adequately shop for prices and adequacy of coverage and because insurance contracts are generally contracts of adhesion. Conceptually insurance regulation is very simple. The public wants two things from insurance regulators. **They want solvent insurers who are financially able to make good on the promises**

they have made and they want insurers to treat policyholders and claimants fairly. All regulatory functions will fall under either solvency regulation or market regulation to meet these two objectives. State insurance regulatory systems are accessible and accountable to the public and sensitive to local social and economic conditions. State regulation has proven that it effectively protects consumers and ensures that promises made by insurers are kept. Insurance regulation is structured around several key functions, including insurer licensing, producer licensing, product regulation, market conduct, financial regulation and consumer services.

NAIC and the Center for Insurance Policy and Research, State Insurance Regulation, *available at* https://www.naic.org/documents/topics_white_paper_hist_ins_reg.pdf, at 2 (last accessed Jan. 20, 2022) (emphasis added).

68. Indeed, the insurance statutes and regulations are designed to require the interests of policyholders to be of paramount concern for the officers, directors, and other persons who exercise ultimate control over regulated and licensed insurance companies. For example, every state has detailed restrictions on transactions within an insurance holding company system (regulated by state insurance Holding Company Acts) to make sure that an insurance company does not improperly transfer funds to the detriment of policyholders. Another example is debt. If an insurance company wants to borrow money, unlike a non-regulated company, any such debt is subordinated to the interests of policyholders and evidenced by what is referred to as a “surplus note,” such that repayment is subject to regulatory approval.
69. Insurers must be operated by individuals who are honest and trustworthy. Indeed, every year, the signatories to the Arrowood statutory financials must personally attest to the veracity of such information, stating:

The officers of this reporting entity being duly sworn, each depose and say that they are the described officers of said reporting entity, and that on the reporting period stated above, all of the herein described assets were the absolute property of the said reporting entity, free and clear from any liens

or claims thereon, except as herein stated, and this statement, together with related exhibits, schedules, and explanations therein contained, annexed or referred to, is a full and true statement of all the assets and liabilities and of the condition and affairs of the said reporting entity as of the reporting period stated above, and of its income and deductions therefrom for the period ended, and have been completed in accordance with the NAIC Annual Statement Instructions and Accounting Practices and Procedures manual except to the extent that (1) state law may differ; or (2) that state rules or regulations require differences in reporting not related to accounting practices and procedures, according to the best of their information, knowledge, and belief, respectively. Furthermore, the scope of this attestation by the described officers also includes the related corresponding electronic filing with the NAIC, when required, that is an exact copy (except for formatting differences due to electronic filing) of the enclosed statement. The electronic filing may be requested by various regulators in lieu of or in addition to the enclosed statement.

See, e.g., Annual Statement as of December 31, 2020 of the Condition and Affairs of the Arrowood Indemnity Company at 1.

70. Insurance company accounting is slightly different than GAAP accounting. An insurer has assets and liabilities with the net difference called the “surplus” or “policyholders’ surplus.” Policyholders’ surplus (together with the company’s stated capital) is roughly equivalent to the net worth of the insurer. As liabilities for losses and expenses increase or assets decrease, the policyholders’ surplus is diminished.

71. Insurance companies must set loss reserves with integrity:

Reserves are liabilities. They reflect an insurer’s financial obligations with respect to the insurance policies it has issued. An insurer’s two major liabilities are loss reserves and unearned premium reserves. Loss reserves are an insurance company’s best estimate of what it will pay in the future for claims. Unearned premium reserves represent the premiums paid for coverage that has not yet been used because the policy has not expired. If the policy was cancelled by the policyholder, for example, the insurer would have to return the dollar amount of unused coverage.

Loss reserves are generally the largest liability on an insurer’s balance sheet. When a claim is filed, a reserve is established for payment of that claim.

Property claims are usually clear-cut and are paid soon after a claim is filed. But with product liability and other so-called long tail coverages, the total harm caused may not be apparent for some time and the ultimate cost of claims may not be known for years, especially in complex cases that are litigated. In such cases, claims adjusters and actuaries continuously reevaluate costs as new information on the claim becomes available and adjust reserves accordingly based on their experience and judgment.

Companies pay considerable attention to their loss reserves. **Serious under-reserving may cause an insurer to over-estimate its policyholder surplus. . . . making its financial health appear better than it is.**

Insurance Information Institute, Financial Reporting, available at: <https://www.iii.org/publications/commercial-insurance/how-it-functions/financial-reporting> (last accessed Jan. 20, 2022) (emphasis added).

72. “Loss reserves” are estimates of unpaid losses that have been booked by an insurer to be paid in the future. There are, in the most general sense, two different types of loss reserves established by property and casualty insurers. One is a case reserve for reported losses. A case reserve should be a good faith estimate of the amount for which a particular claim will ultimately be settled or adjudicated.
73. The other type of loss reserves that an insurer is required to establish is called “IBNR” or “incurred but not reported” loss reserves. IBNR is calculated by the insurer’s appointed actuary using various actuarial tools to estimate (a) losses that have occurred but have not been reported and (b) adverse development of case reserves on known losses (these are also at times referred to as “Bulk Reserves”).
74. In addition to loss reserves, insurance companies must establish reserves for expenses. There are two main types of expenses for a typical operating insurer. One is called “Allocated Loss Adjustment Expense” or “ALAE.” ALAE is generally attributed to the processing of specific

insurance claims. Examples of ALAE are independent adjusters and outside defense counsel with respect to a particular claim.

75. In contrast, “Unallocated Loss Adjustment Expenses,” or “UALAE,” are internal costs and expenses incurred by an insurance company that cannot be associated with specific claims but are related to the claims adjustment process, such as administrative and internal expenses related to the settlement of claims. Examples of UALAE are employees acting in the capacity of claims managers handling claims, establishing loss reserves, providing authority to settle claims, and making coverage determinations.
76. “Incurred losses” are a combination of amounts that are paid for losses, together with loss reserves on reported claims. If an insurance company is adequately reserved, as unpaid losses become paid losses, the incurred amount should not materially change, as the amount simply is recharacterized from a “reserved” amount to a “paid” amount. The same is true for loss adjustment expenses.
77. All of those reserves—incurred loss reserves, ALAE, ULAE, and IBNR/Bulk Reserves—in the aggregate are commonly referred to as the “carried reserves” of the insurer.
78. Every property and casualty insurer domiciled in Delaware, such as Arrowood, is required on a yearly and quarterly basis under 18 Del. Code § 526A to file with regulators an Annual Statement and Quarterly Statement, setting forth detailed information regarding, *inter alia*, its case reserves, IBNR and Bulk reserves, loss adjustment expenses, and “other underwriting expenses.” Every insurer must file those Statements with the regulators in every state in which it is licensed.

79. In addition, every insurer must annually file a Management Discussion and Analysis (“MD&A”). The purpose of the MD&A is to add qualitative information to the quantitative Annual Statement. As the Securities and Exchange Commission has explained,

The Commission has long recognized the need for a narrative explanation of the financial statements, because a numerical presentation and brief accompanying footnotes alone may be insufficient for an investor to judge the quality of earnings and the likelihood that past performance is indicative of future performance. MD&A is intended to give the investor an opportunity to look at the company through the eyes of management by providing both a short and long-term analysis of the business of the company.

Securities and Exchange Commission, Securities Act Release No. 6711 (April 24, 1987) [52 FR 13715].

80. Moreover, every property and casualty insurance company doing business in Delaware, unless exempt (which Arrowood is not), is required to submit to the Delaware DOI the opinion of an appointed actuary, entitled “Statement of Actuarial Opinion,” with supporting documentation on a yearly basis with respect to the loss and expense reserves established and reported by the company. *See* 18 Del. Code. § 1132.

81. The critical role of the Appointed Actuary cannot be overstated, particularly for an insurer such as Arrowood which as of the spin-off had significant asbestos liabilities. The Appointed Actuary must be a member of a professional actuarial association that requires adherence to the same Code of Professional Conduct promulgated by the actuarial credentialing societies, requires adherence to the U.S. Qualification Standards, and participates in the Actuarial Board for Counseling and Discipline when its members are practicing in the U.S.

82. The Appointed Actuary must report to the Board of Directors each year on the items within the scope of the Actuarial Opinion. The Actuarial Opinion and the Actuarial Report must be

made available to the Board of Directors. The Appointed Actuary must explicitly identify whether his/her actuarial opinion provides a reasonable determination of the insurer's reserves. In so doing, the Appointed Actuary must provide relevant comment paragraphs to address Company-Specific Risk Factors and the risk of material adverse deviation.

83. When the insurer's carried reserve amount is less than the minimum amount that the Appointed Actuary believes is reasonable, the Appointed Actuary should issue a Statement of Actuarial Opinion that the carried reserve amount does not make a reasonable provision for the liabilities associated with the specified reserves. In addition, the Appointed Actuary should disclose the minimum amount of reserves that the Appointed Actuary believes is reasonable.
84. As a matter of insurance law and/or regulation promulgated by the NAIC, other key elements of the work of the Appointed Actuary include:
- a. A description of the Appointed Actuary's relationship to the Company, with clear presentation of the Appointed Actuary's role in advising the Board of Directors and/or management regarding the carried reserves. The Actuarial Report should identify how and when the Appointed Actuary presents the analysis to the Board of Directors and, where applicable, to the officer(s) of the Company responsible for determining the carried reserves.
 - b. An exhibit that ties to the Annual Statement and compares the Appointed Actuary's conclusions to the carried amounts consistent with the segmentation of exposure or liability groupings used in the analysis. The Appointed Actuary's conclusions include the Appointed Actuary's point estimate(s), range(s) of reasonable estimates, or both.

- c. An exhibit or appendix showing the change in the Appointed Actuary's estimates from the prior Actuarial Report, including extended discussion of factors underlying any material changes. The exhibit or appendix should illustrate the changes on a net basis but should also include the changes on a gross basis, if relevant. If the Appointed Actuary is newly appointed and does not review the work of the prior Appointed Actuary, then the Appointed Actuary should disclose this.
- d. Extended comments on trends that indicate the presence or absence of risks and uncertainties that could result in material adverse deviation.
- e. Extended comments on factors that led to unusual IRIS ratios for One-Year Reserve Development to Policyholders' Surplus, Two-Year Reserve Development to Policyholders' Surplus, or Estimated Current Reserve Deficiency to Policyholders' Surplus, and how these factors were addressed in prior and current analyses.

iii. *NAIC IRIS Ratios are designed to uniformly measure solvency and liquidity to highlight troubled companies for state insurance regulators.*

85. The NAIC Insurance Regulatory Information System (IRIS) is a collection of analytical solvency tools and databases designed to provide state insurance departments with an integrated approach to screening and analyzing the financial condition of insurers operating within their respective states. IRIS is intended to assist state insurance departments in targeting resources to those insurers in greatest need of regulatory attention.

86. The IRIS Ratios are a set of ratios designed to measure solvency and liquidity. They are calculated from insurers' annual statements that are filed with the NAIC, and insurers that fail four or more tests can be placed under the supervision of their domicile regulator.

87. IRIS Ratios are particularly important where an insurer, like Arrowood, is licensed nationally, since most regulators have limited resources and cannot spend significant time and attention on foreign insurers licensed but not domiciled in their state. The NAIC IRIS Ratios provide the non-domiciliary regulators with important guidance as to the financial wherewithal of the foreign insurer. If an insurer is outside of more than four (4) of the NAIC Ratios, the insurer will come to the attention of the non-domiciliary regulators as a troubled company.

88. Delaware insurance regulations also require that an “Enterprise Risk Report” be filed by the “ultimate controlling person” of an insurer, which here is Arrowood Capital:

The ultimate controlling person of an insurer required to file an enterprise risk report pursuant to Section 5004(l) of the Act shall furnish the required information on Form F, hereby made a part of these regulations.

19 Del. Reg. 642 (2016).

89. Enterprise Risk is a defined term in insurance regulation. Under Delaware regulations,

“Enterprise risk” – The term ‘enterprise risk’ shall mean any activity, circumstance, event or series of events, involving 1 or more affiliates of an insurer that, if not remedied promptly, is likely to have a material adverse effect upon the financial condition or liquidity of the insurer or its insurance holding company system as a whole, including, but not limited to, anything that would cause the insurer’s risk-based capital to fall into company action level as set forth in § 5803 of this title or would cause the insurer to be in hazardous financial condition as set forth in Section 3 of Department of Insurance Regulation 304 – Standards and Commissioner’s Authority for Companies Deemed to be in Hazardous Financial Condition [18 DE Admin. Code § 304-3.0].

18 Del. Code § 5001(4).

90. The foregoing statutory requirements were enacted to impose duties upon the officers, directors, and ultimate controlling persons of insurance companies doing business or domiciled in Delaware to protect the solvency of licensed insurers for the benefit of their policyholders.

91. In addition to the Delaware insurance laws, the Arrowood Third-Party Defendants at all times were well aware of Arrowood's obligation to comply with the insurance laws and regulations in each state in which it was licensed to sell insurance (all 50 states in the case of Arrowood) and, according to Schedule T of Arrowood's Annual Statement, Arrowood has, in varying amounts, significant insurance liabilities in every state other than North Dakota and Wyoming.
92. Insurers have a statutory obligation to be solvent. Under applicable Delaware law, Title 18, Chapter 59 § 5901(a), "The capital of a stock insurer . . . shall be deemed to be impaired, and the insurer shall be deemed to be insolvent, when such insurer is not possessed of assets at least equal to all liabilities and required reserves together with its total issued and outstanding capital stock, it a stock insurer, . . . required by this title to be maintained for the kind or kinds of insurance it is then authorized to transact."
93. Under 18 Del. Code § 5802, Arrowood, like every Delaware domestic insurer, is required to prepare and submit by March 1 of each year to the Delaware Insurance Commissioner a report of its RBC levels as of the end of the calendar year just ended, "in a form as is required by the RBC instructions." "RBC instructions" is a phrase defined as "the RBC report including risk-based capital instructions adopted by the NAIC [National Association of Insurance Commissioners]; as such, RBC instructions may be amended by the NAIC from time to time in accordance with the procedures adopted by the NAIC." 18 Del. Code § 5802(9).
94. The NAIC has explained Risk Based Capital requirements as follows:

Risk-Based Capital (RBC) is a method of measuring the minimum amount of capital appropriate for a reporting entity to support its overall business operations in consideration of its size and risk profile. RBC limits the amount of risk a company can take. It requires a company with a higher amount of risk to hold a higher amount of capital. Capital provides a cushion to a company against insolvency. RBC is intended to be a minimum

regulatory capital standard and not necessarily the full amount of capital that an insurer would want to hold to meet its safety and competitive objectives. In addition, RBC is not designed to be used as a stand-alone tool in determining financial solvency of an insurance company; rather it is one of the tools that give regulators legal authority to take control of an insurance company.

Federal Bar Association, “Insurance Tax Seminar Session 7A – Capital Planning: One Concept to Rule Them All,” available at <https://www.fedbar.org/wp-content/uploads/2019/12/Session-7A-PPT-REV-pdf-1.pdf> (last visited Jan. 20, 2022).

95. Thus, a Delaware regulated insurer has two different financial thresholds that it must maintain:
 - a. It must, under § 5901, maintain “assets at least equal to all liabilities and required reserves,” and
 - b. Pursuant to § 5801, maintain adequate Risk-Based Capital.
96. Although the statutory references obviously vary by state, the basic rules (as dictated by the NAIC) are the same.
97. If a regulated insurer does not maintain adequate surplus or comply with RBC rules, the regulators are required to assume control over the company.
98. Moreover, federal statutes impose harsh penalties when insurers knowingly and with the intent to deceive file with state regulators false financial statements. Indeed, officers and directors who willfully misappropriate funds from insurers can be personally liable under those same statutes. *See, e.g.*, 18 U.S.C. § 1033.

iv. *Pipe & Boiler purchased insurance policies issued by Arrowood.*

99. Security Insurance Company of Hartford issued primary general liability coverage to Pipe & Boiler for at least the two policy periods January 1, 1981 – January 1, 1983, which policies have been administered by Arrowood in runoff since 2007.

100. The officers, directors, Appointed Actuary, and other ultimate controlling persons had a duty to (a) operate Arrowood in a manner consistent with the insurance statutes and regulations of Delaware to protect the interests of Arrowood's policyholders and (b) make accurate and timely regulatory filings and disclosures.

v. *The Arrowood Third-Party Defendants' Conversion of Assets of Arrowood*

101. On March 4, 2007, John Tighe, then CEO of both Arrowpoint and Arrowood, announced,

Our focus has always been on our obligation to all of our policyholders – the successful completion of this transaction is a huge win for them . . . The transaction builds on the strong success we've achieved to date through our restructuring efforts and provides us with a solid foundation for taking the business forward. Most importantly, it represents an excellent outcome for our policyholders, who are the primary beneficiaries of the acquisition and the additional \$287.5 million it provides.

See "Arrowpoint Capital Finalizes Acquisition of Royal & SunAlliance USA Businesses, Arrowpoint Capital Press Release, March 4, 2007, available at <https://www.arrowpointcap.com/Arrowpoint/GetPrintPage.aspx?pageId=500> (last accessed Jan. 20, 2022).

102. In approximately 2007, Arrowood, with approximately \$3 billion in surplus, stopped writing new business and thus, other than investment income on its assets, ceased to have income from operations, and commenced to be engaged solely in the "runoff" of its claims. Arrowood wrote little-to-no new business in and after 2007.
103. Arrowood's sole functions after it was put in runoff were (a) to operate the insurer in a legally compliant manner, and (b) to process and administer claims under insurance policies that had been issued when it was writing insurance, including the primary general liability

policies it issued to Pipe & Boiler for at least the two policy periods January 1, 1981 – January 1, 1983.

104. But the Individual Arrowood Third-Party Defendants, in their management capacities for Arrowood and its parent companies (Arrowpoint Group and Arrowpoint Capital) consistently have failed to properly establish and maintain loss and expense reserves for known and unreported claims, which resulted in Arrowood's statutory financial reports having an appearance of solvency that misrepresented the true nature of Arrowood's deepening financial woes. The ongoing and consistent yearly under-reserving of losses and expenses allowed the Arrowood Third-Party Defendants to maintain the air of solvency and liquidity while millions of dollars in Arrowood funds were improperly and wrongfully transferred from Arrowood through exorbitant salaries, benefits, management fees to its parent companies, and expenses, all performed for the personal benefit of various present and former employees of Arrowood (including the Individual Arrowood Third-Party Defendants herein) as well as its parent companies (Arrowpoint Group and Arrowpoint Capital). The net result has been to cause Arrowood's policyholders' surplus to drop to the point that Arrowood's RBC Level under 18 Del. Code § 5801 is now at a precarious Company Action Level RBC as defined in that statute.
105. The true extent of the diversion of funds that should have been preserved for Arrowood's policyholders is to be determined through discovery; however, it is known from the annual MD&A filed with regulators regarding various pension plans for present and former employees that Arrowood maintains "a non-qualified deferred compensation plan for a select group of management and highly compensated employees." Arrowood Indemnity Co., Management's Discussion and Analysis of Financial Condition and Results of Operations for the Year Ended

December 31, 2020, at 8. This plan may include Third-Party Defendants Tighe and Cahill, and probably a number of others of the Individual Arrowood Third-Party Defendants.

106. Arrowood management also employed other means to deplete or divert the assets of Arrowood to the detriment of its policyholders, but to the benefit of the Arrowood Third-Party Defendants.

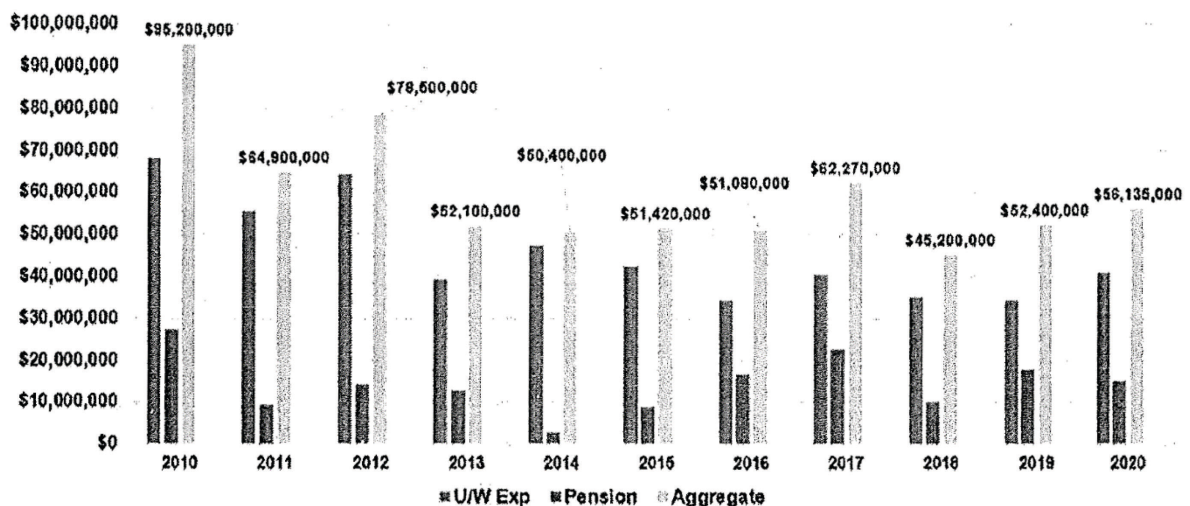
107. Arrowood Indemnity was the 100% owner of another insurer, Arrowood Surplus Lines Insurance Company (“ASL”). As of December 31, 2011, ASL had a Policyholders’ Surplus of \$184 million. The Arrowood Third-Party Defendants implemented a strategy to slowly upstream the \$184 million surplus of ASL. By 2015, \$120 million had been so (?) “upstreamed.” However, Arrowood’s 2015 MD&A filed with the regulators states that a dividend from ASL resulted in “additional unaffiliated equity, commodity and limited partnership holdings.” (emphasis added). Any diversion to unaffiliated entities would constitute an improper diversion of a material portion of the assets of Arrowood to the detriment of policyholders and to the benefit of the Arrowood Third-Party Defendants.

108. Arrowood was a party to a Tax Allocation agreement. That Tax Allocation agreement typically would have allowed the Arrowpoint Group to offset taxable gains against losses of Arrowood. There is no clear public record of Arrowood receiving its properly allocable portion of any such tax savings each year, but PwC’s 2019 audit reflected that Arrowood took an unexplained \$7.7 million tax write-off of money due from its parent company, one of the Arrowood Third-Party Defendants herein.

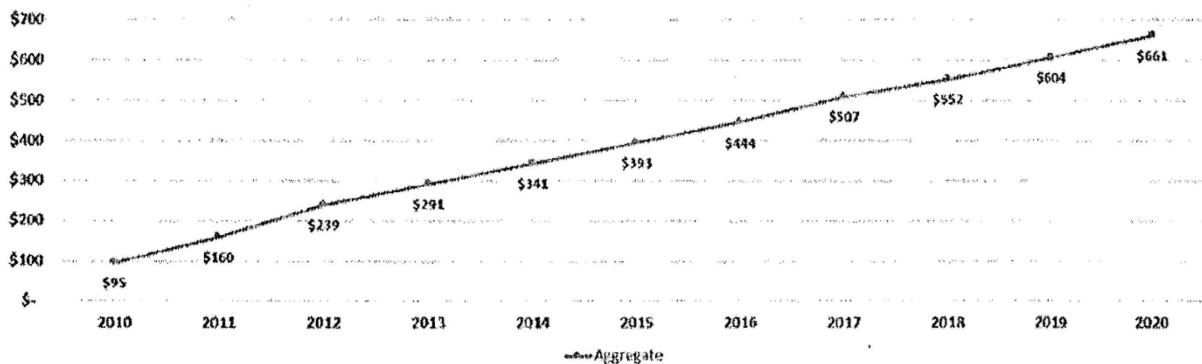
109. The below charts, produced by Arrowood in its publicly filed Annual Statements, quantify some of the material amounts, both annually and in the aggregate, of untoward management

fees, grossly excessive salaries, and other emoluments that the Arrowood Third-Party Defendants have distributed or diverted from the policyholders' surplus for the benefit of management (including, but not limited to, the Individual Arrowood Third-Party Defendants), Arrowpoint, and present and former Arrowood employees.

Other Underwriting Expense and Pension Costs and in the Aggregate



Other Underwriting Expense and Pension Costs and in the Aggregate



110. In 2007, Arrowood had total admitted assets of \$2,998,163,220. Those admitted assets steadily decreased between 2007 and 2020, to \$848,361,366 in 2020, despite the company

having strong net investment gains. Indeed, between 2011 and 2020, Arrowood's net investment gain was as follows for each year:

Net Investment Gain	
2011	\$74,639,663
2012	\$64,643,502
2013	\$54,871,494
2014	\$63,288,306
2015	\$57,762,477
2016	\$48,650,645
2017	\$43,746,769
2018	\$50,921,661
2019	\$40,607,859
2020	\$34,958,745

111. With regard to policyholders, Arrowood's policyholders' surplus also has decreased significantly year after year. In 2007, Arrowood's policyholder surplus was \$445,627,238. The number steadily declined to \$94 million by 2020.

112. Arrowood also has consistently failed to set proper reserves for claims. Year after year, Arrowood has booked reserve deficiencies.

vi. The Arrowood Defendants manipulated reserves as set forth in Schedule P to the Arrowood Annual Statement

113. All insurance company annual statements contain a "Schedule P." The data within schedule P are organized by "Accident Year." "Accident Year" is typically defined as follows:

Accident Year Data – a method of arranging loss and exposure data of an insurer or group of insurers or within a book of business, so that all losses associated with accidents occurring within a given calendar year and all premium earned during that same calendar year are compared. Thus, regardless of individual policy periods and regardless of when a loss is reported or is paid, accident year data 2015 will include all premiums earned during 2015 and will include all losses occurring in 2015.

IRMI, Accident Year Data, available at <https://www.irmi.com/term/insurance-definitions/accident-year-data> (last accessed Jan. 20, 2022).

114. Schedule P provides details, both on an aggregate basis (Parts 1, 2, 3, and 4) and by Line of Business, of critical reserve information. Schedule P, Part 2 Summary provides the details of all Incurred Losses (including bulk reserves and IBNR), which guides the calculation of two of the twelve IRIS Ratios – the One-year and Two-year Adverse Development Ratios. The Schedule P, Part 2 Summary for 2020 is as shown here:

Annual Statement for the year 2020 of the **Arrowood Indemnity Company**

SCHEDULE P - PART 2 - SUMMARY

Years in Which Losses Were Incurred	Incurred Net Losses and Defense and Cost Containment Expenses Reported at Year End (\$000 omitted)										DEVELOPMENT	
	1	2	3	4	5	6	7	8	9	10	11	12
	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	One Year	Two Year
1. Prior.....	933,833	937,288	947,193	1,005,279	1,004,000	1,026,778	1,054,822	1,073,195	1,119,956	1,144,330	24,374	71,135
2. 2011.....	56,108	3,034	3,538	3,796	3,868	4,087	3,321	4,373	4,328	4,095	(233)	(277)
3. 2012.....	XXX	49,613	6,084	6,208	6,116	6,098	6,063	6,020	5,834	5,547	(287)	(473)
4. 2013.....	XXX	XXX	31,276	5,291	5,256	5,282	5,240	5,241	5,195	5,001	(194)	(240)
5. 2014.....	XXX	XXX	XXX	13,538	3,014	3,044	3,096	3,089	3,079	3,131	51	42
6. 2015.....	XXX	XXX	XXX	XXX	8,084	2,554	2,520	2,487	2,437	2,416	(21)	(71)
7. 2016.....	XXX	XXX	XXX	XXX	XXX	4,850	1,705	1,767	1,772	1,785	13	18
8. 2017.....	XXX	XXX	XXX	XXX	XXX	XXX	4,351	874	895	885	(10)	10
9. 2018.....	XXX	XXX	XXX	XXX	XXX	XXX	XXX	2,386	645	640	(5)	(1,746)
10. 2019.....	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX	1,252	633	(619)	XXX
11. 2020.....	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX	8,338	XXX	XXX
12. Totals.....											23,071	68,399

Arrowood Indemnity Company 2020 Annual Statement, at 63.

115. The One-Year Ratio (column 11) measures the development of unpaid losses and loss adjustment expenses based on loss adjustment expenses reported one year prior. The Two-Year Ratio (column 12) measures the development of loss and loss adjustment expenses reported two years ago. Negative results indicate that the reserves were deficient and have since adversely developed. Adverse developments evidence inadequate reserving.

116. This chart demonstrates that for each year going back to 2011, the oldest publicly available information, the Arrowood Third-Party Defendants failed to establish adequate Reserves, year after year, for multiple years. Because an insurer's management and its Appointed Actuary are responsible for establishing a reasonable reserve estimate (and its auditor, PwC, is responsible for an independent verification of those reserves), this state of affairs for Arrowood should, at a minimum, be considered reckless conduct on the part of the Arrowood Defendants.
117. But the Arrowood Third-Party Defendants did not just fail to establish adequate reserves for "Prior Years." To disguise the patent inadequacy of "Prior Year" reserves, so as not to have the appearance of deficient reserves on a cumulative basis, starting no later than 2007, the Arrowood Third-Party Defendants established a materially and clearly artificially large reserve in the first year of any given Accident Year, and then the next year, immediately reduce the Accident Year reserve by 90% or more. The net result of this machination was to make Arrowood's overall reserves appear redundant when, in fact, they were significantly deficient. Added to this ruse as of year-end 2020 was the use of an artificial negative IBNR/Bulk reserve for Accident Year 2020 in the amount of \$17 million. When combined with the grossly inadequate Prior Year Reserves, the Arrowood Third-Party Defendants were able to mask two highly significant IRIS Ratios (the One-Year and Two-Year Adverse Development Ratios), which, in turn, avoided heightened scrutiny from ancillary regulators (*i.e.* all states other than Delaware), including South Carolina. The Arrowood Third-Party Defendants accomplished their goal, but could not have done so without a complicit actuary who filed properly to measure IBNR. That critical actuary was Daniel R. Keddie.

118. Arrowood appointed Keddie as its Appointed Actuary on March 14, 2004, and Keddie continued to serve in that role until his retirement on July 9, 2021. Arrowood Annual Statement General Interrogatories Part 1 – Common Interrogatories #11 (setting forth appointment).
119. Actuaries are subject to a uniform Code of Conduct, adopted by all five U.S.-based actuarial organizations. *See* American Academy of Actuaries 2009 Yearbook and Leadership Manual at 69. The Code of Conduct contains 14 Precepts, two of which are crucial to the instant analysis:

PRECEPT 1. An Actuary shall act honestly, with integrity and competence, and in a manner to fulfill the profession's responsibility to the public and to uphold the reputation of the actuarial profession

...

ANNOTATION 1-4. An Actuary shall not engage in any professional conduct involving dishonesty, fraud, deceit, or misrepresentation or commit any act that reflects adversely on the actuarial profession.

...

PRECEPT 8. An Actuary who performs Actuarial Services shall take reasonable steps to ensure that such services are not used to mislead other parties.

Id. at 70, 71.

120. Keddie ignored those Code of Conduct Precepts, and instead complied with the requirements of his fellow Third-Party Arrowood Defendants to the significant detriment of the Arrowood policyholders, including Pipe & Boiler, by issuing reports every year wrongfully attesting to the reasonableness of the Arrowood reserves.
121. Even though Keddie was credentialed as an Associate of the Casualty Actuarial Society at all material times and, as such, was bound by the Code of Conduct, his primary and critical role over the past 15 years was to facilitate the plan the Arrowood Third-Party Defendants hatched to consistently under-reserve all losses and expenses so that Arrowood assets would

be used not for Arrowood's policyholders as legally required, but instead for the Arrowood Third-Party Defendants' benefit—to pay salaries and management fees to Arrowpoint.

122. Perhaps most troubling, over the last ten years, the expenses Arrowood characterizes as non-claim expenses have been astronomical. Between 2011 and 2020, the Arrowood Third-Party Defendants caused Arrowood to pay the following salaries (primarily to the Individual Arrowood Third-Party Defendants) and management fees (wrongfully paid to Arrowpoint, Arrowood's parent company), as set forth in Arrowood's statutory annual statements:

<u>Year</u>	<u>Salaries</u>	<u>Management Fees</u>
2011	\$22,711,734	\$2,007,592
2012	\$27,165,164	\$4,821,266
2013	\$28,563,024	\$4,539,749
2014	\$21,681,769	\$4,255,422
2015	\$26,790,534	\$4,763,587
2016	\$30,785,393	\$5,009,820
2017	\$26,919,005	\$5,064,432
2018	\$21,360,756	\$5,266,542
2019	\$20,266,145	\$4,909,334
2020	\$22,083,049	\$4,820,219
Total	\$248,326,594	\$45,457,963

123. That is, the Arrowood Third-Party Defendants caused Arrowood to pay nearly \$250 million in salaries—more than would be expected by an active insurance company the size of Arrowood, and far more than typically would be paid by a comparable property and casualty insurer in runoff during the relevant ten-year period – and over \$45 million in “management fees” to its owner (which were improper asset transfers). These monies, which Arrowood should have held and invested to meet its liabilities to its policyholders, as well as to injured asbestos plaintiffs, were taken from the company under false pretenses based on claim reserves that were underreported.

124. Furthermore, had the Arrowood Third-Party Defendants not wrongfully diverted millions of dollars from Arrowood, and instead kept that money with Arrowood to establish adequate reserves for claims and invested the funds, Arrowood would have had substantially more money to adjust and pay claims, considering the investment gains that Arrowood realized with the funds that the Arrowood Third-Party Defendants did not wrongfully divert.

125. In its 2020 Management's Discussion and Analysis, signed by a number of the Individual Arrowood Third-Party Defendants, Arrowood admitted as follows:

The Company is required to maintain certain levels of capital and surplus. The minimum level is based on the individual lines of business for which the Company is licensed. As of December 31, 2020, the Company's RBC ratio, which is the ratio of the Company's adjusted capital to Authorized Control Level, is at the Company Action Level. As required, an RBC plan will be filed with the Delaware Department of Insurance. Discussions are ongoing with the Delaware Department of Insurance regarding the Company's business plan. The operations continue to have risks and uncertainties that could have a material adverse impact on the Company's capital position and ability to maintain capital in excess of regulatory RBC requirements including (i) credit risk of and/or potential disputes with reinsurers; (ii) adverse loss development on certain long-tail lines including workers compensation, asbestos and environmental and professional and general liability.

Arrowood Indemnity Company MD&A for the Year Ended December 31, 2020, at 6-7.

126. While the Delaware DOI, or another insurance department of another state, may require Arrowood to take action to correct its deficient financial circumstances, Pipe & Boiler is not confident that the Delaware DOI will do so in a timely fashion, nor that any other insurance regulator will act in time to remedy the situation.

127. For instance, the Individual Arrowood Third-Party Defendants' failure to post adequate reserves for Arrowood's claims has been a consistent and recurring problem. Indeed, between

2009 and 2014, Arrowood sustained a net underwriting loss of \$464 million. Between 2014 and 2018, Arrowood sustained a net underwriting loss of \$374 million.

128. Indeed, in addition to conceding that Arrowood's RBC Level is at Company Action Level under 18 Del. Code § 5801, Arrowood's 2020 Annual Statement shows that Arrowood has failed 6 of the 13 Insurance Regulatory Information System ("IRIS") tests. As the NAIC notes in its Insurance Regulatory Information Systems ("IRIS") Manual:

The NAIC Insurance Regulatory Information System (IRIS) is a collection of analytical solvency tools and databases designed to provide state insurance departments with an integrated approach to screening and analyzing the financial condition of insurers operating within their respective states. IRIS, developed by the state insurance regulators participating in NAIC committees, is intended to assist state insurance departments in targeting resources to those insurers in greatest need of regulatory attention.

...

IRIS helps by providing solvency tools and databases that highlight those insurers that merit the highest priority in the allocation of the state insurance regulators' resources, thus directing those resources to the best possible use.

NAIC Insurance Regulatory Information System (IRIS) Ratios Manual (2017 ed.) at 9.

129. Pipe & Boiler has tendered the asbestos bodily injury claims that have been filed against it to Arrowood for defense and indemnity coverage under the primary commercial general liability policies that it purchased between 1981 and 1983. Pipe & Boiler is not the only insured of Arrowood that has tendered such claims to Arrowood since 2019; Arrowood insured a number of other similarly situated companies which are seeking defense and indemnity for similar asbestos bodily injury claims. Yet, as evident in Schedule T of Arrowood's Annual Statements for 2019 and 2020, Arrowood has *reduced* its claim reserves ("Unpaid Losses") in 2019 (as compared to 2018), and again *reduced* its reserves in 2020 (as compared to 2019).

130. That is, Arrowood has not posted any realistic reserves for the hundreds (if not thousands) of claims that its insureds, including Pipe & Boiler, have tendered for defense and indemnity coverage, and if and when such reserves are properly posted, Arrowood's financial situation will be shown to be that much worse.

131. The Delaware Insurance Code defines "Enterprise Risk" as follows:

"(4) 'Enterprise risk.' – The term 'enterprise risk' shall mean any activity, circumstance, event or series of events, involving 1 or more affiliates of an insurer that, if not remedied promptly, is likely to have a material adverse effect upon the financial condition or liquidity of the insurer or its insurance holding company system as a whole, including, but not limited to, anything that would cause the insurer's risk-based capital to fall into company action level as set forth in § 5803 of this title or would cause the insurer to be in hazardous financial condition as set forth in Section 3 of Department of Insurance Regulation 304 – Standards and Commissioner's Authority for Companies Deemed to be in Hazardous Financial Condition [CDR 18-300-304-3.0].⁴"

18 Del. Code § 5001(4).

132. While the Arrowood Third-Party Defendants, as the ultimate controlling persons of Arrowood, were required to file an annual Enterprise Risk Report with the Delaware Department of Insurance based on the facts set forth above, the Arrowood Third-Party Defendants failed to do so, or did not file such a report that accurately and completely sets forth the Enterprise Risk Arrowood faced, to the detriment of Pipe & Boiler and Arrowood's other policyholders.

⁴ 18 DE Admin. Code § 304-3.0 sets forth the standards, either singly or a combination of two or more, that the Delaware Department of Insurance Commissioner may consider to determine whether the continued operation of an insurer transacting an insurance business in Delaware might be deemed to be hazardous to its policyholders, creditors, or the general public.

vii. *The misleading Reports on Examination*

133. Every state conducts financial examinations of the insurers that it regulates. This is consistent with the obligation of the domiciliary state to protect policyholders. The purpose of these financial examinations is to determine the insurer's fiscal condition and compliance with applicable laws and regulations.
134. In Delaware, the Bureau of Company Examination, Rehabilitation and Guaranty ("BERG") performs that examination function. BERG "is responsible for ensuring the financial health and stability of insurance companies in Delaware. It does so by analyzing and assessing the financial condition of insurance companies domesticated and doing business in Delaware in order to protect consumers and, if necessary, by managing, rehabilitating or liquidating financially impaired insurers." Delaware Department of Insurance Company Regulation (BERG), <https://insurance.delaware.gov/divisions/berg/> (last visited Jan. 20, 2022).
135. BERG clearly failed in the discharge of its responsibilities concerning Arrowood as it allowed the Arrowood Third-Party Defendants' reckless scheme to be implemented and maintained. Delaware will at times engage independent actuaries to provide assistance on financial examinations. Here, BERG retained and apparently relied upon INS Consultants, Inc. ("INS"), an independent consulting actuarial firm, to review and analyze the adequacy of the carried reserves of Arrowood as part of the state's financial examinations.
136. In reviewing the Arrowood reserves, the credentialed actuarial principals of INS were required to comply with the Actuarial Code of Conduct. They knew at all times that their work

would be relied upon by the regulators of all states, not just Delaware. Indeed, the conclusion of the INS Report, dated October 18, 2019, states:

The assistance of the consulting actuarial firm, INS Consultants, Inc., the consulting information systems specialist firm, INS Services, Inc., the Company's outside audit firm, PwC, and the Company's management and staff was appreciated and is acknowledged.

Delaware Department of Insurance, Examination Report of the Arrowood Surplus Lines Insurance Company as of December 31, 2018, dated October 18, 2019. The same wording can be found in the 2015 Report on Examination for Arrowood as of December 13, 2014.

137. INS Consultants, Inc. and its credentialed principals knew, had reason to know, or should have known in 2015 and 2019 that the carried reserves of Arrowood were consistently, year after year, materially inadequate. And yet, both of those Reports on Examination are silent as to such reserve inadequacy. INS Consultants, Inc. at all times knew that if a company with assets and liabilities of the magnitude of Arrowood was required to significantly increase its carried reserves, that would adversely and materially impact its solvency, its RBC ratios, and its IRIS Ratios, and that, as a result, the regulators of other states would quickly focus their attention on Arrowood. BERG and others at the Delaware Department of Insurance knew that in such an event, other regulators would force Delaware to take action to stop the wrongful conduct of the Arrowood Third-Party Defendants.

viii. The Arrowood Third-Party Defendants cannot rely on safe harbors.

138. The Arrowood Third-Party Defendants believe that they have been artful in taking certain actions to protect their wrongful conduct from question. But they have been living with a false sense of security. They have no safe harbors for their wrongful conduct.

139. The first “safe harbor” that the Arrowood Third-Party Defendants will claim was Keddie’s conduct as the Appointed Actuary. Despite his legal and ethical obligations, despite the Schedule P machinations, and notwithstanding Arrowood’s patent and consistent under-reserving for the past 15 years, Keddie wrongfully attested to the “reasonableness” of Arrowood’s reserves upon which the Arrowood Third-Party Defendants would rely in the annual Arrowood MD&A. One of the Arrowood Third-Party Defendants’ most significant wrongful acts was their failure to properly reserve for Unallocated Loss Adjustment Expense. The Unallocated Loss Adjustment Expenses have been one of the most significant drivers of the losses Arrowood has sustained over the past 10 years.
140. Next, the Arrowood Third-Party Defendants may attempt to rely on the Delaware Department of Insurance’s acquiescence as a “safe harbor.” The Arrowood Third-Party Defendants surely will have made various regulatory filings seeking permission from the Delaware Department of Insurance to commit some of the conduct set forth herein. But regardless of whether the Arrowood Third-Party Defendants believed that they secured absolution by such filings, that does not vitiate in any manner their liability for their abandonment of their primary obligation to Arrowood’s policyholders.
141. Pipe & Boiler alleges that all of its primary coverage provides an unlimited supplemental duty to defend, and provides “per occurrence” coverage for operations claims, with no limit to the number of occurrences. Pipe & Boiler also alleges that its umbrella coverage, when and if to the extent located and identified, provides for an unlimited supplemental duty to defend when there is no responsive primary coverage and that such umbrella coverage also responds on a per occurrence basis with no limit to the number of occurrences.

THIRD-PARTY PLAINTIFF PAYNE & KELLER

142. Payne & Keller's historic operations 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 suits against Payne & Keller, including the instant suit and those referenced above ("Payne & Keller Asbestos Suits").

A. Rexel's and SKRLA's Competing Claims to Payne & Keller's Insurance Program

143. Since his appointment, the Receiver has become aware that Third-Party Defendants Rexel and SKRLA periodically make claims against Payne & Keller's historical insurance program by tendering Rexel-related and SKRLA-related lawsuits to the Payne & Keller insurers. Rexel and SKRLA tender these lawsuits to the Payne & Keller insurers by way of their agent and claims administrator, Third-Party Defendant Compass Risk Services, LLC. without any communication or coordination with the Receiver.

144. The Receiver is informed and believes that Rexel's and SKRLA's uncoordinated and competing claims to Payne & Keller's insurance program will interfere with his efficient and orderly administration of his duties as the receiver for Payne & Keller. In carrying out his duties, Payne & Keller's receiver has made inquiries about the role of Rexel and SKRLA and the competing claims to Payne & Keller's insurance policies, but these inquiries have gone unanswered. Moreover, the existence of these competing claims from Rexel and SKRLA have thwarted, or will thwart, the Receiver's efforts to reach agreements with certain of Payne & Keller's insurers regarding their rights and obligations under these insurance

policies. As such, a justiciable controversy exists between the Receiver for Payne & Keller and Rexel and between the Receiver and SKRLA regarding the rights and responsibilities of each relative to the Payne & Keller insurance program. Similarly, a controversy exists between the Receiver for Payne & Keller and Rexel and SKRLA's agent Compass Risk Services regarding the rights of Compass to submit claims to the Payne & Keller insurers without any communication or disclosing any information in response to requests for information made by the Receiver for Payne & Keller. The Receiver seeks declaratory relief regarding these issues to guide his performance of his duties. The Receiver has joined the known Payne & Keller insurers to this action because their rights and responsibilities, as between the Receiver and Rexel and between the Receiver and SKRLA, will be delineated herein.

B. The 1965 to 1973 Policies

145. During various policy periods from March 1, 1965 to March 1, 1973, Payne & Keller was insured by one or more primary insurers for which the Guaranty Association is responsible, including Reliance Insurance Company and Highlands Underwriting Insurance Company, the latter of which was subject to a liquidation order issued by the 23rd Judicial District, Travis County, dated October 29, 2021, and, upon information and belief, one or more existing defendants including defendant Maryland American General Insurance Company, all of which issued primary general liability policies to Payne & Keller ("The 1965 to 1973 Policies"). The 1965 to 1973 Policies have standard terms and conditions. The 1965 to 1973 Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such

suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. These policies require the insurers fully to defend any Payne & Keller Asbestos Suit alleging bodily injury. These policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any portion of the 1965 to 1973 Policy periods.

146. The Guaranty Association and other pertinent defendant insurers have failed to fully acknowledge, delineate or accept their insuring obligations under the 1965 to 1973 Policies as between Rexel and Payne & Keller or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between and among these parties.

C. The Zurich Policies

147. Defendant Zurich, individually and as successor in interest to Maryland American General Insurance Company and Maryland Casualty Company, issued general liability policies to Payne & Keller (“The Zurich Policies”). The Zurich Policies have standard terms and conditions. The Zurich Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. The Zurich Policies require Zurich fully to defend any Payne & Keller Asbestos Suit alleging bodily injury during any Zurich Policy period. The Zurich Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Zurich Policy period. It is the burden of Zurich to prove any limitation on or exclusion of coverage. Specifically, Zurich issued primary general liability coverage to Payne & Keller for at least

the three policy periods from March 1, 1968 – March 1, 1971 and at least five policy periods March 1, 1973 – March 1, 1978, and may have issued such policies during earlier policy periods.

148. Zurich has failed to fully acknowledge, delineate or accept its insuring obligations under the Zurich Policies between Rexel and Payne & Keller or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.

D. The Aetna Policies

149. Defendant Aetna issued general liability policies to Payne & Keller (“The Aetna Policies”). The Aetna Policies have standard terms and conditions. The Aetna Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false or fraudulent. The duty to defend is joint, several, indivisible and supplemental. The Aetna Policies require Aetna fully to defend any Payne & Keller Asbestos Suit alleging bodily injury during any Aetna Policy period. The Aetna Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Aetna Policy Period. It is the burden of Aetna to prove any limitation on or exclusion of coverage. Specifically, Aetna issued primary general liability coverage to Payne & Keller for at least the seven policy periods March 1, 1978 – April 1, 1985.

150. Aetna has failed to fully acknowledge, delineate or accept its insuring obligations under the Aetna Policies between Rexel and Payne & Keller or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.

E. The Continental Policies

151. Defendant Continental issued umbrella liability policies to Payne & Keller (“The Continental Policies”). The Continental Policies have standard terms and conditions. The Continental Umbrella Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Continental Policy Period. It is the burden of Continental to prove any limitation on or exclusion of coverage. Specifically, Continental issued umbrella liability coverage to Payne & Keller for at least the two policy periods March 1, 1979 – March 1, 1980 and April 1, 1985—April 1, 1986.

152. Continental, by and through Resolute Management and NICO, has failed to fully acknowledge, delineate or accept its insuring obligations under the Continental Policies as between Rexel and Payne & Keller or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.

F. The National Union Policies

153. Defendant National Union issued general liability policies to Payne & Keller (“The National Union Policies”). The National Union Policies have standard terms and conditions. The National Union Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false or fraudulent. The duty to defend is joint, several, indivisible and supplemental. The National Union Policies require National Union fully to defend any Payne & Keller Asbestos Suit alleging bodily injury during any National Union Policy period. The National Union Policies have a separate duty fully to

indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any National Union Policy Period. It is the burden of National Union to prove any limitation on or exclusion of coverage. Specifically, National Union issued primary general liability coverage to Payne & Keller for at least the three policy periods April 1, 1985—April 1, 1989, and issued umbrella liability coverage to Payne & Keller for at least the three policy periods April 1, 1985—October 6, 1988.

154. National Union, by and through Resolute Management and NICO, has failed to fully acknowledge, delineate or accept its insuring obligations under the National Union Policies as between Rexel and Payne & Keller or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.

G. The Dependable Policy

155. Defendant Dependable issued at least one umbrella liability policy to Payne & Keller (“The Dependable Policy”). The Dependable Policy has standard terms and conditions. The Dependable Policy has a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Dependable Policy Period. It is the burden of Dependable to prove any limitation on or exclusion of coverage. Specifically, Dependable issued umbrella liability coverage to Payne & Keller for at least the policy period March 1, 1976—March 1, 1977.

156. Dependable has failed to fully acknowledge, delineate or accept its insuring obligations under the Dependable Policy as between Rexel and Payne & Keller or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.

H. The Stonewall Policies

157. Defendant Stonewall issued umbrella liability policies to Payne & Keller (“The Stonewall Policies”). The Stonewall Policies have standard terms and conditions. The Stonewall Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Stonewall Policy Period. It is the burden of Stonewall to prove any limitation on or exclusion of coverage. Specifically, Stonewall issued umbrella liability coverage to Payne & Keller for at least the three policy periods March 1, 1976—March 1, 1977 and April 1, 1986—October 6, 1988.

158. Stonewall, by and through Resolute Management and NICO, has failed to fully acknowledge, delineate or accept its insuring obligations under the Stonewall Policies as between Rexel and Payne & Keller or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.

I. The Lexington Policy

159. Defendant Lexington issued at least one umbrella liability policy to Payne & Keller (“The Lexington Policy”). The Lexington Policy has standard terms and conditions. The Lexington Policy has a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Lexington Policy Period. It is the burden of Lexington to prove any limitation on or exclusion of coverage. Specifically, Lexington issued umbrella liability coverage to Payne & Keller for at least the policy period April 1, 1985—April 1, 1986.

160. Lexington, by and through Resolute Management and NICO, has failed to fully

acknowledge, delineate or accept its insuring obligations under the Lexington Policy as between Rexel and Payne & Keller or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.

J. The First State Policies

161. Defendant First State issued at least four umbrella liability policies to Payne & Keller (“The Hartford Policies”). The Hartford Policies have standard terms and conditions. The Hartford Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Hartford PolicyPeriod. It is the burden of First State to prove any limitation on or exclusion of coverage. Specifically, First State issued umbrella liability coverage to Payne & Keller for at least the policyperiods March 1, 1976—March 1, 1977, April 1, 1983—April 1, 1985, and May 15, 1985—April 1, 1986.

162. First State has failed to fully acknowledge, delineate or accept its insuring obligations under the Hartford Policies as between Rexel and Payne & Keller or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.

K. The Birmingham Fire Policies

163. Defendant Birmingham Fire issued at least two umbrella liability policies to Payne & Keller (“The Birmingham Fire Policies”). The Birmingham Fire Policies have standard terms and conditions. The Birmingham Fire Policies have a separate duty fully to indemnify Payne & Keller from any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Birmingham Fire Policy Period. It is the burden of Birmingham Fire to prove any limitation or exclusion of coverage. Specifically, Birmingham Fire issued

umbrella liability coverage to Payne & Keller for at least the two policy periods April 1, 1983—April 1, 1985.

164. Birmingham Fire, by and through Resolute Management and NICO, has failed to fully acknowledge, delineate or accept its insuring obligations under the Birmingham Fire Policies as between Rexel and Payne & Keller or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.

L. The Lloyd's Underwriters & London Market Insurers Policy

165. Defendants Lloyd's Underwriters and London Market Insurers issued at least one umbrella policy to Payne & Keller ("The Lloyd's Policy"). The Lloyd's Policy has standard terms and conditions. The Lloyd's Policy has a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Lloyd's Policy Period. The Lloyd's Policy also contains the "service of suit" clause as set forth above. It is the burden of Lloyd's to prove any limitation on or exclusion of coverage. Specifically, Lloyd's issued umbrella liability coverage to Payne & Keller for at least the policy period April 1, 1984—April 1, 1985.

166. Defendant Lloyd's Underwriters, by and through Resolute Management and NICO, have failed to fully acknowledge, delineate or accept their insuring obligations under the Lloyd's Policy as between Rexel and Payne & Keller or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.

M. The Reliance Policies and the Guaranty Association

167. Reliance Insurance Company ("Reliance") issued general liability policies to Payne & Keller ("The Reliance Policies"). The Reliance Policies have standard terms and

conditions. It is the burden of any insurer, or an entity standing in the place of the insurer, to prove any limitation or exclusion of coverage. Reliance issued primary general liability coverage to Payne & Keller for at least the three policy periods March 1, 1965—March 1, 1968.

168. On information and belief, Reliance Insurance Company was liquidated on October 3, 2001.

169. The Guaranty Association was statutorily created to protect the policy holders of insolvent insurance companies like Reliance. 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).

N. The Highlands Policies and the Guaranty Association

170. On information and belief, Highlands Underwriters Insurance Company issued general liability policies to Payne & Keller including policy numbers GA 2038 (March 1, 1971 to March 1, 1972) and GA 2278 (March 1, 1972 to March 1, 1973).

171. On information and belief, Highlands is currently in liquidation proceedings in Texas, by order dated October 29, 2021, staying all proceedings against Highlands.

172. The Guaranty Association was statutorily created to protect the policy holders of insolvent insurance companies like Highlands. 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).

O. R.L. Jarrett and U.S. Risk Broker Services

173. R.L. Jarrett served as an insurance broker and underwriter to Payne & Keller, facilitating and issuing certain quota share policies in conjunction with other Third-Party Defendants herein, including at least First State and Lloyd's.

174. Upon information and belief, in or before 1990, U.S. Risk acquired one or more entities related to R.L. Jarrett, which makes U.S. Risk the successor-in-interest to R.L. Jarrett.

FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT

175. Third-Party Plaintiffs incorporate the foregoing paragraphs by reference.

176. Peter Protopapas is the duly appointed Receiver of Third-Party Plaintiffs, giving him the power and authority fully to administer all assets of Third-Party Plaintiffs, accept service on behalf of Third-Party Plaintiffs, engage counsel on behalf of Third-Party Plaintiffs, and take any and all steps necessary to protect the interests of Third-Party Plaintiffs, 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 Third-Party Plaintiffs' Asbestos Suits in fulfillment of his responsibilities as Receiver. The Receiver will continue to expend substantial time and incur expenses in connection with Third-Party Plaintiffs' Asbestos Suits.

177. An actual and justiciable controversy exists between the Receiver and the Third-Party Defendant Insurers, including their obligations to pay for the Receiver's activities in connection with the defense of Third-Party Plaintiffs' Asbestos Suits.

178. Judicial declarations are necessary and appropriate at this time, under the circumstances alleged above, so that the Receiver may ascertain these rights against Third-Party Defendants.
179. 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.
180. 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.
181. The Receiver respectfully requests this Court to declare that Third-Party Defendants must fairly compensate the Receiver for the substantial time, effort, and expenses expended in connection with the defense of asbestos suits potentially covered under the Third-Party Defendants' policies and to further declare that this obligation is unlimited and shall continue as long as there are Asbestos Suits pending against Third-Party Plaintiffs.

SECOND CAUSE OF ACTION
DECLARATORY JUDGMENT

182. Third-Party Plaintiffs incorporate the foregoing paragraphs as if repeated verbatim herein.
183. 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.
184. Upon information and belief, Third-Party Plaintiffs purchased insurance policies from Third-Party Defendant Insurers. These policies are the property of the Third-Party Plaintiffs.

185. Third-Party Plaintiffs seek 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 Third-Party Defendants are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession for his unrestricted use in carrying out his duties.

THIRD CAUSE OF ACTION
DECLARATORY JUDGMENT

186. Third-Party Plaintiffs incorporate the foregoing paragraphs by reference.

187. The Receiver seeks a declaration and order that Third-Party Defendants Zurich, Continental, Allstate, and U.S. Fire issued primary general liability coverage to Carolina Industrial, subject to the per occurrence and aggregate limits of those policies, and that Zurich, Continental, and Allstate have an unlimited supplemental duty to defend and to pay or reimburse defense costs.

188. The Receiver seeks a further declaration as to the interpretation and meaning of the insurance policies that Third-Party Defendants Zurich, Continental, Allstate, and U.S. Fire issued to Carolina Industrial (the “Carolina Industrial Insurance Policies”), as follows:

- a. The Carolina Industrial Insurance Policies cover all Carolina Industrial 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 policy periods;

- b. Each Carolina Industrial asbestos suit “triggers” the Carolina Industrial Insurance Policies as long as an asbestos plaintiff alleges injury during the period of the policy;
- c. Carolina Industrial may select the policy or policy years to which to assign or allocate in full each Carolina Industrial Asbestos Suit-related loss;
- d. In the case of any claimed ambiguity in any Carolina Industrial Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Carolina Industrial Insurance Policies;
- e. Defense costs for the Carolina Industrial asbestos suits are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of the Carolina Industrial Insurance Policies with a duty to defend;
- f. If any allegation or cause of action in a Carolina Industrial Asbestos Suit is potentially covered under the Carolina Industrial Insurance Policies with a duty to defend, 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 Carolina Industrial 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 Carolina Industrial Asbestos Suits;
- h. Each Carolina Industrial Insurance Policy must indemnify covered Carolina Industrial Asbestos Suits, in full, up to its “per occurrence” limit, regardless of whether a continuing injury spans multiple policy periods;

- i. The Carolina Industrial Asbestos Suits that allege exposure to asbestos during Carolina Industrial's work are subject only to the "per occurrence" limits of the Carolina Industrial Insurance Policies;
 - j. Any aggregate limit on coverage in any of the Carolina Industrial Insurance policies is a limitation on coverage, and therefore each insurer has the burden to prove, based on the evidence, that a Carolina Industrial Asbestos Suit is subject to the aggregate limit in the Carolina Industrial Insurance Policies, if any; and
 - k. Each insurer has the burden to prove, based on the evidence, that any particular Carolina Industrial Asbestos Suit is either a "products" claim or a "completed operations" claim, as those terms are defined in the Carolina Industrial Insurance Policies, in order for the insurer to disclaim coverage for a Carolina Industrial Asbestos Suit against Carolina Industrial otherwise alleging injury during any Carolina Industrial Insurance policy period.
189. Actual and justiciable controversies therefore exist between Carolina Industrial and Third-Party Defendants Zurich, Continental, Allstate, and U.S. Fire concerning their obligations under the Carolina Industrial Insurance Policies.

FOURTH CAUSE OF ACTION
DECLARATORY JUDGMENT

190. Third-Party Plaintiffs incorporate the foregoing paragraphs by reference.
191. The Receiver seeks a declaration and order that Third-Party Defendants Admiral, Hartford, First State, Century Indemnity's predecessor, Continental, and Fireman's Fund issued primary and excess general liability coverage to Flame Refractories, subject to the

per occurrence and aggregate limits of those policies, and that Admiral and Century Indemnity have an unlimited supplemental duty to defend, through the provision of appropriate and qualified defense counsel, and to pay or reimburse defense costs.

192. The Receiver seeks a further declaration as to the interpretation and meaning of the insurance policies that Third-Party Defendants Admiral, Hartford, First State, Century Indemnity's predecessor, Continental, and Fireman's Fund issued to Flame Refractories (the "Flame Refractories Insurance Policies"), as follows:

- a. The Flame Refractories Insurance Policies cover all Flame Refractories 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 policy periods;
- b. Each Flame Refractories asbestos suit "triggers" the Flame Refractories Insurance Policies as long as an asbestos plaintiff alleges injury during the period of the policies;
- c. Flame Refractories may select the policy or policy years to which to assign or allocate in full each Flame Refractories Asbestos Suit-related loss;
- d. In the case of any claimed ambiguity in any Flame Refractories Insurance Policies, such ambiguity shall be construed in favor of the broadest coverage afforded under the Flame Refractories Insurance Policies;
- e. Defense costs for the Flame Refractories asbestos suits are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of the Flame Refractories Insurance Policies with a duty to defend;

- f. If any allegation or cause of action in a Flame Refractories Asbestos Suit is potentially covered under the Flame Refractories Insurance Policies with a duty to defend, 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 Flame Refractories 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 Flame Refractories Asbestos Suits;
- h. Each Flame Refractories Insurance Policy must indemnify covered Flame Refractories Asbestos Suits, in full, up to its “per occurrence” limit, regardless of whether a continuing injury spans multiple policy periods;
- i. The Flame Refractories Asbestos Suits that allege exposure to asbestos during Flame Refractories’ work are subject only to the “per occurrence” limits of the Flame Refractories Insurance Policies;
- j. Any aggregate limit on coverage in any of the Flame Refractories Insurance policies is a limitation on coverage, and therefore each insurer has the burden to prove, based on the evidence, that a Flame Refractories Asbestos Suit is subject to the aggregate limit in the Flame Refractories Insurance Policies, if any; and
- k. Each insurer has the burden to prove, based on the evidence, that any particular Flame Refractories Asbestos Suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Flame Refractories Insurance Policies, in order for the insurer to disclaim coverage for a Flame Refractories

Asbestos Suit against Flame Refractories otherwise alleging injury during any Flame Refractories Insurance Policy period.

193. Actual and justiciable controversies therefore exist between Flame Refractories and Third-Party Defendants Admiral, Hartford, First State, Century Indemnity, Continental, and Fireman's Fund concerning their obligations under the Flame Refractories Insurance Policies for which they are responsible.

FIFTH CAUSE OF ACTION
BREACH OF CONTRACT

194. Third-Party Plaintiff Flame Refractories incorporates the forgoing paragraphs by reference.

195. Flame Refractories was insured by one or more policies issued by Third-Party Defendant Admiral. The Receiver for Flame Refractories provided timely notices to Third-Party Defendant Admiral of the Flame Refractories Asbestos Suits.

196. Third-Party Defendant Admiral unreasonably and without proper cause, has either failed to defend entirely or has failed to provide an appropriate defense for Flame Refractories in the Flame Refractories Asbestos Suits as required by the policies it issued to Flame Refractories.

197. The failure of Third-Party Defendant Admiral to provide a proper defense to Flame Refractories in the Flame Refractories Asbestos Suits has caused, and will continue to cause, harm and damages to Flame Refractories, including, but not limited to, incurring legal fees (or unnecessary legal fees) that should be paid for by Third-Party Defendant Admiral.

SIXTH CAUSE OF ACTION
BREACH OF CONTRACT

198. Third-Party Plaintiff Carolina Industrial incorporates the foregoing paragraphs by reference.
199. Carolina Industrial was insured by one or more policies issued by Third-Party Defendants Zurich, Continental, and Allstate.
200. Carolina Industrial has provided or will provide timely notices to Third-Party Defendants Zurich, Continental, and Allstate of the Carolina Industrial Asbestos Suits.
201. Third-Party Defendants Zurich, Continental, and Allstate unreasonably and without proper cause, have failed or will fail to defend Carolina Industrial in the Carolina Industrial Asbestos Suits as required by the policies they issued to Pipe & Boiler.
202. The failure of Third-Party Defendants Zurich, Continental, and Allstate to provide a defense to Carolina Industrial in the Carolina Industrial Asbestos Suits has caused, and/or will continue to cause, harm and damages to Carolina Industrial, including, but not limited to, incurring legal fees that should be paid for by Defendants Zurich, Continental, and/or Allstate.

SEVENTH CAUSE OF ACTION
UNFAIR OR DECEPTIVE TRADE PRACTICES AFFECTING COMMERCE

203. Third-Party Plaintiff Pipe & Boiler Insulation incorporates the foregoing paragraphs by reference.
204. Prior to its dissolution, Pipe & Boiler was a North Carolina corporation.

205. Under N.C. Gen. Stat. § 75-1.1(a), unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
206. Under N.C. Gen. Stat. § 75-1.1(b), “commerce” includes all business activities, however denominated. The business of insurance falls within the ambit of “in commerce,” and people who buy insurance are consumers whose welfare Chapter 75 of the North Carolina Statutes was intended to protect. *See Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 469 (1986).
207. N.C. Gen. Stat. § 75-16 provides as follows: “if any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.”
208. N.C. Gen. Stat. § 58-63-15 defines unfair methods of competition and unfair or deceptive practices in the business of insurance. Subsection (5) thereof provides as follows:

False Financial Statements. - Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer with intent to deceive.

Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such

insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or, with like intent, willfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

209. The Arrowood Defendants, and each of them, have violated N.C. Gen. Stat. § 58-63-15, and, therefore, N.C. Gen. Stat. Chapter 75, by making false statements in each of Arrowood's Annual Statements and other financial reports and documents to the extent, *inter alia*, that those documents stated or implied that moneys paid by Arrowood in the form of salaries to the Individual Arrowood Defendants, and management fees paid to Arrowpoint Group and/or Arrowpoint Capital, were legitimate payments by Arrowood, and failing to correctly state in those documents that such payments were, in reality, bogus payments made to loot Arrowood and siphon off its funds to line the pockets of the Arrowood Defendants, and otherwise unjustly enrich the Arrowood Defendants, at the expense and harm of policyholders, including Pipe & Boiler.
210. In addition, the Arrowood Defendants, and each of them, have violated N.C. Gen. Stat. § 75-1.1 by unfairly and deceptively looting Arrowood through exorbitant salaries, management fees, and other unreasonable expenses payable to the Arrowood Defendants, causing Arrowood to become impaired and in violation of the applicable risk-based capital requirements and in a position where it cannot pay all current and future policyholder claims.
211. Pipe & Boiler has suffered actual injury as a result of the Arrowood Defendants' unfair and deceptive practices as alleged herein because Arrowood is now, as a direct and proximate result of the Arrowood Defendants' wrongful conduct, in a financial position where it will be unable to comply entirely with its defense and indemnity obligation to Pipe & Boiler. In short, as a direct and proximate result of the Arrowood Defendants' wrongful

looting and filing of false financial statements, and other conduct as alleged herein, Arrowood will be placed in liquidation years after it should have been placed in receivership, which would have allowed for a solvent run-off, and years after the Arrowood Defendants improperly paid benefits to themselves, resulting in an insolvent winding up of the company. Pipe & Boiler will, at best, receive pennies on the dollar with respect to the insurance coverage that Pipe & Boiler is entitled to under its primary commercial general liability policies issued between 1981 and 1983. But for the Arrowood Defendants' conduct, the company would have been able to pay its claim obligations. As a direct and proximate result of the Arrowood Defendants' unfair and deceptive trade practices as alleged herein, Pipe & Boiler will not receive millions of dollars of insurance coverage for which it paid and to which it is entitled.

212. Pipe & Boiler has been injured and damaged as a result of the Arrowood Defendants' unfair and deceptive practices as alleged herein, in violation of N.C. Gen. Stat. § 75-1.1, and is therefore entitled to recover damages in an amount that will be proven at trial, is in excess of any applicable jurisdictional limits, and is subject to treble damages under N.C. Gen. Stat. § 75-16.

213. Pipe & Boiler further seeks a declaration that the actions of the Arrowood Defendants with regard to Arrowood were in fact unfair and deceptive.

EIGHTH CAUSE OF ACTION
CONSTRUCTIVE TRUST

214. Third-Party Plaintiff Pipe & Boiler incorporates the foregoing paragraphs by reference.

215. A constructive trust is a duty or relationship imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder

acquired through fraud, breach of duty, or some other circumstance, making it inequitable for him to retain it against the claim of the beneficiary or the constructive trust. A constructive trust is a fiction of equity, brought into operation to prevent unjust enrichment through the breach of some duty or other wrongdoing. There is a common, indispensable element in the many types of situations out of which a constructive trust is deemed to arise. This common element is some fraud, breach of duty, or other wrongdoing by the holder of the property.

216. The Arrowood Third-Party Defendants have taken possession of the property of Arrowood – to wit, funds – of which they should not have taken through their wrongful and deceptive acts as alleged herein.

217. The funds that the Arrowood Third-Party Defendants have wrongfully diverted from Arrowood should have remained with Arrowood so that the company would have had additional resources available to meet its contractual obligations to policyholders, including Pipe & Boiler, and injured claimant third parties. The funds would have remained in Arrowood had the Arrowood Third-Party Defendants not filed false or misleading financial statements and prevented state insurance regulators from knowing the extent of problems and taking action to place the company into receivership. The proper and appropriate remedy under the circumstances here is for the Court to exercise its equitable power and authority to require the Arrowood Third-Party Defendants to return those funds that they have wrongfully diverted from Arrowood's policyholders in an amount to be proven at trial.

NINTH CAUSE OF ACTION
TORTIOUS INTERFERENCE WITH CONTRACT

218. Third-Party Plaintiffs incorporate the foregoing paragraphs by reference.
219. Arrowood issued at least five contracts of insurance to Pipe & Boiler during the period January 1, 1981 to January 1, 1986.
220. As corporate officers and directors of Arrowood's parent companies, the Individual Arrowood Third-Party Defendants have maintained absolute control of Arrowood.
221. The Individual Arrowood Third-Party Defendants each were aware of the insurance contracts into which Arrowood had entered with insureds, including Pipe & Boiler.
222. Despite their knowledge of these contracts of insurance, the Individual Arrowood Third-Party Defendants, acting in their various roles as officers, directors, employees, and owners of Arrowood, intentionally made decisions and took actions that breached the insurance contracts between Arrowood and Pipe & Boiler.
223. For instance, the Individual Arrowood Third-Party Defendants, in their management capacities for Arrowood and its parent companies, consistently have failed to properly establish and maintain loss and expense reserves for known and unreported claims, which resulted in Arrowood's statutory financials having an appearance of solvency that misrepresented the true nature of Arrowood's deepening financial woes.
224. The Individual Arrowood Third-Party Defendants' actions of looting Arrowood through exorbitant salaries, management fees, and other unreasonable expenses payable to the Individual Arrowood Third-Party Defendants, caused Arrowood to become impaired and in violation of the applicable risk-based capital requirements and in a position where it cannot pay all current and future policyholder claims.

225. There was no justification for the Individual Arrowood Third-Party Defendants' decisions not to properly report loss and expense reserves, and to divert funds that should have been preserved for Arrowood's policyholders, other than to feather the nests of the Individual Arrowood Third-Party Defendants, and to otherwise put the interests of the employees of Arrowood ahead of the interests of Arrowood's policyholders, including Pipe & Boiler.

226. As a direct and proximate result of the Individual Arrowood Third-Party Defendants' tortious interference with the contract between Arrowood and Pipe & Boiler as alleged herein, Pipe & Boiler will not receive millions of dollars of insurance coverage for which it paid and to which it is entitled.

TENTH CAUSE OF ACTION
NEGLIGENT SUPERVISION

227. Third-Party Plaintiff Pipe & Boiler incorporates the foregoing paragraphs by reference.

228. Arrowpoint Group and Arrowpoint Capital employed or were otherwise responsible for the actions of each of the Individual Arrowood Third Party Defendants during their employment with Arrowood.

229. Arrowpoint Group and Arrowpoint Capital negligently supervised the actions of the Individual Arrowood Third-Party Defendants.

230. Arrowpoint Group and Arrowpoint Capital's negligent supervision caused harm to Pipe & Boiler by allowing the Individual Arrowood Third-Party Defendants to loot and siphon funds from Arrowood so that Arrowood no longer had sufficient resources available to meet its contractual obligations to policyholders, including Pipe & Boiler, and injured claimant third parties. As a direct and proximate result of Arrowpoint Group and Arrowpoint Capital's

negligent supervision as alleged herein, Pipe & Boiler will not receive millions of dollars of insurance coverage for which it paid and to which it is entitled.

ELEVENTH CAUSE OF ACTION
DECLARATORY JUDGMENT

231. As outlined above, since his appointment, the Receiver has become aware that Third-Party Defendants Rexel and SKRLA periodically make claims against Payne & Keller's historical insurance program by tendering Rexel-related and SKRLA-related lawsuits to the Payne & Keller insurers. Rexel and SKRLA tender these lawsuits to the Payne & Keller insurers by way of their agent and claims administrator, Third-Party Defendant Compass Risk Services, LLC. without any communication or coordination with the Receiver.

232. The Receiver is informed and believes that Rexel's and SKRLA's uncoordinated and competing claims to Payne & Keller's insurance program will interfere with his efficient and orderly administration of his duties as the receiver for Payne & Keller. In carrying out his duties, Payne & Keller's receiver has made inquiries about the role of Rexel and SKRLA and the competing claims to Payne & Keller's insurance policies, but these inquiries have gone unanswered. Moreover, the existence of these competing claims from Rexel and SKRLA have thwarted, or will thwart, the Receiver's efforts to reach agreements with certain of Payne & Keller's insurers regarding their rights and obligations under these insurance policies. As such, a justiciable controversy exists between the Receiver for Payne & Keller and Rexel and between the Receiver and SKRLA regarding the rights and responsibilities of each relative to the Payne & Keller insurance program. Similarly, a controversy exists between the Receiver for Payne & Keller and Rexel and SKRLA's agent Compass Risk

Services regarding the rights of Compass to submit claims to the Payne & Keller insurers without any communication or disclosing any information in response to requests for information made by the Receiver for Payne & Keller. The Receiver seeks declaratory relief regarding these issues to guide his performance of his duties. The Receiver has joined the known Payne & Keller insurers to this action because their rights and responsibilities, as between the Receiver and Rexel and between the Receiver and SKRLA, will be delineated herein.

233. The Receiver therefore seeks declarations, after thorough discovery regarding Rexel's and SKRLA's competing claims to the Payne & Keller insurance program, regarding the nature, extent, and priority (if any) of Rexel's and SKRLA's claims to the Payne & Keller insurance coverage so as to provide the Receiver with guidance and certainty as to how to go about carrying out his duties as the Receiver for Payne & Keller and to provide the Payne & Keller insurers with certainty and guidance as to the delineation of their rights and responsibilities as between Rexel and Payne & Keller and between SKRLA and Payne & Keller in this regard.

PRAYER FOR RELIEF

WHEREFORE, Third-Party Plaintiffs, by and through their duly appointed Receiver, demand judgment against Third-Party Defendants as follows:

- A. For the Receiver's compensation in connection with the defense of asbestos suits against Third-Party Plaintiffs in an amount set by this Court;
- B. For an order requiring that Third-Party Defendants provide to the Receiver complete and authentic copies of any general liability and excess liability insurance policies they

issued to Pipe & Boiler 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 for the Receiver's unrestricted use in carrying out his duties;

- C. For an order requiring Third-Party Insurer Defendants Zurich, Continental, Allstate, and U.S. Fire to defend Carolina Industrial in full—under policies containing a duty to defend—against all asbestos suits alleging bodily injury during the Third-Party Defendants' policy periods unless and until either Third-Party Defendants 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. For an order requiring Third-Party Insurer Defendants Admiral, Hartford, First State, Century Indemnity, Continental, and Fireman's Fund to defend Flame Refractories in full—under policies containing a duty to defend—against all asbestos suits alleging bodily injury during the Third-Party Defendants' policy periods unless and until these Third-Party Defendants can show unequivocally, based on the evidence adduced in the litigation, that an exclusion in its policies otherwise bars coverage for a suit;
- E. As described in detail above, the Receiver seeks a further declaration as to the interpretation and meaning of the Third-Party Plaintiffs' insurance policies:
 - i. The Third-Party Plaintiffs' Insurance Policies cover all Third-Party Plaintiffs' 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 Third-Party Plaintiffs' asbestos suit "triggers" at least one Third-Party Plaintiffs' Insurance policy as long as an asbestos plaintiff alleges injury during the period of the policy;
- iii. Third-Party Plaintiffs may select the policy or policy years to which to assign or allocate in full each asbestos loss;
- iv. In the case of a claimed ambiguity in any Third Party Plaintiffs' Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Third-Party Defendants' policies, and Third-Party Defendants bear the burden of proof as to any such ambiguity;
- v. Defense costs for the Third-Party Plaintiffs' asbestos suits are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of the Third-Party Plaintiffs' Insurance policies;
- vi. If any allegation in a Third-Party Plaintiffs' Asbestos Suit is potentially covered under the Third-Party Plaintiffs' Insurance Policies, then the responsive 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 Third-Party Plaintiffs' 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 Third-Party Plaintiffs' Asbestos Suits;
- viii. Each Third-Party Plaintiffs' Insurance Policy must indemnify covered Third-Party Plaintiffs' Asbestos Suits, in full, up to its "per occurrence" limits, regardless of whether a continuing injury spans multiple policy periods;

- ix. The Third-Party Plaintiffs' Asbestos Suits that allege exposure to asbestos during Third-Party Plaintiffs' work are subject only to the "per occurrence" limits of the Third-Party Plaintiffs' Insurance policies;
 - x. Any aggregate limit on coverage in any of the Third-Party Plaintiffs' Insurance Policies is a limitation on coverage, and the insurers therefore have the burden to prove, based on the evidence, that a Third-Party Plaintiffs' Asbestos Suit is subject to the aggregate limit in the Third-Party Plaintiffs' Insurance Policies, if any; and
 - xi. Each insurer has the burden to prove, based on the evidence, that any particular Third-Party Plaintiffs' Asbestos Suit is either a "products" claim or a "completed operations" claim, as those terms are defined in the Third-Party Plaintiffs' Insurance Policies, in order for the insurer to disclaim coverage for an Asbestos Suit against a Third-Party Plaintiff otherwise alleging injury during the Third-Party Plaintiffs' insurance policy period.
- F. For an order declaring that Third-Party Defendants Zurich, Continental, and Allstate are liable for the damages incurred by Carolina Industrial due to their breaches of contract, including, but not limited to, reimbursing Carolina Industrial for any legal fees and costs incurred by defending the Carolina Industrial Asbestos Suits.
- G. For an order declaring that Third-Party Defendant Admiral is liable for the damages incurred by Flame Refractories due to its breaches of contract, including, but not limited to, reimbursing Flame Refractories for any legal fees (or inappropriate legal fees) and costs incurred by defending the Flame Refractories Asbestos Suits.

- H. As to the Arrowood Defendants, compensatory and punitive damages in an amount to be proven at trial; and for a declaration that the actions of each of the Arrowood Defendants, together and individually, constituted unfair and deceptive practices.
- I. A constructive trust to recover the amounts that the Arrowood Defendants wrongfully diverted from Arrowood's policyholders, and a preliminary and permanent injunction prohibiting the Arrowood Defendants from further such diversions;
- J. Compensatory and punitive damages against The Individual Arrowood Defendants in an amount to be proven at trial;
- K. For an order outlining the orderly priority of claims as between Rexel and Payne & Keller and between SKRLA and Payne & Keller with respect to the Payne & Keller insurers. Specifically, the Receiver therefore seeks declarations, after thorough discovery regarding Rexel's and SKRLA's competing claims to the Payne & Keller insurance program, regarding the nature, extent, and priority (if any) of Rexel's and SKRLA's claims to the Payne & Keller insurance coverage so as to provide the Receiver with guidance and certainty as to how to go about carrying out his duties as the Receiver for Payne & Keller and to provide the Payne & Keller insurers with certainty and guidance as to the delineation of their rights and responsibilities as between Rexel and Payne & Keller and between SKRLA and Payne & Keller in this regard.
- L. 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

Dated: July 14, 2022

By: s./ Brian M. Barnwell

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Attorney for Third-Party Plaintiffs

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

LENORA CHILDERS, Individually and as
Personal Representative of the Estate of
LEWIS C. CHILDERS

Plaintiff,

v.

Davis Mechanical Contractors, Inc., et al.,

Defendants.

Flame Refractories, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., Payne & Keller Company, and
PBI QSF, LLC, By and Through Their Duly
Appointed Receiver Peter D. Protopapas,

Third-Party Plaintiffs

v.

Zurich American Insurance Company
(Individually and as Successor to Northern
Insurance Company of New York, Maryland
American General Insurance Company, and
Maryland Casualty Company), et al.

Third-Party Defendants

2021-CP-40-03484

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

**THIRD-PARTY DEFENDANT TRAVELERS CASUALTY AND SURETY COMPANY'S
NOTICE OF MOTION AND MOTION TO DISMISS THIRD-PARTY CLAIMS AND
DISSOLVE THE PAYNE & KELLER RECEIVERSHIP**

Third-Party Defendant Travelers Casualty and Surety Company (improperly named as Travelers Casualty & Surety Company), formerly known as The Aetna Casualty and Surety Company (improperly named as Aetna Casualty & Surety Company) (“Travelers”), by and through undersigned counsel, hereby moves (1) pursuant to Rules 12 and 14 of the South Carolina Rules of Civil Procedure (“SCRCP”), to dismiss the claims asserted against Travelers in the Second Amended Third-Party Complaint¹ of Defendant/Third-Party Plaintiff Payne & Keller Company, through its receiver, Peter D. Protopapas² (“Payne & Keller” or the “Receiver”)³ and (2) pursuant to S.C. Code § 15-65-10(4), to dissolve the Payne & Keller Receivership.

PRELIMINARY STATEMENT AND BACKGROUND

On November 23, 2021, Peter D. Protopapas, as Receiver for Payne & Keller, filed an insurance coverage action against Travelers and Payne & Keller’s other historical, out-of-state

¹ Paragraph 1 of the Receiver’s Second Amended Third-Party Complaint incorrectly states that the pleading is the “Third Amended Third-Party Complaint.” In fact, it is the Second Amended Third-Party Complaint (although it is the third iteration of the Receiver’s third-party complaint).

² The Receiver filed his Second Amended Third-Party Complaint in his capacity as the Receiver for Flame Refractories, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.; Payne & Keller Company; and PBI QSF, LLC. All allegations and claims against Travelers, however, appear to have been asserted by the Receiver solely in his capacity as the Receiver for Payne & Keller, not any of the other entities.

³ Travelers understands that the Court has denied other third-party defendant insurers’ motions to dismiss the Receiver’s third-party claims via a July 14, 2022 email. That decision does not affect this Motion as Travelers is asserting several new grounds that require dismissal and were not raised in the other insurers’ motions. To the extent any arguments asserted here were raised and denied in those prior motions, Travelers asserts them here to preserve its arguments and avoid potential waiver of any issue discussed herein.

insurers in the Court of Common Pleas of Richland County, South Carolina. *See Protopapas as Receiver for Payne & Keller Co. v. Am. Int'l Grp. et al.*, No. 2021CP4005768, Summons and Complaint for Declaratory Judgment and Breach of Contract, filed Nov. 23, 2021 (S.C. Ct. Common Pleas, Fifth Judicial Circuit). On December 20, 2021, Travelers removed the case to the United States District Court for the District of South Carolina, Columbia Division, because there is complete diversity of citizenship among the properly joined and served parties and the amount in controversy exceeds \$75,000. *See Protopapas as Receiver for Payne & Keller Co. v. Am. Int'l Grp. et al.*, No. 3:21-cv-04086-JMC, Dkt. No. 1 (Notice of Removal filed Dec. 20, 2021) (D.S.C.) (the "Federal Coverage Action"). On January 18, 2022, the Receiver filed an amended complaint in the Federal Coverage Action; Travelers then answered. *See id.* at Dkt. Nos. 23, 42. The Receiver also filed a motion to remand, along with a motion to stay the Federal Coverage Action pending resolution of the remand motion, both of which Travelers opposed. *See id.* at Dkt. Nos. 24, 47, 80, 119. Those motions have not been decided, and the Federal Coverage Action remains pending in federal court.

On July 14, 2022, the Receiver filed a Second Amended Third-Party Complaint against Travelers⁴ and the other insurance companies, even though the instant action is an *asbestos tort case* that has nothing to do with insurance coverage issues. The tort case was brought by plaintiff Lenora Childers, individually and as Personal Representative of the Estate Lewis C. Childers ("Childers"), pursuant to S.C. Gen. Stat. 15-51-10 *et seq.*, for the alleged wrongful death of Lewis C. Childers purportedly caused by exposure to asbestos and asbestos-containing products. *See generally* Pl.'s 1st Am. Compl. The defendants named in the Childers' complaint

⁴ The Second Amended Third-Party Complaint was served on Travelers on August 9, 2022 via the South Carolina Department of Insurance.

allegedly “manufactured, sold, and/or distributed asbestos-containing products or raw asbestos materials” and/or “controlled the work sites” where Childers was allegedly exposed to asbestos. *See id.* ¶ 3. Travelers is not named as a defendant, nor is any other insurance company, which is not surprising given that none of the insurance companies has ever manufactured, sold, or distributed asbestos-containing products. Nonetheless, the Receiver’s Second Amended Third-Party Complaint includes allegations and claims against Travelers and other insurers in an improper attempt to litigate here insurance coverage issues that are pending in the Federal Coverage Action.

The Receiver’s third-party claims against Travelers must be dismissed for several reasons.

First, the Receiver’s claims against Travelers must be dismissed because the Receiver lacks standing to assert claims against Travelers. Payne & Keller, according to the Receiver’s own filings, is a *Texas* corporation that dissolved in 1986. Under Texas corporate law, a dissolved corporation is not liable for post-dissolution claims and cannot sue or be sued with respect to any claim more than three years beyond dissolution. As a matter of settled receivership law, the Receiver stands in Payne & Keller’s shoes and does not acquire rights greater than those of Payne & Keller. Thus, the Receiver’s suit against Travelers is a nullity by operation of Texas corporate law. Moreover, even if the Receiver could bring suit, South Carolina law does not authorize nationwide receiverships over foreign corporations; it permits receiverships only with respect to property located within South Carolina. Insurance policies issued by Travelers to Payne & Keller in Texas are not property located in South Carolina.

What’s more, those lack of standing arguments also warrant dissolution of the Payne & Keller Receivership. First, because the law of Payne & Keller’s domicile (Texas) precludes any

suits by or against Payne & Keller brought after 1989, appointment of the Receiver here for the purpose of investigating and administering Payne & Keller's insurance assets was improper and must be undone. Second, the Receiver's third-party claims brought on behalf of Payne & Keller relate solely to alleged insurance assets of Payne & Keller under policies issued by foreign insurers; any insurance assets are property of the state where the debtor or obligor (*i.e.*, the insurers) are domiciled; and the Receiver admits that neither the debtor nor any of its insurers are domiciled in South Carolina. Thus, there is no South Carolina property over which the Receiver has any power—making a South Carolina Receiver powerless and a South Carolina receivership pointless and in need of dissolution.

Second, the Court lacks personal jurisdiction over Travelers. The Court has no general personal jurisdiction over Travelers because the company is not incorporated in South Carolina, it does not have its principal place of business in South Carolina, and it is not otherwise “essentially at home” in South Carolina. The Court also cannot exercise specific personal jurisdiction over Travelers because Payne & Keller's third-party claims against Travelers do not arise out of or relate to any contacts between Travelers and South Carolina.

Third, under SCRCP 14(a), a third-party claim may be asserted only against “a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.” A defendant acting as a third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability, *i.e.*, the outcome of the principal claim must impact the third-party defendant's liability. Here, Payne & Keller's third-party contract claims against Travelers are not “derivative” of Payne & Keller's alleged tort liability to Childers specifically. Rather, the third-party contract claims seek relief directly against Travelers, independent of Childers' claims, as demonstrated by the fact that Payne & Keller is pursuing

substantially identical relief in the first-filed Federal Coverage Action, a case to which Childers is not a party.

Finally, the third-party claims must be dismissed under SCRCP 12(b)(8), because the relief the Receiver seeks is the subject of the first-filed Federal Coverage Action, and the allegations and claims against Travelers in the instant case are substantially identical to those asserted there.

Accordingly, Travelers respectfully requests that the Court dismiss the third-party claims against it with prejudice and dissolve the Payne & Keller receivership.

ARGUMENT

I. The Receiver Lacks Standing to Bring Claims Concerning Payne & Keller’s Insurance Coverage Against Travelers, and Those Same Grounds Warrant Dissolution of the Payne & Keller Receivership.

“Standing to sue is a fundamental requirement in instituting an action.” *Joseph v. S.C. Dep’t of Lab., Licensing & Regul.*, 417 S.C. 436, 467, 790 S.E.2d 763, 779 (2016). In order for a party to have standing to bring an action, the party “must have a real, material, or substantial interest in the subject matter of the action.” *Id.*; *see also Sea Pines Ass’n for Prot. of Wildlife, Inc. v. S.C. Dep’t of Nat. Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). “No justiciable controversy is presented unless the plaintiff has standing to maintain the action.” *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct. App. 1994). Thus, “[o]nce it is determined a plaintiff has no standing to prosecute, the court must dismiss the action.” *Id.*

It is black-letter law that a plaintiff may not seek recovery on a claim that belongs to another, or that he otherwise lacks a right to bring. *See, e.g., Furman Univ. v. Livingston*, 244 S.C. 200, 204 (1964) (“It is fundamental that one without interest in the subject matter of a law suit has no legal standing to prosecute it.”); *Duke Power Co. v. S.C. Pub. Serv. Comm’n*, 284

S.C. 81, 96 (1985) (“In order to have standing to present a case before the courts of this State, a party must have a personal stake in the subject matter of the lawsuit.”).

Here, the Receiver does not allege any personal right or interest in the matters asserted in his Second Amended Third-Party Complaint. Instead, his right to sue is wholly dependent on, and derivative of, his authority as Receiver for Payne & Keller, a Texas corporation that dissolved in 1986. *See Nat’l Cash Register Co. v. Burns*, 217 S.C. 310, 313, 60 S.E.2d 615, 617 (1950) (“A primary concept of the law of receivers is that a receiver stands in the shoes of the debtor . . .”); *In re Am. Slicing Mach. Co.*, 125 S.C. 214, 218, 118 S.E. 303, 304 (1923) (“[I]t is clear that the appointment by the Court can vest in the Receiver no greater interest than the insolvent possessed.”).

Moreover, because Payne & Keller is not a South Carolina corporation, the Court’s authority to appoint a receiver over Payne & Keller is limited to Payne & Keller’s in-state property. Under South Carolina law, a “receiver may be appointed by a judge of the circuit court, either in or out of court . . . [w]hen a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the ***property within this State*** of foreign corporations.” S.C. Code § 15-65-10(4) (emphasis added).

These two bedrock principles of South Carolina receivership law doom the claims the Receiver seeks to assert on behalf of Payne & Keller for two distinct reasons. First, under Texas corporate law, a dissolved corporation cannot sue or be sued more than three years after its dissolution. That means the Receiver, standing in Payne & Keller’s shoes, cannot sue Travelers here. Second, even if the Receiver could sue on behalf of Payne & Keller contrary to Texas law, Payne & Keller’s insurance policies are not property of Payne & Keller located within South

Carolina, and therefore the Receiver lacks standing to administer or liquidate Payne & Keller's insurance policies.

A. Payne & Keller Cannot Sue or Be Sued Under Texas Law, So Payne & Keller's Claims Against Travelers Fail as a Matter of Law and Dissolution of the Payne & Keller Receivership Is Warranted.

Payne & Keller is a Texas corporation that dissolved in 1986. *See* Ex. A to Plaintiffs' Motion to Appoint a Receiver over Payne & Keller Co. Pursuant to S.C. Code § 15-65-10(4). Texas law provides that dissolved corporations are liable only for "existing claims." Tex. Bus. Orgs. Code Ann. § 11.351. Moreover, such claims can only be brought for three years after dissolution. *Id.* § 11.359; *see, e.g., Durham Clinic, P.A. v. Barrett*, 107 S.W.3d 761, 762 (Tex. App. 2003) (claim against dissolved corporation was barred because it was brought more than three years post-dissolution; under the statute, "a corporation shall not be liable for any claim other than an existing claim . . ."); *Boudreaux v. U.S. Framing*, No. 6:17-cv-0517, 2017 WL 6758448 (W.D. La. Nov. 21, 2017), *aff'd sub nom. Boudreaux v. C J R Framing Inc.*, 744 F. App'x 208 (5th Cir. 2018) ("[U]nder Texas law, a dissolved corporation is not liable for a post-dissolution claim."). Thus, Payne & Keller has an absolute defense to any personal injury tort claims that may now be brought against it.

In addition, a dissolved corporation may bring suit only within three years of the date of its dissolution. Under Texas corporate law, a "terminated filing entity continues in existence *until the third anniversary of the effective date of the entity's termination only* for purposes of: (1) prosecuting or defending in the terminated filing entity's name an action or proceeding brought by or against the terminated entity." Tex. Bus. Orgs. Code Ann. § 11.356(a) (emphasis added); *see also id.* § 11.359(a) ("[A]n existing claim *by or against* a terminated filing entity is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity.") (emphasis added).

Again, Payne & Keller dissolved in 1986. Its ability to sue lapsed in 1989. *See Emmett Props. v. Halliburton Energy Servs.*, 167 S.W.3d 365, 369-70 (Tex. App. 2005) (“[Plaintiff] was a ‘dissolved corporation’ with a dissolution date of February 12, 1999. As such, [Plaintiff] was required to bring suit on its claims within three years of this date, which was February 12, 2002. [Plaintiff], however, did not file suit until June 13, 2002, more than three years after the dissolution date. Therefore, [Plaintiff’s] claims were extinguished under article 7.12, section C, and the trial court properly granted the appellees’ motion for summary judgment.”)⁵; *Brooks v. Binger*, 2019 WL 3023226, at *2 (Tex. App. July 11, 2019) (“The trial court’s purported adjudication of claims by B2 Towing in a lawsuit commenced more than 26 years after B2 Towing’s dissolution amounted to a nullity. . . .”); *see also Carter v. Harvey*, 525 S.W.3d 420, 426 (Tex. App. 2017) (same). Appointment of a receiver cannot create a right to sue that does not exist under the Texas statutes that govern Payne & Keller’s corporate existence. *See Nat’l Cash Register Co., supra; In re Am. Slicing Mach. Co., supra*. Therefore, the Receiver lacks the authority to bring claims on behalf of Payne & Keller and his claims against Travelers must be dismissed for lack of standing.

As shown above, Texas law is clear that Payne & Keller may not sue or be sued at this point. *In re All Cases Against Sager Corp.*, 967 N.E.2d 1203, 1209 (Ohio 2012) (“We concur. The question of whether a dissolved foreign corporation has the capacity to sue or be sued is a matter determined by the law of the state of incorporation.”). And because Payne & Keller is no longer amenable to suit, foreign courts lack authority under the Full Faith and Credit Clause of

⁵ *Emmett* cites article 7.12 of the Texas Business Corporations Act (“TBCA”), the predecessor statute to the current Texas Business Organizations Code (“TBOC”). The TBOC replaced the TBCA on January 1, 2010 but made no substantive changes to TBCA article 7.12. *See Boudreaux v. U.S. Framing*, No. CV 6:17-0517, 2017 WL 6758448, at *3 (W.D. La. Nov. 21, 2017).

the United States Constitution to appoint a receiver over Payne & Keller for claims not pending before 1989. *Id.* at 1211 (“The authority to appoint a receiver for a dissolved foreign corporation is subject to constitutional limitations, notably the Full Faith and Credit Clause, obliging us to recognize Illinois corporation law as barring claims filed against Sager that were not pending on June 17, 2003. Thus, the court is without authority to appoint a receiver to ‘accept the process of claims, process defenses and marshal assets’ on behalf of the Sager Corporation, as the trial court ruled.”).

In *Sager*, the Ohio Supreme Court reversed an Ohio court’s appointment of a receiver for a defunct foreign corporation in an identical situation as here. *In re Sager*, 967 N.E.2d at 1211. *Sager* involved a plaintiff that sought appointment of a receiver to access Sager’s insurance assets to compensate the claimant for asbestos-related injuries. *See id.* at 1205. Sager was an Illinois corporation that dissolved in 1998. *Id.* Illinois law set a five-year post-dissolution window for claims to be brought by or against dissolved corporations, meaning Sager was amenable to suit until 2003. *Id.* But the claimants did not bring suit against Sager until 2007. *Id.* Sager sought summary judgment, in part arguing that the appointment of a receiver violated the Due Process, Commerce, and Full Faith and Credit Clauses of the United States Constitution. *Id.* The trial court and intermediate appellate court both disagreed and affirmed the receiver’s appointment. *Id.* Reversing the intermediate appellate court, the Ohio Supreme Court held that the Ohio trial court was “without authority to appoint a receiver” over foreign-domiciled Sager because “[t]he authority to appoint a receiver for a dissolved foreign corporation is subject to constitutional limitations, notably the Full Faith and Credit Clause” and the court was “oblig[ed] ... to recognize Illinois corporation law as barring claims filed against Sager that were not pending on June 17, 2003.” *Id.* at 1211. The Ohio Supreme Court also noted that “the existence

of an insurance policy is irrelevant” where “[n]o cause of action which accrues after dissolution may be brought against a dissolved corporation.” *Id.*

The principles underlying *Sager* forcefully demonstrate that this Court lacks the authority to appoint a receiver for Payne & Keller, because the company has not been amenable to suit under the laws of its state of incorporation (Texas) since 1989. Because Texas law bars Payne & Keller from suing or being sued, the Full Faith and Credit Clause of the United States Constitution requires this Court to honor Texas corporate law and prevents it from appointing a receiver over Payne & Keller in contravention of Texas law. Thus, the receivership must be dissolved.

Dismissal is also warranted by the fact, as observed in *Sager*, that insurance policies are worthless where a dissolved foreign corporation is immune from suit. *In re Sager*, 967 N.E.2d at 1211. Here, as Plaintiffs admit, “all that remains of Payne & Keller is its insurance coverage.” Pl.’s Mot. to Appoint a Receiver over Payne & Keller Co. Pursuant to S.C. Code § 15-65-10(4) at 1 (Aug. 23, 2021).

B. Because the Travelers Insurance Policies Are Not Property of Payne & Keller in South Carolina (Nor Are Any of the Other Insurers’ Policies), the Receiver Lacks Standing to Sue Travelers and the Receivership Must Be Dissolved.

Even if the Receiver could bring claims on behalf of Payne & Keller contrary to Texas law, his authority is circumscribed by South Carolina law, which strictly confines the powers of South Carolina receivers of foreign corporations to the corporation’s in-state property.

It is undisputed that Payne & Keller is not a South Carolina corporation. *See* 2d Am. Third-Party Compl. ¶ 1 (citing Ex. D, Order (identifying Payne & Keller as a dissolved “Texas

corporation”).⁶ The statute under which the Receiver was appointed—S.C. Code § 15-65-10(4)—does not authorize general receiverships over corporations not incorporated in South Carolina. It only permits South Carolina courts to appoint receivers for such foreign corporations to the extent of their “property within this state.” The South Carolina Supreme Court has confirmed that this statute means what it says: if a foreign corporation has property within South Carolina, a South Carolina court may appoint a receiver over that in-state property; if a foreign corporation has no in-state property, no receiver may be appointed. *See Boynton v. Consol. Indem. & Ins. Co.*, 185 S.E. 731, 737 (S.C. 1936) (reversing appointment of receiver where there was a “total failure of any proof” that the foreign company “has property in this state”).

The circumscribed nature of state receiverships over foreign corporations is a basic principle of state receivership law. *See, e.g.*, 17A FLETCHER CYC. CORP. § 8554, *Jurisdiction and power to appoint receivers—General receivers* (“But where the corporation has no property in the state, there would be nothing for the receiver to take under control, and the appointment would be an idle act that the courts cannot be called upon to perform.”) (collecting cases); *id.* § 8555, *Receivers to take charge of local assets* (“While denying the power to appoint a general receiver, the authorities agree that equity has jurisdiction to prevent the dissipation and

⁶ Nor are any of the entities “related to the historic operations of Payne & Keller Company” to which the Payne & Keller Receivership was extended pursuant to the September 30, 2021 Order Granting the Receiver for Payne & Keller Company’s Motion to Clarify the Receiver Order. *See* 2d Am. Third-Party Compl. ¶ Ex. E (Order Granting The Receiver For Payne & Keller Company’s Motion To Clarify The Receiver Order). That order identifies several companies, all of which were incorporated in either Texas or Louisiana, not South Carolina. *See* Payne & Keller, Inc. (Ex. A, Texas corporation); Payne & Keller of Louisiana, Inc. (Ex. B, Louisiana corporation); Bayou Maintenance, Inc. (Ex. C, Louisiana corporation); Bayou Maintenance and Constructors, Inc. (Ex. D, Louisiana corporation); Payne & Keller Gulf Coast, Inc. (Ex. E, Louisiana corporation); Frentex Enterprises Company (Ex. F, Texas corporation); and Frentex Enterprises Company of Texas (Ex. G, Texas corporation).

misapplication of assets of the foreign corporation within the state, and if necessary, to appoint a receiver of the assets . . .”) (collecting cases); *see also* 75 C.J.S. RECEIVERS § 475 (“In accordance with the general rule as to extraterritorial rights, neither the court nor the receiver appointed by it has authority over property beyond the boundaries of its territorial jurisdiction.”). As a matter of clear South Carolina law, the Receiver may have authority with respect to Payne & Keller’s property located within the state of South Carolina, but he has no authority with respect to Payne & Keller’s out-of-state property.

Insurance policies issued to Payne & Keller (in Texas) by Travelers (in Connecticut) are not “property [of Payne & Keller] within [South Carolina]” as required under the South Carolina receivership statute. The situs of intangible property such as a contractual obligation under an insurance policy is the domicile of the debtor/obligor (here, Travelers), whose domicile is its state of incorporation or principal place of business (here, Connecticut). *See, e.g., H.J. Baker & Bro. v. Doe*, 70 S.E. 431, 433 (S.C. 1911) (“The general rule of law is well settled that for the purposes of founding administration, all simple contract debts are assets at the domicile of the debtor.”); *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, 371–72 (5th Cir. 2004) (“[C]ourts consistently hold that the situs of a debt obligation is the situs of the debtor [T]his rule’s general operation has been recognized by the Supreme Court.”); *Long v. Baldt*, 464 F. Supp. 269, 273 (D.S.C. 1979) (“the situs of the debt lies with the debtor”). Travelers is incorporated and has its principal place of business in Connecticut; it has few, if any, contacts with South Carolina, and all of the subject insurance policies were issued and delivered to Payne & Keller outside of South Carolina. *See infra* at § II; *see also* Ex. I (Declaration of Ann B. Mulcahy (“Mulcahy Decl.”)) at ¶¶ 3-6. Similarly, all other third-party defendant insurers are incorporated and maintain their principal places of business outside of South Carolina. *See* 2d Am. Third-Party

Compl. at ¶¶ 4-5, 7-14, 21-24. As a result, the subject contracts are plainly not “property [of Payne & Keller] within [South Carolina].” Accordingly, the Receiver has no standing to assert Payne & Keller’s rights or otherwise act on Payne & Keller’s behalf with respect to contracts of insurance between Travelers and Payne & Keller. The claims the Receiver asserts against Travelers in this action must be dismissed for this reason as well.

The Payne & Keller Receivership also must be dissolved for similar reasons. The Receiver’s Third-Party Claims, as they relate to Payne & Keller, relate solely to insurance assets. *See* 2d Am. Third-Party Compl. ¶¶ 142-174, Causes of Action 1, 2, 11, and “all that remains of Payne & Keller is its insurance coverage” (Pl.’s Mot. to Appoint a Receiver over Payne & Keller Co. Pursuant to S.C. Code § 15-65-10(4) at 1 (Aug. 23, 2021)). As discussed above, those assets are property of the state in which the issuing insurer is domiciled. *See, e.g., H.J. Baker*, 70 S.E. at 433; *Af-Cap*, 383 F.3d at 371–72; *Long*, 464 F. Supp. at 273. And the Receiver admits that none of Payne & Keller’s insurers are domiciled in South Carolina. *See* 2d Am. Third-Party Compl. at ¶¶ 4-5, 7-14, 21-24. Given that Payne & Keller has no property located in South Carolina for a receiver to administer, the Payne & Keller receivership has no point and must be dissolved.

II. The Court Lacks Personal Jurisdiction Over Travelers

Pursuant to SCRCP 12(b)(2), a court must grant a motion to dismiss where the plaintiff fails to allege plausible facts supporting the exercise of personal jurisdiction over the non-resident defendant. *See Power Prods. & Servs. Co., Inc. v. Kozma*, 665 S.E.2d 660, 664 (S.C. Ct. App. 2008). “The party seeking to invoke personal jurisdiction over a non-resident defendant . . . bears the burden of establishing jurisdiction.” *Id.* (citation omitted). “When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is

not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.” *Id.* (citation omitted). “Personal jurisdiction over a nonresident defendant is a question to be resolved upon the facts of each particular case.” *Id.* (citation omitted). Because South Carolina’s long-arm statute has been interpreted to apply coextensively with the limits of due process, the sole question eventually “becomes whether the exercise of personal jurisdiction in this case would violate the strictures of due process.” *Id.* (citation omitted); *see also, e.g., S. Plastics Co. v. S. Com. Bank*, 423 S.E.2d 128, 130 (S.C. 1992) (“the question becomes whether the exercise of personal jurisdiction over the [nonresident defendant] comports with due process.”).

“Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Hidria, USA, Inc. v. Delo*, 783 S.E.2d 839, 843 (S.C. Ct. App. 2016) (quotation omitted). There are two prongs to the due process analysis: “(1) the ‘power’ prong, under which minimum contacts grant a court the ‘power’ to adjudicate the action; and (2) the ‘fairness’ prong, which requires the exercise of jurisdiction to be ‘reasonable’ or ‘fair.’” *Id.* (citation omitted). The plaintiff bears the burden of satisfying both; if either prong fails, the exercise of personal jurisdiction over the nonresident defendant fails to comport with the requirements of due process. *See id.* (citations omitted). Here, there is no basis for the Court to exercise either general or specific jurisdiction over Travelers.

A. The Court Does Not Have General Jurisdiction Over Travelers

“General jurisdiction is the State’s right to exercise personal jurisdiction over a defendant even though the suit does not arise out of or relate to the defendant’s contacts with the forum[.]” *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 655 S.E.2d 476, 478 (S.C. 2007) (citing

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n. 15, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985)). A nonresident corporation must have substantial contacts with the forum state to support a court’s exercise of general jurisdiction when the nonresident’s contacts do not directly relate to the plaintiff’s cause of action. *See Cockrell v. Hillerich & Bradsby Co.*, 611 S.E.2d 505, 508 (S.C. 2005) (citations omitted).

Subject to the constraints imposed by federal due process, general jurisdiction is determined under S.C. Code Ann. § 36-2-802, which states: “A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action.” For general jurisdiction to attach, the foreign corporation’s activities or affiliations within the forum state must be “so continuous and systematic as to render [it] essentially at home in the forum State.” *Daimler AG v. Bauman*, 571 U.S. 117, 119 (2014) (citation and internal quotation marks omitted); *see also Companion Prop. & Cas. Ins. Co. v. U.S. Bank Nat’l Ass’n.*, 3:15-cv-01300-JMC, 2016 WL 6781057, at *5 (D.S.C. Nov. 16, 2016) (“general jurisdiction requires affiliations so continuous and systematic as to render [the foreign corporation] essentially at home in the forum State, *i.e.*, comparable to a domestic enterprise in that State” (citation and internal quotation marks omitted)). “[O]nly a limited set of affiliations with a forum” can satisfy the “essentially at home” requirement. *Daimler*, 571 U.S. at 137. Thus, in order to haul a nonresident corporation into court to answer for claims that have nothing to do with the corporation’s activities in or contacts with the forum state, the corporation must have substantial contacts with the forum state. *See Gibson v. Confie Ins. Grp. Holdings, Inc.*, 2:16-CV-02872-DCN, 2017 WL 2936219, at *5 (D.S.C. July 10, 2017) (“The threshold level of contacts with the

forum state required for the exercise of general jurisdiction is significantly higher than for specific jurisdiction and must be fairly extensive.” (citation omitted)).

A corporation typically will only be found “at home” in its state of incorporation and the state in which it has its principal place of business. *See Sutton v. Motor Wheel Corp., LLC*, No. 3:17-01161-MGL, 2018 WL 2197535, at *3 (D.S.C. May 14, 2018) (citation omitted); *see also Daimler*, 571 U.S. at 137 (“the place of incorporation and principal place of business are ‘paradig[m] ... bases for general jurisdiction.’” (citations omitted)). Only “in an exceptional case” may “a corporation’s operations in a forum other than its formal place of incorporation or principal place of business [] be so substantial and of such a nature as to render the corporation at home in that State.” *Daimler*, 571 U.S. at 139 n. 19. This exception is very limited, and plaintiffs face a heavy burden in proving it applies. *See Daimler*, 571 U.S. at 138 (rejecting as “unacceptably grasping” the proposition that a party can be subject to general jurisdiction in every state in which it “engages in a substantial, continuous, and systematic course of business”).⁷

⁷ *See also, e.g., Companion Prop. & Cas. Ins. Co.*, 2016 WL 6781057, at *7 (noting a party asserting general jurisdiction under *Daimler*’s “exceptional case” exception “faces a heavy burden,” and rejecting argument that foreign corporation was at home in South Carolina (citations omitted)); *Maseng v. Lenox Corp.*, 483 F. Supp. 3d 360, 368-69 (D.S.C. 2020) (“Lenox’s contacts with South Carolina are limited to one retail store in Myrtle Beach, South Carolina and the marketing, distribution, and sale of its own products in various retail stores in South Carolina. The Myrtle Beach retail store is one of the 20 retail stores that Lenox operates in 12 states. . . . Thus, while this contact is certainly systematic and continuous, it is not substantial enough to render Lenox ‘at home’ in South Carolina.”); *Sunny Days Entm’t, LLC v. Traxxas, L.P.*, 376 F. Supp. 3d 654, 660-61 (D.S.C. 2019) (nonresident company that sold toys to South Carolina customers through brick and mortar stores and online not subject to general jurisdiction in South Carolina); *Fidrych v. Marriott Int’l, Inc.*, No. 2:17-2195-BHH, 2018 WL 9811052, at *6 (D.S.C. Aug. 3, 2018) (nonresident corporation with 90 hotels and certificate of authority to transact business in South Carolina not subject to general jurisdiction in South Carolina).

Here, there is no basis for the assertion of general jurisdiction over Travelers. Travelers is incorporated in and has its principal place of business in Connecticut. *See* Ex. I at ¶ 3. Thus, the only way this Court can have general personal jurisdiction over Travelers is if Payne & Keller can meet its heavy burden of showing that Travelers' contacts with South Carolina are so continuous and systematic as to render it essentially at home in South Carolina. Payne & Keller cannot possibly meet its burden here.

Payne & Keller does not so much as allege that Travelers is subject to general jurisdiction in South Carolina, let alone explain how or why it could be. That is reason alone to reject any argument that Travelers is somehow at home in South Carolina. But even if the Court were to look past this pleading deficiency, Travelers' limited activities in South Carolina are plainly insufficient to render it at home in South Carolina. As set forth in the accompanying declaration of Ann B. Mulcahy:

- Travelers is a corporation with its principal place of business and state of incorporation outside of South Carolina (*see* Ex. I at ¶¶ 3, 6);
- Travelers' business operations are managed principally from its Connecticut offices (*see id.* at ¶ 4);
- None of Travelers' senior officers or directors are located in South Carolina (*see id.* at ¶ 5);
- Travelers does not have employees in South Carolina (*see id.* at ¶ 6);
- Travelers does not own or rent office space in South Carolina (*see id.* at ¶ 6);
- Travelers does not have any loan applications with South Carolina banks or financial institutions (*see id.* at ¶ 6); and
- Travelers does not hold meetings of directors in South Carolina (*see id.* at ¶ 6).

Simply put, Travelers is not "at home" in South Carolina, and Payne & Keller does not assert otherwise. Travelers' limited contacts with South Carolina relate solely to its insuring

relationship with certain South Carolina businesses and residents. Notably, Payne & Keller, a defunct Texas corporation, is not one such business. Accordingly, because Travelers is not incorporated in South Carolina, does not have its principal place of business in South Carolina, and otherwise lacks the type of contacts needed to render it essentially at home in South Carolina, general jurisdiction does not exist.

B. The Court Lacks Specific Jurisdiction Over Travelers

Specific jurisdiction exists where the plaintiff's claims arise out of or relate to the defendant's substantial contacts with the forum state. *See Coggeshall*, 655 S.E.2d at 478 ("Specific jurisdiction is the State's right to exercise personal jurisdiction because the cause of action arises specifically from a defendant's contacts with the forum" (citation omitted)); *Maseng*, 483 F. Supp. 3d at 365 ("A defendant has minimum contacts with a jurisdiction sufficient to subject it to specific jurisdiction in the forum state if 'the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" (quotation omitted)). Because South Carolina's long-arm statute has been interpreted to be coextensive with the limits of due process, the dispositive question for purposes of specific jurisdiction is whether the exercise of jurisdiction would comport with due process. *See Coggeshall*, 655 S.E.2d at 478; *S. Plastics Co.*, 423 S.E.2d at 131.

As noted above, to comport with due process in the specific jurisdiction context, Payne & Keller must allege plausible facts sufficient to satisfy both the "power" prong and the "fairness" prong. *See Hidria, USA, Inc.*, 783 S.E.2d at 843. "The court must (1) find that the defendant has the requisite minimum contacts with the forum, without which, the court does not have the 'power' to adjudicate the action and (2) find the exercise of jurisdiction is reasonable or fair." *Power Prods. & Servs. Co.*, 665 S.E. 2d at 665 (citation omitted). "If either prong fails, the

exercise of personal jurisdiction over the defendant fails to comport with the requirements of due process.” *Id.* (quotation omitted). Payne & Keller has not come close to alleging specific jurisdiction facts sufficient to satisfy its burden as to either the “power” prong or the “fairness” prong.

1. The Power Prong Is Not Met

“A minimum contacts analysis requires a court to find that the defendant directed its activities to a resident of this State and that the cause of action arises out of or relates to those activities.” *S. Plastics Co.*, 423 S.E.2d at 131 (citation omitted). Here, Travelers did not purposefully avail itself of the privileges of conducting activities in South Carolina in connection with the instant claims, given that there are no factual allegations or evidence that Travelers conducted activities in South Carolina that serve as the basis for Payne & Keller’s third-party claims against Travelers.

In its Second Amended Third-Party Complaint, Payne & Keller rotely alleges that “[t]his 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,” and that “[t]his Court appointed Peter D. Protopapas as Receiver of Third-Party Plaintiffs.” 2d Am. Third-Party Compl. ¶ 25. There are no jurisdictional allegations specific to Travelers. This is reason alone to find that specific personal jurisdiction is lacking. *See Sullivan v. Hawker Beechcraft Corp.*, 723 S.E.2d 835, 839 (S.C. Ct. App. 2012) (the mere “repeating of the [long-arm] statute is insufficient to support a finding of personal jurisdiction”).

Beyond this pleading deficiency, Payne & Keller cannot demonstrate the minimum, claim-specific contacts between Travelers and South Carolina necessary to meet the constitutional requirements of due process. Payne & Keller’s third-party claims against

Travelers do not arise from or relate to Travelers' contacts with South Carolina. Payne & Keller seeks insurance coverage rulings that have nothing to do with Travelers' limited contacts with South Carolina. The Receiver has not alleged, and cannot allege, that Travelers directed its Payne & Keller-related activities at residents of South Carolina, or that Payne & Keller's third-party claims against Travelers in this case arise out of Travelers' in-state activities. Indeed, Payne & Keller is not and has never been a South Carolina company, and all of the subject insurance policies were issued and delivered to Payne & Keller outside of South Carolina. Travelers is not alleged to have ever manufactured, distributed, or sold any Payne & Keller-related asbestos or asbestos-containing products in South Carolina or elsewhere, and the insurance policies Travelers issued to Payne & Keller are not alleged to have caused Childers' asbestos injuries.

Moreover, even assuming Travelers could have foreseen that Payne & Keller would be subject to asbestos tort lawsuits in South Carolina, foreseeability alone is insufficient to establish personal jurisdiction. *See Cockrell*, 611 S.E.2d at 509 ("The foreseeability that is critical to due process analysis" is that "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." (citation omitted)). Payne & Keller cannot avoid the absence of jurisdiction over Travelers by attempting to impute the South Carolina contacts of individual asbestos claimants (or others) to Travelers. The relevant contacts for jurisdictional purposes "must center on the contacts generated by the defendant and not on the unilateral actions of some other entity[.]" *Id.* at 508 (citation omitted); *see also Moosally v. W.W. Norton & Co., Inc.*, 594 S.E.2d 878, 885 (S.C. Ct. App. 2004) ("Because the due process requirements must be met as to each defendant, we must assess individually each defendant's contacts with South Carolina." (citations omitted)); *Walden v. Fiore*, 571 U.S. 277, 284 (2014)

(“the relationship must arise out of contacts that the ‘defendant *himself*’ creates with the forum State” (citation omitted) (emphasis in original)); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). Indeed, the United States Supreme Court has made clear that the “unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) (citations omitted).⁸ Thus, the contacts asbestos claimants or others may have had with South Carolina are irrelevant to the question whether Travelers has sufficient minimum contacts with South Carolina to give rise to specific personal jurisdiction over Travelers.

In short, because Payne & Keller fails to allege facts sufficient to show that Travelers conducted activities in South Carolina that serve as the basis for Payne & Keller’s third-party claims against Travelers in this case, the exercise of personal jurisdiction over Travelers would violate due process under the power prong of the due process analysis.

2. The Fairness Prong is Not Met

It would also be unreasonable and unfair for the Court to exercise personal jurisdiction over Travelers in this case. Under the fairness prong of the due process analysis, a court should consider: “(1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident’s acts; (3) the inconvenience resulting to

⁸ See also, e.g., *Wallace v. Yamaha Motors Corp.*, No. 9:19- cv-0730-DCN, 2019 WL 6170419, at *3 (D.S.C. Nov. 20, 2019) (finding personal jurisdiction could not be exercised over a nonresident motorcycle manufacturer for product liability claims stemming from a vehicular accident because “conduct of plaintiffs or third parties that creates a connection between the defendant and the forum state will be disregarded”); *Sutton v. Motor Wheel Corp.*, 2018 WL 2197535, at *5 (finding personal jurisdiction did not exist over the defendant, a tire manufacturer, based on the contacts of a distributor of defendant’s tires that was authorized to transact business in South Carolina).

the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction." *Power Prods. & Servs. Co., Inc.*, 655 S.E.2d at 665 (citation omitted). Each of these considerations weighs in favor of declining to exercise jurisdiction over Travelers in this case.

With respect to the first two factors, Travelers' activities in South Carolina are not only limited, they are unrelated to the facts and circumstances of Payne & Keller's third-party claims against Travelers. As explained, Travelers is incorporated in Connecticut, its principal place of business is in Connecticut, none of its senior officers or directors are located in South Carolina, it does not have employees in South Carolina, and it does not own or rent office space in South Carolina. *See* Ex. I at ¶¶ 3-6. In addition, Payne & Keller was never a South Carolina company, and Travelers is not alleged to have done anything in South Carolina that forms the basis for Payne & Keller's third-party claims against Travelers in this case. Indeed, Payne & Keller's claims against Travelers are based on insurance policies that Travelers issued to Payne & Keller outside of South Carolina.

With respect to the third factor, no party would be inconvenienced if this Court were to find that it does not have jurisdiction over Travelers. The parties are litigating substantially identical claims in the first-filed Federal Coverage Action, which is pending in federal court in Columbia, South Carolina. Thus, the Receiver will have no reason to complain if his substantially identical claims are dismissed in this case. If anything, the parties to this asbestos tort case—particularly Childers—would be inconvenienced if the Receiver is allowed to implead Travelers and other insurers. Permitting the Receiver to pursue his duplicative third-party claims would expand unnecessarily the scope of the case and delay its ultimate resolution, thereby prejudicing Childers and the other parties, and wasting party and judicial resources.

Finally, South Carolina's interest in exercising jurisdiction here is minor. "[W]hile South Carolina has an interest in providing redress for its citizens, that interest is diminished when no business was transacted in this State and any contract formed was not to be performed in this State." *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 402 S.E.2d 177, 181 (S.C. 1991). Payne & Keller has never been a South Carolina company, and all of the policy contracts were issued to Payne & Keller outside of South Carolina. Further, given the existence of the first-filed Federal Coverage Action now pending in South Carolina federal court, a court located in South Carolina will still hear and resolve substantially identical claims if this Court were to decline to exercise jurisdiction over Travelers in this case, as it should.

Under the facts of this case, even if Payne & Keller could establish the minimum contacts necessary to meet the constitutional requirements of due process under the power prong (it cannot), the Court cannot exercise jurisdiction over Travelers under the fairness prong because it would be neither reasonable nor fair.

III. The Third-Party Claims Are Improper Under SCRCP 14 Because They Cannot Establish, and Are Not Based On, Derivative Liability of Childers' Tort Claims

Rule 14 of the SCRCP provides that a defendant "as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him for all or part of the plaintiff's claim against him.*" S.C. R. Civ. P. 14(a) (emphasis added). This means that "the third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability," and "[t]he outcome of the principal claim must impact the third-party defendant's liability[.]" *First Gen. Servs. of Charleston, Inc. v. Miller*, 445 S.E.2d 446, 447 (S.C. 1994) (citation omitted). "Consequently, a non-party is subject to impleader [under SCRCP 14] only if there is a basis to assert he is liable to the named defendant(s) for all or part of the plaintiff's claim." *Smith v. Tiffany*, 799 S.E.2d 479, 486 (S.C.

2017); *see also Gathings v. Robertson Brokerage Co., Inc.*, 367 S.E.2d 423, 426 (S.C. Ct. App. 1988) (“Rule 14 may be used only when the substantive law permits the defendant to shift some or all of his liability [on the principal claim] to the impleaded party.” (quotation omitted)).

“The third party claim must be derivative of the plaintiff’s claim because [d]erivative liability is central to the operation of Rule 14.” *CNH Indus. Cap. Am. LLC v. Able Cont., Inc.*, No. 9:16-cv-2520-RMG, 2017 WL 512453, at *1 (D.S.C. Feb. 7, 2017) (citation and internal quotation marks omitted).⁹ “It is not sufficient that the third-party claim is a related claim; the claim must be derivatively based on the original plaintiff’s claim.” *Id.* (quotation omitted). “Rule 14(a) does not allow the defendant to assert a separate and independent claim even though the claim arises out of the same general set of facts as the main claim.” *Id.* (quotation and other citation omitted). “In other words, impleader ‘must involve an attempt to pass on to the third party all or part of the liability asserted against the defendant.... An impleader claim may not be used to assert any and all rights to recovery arising from the same transaction or occurrence as the underlying action.’” *Id.* (quotation omitted). Thus, “[a] third-party claim may be asserted . . . *only when the third party’s liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to the defending party.*” *Id.* (citation omitted) (emphasis in original). “[A] third-party claim is ‘viable only where a proposed third party plaintiff says, in effect, ‘If I am liable to [the original] plaintiff, then my liability is only technical or secondary or partial, and the third party defendant is derivatively liable and must reimburse me for all or part ... of anything I must pay [the original] plaintiff.’” *For Life Prods.*,

⁹ Rule 14 of the Federal Rules of Civil Procedure is substantially the same as Rule 14 of the SCRCF. “In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules.” *Maybank v. BB&T Corp.*, 787 S.E.2d 498, 510 (S.C. 2016) (citation omitted).

LLC v. Universal Cos., Inc., No. 1:20CV00016, 2021 WL 1169532, at *4 (W.D. Va. Mar. 29, 2021) (quotation omitted).

Here, Payne & Keller's third-party *contract* claims against Travelers are not derivative of or dependent on Childers' *tort* claims against Payne & Keller. Payne & Keller does not and cannot allege that Travelers, an insurer, is derivatively liable if Payne & Keller is found responsible for Childers' alleged asbestos exposure. Nor does Payne & Keller allege that Travelers has any obligation to Childers.

Indeed, rather than seeking to establish derivative liability, the third-party claims seek relief directly from and against Travelers. Specifically, as to Travelers, the Receiver for Payne & Keller seeks the following relief:

- In Count I, a declaration that "Third-Party Defendants must fairly compensate the Receiver for the substantial time, effort, and expenses expended in connection with the defense of asbestos suits potentially covered under the Third-Party Defendants' policies and to further declare that this obligation is unlimited and shall continue as long as there are Asbestos Suits pending against Third-Party Plaintiffs." 2d Am. Third-Party Compl. ¶ 181.
- In Count II, a 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 Third-Party Defendants are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession for his unrestricted use in carrying out his duties." *Id.* at ¶ 185.
- In Count XI, "declarations, after thorough discovery regarding Rexel's and SKRLA's competing claims to the Payne & Keller insurance program, regarding the nature, extent, and priority (if any) of Rexel's and SKRLA's claims to the Payne & Keller insurance coverage so as to provide the Receiver with guidance and certainty as to how to go about carrying out his duties as the Receiver for Payne & Keller and to provide the Payne & Keller insurers with certainty and guidance as to the delineation of their rights and responsibilities as between Rexel and Payne & Keller in this regard." *Id.* at ¶ 233.
- In the Prayer for Relief, a "declaration as to the interpretation and meaning of the Third-Party Plaintiffs' insurance policies," ostensibly including any insurance policies Travelers issued to Payne & Keller. *Id.*, Prayer for Relief ¶ E.

These are direct claims against Travelers; they are not based on derivative liability and, as a result, they are not actionable under SCRCP 14. *See Miller*, 445 S.E.2d at 447 (explaining that, because third-party claims are dependent on derivative liability, “no right exists to implead a third-party defendant who is *directly* liable to the [third-party] plaintiff.” (citation omitted) (emphasis in original)). Payne & Keller’s third-party claims against Travelers seek broad insurance coverage contract rulings, including a declaration that Travelers “must fairly compensate the Receiver” for time spent defending “asbestos suits” generally (2d Am. Third-Party Compl. ¶ 181), a declaration that “all policies, evidence of policies and documents relating to their placement, purchase and underwriting . . . are the property of the Receiver and shall be delivered immediately to the Receiver (*id.* ¶ 185), and a declaration regarding “Rexel’s competing claims to the Payne & Keller insurance program” (*id.* ¶ 233). These claims are not specific to Childers and are not based on derivative liability.

Again, the instant case is a tort lawsuit related to alleged asbestos exposure. It has nothing to do with insurance policy obligations. Travelers’ insuring relationship with Payne & Keller is not alleged to have caused Childers’ injuries—nor could it. Childers is a stranger to the insurance contracts Travelers issued to Payne & Keller, and Childers has yet to establish that Payne & Keller has any liability to Childers.

“It is hardly necessary to cite cases or authorities to the effect that in a tort action, suit must first be brought against the insured or party claimed to be liable, and that an insurance carrier cannot be joined in such a suit, or suit brought individually against such a company; and in fact, it is universally forbidden that any evidence or reference be made to the fact that the defendant is protected by insurance.” *Ford v. Glens Falls Indem. Co. of Glens Falls, N.Y.*, 80 F. Supp. 347, 348 (E.D.S.C. 1948). Indeed, recognizing the distinct set of facts and issues relevant

to tort claims as opposed to contract claims, courts in South Carolina have long held that liability issues and insurance coverage issues should be litigated separately. *See Am. Fidelity Fire Ins. Co. v. Hood*, 37 F.R.D. 17, 24 (E.D.S.C. 1965) (dismissing tort cross-claims asserted in declaratory judgment action on insurance coverage because such claims did not arise from same transaction or occurrence as declaratory judgment claims); *Ex Parte Builders Mutual Ins. Co.*, 847 S.E.2d 87, 110-111 (S.C. 2020) (affirming trial court's decision to deny insurers' motions to intervene in underlying tort action, and recognizing that a separate declaratory judgment action is the proper forum to resolve insurance coverage issues).

The Payne & Keller insurance contracts themselves likewise reflect the parties' agreement that Payne & Keller cannot implead Travelers in a direct asbestos tort case before Payne & Keller's liability has been determined. For example, in a liability insurance policy Travelers issued to Payne & Keller for the policy period April 1, 1983 to April 1, 1986, the parties agreed that:

No action shall lie against the company [*i.e.*, Travelers] unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, *nor until the amount of the insured's [i.e., Payne & Keller's] obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company. . . .*

No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine the insured's liability, nor shall the company be impleaded by the insured or his legal representative. . . .

Ex. H, at TRAV_SUB_002207 (policy number 61 AL 473361 SRA) (emphasis added).

In short, Payne & Keller's third-party claims against Travelers improperly ask this Court for contract-related judicial declarations unrelated to Childers' asbestos tort action and not

premised on derivative liability. Travelers, therefore, cannot be impleaded, and the third-party claims against Travelers must be dismissed.

IV. Payne & Keller’s Third-Party Claims Should Be Dismissed Under SCRCP 12(b)(8) Because They Are Duplicative of Payne & Keller’s Claims Against Travelers in the First-Filed Federal Coverage Action

Under SCRCP 12(b)(8), “[a] defendant may seek dismissal of an action . . . when another action is pending between the same parties for the same claim.” *Babb v. Shaw*, No. 2011-UP-440, 2011 WL 11735697, at *1 (S.C. Ct. App. Oct. 11, 2011) (citation and internal question marks omitted). “[T]he principle underlying Rule 12(b)(8) . . . [is] that duplicative litigation should be avoided[.]” *State ex rel. Wilson v. Condon*, 410 S.C. 331, 333 (S.C. 2014) (Toal, C.J.). “Avoiding concurrent litigation in both the courts of this state and the Federal District Court will foster wise judicial administration and conserve judicial resources.” *Id.* (citation omitted); *see also, e.g., Corbett v. City of Myrtle Beach*, 521 S.E.2d 276, 281 (S.C. Ct. App. 1999) (holding dismissal pursuant to SCRCP 12(b)(8) was appropriate where the “claim involves the same parties and is based upon the same facts and circumstances”).

As the following table demonstrates, the allegations and claims in both cases are substantially identical as to Travelers.

Allegations and Relief Sought as to Travelers in the Federal Coverage Action	Allegations and Relief Sought as to Travelers in the Instant Case
¶ 30 Defendant Aetna issued general liability policies to Payne & Keller (“The Aetna Policies”). The Aetna Policies have standard terms and conditions. The Aetna Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false or fraudulent. The duty to	¶ 149 Defendant Aetna issued general liability policies to Payne & Keller (“The Aetna Policies”). The Aetna Policies have standard terms and conditions. The Aetna Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false or fraudulent. The duty to

defend is joint, several, indivisible and supplemental. The Aetna Policies require Aetna fully to defend any Payne & Keller Asbestos Suit alleging bodily injury during any Aetna Policy period. The Aetna Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Aetna Policy Period. It is the burden of Aetna to prove any limitation on or exclusion of coverage. Specifically, Aetna issued primary general liability coverage to Payne & Keller for at least the seven policy periods March 1, 1978 – April 1, 1985.	defend is joint, several, indivisible and supplemental. The Aetna Policies require Aetna fully to defend any Payne & Keller Asbestos Suit alleging bodily injury during any Aetna Policy period. The Aetna Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Aetna Policy Period. It is the burden of Aetna to prove any limitation on or exclusion of coverage. Specifically, Aetna issued primary general liability coverage to Payne & Keller for at least the seven policy periods March 1, 1978 – April 1, 1985.
¶ 31 Aetna has failed to fully acknowledge or accept its insuring obligations under the Aetna Policies. An actual and justiciable dispute exists between these parties.	¶ 150 Aetna has failed to fully acknowledge, delineate or accept its insuring obligations under the Aetna Policies between Rexel and Payne & Keller or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.
Count I – Declaratory Judgment ¶ 62 Plaintiff seeks a judicial declaration that all policies, evidence of policies and documents relating to their placement, purchase and underwriting, and claims handling, including but not limited to such documents in the possession of defendants, are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession.	Count II – Declaratory Judgment ¶ 185 Third-Party Plaintiffs seek 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 Third-Party Defendants are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession for his unrestricted use in carrying out his duties.
Count VII – Declaratory Judgment ¶ 94 Plaintiff respectfully requests this Court to declare that defendants must fairly	Count I – Declaratory Judgment ¶ 181 The Receiver respectfully requests this Court to declare that Third-Party Defendants must

compensate plaintiff for the substantial time, effort, and expenses plaintiff expended in connection with the defense of asbestos suits potentially covered under the defendants' policies and to further declare that this obligation is unlimited and shall continue as long as there is any Payne & Keller Asbestos Suit pending.	fairly compensate the Receiver for the substantial time, effort, and expenses expended in connection with the defense of asbestos suits potentially covered under the Third-Party Defendants' policies and to further declare that this obligation is unlimited and shall continue as long as there are Asbestos Suits pending against Third Party Plaintiffs.
Prayer for Relief ¶ D The Receiver seeks a further declaration as to the interpretation and meaning of the Payne & Keller insurance policies: i. The Payne & Keller Insurance Policies cover all Payne & Keller 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 Payne & Keller asbestos suit "triggers" at least one Payne & Keller Insurance policy as long as an asbestos plaintiff alleges injury during the period of the policy; iii. Payne & Keller may select the policy or policy years to which to assign or allocate in full each Payne & Keller asbestos loss; iv. In the case of a claimed ambiguity in any Payne & Keller Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the defendants' policies, and defendants bear the burden of proof as to any such ambiguity; v. Defense costs for the Payne & Keller asbestos suits are supplemental, and the payment of defense costs does not erode or	Prayer for Relief ¶ E As described in detail above, the Receiver seeks a further declaration as to the interpretation and meaning of the Third-Party Plaintiffs' insurance policies: i. The Third-Party Plaintiffs' Insurance Policies cover all Third-Party Plaintiffs' 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 Third-Party Plaintiffs' asbestos suit "triggers" at least one Third-Party Plaintiffs' Insurance policy as long as an asbestos plaintiff alleges injury during the period of the policy; iii. Third-Party Plaintiffs may select the policy or policy years to which to assign or allocate in full each asbestos loss; iv. In the case of a claimed ambiguity in any Third Party Plaintiffs' Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Third Party Defendants' policies, and Third-Party Defendants bear the burden of proof as to any such ambiguity; v. Defense costs for the Third-Party Plaintiffs' asbestos suits are supplemental, and the payment of defense costs does not erode or

impair any limit of liability of any of the Payne & Keller Insurance policies; vi. If any allegation in a Payne & Keller Asbestos Suit is potentially covered under the Payne & Keller 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 Payne & Keller 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 Payne & Keller Asbestos Suits; viii. Each Payne & Keller Insurance Policy must indemnify covered Payne & Keller Asbestos Suits, in full, up to its “per occurrence” limits, regardless of whether a continuing injury spans multiple policy periods; ix. The Payne & Keller Asbestos Suits that allege exposure to asbestos during Payne & Keller’s work are subject only to the “per occurrence” limits of the Payne & Keller Insurance policies; x. Any aggregate limit on coverage in any of the Payne & Keller Insurance Policies is a limitation on coverage, and the insurers therefore have the burden to prove, based on the evidence, that a Payne & Keller Asbestos Suit is subject to the aggregate limit in the Payne & Keller Insurance Policies, if any; and xi. Each insurer and the Guaranty Association has the burden to prove, based on the evidence, that any particular Payne & Keller Asbestos Suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Payne & Keller Insurance	impair any limit of liability of any of the Third-Party Plaintiffs’ Insurance policies; vi. If any allegation in a Third-Party Plaintiffs’ Asbestos Suit is potentially covered under the Third-Party Plaintiffs’ Insurance Policies, then the responsive 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 Third-Party Plaintiffs’ 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 Third-Party Plaintiffs’ Asbestos Suits; viii. Each Third-Party Plaintiffs’ Insurance Policy must indemnify covered Third- Party Plaintiffs’ Asbestos Suits, in full, up to its “per occurrence” limits, regardless of whether a continuing injury spans multiple policy periods; ix. The Third-Party Plaintiffs’ Asbestos Suits that allege exposure to asbestos during Third-Party Plaintiffs’ work are subject only to the “per occurrence” limits of the Third-Party Plaintiffs’ Insurance policies; x. Any aggregate limit on coverage in any of the Third-Party Plaintiffs’ Insurance Policies is a limitation on coverage, and the insurers therefore have the burden to prove, based on the evidence, that a Third-Party Plaintiffs’ Asbestos Suit is subject to the aggregate limit in the Third-Party Plaintiffs’ Insurance Policies, if any; and xi. Each insurer has the burden to prove, based on the evidence, that any particular Third-Party Plaintiffs’ Asbestos Suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Third-Party Plaintiffs’ Insurance

Policies, in order for the insurer to disclaim coverage for a Payne & Keller Asbestos Suit against Payne & Keller otherwise alleging injury during the Payne & Keller insurance policy period[.]	Policies, in order for the insurer to disclaim coverage for an Asbestos Suit against a Third Party Plaintiff otherwise alleging injury during the Third-Party Plaintiffs' insurance policy period.

Payne & Keller's third-party claims against Travelers here must be dismissed under SCRCP 12(b)(8), because they are substantially identical to Payne & Keller's claims against Travelers in the Federal Coverage Action. *See Condon*, 410 S.C. at 333 ("although the parties in this matter and the federal case are not identical, the principle underlying Rule 12(b)(8) of the South Carolina Rules of Civil Procedure that duplicative litigation should be avoided applies to this case.").

Dismissal is particularly appropriate here because the claims in the Federal Coverage Action were filed first. When considering whether to dismiss or stay a parallel action, courts often give deference to a first-filed suit over a second-filed competing action. *See, e.g., VRCompliance LLC v. HomeAway, Inc.*, 715 F.3d 570, 574 (4th Cir. 2013) ("where two parallel suits are pending in state and federal court, 'the first suit should have priority, absent the showing of balance of convenience in favor of the second action.'" (quotation omitted)); *United Prop. & Cas. Ins. v. D'Ambrosio*, No. 9:19-CV-547-BHH, 2020 WL 6434786, at *2-3 (D.S.C. Nov. 2, 2020) (agreeing "with the sound analysis of the State Court" ruling that, "pursuant to the first-to-file principal, the federal action shall have priority over the state action" where the "the parties to the [first-filed] federal action and state action are identical, and the claims are precisely or substantially the same"). The Receiver for Payne & Keller initiated insurance coverage litigation against its insurers many months ago; he only filed his Third-Party Complaint here when the insurance coverage litigation was removed to federal court and became the Federal Coverage Action. Thus, the Third Amended Complaint should be seen for what it is—pure jurisdictional

gamesmanship. This is an additional reason that counsels in favor of dismissing the Receiver's third-party claims here in favor of the first-filed Federal Coverage Action.

CONCLUSION

Accordingly, for the foregoing reasons and others appearing in the record, Travelers respectfully requests that the Court dismiss the third-party claims asserted against Travelers with prejudice and dissolve the Payne & Keller Receivership.

Respectfully submitted,

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 named as Aetna Casualty & Surety Company)

August 24, 2022

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LENORA CHILDERS, Individually and as
Personal Representative of the Estate of LEWIS
C. CHILDERS,

Plaintiff,

v.

Case No. 2021-CP-40-03484

Davis Mechanical Contractors, Inc., Flame
Refractories, Inc., General Boiler Casing
Company, Inc., HEFCO, Inc., J.R. Deans
Company, Inc., Payne & Keller Company, SFB,
Incorporated, Stafford Insulation Company,
Standard Insulation Company of N.C., Inc.,
Systra Engineering, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co.,

Defendants.

Flame Refractories, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., and Payne & Keller Company
By and Through Their Duly Appointed
Receiver Peter D. Protopapas,

Third-Party Plaintiffs,

v.

Zurich American Insurance Company
(Individually and as Successor to Northern
Insurance Company of New York, Maryland
American General Insurance Company, and
Maryland Casualty Company); Allstate
Insurance Company; John Tighe; Sean Antony
Beatty; Dennis William Cahill; Catherine Ann
Carlino; Andre Lefebvre; David Dean

**NOTICE OF MOTION AND JOINDER
TO THIRD-PARTY DEFENDANT
TRAVELERS CASUALTY AND
SURETY COMPANY'S MOTION TO
DISMISS THIRD-PARTY CLAIMS
AND DISSOLVE THE PAYNE &
KELLER RECEIVERSHIP**

Shumway; Gil Chandler, Michael Davenport; Linda Young Pettigrew; Gwen Wallace Fuller; Daniel Robert Keddie; Julie Ann Fortune; Michael John Crall; James Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital Corp.; Admiral Insurance Company; Continental Insurance Company (Individually and as Successor in interest to Harbor Insurance Company); Hartford Accident and Indemnity Company, Travelers Casualty & Surety Company f/k/a/ Aetna Casualty & Surety Company, National Union Fire Insurance Company of Pittsburgh, PA, Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc., Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in Interest to Stonewall Surplus Lines Insurance Company, Lexington Insurance Company, First State Insurance Company, Birmingham Fire Insurance Company, Certain Underwriters at Lloyd's of London and various London Market Companies, South Carolina Property and Casualty Insurance Guaranty Association, R.L. Jarrett (Underwriting) Agency, Inc., U.S. Risk, LLC, Rexel USA, Inc., Compass Risk Services, LLC, SKRLA, LLC, Century Indemnity Company, in its own capacity and as successor to CCI Insurance Company, as successor to Insurance Company of North America, United States Fire Insurance Company, and Fireman's Fund Insurance Company,

Third-Party Defendants.

TO: BRIAN BARNWELL, ESQUIRE, ATTORNEY FOR THE THIRD-PARTY PLAINTIFF PAYNE & KELLER COMPANY, BY AND THROUGH PETER D. PROTOPAPAS, AND TO THE THIRD-PARTY PLAINTIFF ABOVE-NAMED:

Defendants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall

Insurance Company; The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Certain as yet Unnamed Underwriters at Lloyd's, London and Certain as yet Unnamed London Market Companies (hereinafter collectively referred to as "Joining Defendants"), hereby move for dismissal pursuant to Rule 12(b)(1) and move to dissolve the Payne & Keller Receivership.

On August 24, 2022, Third-Party Defendant Travelers Casualty and Surety Company (hereinafter "Travelers") filed a Motion to Dismiss Third-Party Claims and Dissolve the Payne & Keller Receivership (hereinafter "Travelers' Motion"). In the interest of judicial economy and to avoid unnecessary duplication of briefing, the Joining Defendants join in and adopt by reference the factual recitations and legal authorities in support of certain arguments raised in Travelers' Motion.¹ Specifically, the Joining Defendants hereby join in and adopt by reference the issues and arguments raised in Argument Section I of Travelers' Motion (included on pages 6-14) as well as the factual recitations supporting those arguments.

MURPHY & GRANTLAND, P.A.

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¹ The Joining Defendants previously raised certain arguments in Motions to Dismiss and/or Strike or in the Alternative to Sever and/or Stay. In an Order entered on August 9, 2022, the Court denied those motions and held that the arguments raised in those motions were preserved as to the Second Amended Third-Party Complaint. This Motion and Joinder does not raise those issues which have already been addressed and preserved.

Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Certain as yet Unnamed Underwriters at Lloyd's, London and Certain as yet Unnamed London Market Companies.

September 19, 2022
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

LENORA CHILDERS, Individually and as
Personal Representative of the Estate of
LEWIS C. CHILDERS,

Plaintiff,

v.

Davis Mechanical Contractors, Inc., et al.,

Defendants.

Flame Refractories, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., and Payne & Keller Company
By and Through Their Duly Appointed
Receiver Peter D. Protopapas,

Third-Party Plaintiffs,

v.

Zurich American Insurance Company, et al.,

Third-Party Defendants.

Case No. 2021-CP-40-03484

**THE RECEIVER FOR PAYNE &
KELLER'S RESPONSE TO THIRD-
PARTY DEFENDANT TRAVELERS
CASUALTY & SURETY COMPANY'S
MOTION TO DISMISS THIRD-PARTY
CLAIMS AND DISSOLVE THE PAYNE &
KELLER RECEIVERSHIP**

Third Party Plaintiff Payne & Keller Company ("Payne & Keller"), by and through its duly
appointed Receiver Peter D. Protopapas (the "Receiver"), files this Response in Opposition to

Third-Party Defendant Travelers Casualty & Surety Company's August 24, 2022 Motion to Dismiss Third-Party Claims and to Dissolve the Payne & Keller Receivership (the "Motion").¹

I. INTRODUCTION

On August 27, 2021, this Court appointed the Receiver and granted him "the power and authority [to] fully administer all assets of Payne & Keller" including "the right and obligation to administer any insurance assets of Payne & Keller as well as any claims related to the actions or failure to act of Payne & Keller's insurance carriers." (Exhibit A, 8/27/2021 Order.) On September 30, 2021, the Court amended its receivership order clarifying that the Receiver's authority extended to certain specifically identified entities that were related to Payne & Keller's operations (the "P&K Entities") "and their predecessors, successors, affiliates, parents, assigns, and subsidiaries that may be discovered in the future." (Exhibit B, 9/30/2021 Order.) Although the Third-Party Plaintiff Payne & Keller dissolved in 1986, asbestos personal-injury plaintiffs continue to file asbestos personal-injury lawsuits against it (the "Asbestos Suits") (2d Amend. Compl. ¶¶ 27, 142), including this suit filed by Lenora Childers, Individually and as Personal Representative of the Estate of Lewis C. Childers.

During its existence, Payne & Keller purchased insurance policies, including policies issued by The Aetna Casualty & Surety Company, n/k/a Travelers Casualty & Surety Company

¹ On September 19, 2022, Defendants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Certain as yet Unnamed Underwriters at Lloyd's, London and Certain as yet Unnamed London Market Companies (the "Joining Defendants") filed a Joinder to Travelers' Motion, wherein they "join[ed] in and adopt[ed] by reference the issues and arguments raised in Argument Section I of Travelers' Motion (included on pages 6-14) as well as the factual recitations supporting those arguments." (Joining Defs.' Mot. at 3.) The Receiver submits this filing in response to that Joinder as well.

(“Travelers”), that should now provide defense costs and liability coverage for the Asbestos Suits, and the Receiver seeks declaratory relief in that regard. *Id.* at ¶¶ 143–172. *See* Exhibit C, Initial Payne & Keller Insurance Coverage Chart. Payne & Keller also seeks declaratory relief from Travelers establishing that Travelers is one of the Third-Party Defendants that must compensate the Receiver for his time and efforts spent defending the Asbestos Suits. *See id.* at ¶¶ 175–181. Payne & Keller also seeks declaratory relief relating to production of policies and related documents from all of the Third-Party Defendants. *See id.* at ¶¶ 182–85. Finally, Payne & Keller seeks declaratory relief addressing competing claims for historical insurance coverage issued to Payne & Keller from other companies. *See id.* at ¶¶ 231–33.

II. TRAVELERS’ MOTION TO DISMISS AND TO DISSOLVE THE PAYNE & KELLER RECEIVERSHIP SHOULD BE DENIED

Travelers offers two arguments in support of its motion to dismiss and dissolve the Payne & Keller Receivership. Neither is availing.

First, Travelers argues that the Receiver has no greater right to assert coverage claims than Payne & Keller, and, as a Texas corporation that dissolved in 1986, Payne & Keller can no longer file suit. (Mot. at 4, 6–11). This argument fails because both South Carolina and Texas law allow the appointment of a receiver even **after** a company “has been dissolved” (*see* Section A below). These statutes do not impose any limitation on how soon after dissolution appointment must occur, and neither South Carolina nor Texas courts have elected to import into their receivership statutes the survival periods set forth in dissolution statutes. Thus, both South Carolina and Texas law contemplate that a receiver can be appointed to bring suit on behalf of a dissolved corporation even after the company has lost the ability to act on its own behalf.

Even if this were not the case, this Court also has the power, based on Texas law, to ignore and/or set aside the dissolution of Payne & Keller because the Receiver will demonstrate that the

dissolution occurred “as a result of actual or constructive fraud.” TEX. BUS. ORGS. CODE § 11.153(a). Although the Receiver’s investigation is continuing, there is sufficient evidence available even at this initial pleading stage (*see* Section A below) to allow the Receiver to demonstrate that, at a minimum, constructive fraud occurred in connection with the Payne & Keller dissolution sufficient to invoke Section § 11.153.

After operating for decades building and maintaining major petrochemical and heavy industrial facilities, Payne & Keller abruptly dissolved just as a flood of asbestos-related personal injury claims were being filed (including in Texas) and immediately after the company learned it could face significant toxic tort liability as a creditor in a pending bankruptcy proceeding. Despite the existence of significant historic insurance to address these liabilities, there is evidence that Payne & Keller dissolved with an intent to avoid (or, at the very least, ignore) these liabilities in direct violation of the statutory duties it owed creditors to make adequate provision for these liabilities.

Second, Travelers argues that South Carolina law “permits receiverships only with respect to property located in South Carolina.” (Mot. at 4; *see also id.* at 11–14.) This flawed argument ignores well-settled South Carolina law relating to the scope of this Court’s authority to appoint a receiver.

A. Texas and South Carolina Law Authorize the Receiver to Pursue Payne & Keller’s Coverage Claims After the Company Has Dissolved and the Survival Period Has Ended.

Travelers’ motion to dissolve is predicated on the incorrect assumption that this Court’s ability to appoint a Receiver to bring claims on behalf of Payne & Keller is limited by the three-year window after a dissolution for a dissolved entity to sue or be sued. But here it is the Receiver, pursuant to his appointment by this Court—and not Payne & Keller itself—that asserts coverage

claims. This Court’s authority to appoint a receiver has a legal basis that is separate and apart from the provisions of the corporate code that govern dissolutions. Indeed, the South Carolina and Texas receivership statutes expressly authorize this Court to appoint a receiver to pursue claims on behalf of a corporation that “has been dissolved” without limiting the time within which an appointment must occur.

Section 15-65-10 of the South Carolina Code governs the appointment of a receiver and authorizes a circuit court judge to appoint a receiver “[w]hen a corporation *has been dissolved*, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the property within this State of foreign corporations.” S.C. Code Ann. § 15-65-10(4) (emphasis added). Likewise, Section 64.001 of the Texas Code governs the appointment of a receiver and authorizes “[a] court of competent jurisdiction” to appoint a receiver “for a corporation that is insolvent, is in imminent danger of insolvency, *has been dissolved*, or has forfeited its corporate rights.” TEX. CIV. PRAC. & REM. CODE § 64.001(a)(5) (emphasis added). These statutory provisions expressly provide for the appointment of a receiver after a corporation “*has been dissolved*,” and that is how they have been interpreted and applied. *See, e.g., Allen v. Cooley*, 53 S.C. 414, 31 S.E. 634 (1898) (approving the appointment of a receiver post-dissolution); *Cent. Nat’l. Bank v. Dallas Bank & Tr. Co.*, 66 S.W.2d 474, 479 (Tex. Civ. App.—Dallas 1933, no writ) (indicating the appointment of a receiver is appropriate when dissolution has been “accomplished” and holding that the trial court could not appoint a receiver for banks in voluntary liquidation including because “their dissolution as corporations has not yet been accomplished”).

Texas courts also have interpreted section 64.001 as authorizing the appointment of a receiver after a dissolved corporation’s existence terminates. In *A-Medical Advantage Healthcare*

Sys. v. Shwarts, No. 10-18-00050-CV, 2019 WL 7374735, 2019 Tex. App. LEXIS 11278 (Tex. App.—Waco Dec. 31, 2019, pet. denied) (mem. op.), the Waco Court of Appeals reviewed the trial court’s appointment of a receiver for a dissolved professional association more than three years after dissolution. Noting that the appointment would be affirmed “if it can be upheld on any legal theory that finds support in the evidence,” the court determined it was appropriate under Section 64.001(6). *See id.* at *9.² That provision of the Texas receivership statute authorizes a court to appoint a receiver “in any other case in which a receiver may be appointed under the rules of equity.” TEX. CIV. PRAC. & REM. CODE § 64.001(a)(6). The court of appeals upheld the trial court’s determination that—in light of evidence of financial mismanagement of the dissolved entity’s assets presented during an evidentiary hearing—appointment of a receiver was justified and necessary to oversee management of those assets and distributions.³ *See Shwarts*, 2019 WL 7374735, at *11–12.

By recognizing that the broad statutory authorization granted to a receiver is distinct from the statutory limitations placed on the independent actions of dissolved corporations, these courts (as well as courts in other jurisdictions⁴) recognize the special role and broad responsibilities of a

² The court did not consider the application of section 64.001(5).

³ Appellants also challenged the trial court’s jurisdiction on the grounds that (i) venue was lacking, and (ii) Respondents did not have standing to assert claims after the end of the three-year survival period. The appeal was interlocutory, and the court of appeals held that it lacked jurisdiction to decide these issues. *See Shwarts*, 2019 WL 7374735, at *8.

⁴ Other courts have reached the same result and expressly held that a receiver can be appointed after the expiration of the dissolution statute’s three-year survival period. In *In re Krafft-Murphy Co.*, 82 A.3d 696 (Del. 2013), for example, the Delaware Supreme Court acknowledged that “[a]fter the expiration of § 278’s three year winding-up period, the dissolved Corporation ceased to exist as a ‘body corporate,’ and lost the power to conduct its own affairs.” *Id.* at 710. That did not mean, however, that a receiver could not be appointed to complete the winding up process on behalf of the dissolved corporation. The dissolved corporation, the court held, “may become re-empowered to defend its interests in the litigation . . . through the appointment of a receiver under

court-appointed Receiver. As the South Carolina Supreme Court explained almost a century ago in *Peurifoy v. Gamble*, 145 S.C. 1, 142 S.E. 788, 790 (1928), the Receiver is an “officer of the court.” As such, the Receiver fills a complex role that implicates corporate interests as well as the interests of creditors, shareholders, and property owners:

A receiver is an officer of the court through whom the court takes possession of the assets of the insolvent [entity], for the purpose of preventing their waste or destruction and of reducing them to such form as may be necessary for their ratable distribution among those who may be entitled thereto. A receivership is simply a remedial agency created for the purpose of preserving and disbursing the assets of the insolvent estate. The property in the hands of the receiver is in *custodia legis*; the possession of the property by him is the possession of the court which appointed him. . . . He is the medium through which the court acts in the execution of its orders and decrees.

Id. The Supreme Court of Texas shares this view of a Receiver’s role:

[T]he receiver does not act as the agent of the creditors or of any of the other parties. He is officer of the court, the medium through which the court acts. He is a disinterested party, the representative and protector of the interests of all persons, including creditors, shareholders and others, in the property in receivership.

Sec. Tr. Co. of Austin v. Lipscomb Cnty., 180 S.W.2d 151, 158 (Tex. 1944). A Receiver is appointed to act to protect interests beyond those of the dissolved corporation itself. Subjecting the Receiver to a three-year survival period would undermine the Receiver’s ability to fill this role and would be contrary to state receivership statutes, which do not incorporate this limitation.

[the receivership statute].” *Id.* The receiver could assert the corporation’s rights to recover under liability insurance policies when the dissolved corporation itself had lost its ability to act. In *Glazer v. Motor Parts Rebuilders, Inc.*, 865 S.W.2d 371 (Mo. Ct. App. W.D. 1993), the result was the same. Interpreting Kansas statutes governing corporate dissolutions and the appointment of receivers, the court held that the three-year statutory limitation placed on a dissolved corporation’s ability to prosecute and defend suits does not apply to a receiver acting on behalf of a dissolved corporation. The survival period, the court explained, was included in the dissolution statute but not in the receivership statute. *Id.* at 373–374 (comparing Kansas Stat. Ann. § 17-6807 with Kansas Stat. Ann. § 17-6808).

For all these reasons, the Receiver's pursuit of coverage claims on behalf of Payne & Keller is consistent with both South Carolina and Texas law. Accordingly, dissolution of the receivership on the ground that the Receiver lacks standing to assert coverage claims is neither required nor appropriate.

B. Payne & Keller can assert claims that relate back to when its corporate existence was terminated because the dissolution was based on actual or constructive fraud.

Alternatively,⁵ this Court also has the ability to ignore and/or set aside the Payne & Keller dissolution because the dissolution was the result of actual or constructive fraud.

In alleging that the Receiver lacks standing to pursue coverage claims on behalf of Payne & Keller, Travelers' focus is on the Texas three-year survival statute, which limits a dissolved corporation's ability to sue or defend against claims in its own corporate name. (Mot. at 7–9.) According to Travelers, the Receiver can assert only the rights of the dissolved company, and the rights of Payne & Keller were extinguished when the survival period ended in 1989.

However, in making that argument, Travelers ignores Section 11.153 of the Texas Business Organizations Code ("TBOC"), which authorizes a court to revoke a corporation's termination of its own corporate existence if that termination was "as a result of actual or constructive fraud." § 11.153(a) ("Notwithstanding any provision of this code to the contrary, a court may order the revocation of termination of an entity's existence that was terminated as a result of actual or constructive fraud."). Revocation of the corporate termination enables the corporate entity to pursue claims as if it were never dissolved. "[T]he revocation relates back to the effective date of the termination and takes effect as of that date . . . [and] the entity's status as an entity continues

⁵ Even if this Court does not find it necessary to reach this "actual or constructive fraud" issue at this time, the Receiver reserves the right to assert this argument at a later time to potentially identify other sources of funds for Payne & Keller creditors.

in effect as if the termination of the entity's existence had never occurred.” *Id.* at § 11.153(b)(1)–(2).

In interpreting another provision of the TBOC imposing liability for “actual fraud,” the Texas Supreme Court addressed the distinction between “actual fraud” and “constructive fraud”:

Actual fraud usually involves dishonesty of purpose or intent to deceive, whereas constructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests.

Castleberry v. Branscum KM, 721 S.W.2d 270, 273 (Tex. 1986), *superseded on other grounds by statute, as recognized in SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008) (citations omitted). For example, dissolving a company after an attorney threatens to file a suit for damages suggests an intent to avoid liability and is evidence of actual fraud. *See Latham v. Burgher*, 320 S.W.3d 602, 610 (Tex. App.—Dallas 2010, no pet.) (“A rational juror could also have decided Latham’s conduct in dissolving the corporation in the face of Burgher’s claim represented dishonesty of purpose or an intent to deceive, i.e., actual fraud.”).

Even at this early juncture in this case, there is ample evidence supporting a claim that, at the very least, constructive fraud occurred in connection with Payne & Keller’s dissolution. Events surrounding Payne & Keller’s dissolution suggest that the company terminated its corporate existence to avoid liability for both current and future toxic tort, silica, and asbestos personal liability claims, and Payne & Keller was keenly aware of those claims when the decision to dissolve Payne & Keller was made.

The historical record developed to date suggests that Payne & Keller’s work included significant construction projects in industries and time periods where the use of asbestos-containing products was prevalent, including manufacturing facilities and petrochemical facilities.

For example, in 1981, Payne & Keller worked on an insulation replacement project for Archer Daniels Midland (“Archer Daniels”). Archer Daniels initially awarded this project to another firm. After its workers went on strike, Archer Daniels cancelled that initial contract and assigned the remainder of the work to Payne & Keller. (Exhibit D, Construction: Labor Report, Vol. 28, No. 1391.) Payne & Keller also worked on valve replacements at a Citgo Petroleum Corporation facility in Westlake/Lake Charles, Louisiana, *see Seeney v. Citgo Petroleum Corp.*, 848 F.2d 664, 666 (5th Cir. 1988), which has since been the subject of asbestos litigation. *See Bourque v. Anco Insulations, Inc.*, 25 So. 3d 1008 (La. App. 3 Cir. 2009).

By 1983, some of Payne & Keller’s excess-level insurance policies expressly excluded coverage for asbestos-related claims, and, in the years before its dissolution, Payne & Keller agreed, in its service contracts, to indemnify companies from financial responsibility for any property damage or personal injury claims arising from the work completed by Payne & Keller employees. *See, e.g., In re Charter Co.*, 63 B.R. 568, 570 (Bankr. M.D. Fla. 1986).

During the 1980s, Payne & Keller defended itself against a variety of toxic tort claims arising from occupational exposures. In 1983, the Louisiana Court of Appeals affirmed that Payne & Keller and its insurer Aetna Surety & Casualty Company (now a Travelers company, the movant here) were liable for a workers’ compensation claim brought by a former Payne & Keller painter and sandblaster who was permanently disabled by silicosis. *See Thornell v. Payne & Keller, Inc.*, 442 So.2d 536 (La. App. 1st Cir. 1983), *cert. denied*, 445 So. 2d 1231 (La. 1984). In 1986, Payne & Keller was also a defendant in a Texas asbestos case filed by Baron & Budd. (Exhibit E, *Hanagriff v. Brown & Root Inc.*, cover sheet). The claims against Payne & Keller filed in that case were dismissed on May 21, 1986, (Exhibit F, Order), but by then, asbestos-related personal injury claims were filling court dockets. In the Eastern District of Texas alone, more than 3,000 asbestos-

related personal injury claims had been filed by 1981. *See Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1354 (E.D. Tex. 1981), *reversed in part*, 681 F.2d 334 (5th Cir. 1982).

In the weeks before it began its hasty dissolution process, Payne & Keller was alleged to be liable for significant personal injury claims arising from toxic occupational exposures at a Houston refinery. In a bankruptcy proceeding filed by the Charter International Oil Company (“Charter”), Payne & Keller sought payment for services provided to Charter, which were secured by mechanic’s and materialmen’s liens against the refinery. *See In re Charter Co.*, 63 B.R. 568 (Bankr. M.D. Fla. 1986). Charter objected to the claim on the grounds that Payne & Keller had agreed to indemnify Charter for personal injury claims arising from the refinery work and that this indemnification obligation encompassed more than a thousand claims arising from occupational dioxin exposure. The bankruptcy court denied Charter’s objection, holding that the claims of the dioxin class had not been reduced to judgment and, as “unmatured” claims, could not be “offset” against Payne & Keller’s matured claim, unless Payne & Keller was insolvent. *Id.* at 571. No such allegation had been made. To the contrary, Payne & Keller asserted that it maintained insurance that would cover any indemnification obligation it owed to Charter. *Id.* at 570. The court ordered Charter to pay Payne & Keller’s bankruptcy claim.

Immediately after this decision was issued (on July 31, 1986), Payne & Keller began taking steps to dispose of its assets and dissolve. On September 29, 1986, Payne & Keller’s parent company executed a Specific Guaranty with Payne & Keller and the entity that purchased its assets, guaranteeing certain aspects of Payne & Keller’s performance under a purchase and sale agreement. (Exhibit G, Specific Guaranty). The sale was initially intended to close the next day, on September 30, 1986, but was delayed. In the interim, on October 1, 1986, Charter filed a proof

of claim on behalf of the dioxin plaintiffs in the bankruptcy proceeding. Only six days later, Payne & Keller sold its assets and began completing the rest of its dissolution-related paperwork:

- On October 7, 1986, Payne & Keller executed its purchase and sale agreement, selling substantially all of its assets.
- Payne & Keller retained liabilities including those arising from its operations. Payne & Keller agreed to indemnify and hold its Buyer harmless for a range of claims, including “[c]laims for injury to or death of any person or damage to property relating to the business, operations or assets of Sellers or Shareholder or any of them or any subcontractor or supplier, regardless of tier, or any of them whether related to the Assigned Contracts or the Purchased Assets or otherwise based on facts, omissions or events that occurred prior to Closing.” (Exhibit H, Purchase & Sale Agreement, ¶ 9(c).) Payne & Keller’s parent agreed to maintain \$6 million in insurance coverage for these claims for two years after closing and capped its overall liability to the Buyer to \$5 million in the aggregate. (Exhibit G, Specific Guaranty, ¶¶ 8, 9.)
- On October 7, 1986, Payne & Keller changed its name to Frentex Enterprises Company (“Frentex”). Frentex filed its amended articles of incorporation on October 20, 1986. (Exhibit I, Amended Articles of Incorporation.)
- On October 27, 1986, Frentex adopted its articles of dissolution. (Exhibit J, Articles of Dissolution.)
- On December 3, 1986, Frentex filed its articles of dissolution and certificate of dissolution representing that “[a]ll debts, obligations and liabilities of the corporation have been paid, discharged, or adequate provision has been made thereof.” (*Id.* at ¶ 5.) With thousands of potential dioxin claims pending, the limited parental guaranty was the only provision made for the payment of significant known current and decades of future liabilities.
- On January 16, 1987, the dioxin class claims in the Charter bankruptcy proceeding matured. The bankruptcy court entered an order approving settlement of the dioxin class claims against Charter. The court authorized an award of \$5.275 million to the 1,105 personal injury dioxin claimants, \$1 million to the State of Missouri, and \$5 million to the United States Environmental Protection Agency for their dioxin-related contamination claims. *See In re Charter Co.*, 81 B.R. 90, 91 (M.D. Fla. 1987).

Payne & Keller dissolved before the Charter dioxin claims matured and, contrary to the representations it made to the Secretary of State, failed to make adequate provision for the payment of either those claims or the variety of other occupational injury claims that it had faced—and reasonably expected that it would face for many decades in the future. Because the company

therefore dissolved as a result of (at the very least) constructive fraud, the termination of its corporate existence should be revoked, and pursuant to section 11.153 of TBOC, Payne & Keller should be permitted to maintain the insurance coverage claims pending in this litigation to allow it to address the decades of tort claims that it sought to avoid by way of its improper dissolution.

C. The Receiver's assertion of coverage claims is proper and consistent with the South Carolina receivership statute.

Travelers also argues that the receivership should be dissolved because the Court has exceeded its authority under South Carolina's receivership statute, section § 15-65-10(4). According to Travelers, the statute provides that a receiver can only be appointed for a foreign corporation "to the extent of their 'property within this state.'" (Mot. at 12.) However, the law does not limit a receiver's authority in this manner.

The South Carolina receivership statute provides in relevant part that "[a] receiver may be appointed by a judge of the circuit court . . . when a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the property within this State of foreign corporations." S.C. Code Ann. §15-65-10(4). The statute authorizes the receiver to dispose of the "property" of a foreign corporation within the state, but that is neither the extent of a receiver's authority or the most relevant aspect of a receiver's authority in a receivership like this one, which involves a corporation that "has been dissolved" and has disposed of its tangible assets. As this Court's order appointing the Receiver recognizes, the Receiver has the authority to assert the dissolved corporation's rights of action. Here, the Receiver has the authority to "administer all assets of Payne & Keller" and has a further obligation to "administer any insurance assets" including "any claims related to the actions or failure to act of Payne & Keller's insurance carriers." (Exhibit B.)

This Court's view of the scope of the Receiver's authority is not unique. The United States Supreme Court recognized in *Porter v. Sabin*, 149 U.S. 473 (1893), that "[t]he whole property of the corporation [is] within the jurisdiction of the court which appointed the receiver, ***including all its rights of action***, except so far as already lawfully disposed of under orders of that court, [and] remains in its custody, to be administered and distributed by it." *Id.* at 480 (emphasis added). Recognizing that assets subject to the Receiver's oversight include rights of action is particularly significant where, as here, those rights of action represent the full extent of the remaining corporate assets.

That the South Carolina receivership statute references "property within this state" is not a limitation on the Receiver's authority in this case, which does not involve any tangible property. Instead, the statutory reference is consistent with principles of comity, which deter a state court from reaching beyond a state's borders and asserting jurisdiction over such property located in another jurisdiction. These same principles of comity support a state court's authority to vest a statutory receiver with the authority to assert a dissolved corporation's rights of action. *See, e.g., Hirson v. United Stores Corp.*, 263 A.D. 646, 34 N.Y.S.2d 122 (App. Div. 1st Dept. 1942), *aff'd*, 43 N.E.2d 712 (N.Y. App. Ct. 1942) (holding that title to choses in action held by a receiver appointed in a dissolution proceeding pursuant to Delaware law would be afforded "full faith and credit"). That is the authority asserted by the Receiver here.

The case law cited by Travelers does not support a contrary view of the scope of the Receiver's authority under the South Carolina receivership statute. *Boynton v. Consolidated Indemnity & Insurance Co.*, 180 S.C. 279, 185 S.E. 731 (1936), (*see* Mot. at 12), addressed a plaintiff's efforts to enforce a money judgment entered against a dissolved foreign corporation against a bond posted with the superintendent of insurance by a different foreign corporation. The

Court held that the bond was not the property of the liable company and was not available to satisfy the judgment; the plaintiff had delayed in enforcing its judgment against the liable company's own bond, and during the delay the liable defendant became insolvent. The case does not address the issue that is relevant here: the Receiver's authority to assert Payne & Keller's rights of action.

The cases that Travelers cites for the proposition that an executory contract is located in the state of the obligor (here, Travelers), are no more persuasive, as they address the attachment and garnishment of assets and the basis of a court's personal jurisdiction. (*See* Mot. at 13.) None of those issues are relevant here. As is shown below, the propriety of the Court's personal jurisdiction over Travelers is not in doubt. And the Receiver does not seek to attach or garnish any res held by Travelers.

The Receiver's assertion of rights of action on behalf of Payne & Keller is appropriate and consistent with the Court's authority to appoint a receiver under the South Carolina receivership statute.

III. TRAVELERS' REMAINING ARGUMENTS FAIL AS A MATTER OF LAW

Travelers' other arguments for dismissal fare no better. Travelers' personal jurisdiction argument is belied by the evidence available to the Receiver at this early stage in the case showing that Travelers wrote coverage for Payne & Keller in South Carolina. Travelers' other arguments already have been addressed by this Court and should once again be rejected here.

A. Travelers is subject to specific personal jurisdiction in this Court.

Travelers seeks dismissal of Payne & Keller's third-party claims under Rule 12(b)(2), SCRCF, on the theory that this Court lacks specific personal jurisdiction over Travelers.⁶ (Mot. at

⁶ The Second Amended Complaint does not assert that Travelers is "at home" in South Carolina or otherwise subject to general jurisdiction.

19–24.) This Court has repeatedly held—consistent with the South Carolina long-arm statute, S.C. Code Ann. § 36-2-803⁷—that insurers who enter insurance contracts covering risks within the state of South Carolina are subject to specific personal jurisdiction in South Carolina. *See, e.g.*, Exhibits K and L, Orders Denying Zurich’s Motion to Dismiss, *Pavlish v. Covil Corp.*, No. 2019-CP-42-03968 (S.C. Com. Pl. June 26, 2020), and USF&G’s Motion to Dismiss, *Protopapas v. Wall Templeton*, No. 2019-CP-40-02285 (S.C. Com. Pl. Sept. 15, 2020) (holding it is undisputed that the relevant insurers contracted with Covil to insure a risk located within South Carolina at the time of contracting), respectively.

Even at this early stage of discovery, the Receiver has compiled evidence that makes this showing. For example:

- Certain of the insurance policies that Travelers issued to Payne & Keller are described by Travelers itself as “National Accounts” that cover the entire United States of America, including South Carolina. *See* Exhibit M, Excerpt of Aetna (Travelers) Comprehensive Liability Policy for the period March 1, 1979 to March 1, 1980 at 2 (declarations page stamped “NATIONAL ACCOUNT” and “NATIONAL ACCOUNT OFFICE”); *id.* at 6 (“policy territory” defined as “the United States of America, its territories or possessions, or Canada”). *See also* Exhibit N, Excerpt of Aetna (Travelers) Comprehensive Liability Policy for the period April 1, 1983 to April 1, 1986 (same).
- Additionally, as to Payne & Keller’s work in South Carolina, the Receiver has uncovered evidence that Payne & Keller was “awarded new jobs in South Carolina” and sought to “add South Carolina . . . to P&K’s WC and CL policies” in 1973. *See* Exhibit O, Sept. 29, 1973 (asking “what can we do about covering South Carolina”).
- Payne & Keller applied for and obtained a Certificate of Authority to transact business in South Carolina. *See* Exhibit P, July 17, 1967 (Application for Amended Certificate of Authority).

⁷ The South Carolina long-arm statute expressly extends jurisdiction to any entity that “contract[ed] to insure [a] person, property, or risk located within” South Carolina. S.C. Code Ann. § 36-2-803 (2016).

The Receiver expects that discovery will show additional links between the policies issued by Travelers and risks in South Carolina, but the evidence available to the Receiver at this time already supports a finding that specific personal jurisdiction exists.

Likely recognizing this, Travelers retreats to a “fairness” argument, i.e., that it could not have expected to be haled into court in South Carolina. (Mot. at 20–22.) In the context of a motion to dismiss, however, that is not dispositive. In *Leggett v. Smith*, 386 S.C. 63, 686 S.E.2d 699 (Ct. App. 2009), the court affirmed a lower court ruling that South Carolina had personal jurisdiction over an insurer, recognizing that “[o]ther jurisdictions have . . . held a territory-of coverage provision that includes the forum state, coupled with the insured event occurring in the forum state, is sufficient to establish minimum contacts.” *Id.* at 69 (holding that an insurer was subject to specific jurisdiction); *see also Parker v. Fireman’s Ins. Co. of Newark, N.J.*, 297 S.C. 166, 375 S.E.2d 325 (Ct. App. 1988) (holding that personal jurisdiction is proper where an insurer knew an insured would drive his vehicle in South Carolina).

Travelers asserts that “[t]he Court must . . . find the exercise of jurisdiction is reasonable or fair.” (Mot. At 19 (quoting *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 432, 665 S.E.2d 660, 665 (Ct. App. 2008)).) Based on the facts, the allegations asserted in the Second Amended Complaint, and the record before this Court, the exercise of jurisdiction over Travelers is both reasonable and fair. Travelers should “reasonably anticipate being haled into [this] court” because it intentionally wrote insurance coverage designed to cover risks within South Carolina. *Coggeshall v. Reprod. Endocrine Assoc.*, 376 S.C. 12, 22, 655 S.E.2d 476, 478 (2007) (Toal, C.J., concurring). Travelers issued policies that cover Payne & Keller risks in South Carolina, and Travelers was aware that Payne & Keller was awarded contracts to perform work in South Carolina. Travelers clearly “directed its activities to . . . resident[s] of this State,” and the Third-

Party Plaintiffs' causes of action "arise[] out of or relate[] to those activities." (Mot. at 20 (quoting *S. Plastics Co. v. S. Com. Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992)).)

In sum, considering the pleadings in the light most favorable to the Receiver and accepting all facts as true, Travelers' 12(b)(2) motion should be denied because the Receiver alleges facts sufficient to establish his claim that this Court has specific personal jurisdiction over Travelers.

B. Travelers' Arguments Under Rules 12(b)(8) and 14(a) Should Be Rejected (Again).

1. This Court Has Already Rejected These Same Arguments When Raised By Other Third-Party Defendants in Receivership Cases.

Travelers' arguments under Rules 12(b)(8) and 14(a), SCRCPP, have already been rejected by this Court when raised by other Third-Party Defendants.

Before Travelers appeared in this case, several Third-Party Defendants filed Motions to Dismiss or Strike the Amended Third-Party Complaint or, in the Alternative, to Sever and/or Stay the Amended Third-Party Complaint.⁸ These Third-Party Defendants sought similar relief under Rules 12(b)(6), 12(b)(8), 12(e), 14(a), 12(e), and 20, SCRCPP. At a June 20, 2022 hearing, this Court denied the Third-Party Defendants' Rule 12(b)(1), 12(b)(2), and 14(a) motions. *See* Exhibit Q, June 20, 2022 Hr'g Tr. at 70:17–19. Regarding the Arrowpoint Group's 12(b)(6) motion, the Arrowpoint Group declined to argue the motion, noting that the Court could rule on the papers. *See id.* at 10:18–21.

⁸ Third-Party Defendants Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company ("Berkshire"); Birmingham Fire Insurance Company ("Birmingham"); Certain Underwriters at Lloyd's of London and various London Market Companies ("Lloyd's"); Continental Insurance Company (individually and as successor in interest to Harbor Insurance Company) ("Continental" and "Continental for Harbor"); Lexington Insurance Company ("Lexington"); Medmarc Casualty Insurance Company, individually and as successor in interest to Dependable Insurance Company, Inc. ("Medmarc"); and National Union Fire Insurance Company ("National Union") filed motions to dismiss.

Since that hearing, the Court has fully denied the eight motions on the papers:

Chief Justice Toal has ruled that Continental's Motion to Dismiss/Strike and/or Sever and/or Stay or for a more Definitive Statement, Continental, Individually and as Successor in Interest to Harbor Ins. Co's, Motion to Dismiss/Strike and/or Sever and/or Stay, Birmingham Fire Insurance Company's Motion to Dismiss and/or Strike or in the Alternative to Sever and/or Stay, Lexington Insurance Company's Motion to Dismiss and/or Strike or in the Alternative to Sever and/or Stay, Certain Underwriters at Lloyds Motion to Dismiss and/or Strike or in the Alternative to Sever and/or Stay, National Union Fire Insurance Company's Motion to Dismiss and/or Strike or in the Alternative to Sever and/or Stay, Berkshire Hathaway's Motion to Dismiss and/or Strike or in the Alternative to Sever and/or Stay, and MedMarc Casualty Company, Individually and as Successor to Dependable Insurance Company's Motion to Dismiss and/or Strike or [in] the Alternative to Sever and/or Stay are **denied**.

Exhibit R, July 14, 2022 e-mail from Judicial Law Clerk M. Weeks.⁹

Six weeks after this ruling, Travelers filed the instant motions on August 24, 2022, raising essentially the same arguments made by the other Third-Party Defendants that this Court already has rejected. There is no need for this Court to revisit the rulings it already has made. For the same reasons that justified denying the prior motions, Travelers' arguments under Rules 12(b)(8) and 14(a) should be denied.

⁹ Payne & Keller would also like to update this Court on the status of the case styled *Protopapas, Receiver for Payne & Keller Company v. Zurich American Insurance Company, et al.*, C/A 3:21-4086-DCC (D.S.C.). Magistrate Judge Paige Gossett held argument on Payne & Keller's motion to remand on October 4, 2022. In her October 20, 2022 Report and Recommendation, the judge found that this case must be remanded because "at least one properly joined and served Defendant is apparently bound by a 'service of suit' or forum selection clause." ECF No. 167 at 14.

On November 3, 2022, Plaintiff filed its partial objections to the Magistrate's Report and Recommendation. ECF No. 169. Plaintiff argued, in part, that *this Court* retains exclusive jurisdiction over all of Payne & Keller's assets, including Plaintiff's claims. *Id.* Plaintiff further argued that, contrary to the Magistrate Judge's recommendation, the Barton doctrine, and in particular the Supreme Court's articulation of that doctrine in *Porter v. Sabin*, 149 U.S. 473 (1893), is binding in this case and precludes the exercise of federal court jurisdiction, independently requiring remand. Travelers also filed partial objections, which were joined by Zurich American Insurance Company, Medmarc, and US Risk, LLC. *See* ECF Nos. 168, 170, 171.

2. Travelers' Rule 12(b)(8) Motion should be denied.¹⁰

Travelers argues that the claims against it in this case should be dismissed under Rule 12(b)(8) due to the pendency of a federal case captioned *Protopapas as Receiver for Payne & Keller Co. v. American International Group*, No. 3:21-cv-04086-DCC; *see* Rule 12(b)(8), SCRCP. However, Rule 12(b)(8) does not apply when two actions are pending in separate jurisdictions, or when the two cases do not have precisely or substantially the same claims between the same parties. As this Court has ruled previously, regarding the same *Protopapas* matter above, Travelers' Rule 12(b)(8) Motion should be denied.

Overlapping jurisdiction, sometimes in virtually identical cases, has long been the accepted practice: "Despite what may appear to result in a duplication of judicial resources, 'the rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *McLaughlin v. United Va. Bank*, 955 F.2d 930, 934 (4th Cir. 1992) (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). Rule 12(b)(8) provides for dismissal if "another action is pending between the same parties for the same claim." Rule 12(b)(8), SCRCP. The Rule must be interpreted "narrowly such that the claim must be *precisely or substantially the same* in both proceedings in order for the drastic remedy of dismissal to be appropriate." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 106, 674 S.E.2d 524, 532 (Ct. App. 2009) (emphasis added). Indeed, "an action may be pleaded in abatement of a second suit only when between the same parties and in the same jurisdiction and with the same object." *Poston v. Home Ins. Co. of N.Y.*, 191 S.C. 314, 317–18, 4 S.E.2d 261, 262 (1939). Also, a Rule 12(b)(8) motion cannot prevail if, as here, one case is in state court and another in federal

¹⁰ Although the Court need not revisit its previous rulings, for the sake of completeness, Payne & Keller has included substantive responses to Travelers' motions under Rules 12(b)(8) and 14(a).

court. *Logan v. Atlanta & C. Air Line R. Co.*, 82 S.C. 518, 520–21, 64 S.E. 515, 516 (1909); *see also Hauge v. Curran*, No. 2011-UP-264, 2011 WL 11734637, at *1 (S.C. Ct. App. June 7, 2011).

This Court has already denied multiple insurers’ substantially similar 12(b)(8) motions in its July Order. *See* Exhibit R, July 14, 2022 email from M. Weeks (denying 12(b)(8) motion that argued the *Protopapas* action at issue here was the same as the current state court action). There is no reason to reach a different conclusion here. As previously held, the federal case is not “identical” to this case because (1) the two cases do not involve the same parties, and (2) only the *Childers* case involves claims against Rexel, SKRLA, and Compass Risk. Also, of course, the *Childers* case is in state court, while the *Protopapas* case is currently in federal court.

The South Carolina Supreme Court has held that there is no bar to a state court action, even though an action is already pending in federal court for the same cause of action, when the suits are in different jurisdictions. *Logan*, 82 S.C. at 520–21, 64 S.E. at 516. The *Logan* Court found that actions pending “in jurisdictions which are foreign to each other . . . will not abate an action pending in the other between the same parties for the same cause.” *Id.* at 516. Relevant here, “the state courts are foreign to the federal courts sitting within the same state.” *Id.* For this reason, Travelers’ Rule 12(b)(8) motion should be denied because the *Protopapas* case is treated as if it is pending in a foreign jurisdiction.

Travelers’ 12(b)(8) motion should also be denied because South Carolina courts have held that “an action may be pleaded in abatement of a second suit only when between the same parties and in the same jurisdiction and with the same object.” *Poston*, 191 S.C. at 317–18, 4 S.E.2d at 262. Here, the parties are not in the same jurisdiction, and the claims are not “precisely or substantially the same in both proceedings.” *Capital City*, 382 S.C. at 106, 674 S.E.2d at 532.

Further, dismissal under Rule 12(b)(8) is only appropriate when the action involves “the same facts and circumstances” as the other actions. *Corbett v. City of Myrtle Beach*, 336 S.C. 601, 610, 521 S.E.2d 276, 281 (Ct. App. 1999). While the two cases tangentially relate to one another, the two cases are different because the case pending in federal court is a traditional insurance coverage action between a policyholder and its insurers. The state court action, however, also involves a dispute between alleged policyholders whereby the Receiver seeks a declaratory judgment delineating Rexel’s rights, if any, under Payne & Keller’s historical insurance policies. Travelers’ Rule 12(b)(8) motion should thus be denied because the facts and circumstances in the two cases differ.¹¹

3. Travelers’ Rule 14(a) motion should be denied.

Rule 14(a), SCRCP, provides:

At any time after commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff’s claim against him.

As Travelers acknowledges, a third-party complaint is appropriate under Rule 14 so long as the third-party plaintiff has “a substantive claim against the third-party defendant founded upon derivative liability” and the outcome of the principal claim “impact[s] the third-party defendant’s liability.” *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994). Whether to grant a motion to strike a third-party claim is within “the sound discretion of the trial court.” *Beach v. Hudson*, 298 S.C. 424, 426, 380 S.E.2d 869, 871 (Ct. App. 1989). A court may properly consider “the effect the additional parties and claims will have on the

¹¹ Travelers relies on *State ex rel. Wilson v. Condon*, 410 S.C. 331, 764 S.E.2d 247 (2014), but there the Supreme Court did not dismiss the state case. *Id.* at 333, 764 S.E.2d at 247. Instead, it “accept[ed] this case in [its] original jurisdiction for the limited purpose of maintaining the status quo.” *Id.*

adjudication of the main action—in particular, whether continued joinder will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way.” *Id.* (citation omitted).

Travelers argues the Second Amended Complaint’s Counts I, II, and XI against Travelers must be dismissed because they are not derivatively based on Plaintiff Childers’s tort claims. (Mot. at 24–25.) This argument fails for several reasons.

First, the Receiver properly filed claims against Travelers because Travelers may be liable to Payne & Keller for all or part of Plaintiff Childers’s asbestos claim. “Impleader of the insurer . . . is the proper procedural device for an insured to state its claim against the insurer for the amounts which the insured is or may be liable to the plaintiff.” *Impex Agric. Commodities Div. Impex Overseas Corp. v. Parness Trucking Corp.*, 576 F. Supp. 587, 588 n.1 (D.N.J. 1983) (citing FED. R. CIV. P. 14(a)).¹² Indeed:

It is common practice for an insured party, who is a defendant in a case brought by an injured party, to implead her insurer . . . because it makes sense to determine within the same proceeding, not only liability and damages, but also the legal rights and obligations of involved parties with respect to the payment of those damages. Trying this latter issue separately in a different case or court system imposes an unnecessary burden on parties and on the courts.

O’Bannon v. Friedman’s, Inc., 437 F. Supp. 2d 490, 493 (D. Md. 2006).

Second, the Receiver has substantive claims against Travelers founded upon derivative liability; that is, Childers’s primary claim against Payne & Keller (and other claims like it) impacts Travelers’ obligations to the Receiver, who acts for Payne & Keller. *See First Gen. Servs. of Charleston*, 314 S.C. at 442, 445 S.E.2d at 447. It is therefore squarely within the Court’s

¹² Rule 14 of the Federal Rules of Civil Procedure is similar to Rule 14 of the South Carolina Rules of Civil Procedure. *See* Rule 14 note (providing Rule 14(a) is “substantially the same as the Federal Rule”).

discretion to allow the third-party complaint to move forward. *See Mahaffey v. First Coast Intermodal Serv., Inc.*, No. CV 00-68-M2, 2001 WL 37126679, at *3 (M.D. La. May 29, 2001) (finding that the insured's third-party "claims against [the insurer] are derivative of the claims asserted in the main [underlying tort] action and therefore [the insurer was] appropriately a third-party defendant"); *Hitachi Cap. Am. Corp. v. Nussbaum Sales Corp.*, No. CIV.A.09-731(SDW), 2010 WL 1379804, at *7 (D.N.J. Mar. 30, 2010) (permitting a defendant to implead primary insurers, emphasizing that "Rule 14 is intended to reduce multiplicity of litigation and therefore is entitled to liberal construction"); *Fid. State Bank of Garden City v. McNeilus Truck & Mfg., Inc.*, No. 96-1253-JTM, 1997 WL 446422, at *5 (D. Kan. July 8, 1997) (permitting impleading liability insurer in a wrongful death case); *Baker v. Moors*, 51 F.R.D. 507, 510 (W.D. Ky. 1971).

For these reasons, Travelers' Rule 14(a) motion should be denied.

IV. CONCLUSION

Based on the foregoing, the Receiver respectfully requests that this Court deny Travelers' motion to dismiss/dissolve in its entirety.

Dated: January 13, 2023

Respectfully submitted,

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Attorney for the Receiver of Payne & Keller

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LENORA CHILDERS, Individually and as
Personal Representative of the Estate of
LEWIS C. CHILDERS,

Plaintiff,

Case No. 2021-CP-40-03484

v.

Davis Mechanical Contractors, Inc., et al.,

Defendants.

Flame Refractories, Inc.; United Construction
Co. of Rome, Inc.; Wind Up, Ltd.,
Individually and as Successor-in-Interest to
Pipe & Boiler Insulation, Inc. f/k/a Carolina
Industrial Insulating Co.; and Payne & Keller
Company, By and Through Their Duly
Appointed Receiver, Peter D. Protopapas,

Third-Party Plaintiffs,

v.

Zurich American Insurance Company, et al.,

Third-Party Defendants.

**ORDER DENYING THIRD-PARTY
DEFENDANT TRAVELERS CASUALTY
AND SURETY COMPANY'S MOTION
TO DISMISS THIRD-PARTY CLAIMS
AND DISSOLVE THE PAYNE &
KELLER RECEIVERSHIP**

This matter comes before the Court on Third-Party Defendant Travelers Casualty and Surety Company's ("Travelers") August 24, 2022 Motion to Dismiss Third-Party Claims and Dissolve the Payne & Keller Receivership.¹ Payne & Keller Company, by and through its duly

¹ On September 19, 2022, Defendants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Certain as yet

appointed receiver, Peter D. Protopapas (“the Receiver”), filed a Response in Opposition to the Motion on January 13, 2023, and Travelers filed a Reply in Support of the Motion on January 25, 2023.² The Court heard oral arguments on the Motion during a January 27, 2023 hearing. After careful consideration of the parties’ filings and arguments, and for the reasons stated below, Travelers’ Motion is **DENIED**.

BACKGROUND

On August 27, 2021, this Court entered an Order appointing Peter D. Protopapas as the Receiver for Defendant Payne & Keller Company on Plaintiff’s Motion to Appoint a Receiver. The Court’s Order vested the Receiver “with the power and authority [to] fully administer all assets of Payne & Keller” and, among other things, specifically instructed “the Receiver to investigate the existence of all insurance coverages potentially available to [Payne & Keller].” Thereafter, the Receiver discovered that Payne & Keller Company had conducted business under various corporate names before its dissolution. The Court accordingly granted the Receiver’s Motion to Clarify Order Appointing a Receiver for Payne & Keller Company on September 30, 2021, and entered an Order providing that “all of the Receiver’s duties and protections [in the August 7, 2021 Appointment Order] . . . extend[] to all of the P&K Entities and their predecessors, successors, affiliates, parents, assigns, and subsidiaries that may be discovered in the future.”

Pursuant to that authority, the Receiver initiated an insurance coverage action for Payne & Keller by way of a third-party action against multiple carriers in this case on February 23, 2022. Travelers appeared and filed a motion to dismiss the Receiver’s third-party claims and dissolve the Payne & Keller Receivership on August 24, 2022. After the Receiver served discovery requests

Unnamed Underwriters at Lloyd’s, London and Certain as yet Unnamed London Market Companies (the “Joining Defendants”) filed a Joinder to Travelers’ Motion.

² On January 26, 2023, the Joining Defendants filed a Joinder to Travelers’ Reply.

on Travelers, on November 16, 2022, Travelers moved for a protective order and again moved the Court for an order dissolving the Payne & Keller Receivership and dismissing Travelers from this case.

ANALYSIS

A. Standing

Travelers argues that the Receiver's third-party claims should be dismissed because the Receiver lacks standing to bring them. Specifically, Travelers first contends that under section 15-65-10 of the South Carolina Code, the Receiver only has authority over Payne & Keller property located within the State of South Carolina, and (according to Travelers) Payne & Keller's insurance policies are not property within this State. *See generally* § 15-65-10 ("A receiver may be appointed by a judge of the circuit court, either in or out of court . . . (4) When a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the property within this State of foreign corporations . . ."). Even assuming Travelers' interpretation of section 15-65-10 is correct, the Court finds the Receiver has alleged and presented sufficient evidence to demonstrate that Travelers issued insurance policies insuring Payne & Keller risks nationwide, including within South Carolina. Accordingly, the Receiver was properly appointed under section 15-65-10 and has standing to assert the third-party claims raised in this action. *See* S.C. Code Ann. § 38-61-10 ("All contracts of insurance on property, lives, or interests in this State are considered to be made in the State . . . and are subject to the laws of this State."); *Sangamo Weston v. Nat'l Sur. Corp.*, 307 S.C. 143, 149, 414 S.E.2d 127, 130 (1992) ("[I]t is immaterial where the contract was entered into. Further there is no requirement that the policyholders or insurers be citizens of South Carolina. What is solely relevant is where the property, lives, or interests insured are located.").

Travelers cites *Howard v. Allen*, 254 S.C. 455, 176 S.E.2d 127 (1970) for the proposition that insurance policies are not “property.” This case does not support Travelers argument. In *Howard v. Allen*, a personal injury plaintiff sought to attach, as a debt, the defense and indemnity obligations of an insurance policy covering the defendant tortfeasor. *Howard* does not speak to whether the Travelers insurance policies protective of Payne & Keller are property within South Carolina for the purposes of the receivership statute.

Travelers also argues that the Receiver lacks standing to bring the third-party claims on behalf of Payne & Keller because, as a Texas corporation that dissolved in 1986, Payne & Keller is no longer able to sue or be sued under Texas law. Travelers relies on Section 11.359(a) of the Texas Business Organizations Code, which provides that a “claim by or against a terminated filing entity is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity.” However, that statute further provides, “Notwithstanding Subsections (a) and (b), the extinguishment of an existing claim with respect to a terminated filing entity as provided by this section is nullified if . . . the filing entity’s termination is revoked with retroactive effect under Section 11.153 . . .” § 11.359(c). And section 11.153 of the Texas Business Organizations Code allows a court to “order the revocation of termination of an entity’s existence that was terminated as a result of actual or constructive fraud.” § 11.153(a); *see also* § 11.153(b) (“If the termination of an entity’s existence is revoked under Subsection (a): (1) the revocation relates back to the effective date of the termination and takes effect as of that date; and (2) the entity’s status as an entity continues in effect as if the termination of the entity’s existence had never occurred.”).

Here, the Receiver has presented sufficient evidence at the pleading stage to support a claim that Payne and Keller’s 1986 dissolution was the result of, at least, constructive fraud. *See Resp.*

in Opp’n, 8–13. Specifically, the Receiver asserts that Payne & Keller “terminated its corporate existence to avoid liability for both current and future toxic tort, silica, and asbestos personal liability claims, and Payne & Keller was keenly aware of those claims when the decision to dissolve Payne & Keller was made.” *Id.* at 9. In support of this contention, the Receiver submitted evidence that, prior to its dissolution: Payne & Keller was exposed to significant potential liability resulting from its construction work at a time when the use of asbestos-containing products was prevalent, its insurers began to exclude coverage for asbestos-related claims, and it contracted to indemnify companies with which it did business for personal injury claims arising out of its work. *Id.* at 9–10. Further evidence indicates that Payne & Keller began the dissolution process in response to demands for indemnification by an oil company in bankruptcy concerning over a thousand personal injury claims arising out of exposure to dioxin, and Payne and Keller dissolved without taking the steps necessary to ensure those claims, and others it reasonably expected to face absent dissolution, would be paid. *Id.* at 11–12.

Travelers has not disputed the Receiver’s evidence or submitted any countervailing evidence regarding the circumstances surrounding its dissolution. Accordingly, this Court finds the Receiver has made a prima facie showing that Payne & Keller “was terminated as a result of actual or constructive fraud,” § 11.153(a), and dismissal on the basis of the termination is unwarranted. *See Latham v. Burgher*, 320 S.W.3d 602, 610 (Tex. App. 2010) (ruling a company’s dissolution, conducted shortly after receiving notice of an intended lawsuit against it and without setting aside funds to address the liability of the lawsuit, could support a finding of fraud). This Court does not, however, find that fraud has been conclusively proven, nor does the Court order the revocation of Payne & Keller’s termination at this time. Such a determination will be made after the parties have had the opportunity to explore this issue through the discovery process.

Relying on *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126 (Tex. 2010), Travelers argues that applying section 11.153 to Payne & Keller’s dissolution would violate Article I, Section 16 of the Texas Constitution. However, as the *Robinson* court explained, “No bright-line test for unconstitutional retroactivity is possible.” *Id.* at 145. Instead, the court outlined a three-factor analysis that must be conducted. *Id.* Moreover, Travelers’ retroactivity argument as to section 11.153 undercuts its reliance on section 11.359, which was also enacted well after Payne & Keller’s dissolution.³ The Court declines Travelers’ invitation to retroactively apply section 11.359 in Travelers’ favor to dismiss the Receiver’s third-party claims while simultaneously holding the retroactive application of section 11.153 would violate the Texas Constitution, especially given that the Texas legislature added subsection (b) to section 11.153 in response to the Fifth Circuit’s determination that revoking an entity’s dissolution would not revive claims extinguished by section 11.359. *See Boudreaux v. C J R Framing*, 744 F. App’x 208, 211 (5th Cir. 2018).

B. Personal Jurisdiction

Travelers argues that the Receiver’s claims should also be dismissed under Rule 12(b)(2), SCRCP, because this Court lacks personal jurisdiction over Travelers in this case. The Court disagrees and finds the Receiver has made a prima facie showing that personal jurisdiction over Travelers exists. *See Brown v. Inv. Mgmt. & Research*, 323 S.C. 395, 399, 475 S.E.2d 754, 756 (1996) (stating when a defendant seeks dismissal for lack of personal jurisdiction under Rule 12(b)(2), “the plaintiff has the burden of showing jurisdiction is properly asserted; however, the law is well-settled that at the pre-trial stage only a prima facie showing is required”). In addition

³ The Court further notes that a predecessor to the Texas Business Organizations Code—the Texas Business Corporation Act—contained a fraudulent termination provision similar to section 11.153.

to relevant allegations in the Second Amended Complaint, the Receiver has also presented evidence that Travelers contracted with Payne & Keller to insure risks in all states, including South Carolina, and that Payne & Keller was registered to do business in South Carolina and had performed work in South Carolina when Travelers issued its policies. *See* Resp. in Opp’n, at 15–17 & Ex. M–O. Travelers’ conduct in issuing such policies to Payne & Keller supports a finding of personal jurisdiction and precludes dismissal on this basis. *See* S.C. Code Ann. § 36-2-803(A) (“A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person’s . . . contracting to insure any person, property, or risk located within this State at the time of contracting”); *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (“It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State.”); *Ross v. Am. Income Life Ins. Co.*, 232 S.C. 433, 438-39, 102 S.E.2d 743, 745 (1958) (holding a single insurance policy mailed to an individual in this state was a sufficient contact to warrant the exercise of jurisdiction without violating Due Process).

C. Rule 14

Rule 14(a), SCRCP, allows a defendant to bring third-party claims against “a person not a party to the action who is or may be liable to him for all or part of the plaintiff’s claim against him.” Here, the Receiver has asserted claims against Travelers, which he alleges issued insurance policies to Payne & Keller that may provide coverage for, and therefore trigger indemnity obligations in relation to, the claims brought by the plaintiff in this action. Accordingly, the third-party claims are appropriate under Rule 14 and Travelers’ arguments for dismissal on this basis are rejected.

D. Rule 12(b)(8)

Finally, Travelers argues that the Receiver's third-party claims should be dismissed under Rule 12(b)(8), SCRCP, because they are duplicative of claims brought against it in *Protopapas as Receiver for Payne & Keller Co. v. Am. Int'l Grp. et al.*, No. 3:21-cv-04086-JMC (D.S.C.). However, as the courts of this state have long observed, "The general rule is that an action may be pleaded in abatement of a second suit only when between the same parties and *in the same jurisdiction* and with the same object." *Poston v. Home Ins. Co. of N.Y.*, 191 S.C. 314, 317–18, 4 S.E.2d 261, 262 (1939) (emphasis added). Because no separate action is pending between the Receiver and Travelers for the same claims in South Carolina state court, Rule 12(b)(8) does not provide a basis for dismissing the Receiver's third-party claims here. *See Hill v. Hill*, 51 S.C. 134, 137, 28 S.E. 309, 310 (1897) ("[I]t is a well established doctrine that the pendency of another suit in a foreign jurisdiction cannot be pleaded in the domestic forum."); *see, e.g., Hauge v. Curran*, No. 2011-UP-264, 2011 S.C. App. Unpub. LEXIS 300, at *4 (Ct. App. June 7, 2011) (reversing the trial court's dismissal under Rule 12(b)(8) because the two similar actions were in different jurisdictions).

CONCLUSION

Based on the foregoing, as well as the arguments presented by the Receiver in his filings and at the January 27 hearing, **IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT** Travelers' Motion to Dismiss Third-Party Claims and Dissolve the Payne & Keller Receivership is hereby **DENIED**.⁴ Travelers' November 16, 2022 Motion for Protective Order and to Dissolve Receivership, which relies solely on the standing arguments rejected above, is also **DENIED**.

⁴ The Joining Defendants' motion is also denied.

IT IS SO ORDERED.

[JUDGE'S E-SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

Case Caption: Lenora Childers , plaintiff, et al vs Davis Mechanical Contractors ,
defendant, et al
Case Number: 2021CP4003484
Type: Order/Other

So Ordered

Jean H. Toal

Electronically signed on 2023-03-30 14:34:37 page 10 of 10

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
LENORA CHILDERS , Individually and as	)	C/A NO. 2021-CP-40-03484
Personal Representatives of the Estate of	)	
LEWIS C. CHILDERS ,	)	<i>In Re:</i>
	)	Asbestos Personal Injury Litigation
Plaintiff,	)	Coordinated Docket
	)	
v.	)	
	)	
DAVIS MECHANICAL	)	
CONTRACTORS, INC. , et al.	)	
	)	
Defendants.	)	

**PLAINTIFFS' MOTION TO REVOKE THE TERMINATION OF PAYNE & KELLER
COMPANY**

Plaintiffs in the above captioned action move this Court to revoke the termination of Payne & Keller Company ("Payne & Keller") pursuant to Section 11.153 of the Texas Business Organizations Code ("TBOC").

BACKGROUND

On August 27, 2021, this Court entered an order appointing Peter D. Protopapas ("Receiver") over this dissolved Texas Corporation. The Receiver has conducted substantial research regarding Payne & Keller, including the reasons for Payne & Keller's purported dissolution and the underlying reasons for that dissolution. Much of that history is set forth in the Receivers' Response to Third Party Defendant Travelers Casualty & Surety Company's Motion to Dismiss Third Party Claims and Dissolve the Payne & Keller Receivership filed January 13, 2023. Large portions of those facts and law are reiterated here in whole or in part.

After operating for decades building and maintaining major petrochemical and heavy industrial facilities, Payne & Keller abruptly dissolved just as a flood of asbestos-related

personal injury claims were being filed (including in Texas) and immediately after the company learned it could face significant toxic tort liability as a creditor in a pending bankruptcy proceeding. Despite the existence of significant historic insurance to address these liabilities, there is evidence that Payne & Keller dissolved with an intent to avoid (or, at the very least, ignore) these liabilities in direct violation of the statutory duties it owed creditors to make adequate provision for these liabilities.

For example, in 1981, Payne & Keller worked on an insulation replacement project for Archer Daniels Midland (“Archer Daniels”). Archer Daniels initially awarded this project to another firm. After its workers went on strike, Archer Daniels cancelled that initial contract and assigned the remainder of the work to Payne & Keller. (Exhibit 1), Construction: Labor Report, Vol. 28, No. 1391.). Payne & Keller also worked on valve replacements at a Citgo Petroleum Corporation facility in Westlake/Lake Charles, Louisiana, *see Seeney v. Citgo Petroleum Corp.*, 848 F.2d 664, 666 (5th Cir. 1988), which has since been the subject of asbestos litigation. *See Bourque v. Anco Insulations, Inc.*, 25 So. 3d 1008 (La. App. 3 Cir. 2009).

By 1983, some of Payne & Keller’s excess-level insurance policies expressly excluded coverage for asbestos-related claims, and, in the years before its dissolution, Payne & Keller agreed, in its service contracts, to indemnify companies from financial responsibility for any property damage or personal injury claims arising from the work completed by Payne & Keller employees. *See, e.g., In re Charter Co.*, 63 B.R. 568, 570 (Bankr. M.D. Fla. 1986).

During the 1980s, Payne & Keller defended itself against a variety of toxic tort claims arising from occupational exposures. In 1983, the Louisiana Court of Appeals affirmed that Payne & Keller and its insurer Aetna Surety & Casualty Company (now a Travelers company, the movant here) were liable for a workers’ compensation claim brought by a former Payne & Keller painter

and sandblaster who was permanently disabled by silicosis. *See Thornell v. Payne & Keller, Inc.*, 442 So.2d 536 (La. App. 1st Cir. 1983), *cert. denied*, 445 So. 2d 1231 (La. 1984). In 1986, Payne & Keller was also a defendant in a Texas asbestos case filed by Baron & Budd. (Exhibit 2), *Hanagriff v. Brown & Root Inc.*, cover sheet). The claims against Payne & Keller filed in that case were dismissed on May 21, 1986, (Exhibit 3), Order), but by then, asbestos-related personal injury claims were filling court dockets. In the Eastern District of Texas alone, more than 3,000 asbestos-related personal injury claims had been filed by 1981. *See Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1354 (E.D. Tex. 1981), *reversed in part*, 681 F.2d 334 (5th Cir. 1982).

In the weeks before it began its hasty dissolution process, Payne & Keller was alleged to be liable for significant personal injury claims arising from toxic occupational exposures at a Houston refinery. In a bankruptcy proceeding filed by the Charter International Oil Company (“Charter”), Payne & Keller sought payment for services provided to Charter, which were secured by mechanic’s and materialmen’s liens against the refinery. *See In re Charter Co.*, 63 B.R. 568 (Bankr. M.D. Fla. 1986). Charter objected to the claim on the grounds that Payne & Keller had agreed to indemnify Charter for personal injury claims arising from the refinery work and that this indemnification obligation encompassed more than a thousand claims arising from occupational dioxin exposure. The bankruptcy court denied Charter’s objection, holding that the claims of the dioxin class had not been reduced to judgment and, as “unmatured” claims, could not be “offset” against Payne & Keller’s matured claim, unless Payne & Keller was insolvent. *Id.* at 571. No such allegation had been made. To the contrary, Payne & Keller asserted that it maintained insurance that would cover any indemnification obligation

it owed to Charter. *Id.* at 570. The court ordered Charter to pay Payne & Keller's bankruptcy claim.

Immediately after this decision was issued (on July 31, 1986), Payne & Keller began taking steps to dispose of its assets and dissolve. On September 29, 1986, Payne & Keller's parent company executed a Specific Guaranty with Payne & Keller and the entity that purchased its assets, guaranteeing certain aspects of Payne & Keller's performance under a purchase and sale agreement. (Exhibit 4), Specific Guaranty). The sale was initially intended to close the next day, on September 30, 1986, but was delayed. In the interim, on October 1, 1986, Charter filed a proof of claim on behalf of the dioxin plaintiffs in the bankruptcy proceeding. Only six days later, Payne & Keller sold its assets and began completing the rest of its dissolution-related paperwork:

- On October 7, 1986, Payne & Keller executed its purchase and sale agreement, selling substantially all of its assets.
- Payne & Keller retained liabilities including those arising from its operations. Payne & Keller agreed to indemnify and hold its Buyer harmless for a range of claims, including "[c]laims for injury to or death of any person or damage to property relating to the business, operations or assets of Sellers or Shareholder or any of them or any subcontractor or supplier, regardless of tier, or any of them whether related to the Assigned Contracts or the Purchased Assets or otherwise based on facts, omissions or events that occurred prior to Closing." (Exhibit 5), Purchase & Sale Agreement, ¶ 9(c).) Payne & Keller's parent agreed to maintain \$6 million in insurance coverage for these claims for two years after closing and capped its overall liability to the Buyer to \$5 million in the aggregate. (Exhibit 4), Specific Guaranty, ¶¶ 8, 9.)
- On October 7, 1986, Payne & Keller changed its name to Frentex Enterprises Company ("Frentex"). Frentex filed its amended articles of incorporation on October 20, 1986. (Exhibit 6), Amended Articles of Incorporation.)
- On October 27, 1986, Frentex adopted its articles of dissolution. (Exhibit 7), Articles of Dissolution.)
- On December 3, 1986, Frentex filed its articles of dissolution and certificate of dissolution representing that "[a]ll debts, obligations and liabilities of the corporation have been paid, discharged, or adequate provision has been made thereof." (*Id.* at ¶ 5.) With thousands

of potential dioxin claims pending, the limited parental guaranty was the only provision made for the payment of significant known current and decades of future liabilities.

- On January 16, 1987, the dioxin class claims in the Charter bankruptcy proceeding matured. The bankruptcy court entered an order approving settlement of the dioxin class claims against Charter. The court authorized an award of \$5.275 million to the 1,105 personal injury dioxin claimants, \$1 million to the State of Missouri, and \$5 million to the United States Environmental Protection Agency for their dioxin-related contamination claims. *See In re Charter Co.*, 81 B.R. 90, 91 (M.D. Fla. 1987).

Payne & Keller dissolved before the Charter dioxin claims matured and, contrary to the representations it made to the Secretary of State, failed to make adequate provision for the payment of either those claims or the variety of other occupational injury claims that it had faced—and reasonably expected that it would face for many decades in the future. Because the company therefore dissolved as a result of (at the very least) constructive fraud, the termination of its corporate existence should be revoked, and pursuant to section 11.153 of TBOC.

LAW AND ARGUMENT

Section 11.153 of the TBOC authorizes a court to revoke a corporation's termination of its own corporate existence if that termination was "as a result of actual or constructive fraud." § 11.153(a) ("Notwithstanding any provision of this code to the contrary, a court may order the revocation of termination of an entity's existence that was terminated as a result of actual or constructive fraud."). Revocation of the corporate termination enables the corporate entity to pursue claims as if it were never dissolved. "[T]he revocation relates back to the effective date of the termination and takes effect as of that date . . . [and] the entity's status as an entity continues in effect as if the termination of the entity's existence had never occurred." *Id.* at §11.153(b)(1)–(2).

In interpreting another provision of the TBOC imposing liability for “actual fraud,” the Texas Supreme Court addressed the distinction between “actual fraud” and “constructive fraud”:

Actual fraud usually involves dishonesty of purpose or intent to deceive, whereas constructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests.

Castleberry v. Branscum KM, 721 S.W.2d 270, 273 (Tex. 1986), *superseded on other grounds by statute, as recognized in SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008) (citations omitted). For example, dissolving a company after an attorney threatens to file a suit for damages suggests an intent to avoid liability and is evidence of actual fraud. *See Latham v. Burgher*, 320 S.W.3d 602, 610 (Tex. App.—Dallas 2010, no pet.) (“A rational juror could also have decided Latham’s conduct in dissolving the corporation in the face of Burgher’s claim represented dishonesty of purpose or an intent to deceive, i.e., actual fraud.”).

Even at this early juncture in discovering the story of Payne & Keller, there is ample evidence supporting a claim that, at the very least, constructive fraud occurred in connection with Payne & Keller’s dissolution. Events surrounding Payne & Keller’s dissolution suggest that the company terminated its corporate existence to avoid liability for both current and future toxic tort, silica, and asbestos personal liability claims, and Payne & Keller was keenly aware of those claims when the decision to dissolve Payne & Keller was made.

The historical record developed to date suggests that Payne & Keller’s work included significant construction projects in industries and time periods where the use of asbestos-containing products was prevalent, including manufacturing facilities and petrochemical

facilities. These are precisely the types of facilities from which asbestos and other toxic diseases are expected to develop. It is clear from the above historical narrative and facts that Payne & Keller's dissolution was fraudulent as that term has been defined under the Texas Business Organization Code. Therefore revoking Payne & Keller's dissolution is appropriate here.

CONCLUSION

For all of the reasons set forth above, Plaintiffs in the above captioned action submit that this Court, after review of all the evidence should order that Payne & Keller's dissolution be revoked and Payne & Keller Company be reinstated as provided by Section 11.153 of the TBOC and grant such further and other relief to which Plaintiffs may be entitled.

Respectfully submitted,

/s/ Jonathan M. Holder

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ATTORNEYS FOR PLAINTIFF

June 14, 2023
Dallas, Texas.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

LENORA CHILDERS, Individually and as
Personal Representative of the Estate of
LEWIS C. CHILDERS

Plaintiff,

v.

Davis Mechanical Contractors, Inc., et al.,

Defendants.

Flame Refractories, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., Payne & Keller Company, and
PBI QSF, LLC, By and Through Their Duly
Appointed Receiver Peter D. Protopapas,

Third-Party Plaintiffs,

v.

Zurich American Insurance Company
(Individually and as Successor to Northern
Insurance Company of New York, Maryland
American General Insurance Company, and
Maryland Casualty Company), et al.,

Third-Party Defendants.

2021-CP-40-03484

In Re:

Asbestos Personal Injury Litigation
Coordinated Docket

**TRAVELERS CASUALTY AND SURETY COMPANY’S OPPOSITION TO
PLAINTIFF’S MOTION TO REVOKE THE TERMINATION
OF PAYNE & KELLER COMPANY**

Third-Party Defendant Travelers Casualty and Surety Company, formerly known as The Aetna Casualty and Surety Company (“Travelers”), submits this opposition to Plaintiff Lenora Childers’s “Motion to Revoke the Termination of Payne & Keller Company,” filed June 14, 2023.

I. INTRODUCTION

Plaintiff’s motion asks this Court to revoke as a matter of law the corporate termination of Payne & Keller Company (“Payne & Keller”), a former Texas corporation that dissolved in Texas 1986, and thereby reinstate its corporate existence more than 35 years later. Plaintiff seeks this extraordinary and unprecedented relief based on sheer speculation, *i.e.*, that the supposed motivation behind Payne & Keller’s decision to dissolve may have been “fraudulent” as respects Plaintiff’s claim. Plaintiff admits that the evidence she cites is merely “suggestive,” but based on this speculation Plaintiff requests that this Court reach into Texas’s corporate affairs and revoke Payne & Keller’s termination pursuant to Section 11.153 of the Texas Business Organizations Code.

As a preliminary matter, this Court lacks jurisdiction to decide the issues raised in Plaintiff’s motion. The motion is based entirely on an argument Payne & Keller’s Receiver made in his opposition to Travelers’ motion to dissolve the Payne & Keller Receivership. As Travelers explained in that motion, Payne & Keller’s ability to sue or be sued lapsed as a matter of law in 1989, three years after it filed for dissolution. That means the Receiver, standing in Payne & Keller’s shoes, cannot sue Travelers here, and Payne & Keller likewise cannot be sued by Plaintiff. This Court nevertheless denied Travelers’ motion, and Travelers appealed the

denial order. The appeal remains pending. As a result, this Court does not have jurisdiction to address Plaintiff's motion to revoke, because it is based on the same arguments made in the Receiver's opposition to Travelers' motion to dissolve. *See Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 532 (S.C. 2016) ("Pursuant to Rule 205, the service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal" (citing Rule 205, SCACR)); Rule 241(a), SCACR ("the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. . . ."); *In re Estate v. Connor*, No. 2009-UP-502, 2009 WL 9530097, at *2 (S.C. Ct. App. Oct. 29, 2009) ("Appellants assert the circuit court erred in failing to find Slotchiver was precluded from bringing additional actions in the probate court while the validity of his appointment was on appeal. We agree. Service of a notice of appeal deprives the trial court of jurisdiction over the matters appealed").

Even if this Court could address the issues raised in Plaintiff's motion now, *i.e.*, while the appeal is pending, Plaintiff's motion fails for numerous reasons.

First, Plaintiff cites no authority, and Travelers is aware of none, in support of her assertion that a South Carolina state court has the power to revoke the termination of a foreign corporation and reinstate its corporate existence in another state as if the dissolution never happened. This Court cannot issue an extraterritorial order that purports to change Payne & Keller's dissolution status in Texas, nor can it instruct a Texas agency, its secretary of state, attorney general, or any other Texas officer to do so. State courts are not permitted to reach beyond the territorial limits imposed on them by their status as coequal sovereigns in our federal system.

Second, the provision of the Texas Business Organizations Code on which Plaintiff relies for her termination-by-fraud theory, Section 11.153, was not added to the Code until 2021, decades after Payne & Keller's dissolution. Texas law is crystal clear that statutory provisions cannot be applied retroactively to disrupt substantive rights that have already vested—here in 1989, when the statute of repose indisputably took effect to preclude any further claims against Payne & Keller.

Third, Plaintiff does not have standing to move to revoke the termination with respect to her claims because she has no admissible evidence that Payne & Keller ever injured her. Indeed, Plaintiff has offered no evidence at all that Payne & Keller ever conducted any activities in South Carolina, where Plaintiff contends she was injured, let alone any evidence that she came in contact with any Payne & Keller product or activity anywhere. Plaintiff also lacks standing to move to revoke Payne & Keller's dissolution to the extent she contends the termination affects other claimants, with whom she has no relationship.

Fourth, even if this Court had jurisdiction or authority to reach into Texas's corporate affairs and revoke Payne & Keller's termination, and even if Plaintiff had standing, the Court cannot revoke Payne & Keller's termination because there is no claim of fraud in the operative complaint. The claims embedded in Plaintiff's motion are entirely unpled, which is reason alone to deny her motion.

Fifth, there is no admissible evidence Payne & Keller's corporate existence was terminated as a result of fraud. Plaintiff's motion is based entirely on speculation that Payne & Keller *may* have dissolved to avoid liability for asbestos claims. But Plaintiff cites absolutely no evidence, admissible or otherwise, that Payne & Keller defrauded anyone in 1986. Indeed, the basis for Plaintiff's motion is not only speculation and conjecture, all of the evidence has to do

with known claimants who over the last 40-plus years have never sought to revoke Payne & Keller's termination. The evidence has nothing to do with Plaintiff or any other asbestos claimant extant in 1986. Moreover, the evidence does not come close to satisfying the heightened standard for proving fraud claims. There is simply no legitimate factual basis for this Court to find that Payne & Keller actually committed fraud vis-à-vis Plaintiff's claim.

Sixth, Plaintiff's motion is barred by laches and estoppel. Plaintiff had inquiry notice of all the bases for her motion the day she was diagnosed in April 2020, because (i) she was on inquiry notice that Payne & Keller may have caused her alleged injury (as she now alleges, albeit without any evidence), (ii) she was on inquiry notice that Payne & Keller had dissolved, and (iii) she was on inquiry notice of the publicly-reported activities on which she now relies for her argument that fraud occurred in 1986. Yet, Plaintiff waited until June 2023—more than three years—to bring her motion (and has yet to even plead a fraud claim). Plaintiff is also estopped from bringing her motion now because she asserted the validity of Payne & Keller's dissolution when seeking appointment of the Receiver. She cannot assert the dissolution's validity to obtain a benefit (appointment of a Receiver), and then baldly claim that the dissolution is invalid to obtain additional benefits (reinstatement of a dissolved Texas company).

Travelers respectfully requests that the Court deny Plaintiffs' motion, with prejudice. Alternatively, and at a minimum, this Court should hold in abeyance its ruling on Plaintiff's motion pending resolution of Travelers' appeal of this Court's order denying Travelers' motion to dissolve the Payne & Keller Receivership.

II. BACKGROUND

Payne & Keller is a former Texas entity that dissolved nearly 40 years ago. *See* Texas Comptroller of Public Accounts Dissolution Papers for Frentex Enterprises Company of Texas,

f/k/a Payne & Keller Company dated Nov. 25, 1986. It has not been an active company since 1986. *See id.*

On July 14, 2021, Plaintiff commenced this asbestos personal injury case against Payne & Keller and various other tort defendants. *See* Compl. dated July 14, 2021. On August 23, 2021, Plaintiff filed a motion to appoint a Receiver over Payne & Keller. *See* Motion to Appoint dated Aug. 23, 2021. Just four days later, on August 27, 2021, this Court granted Plaintiff's motion and appointed the Receiver. *See* Order Appointing Receiver dated Aug. 27, 2021. It did so without a hearing. To the extent the order purports to appoint a receiver over Texas property (including rights of Payne & Keller), it is void and of no effect. Tex. Civ. Prac. & Rem. Code Ann., § 64.021 (requiring receivers over Texas property to live and vote in Texas and deeming void the appointment of any other person).

In its appointment order, this Court invoked South Carolina law, S.C. Code §15-65-10(4), and held that the appointment was proper because Payne & Keller is a former Texas corporation that “has forfeited its charter and has further failed to answer this case[.]” *Id.* at 1. The Court directed the Receiver to “take any and all steps necessary to protect the interests of Payne & Keller whatever they may be.” *Id.* at 1; *see also* Order Granting the Receiver for Payne & Keller's Motion to Clarify dated Sept. 30, 2021.

The Receiver for Payne & Keller then filed a separate suit against a host of Payne & Keller's historic insurers, including Travelers, seeking declarations regarding Payne & Keller's historic liability insurance program. *See* Am. Compl. in *Protopapas v. Am. Int'l Group*, Case No. 3:21-cv-4086-DCC (D.S.C.). The insurers removed that case to federal court, and an order remanding the case back to state court is currently on appeal to the United States Court of Appeals for the Fourth Circuit. *See Protopapas v. Am. Int'l Grp.*, Appeal No. 23-1339 (4th Cir.).

While the federal case has been pending, the Receiver re-filed the same insurance claims by way of a third-party complaint against Travelers and other insurers in the instant case, even though this case is an asbestos tort action that has nothing to do with insurance coverage issues. *See* Second Am. Third-Party Compl. dated July 14, 2022. Travelers contends that the third-party complaint is part of a continuing effort to dodge clear federal jurisdiction.

On August 24, 2022, Travelers filed a motion to dismiss the Payne & Keller Receiver's third-party claims and to dissolve the Payne & Keller Receivership. *See* Motion to Dismiss and Dissolve dated Aug. 24, 2022. As Travelers explained in its motion, Texas corporate law creates a repose period for terminated companies like Payne & Keller that bars any claim involving the company three years after it terminates. *See* Tex. Bus. Org. Code § 11.359(a) (providing that except in an inapplicable limited circumstance, "an existing claim by or against a terminated filing entity is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity"). Travelers pointed out that the Full Faith and Credit Clause requires this Court to enforce Texas law here, and because the period to file claims both by and against Payne & Keller closed in 1989, the Receivership is a nullity as a matter of law and should be dissolved. Travelers also emphasized that South Carolina law does not authorize nationwide receiverships over foreign entities absent property in this State, of which there is none. *See* S.C. Code Ann. § 15-65-10(4).

The Receiver for Payne & Keller opposed Travelers' motion to dismiss and to dissolve the Receivership. Remarkably, in a desperate effort to avoid Texas's statute of repose, the Receiver argued, for the very first time, that Payne & Keller may have engaged in some sort of fraud at the time of its dissolution in 1986, such that this Court should take it upon itself to revoke the Texas dissolution and reinstate Payne & Keller's Texas corporate existence. *See*

Receiver for Payne & Keller's Response to Travelers' Motion to Dismiss and Dissolve dated Jan. 13, 2023. Despite having been ordered by this Court to "protect the interests of Payne & Keller," the Receiver effectively asked this Court to re-create liability for Payne & Keller that has been extinguished as a matter of law since 1989.

This Court accepted the Receiver's arguments and, in an order dated March 30, 2023, denied Travelers' motion to dismiss and dissolve. *See* Order Denying Motion to Dismiss and Dissolve dated Mar. 30, 2023 (filed Mar. 31, 2023). The Court's order not only continued the Receivership over Travelers' motion to dissolve, it also materially modified the scope and purview of the Receivership by authorizing him to pursue his fraud theory with the ultimate goal of revoking Payne & Keller's termination under Texas law. *See id.* at 5. Notably, though, the Court did *not* find that any fraud had in fact occurred; rather, based on the same evidence presented here, the Court held that "[s]uch a determination will be made after the parties have had the opportunity to explore this issue through the discovery process." *Id.* ("This Court does not, however, find that fraud has been conclusively proven, nor does the Court order the revocation of Payne & Keller's termination at this time.").

On April 28, 2023, Travelers timely appealed this Court's denial order, and the appeal remains pending before the South Carolina Court of Appeals. *See* Notice of Appeal dated Apr. 28, 2023. Despite the pendency of the appeal, on June 14, 2023, Plaintiff filed her motion to revoke the termination of Payne & Keller. The motion is a near-verbatim recitation of the arguments made by the Receiver in his opposition to Travelers' motion to dissolve, which, as explained above, is now before the Court of Appeals.

III. ARGUMENT

Plaintiff asks this Court to revoke Payne & Keller’s corporate dissolution under Section 11.153 of the Texas Business Organizations Code, because Plaintiff contends that, “[e]ven at this early juncture in discovering the story of Payne & Keller, there is ample evidence supporting a claim that, at the very least, constructive fraud occurred in connection with Payne & Keller’s dissolution.” Mot. at 6. According to Plaintiff, “[e]vents surrounding Payne & Keller’s dissolution *suggest* that the company terminated its corporate existence to avoid liability for both current and future toxic tort, silica, and asbestos personal liability claims, and Payne & Keller was keenly aware of those claims when the decision to dissolve Payne & Keller was made.” Mot. at 6 (emphasis added). Plaintiff’s argument—lifted almost word-for-word from the Receiver’s opposition to Travelers’ motion to dissolve—is not only procedurally defective and substantively lacking, it is not within this Court’s power to hear the issues raised in the motion, because those issues are the subject of a pending appeal, *see supra* at 1-2, and, in any event, a South Carolina state court does not have jurisdiction or power to change the dissolution status of a foreign corporation.

A. **This Court Does Not Have the Power to Issue an Extraterritorial Order that Purports to Revoke the Termination of a Foreign Corporation Like Payne & Keller and Reinstate Its Corporate Existence**

Plaintiff cites no authority to support her assertion that a South Carolina court has jurisdiction or power to meddle in Texas statutory law and change Payne & Keller’s Texas dissolution status. Indeed, Plaintiff does not even try to explain how that could happen, legally or practically. Nor can she. This Court does not have the constitutional authority to revoke a foreign corporation’s dissolution and reinstate its corporate existence. It would be a textbook example of judicial overreach at the expense of other states.

This Court's authority is, of course, subject to constitutional limitations. Pursuant to the Full Faith and Credit Clause of the United States Constitution, each state must give full faith and credit to the public acts, records, and judicial proceedings of every other state. U.S. Const. Art. IV, § 1. In other words, each state must respect the sovereign acts of their sister states. The creation and dissolution of a corporation is one such act. *See, e.g., Young v. JCR Petroleum, Inc.*, 423 S.E.2d 889, 892 (W. Va. 1992) (collecting cases and other authorities).

“When one state reaches into another state's affairs or blocks its goods, ‘the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.’” *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 489-90 (4th Cir. 2007) (quotation omitted). “The principle that state laws may not generally operate extraterritorially is one of constitutional magnitude” – “[o]ne state may not ‘project its legislation’ into another.” *Id.* (citation omitted)). “This rule reflects core principles of constitutional structure.” *Id.* at 490. “It derives in part from the structure of federalism, which is built upon the autonomy of the individual states within their respective spheres,” as well as “the Constitution's special concern with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce.” *Id.* (internal quotation marks and citations omitted).

As the South Carolina Supreme Court has explained, “the principle that state statutes generally have no extra-territorial effect remains a foundation of the respect for individual sovereignty the states must share with one another.” *Doctors Hosp. of Augusta, L.L.C. v. CompTrust AGC Workers' Comp. Trust Fund*, 371 S.C. 5, 9 (S.C. 2006) (Toal, C.J.); *see also* U.S. Const. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”); S.C. Code Ann. § 33-15-105(c) (“This

title does not authorize this State to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state.”); U.S. Const. art. I, § 8 (reserving to Congress the authority “to regulate Commerce . . . among the several States”). State court orders are similarly restricted in scope and applicability.

Because a corporation is a creature of the state that created it, that state controls its legal existence. *See, e.g., Rogers v. Guar. Trust Co.*, 288 U.S. 123, 130 (1933) (“It has long been settled doctrine that a court—state or federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another state but will leave controversies as to such matters to the courts of the state of the domicile.” (collecting cases)); *Mitchell v. Hancock*, 196 S.W. 694, 698 (Tex. Ct. App. 1917) (“we know of no authority for the courts of this state to dissolve a foreign corporation on any ground”); *Zarate v. Ateca*, 99 S.W.2d 628, 631 (Tex. Ct. App. 1936) (“the courts of Texas will not undertake to exercise visitorial powers over a Mexican corporation and interfere in matters relating to its internal management and affairs” (citation omitted)); *In re Coinmint, LLC*, 261 A.3d 867, 909 (Del. Ct. Ch. 2021) (collecting cases finding that local courts have no “visitorial powers” over foreign corporations, and noting that courts should have “respect for the interests of other sovereigns in overseeing the life and death of their entities,” which is “consistent with the general rule advanced in other state and federal courts that only the courts of the jurisdiction under whose law [a] limited liability company is organized have the capacity to order its dissolution.”); *Matter of MHS Venture Mgt. Corp. v. Utilisave, LLC*, 63 A.D.3d 840, 841 (N.Y. 2d Dept. 2009) (“A claim for dissolution of a foreign limited liability company is one over which the New York courts lack subject matter jurisdiction” (citations omitted)); *Matter of Porciello v. Sound Moves*, 253 A.D.2d 467 (N.Y. 2d Dept. 1998)

(dismissing case seeking dissolution of foreign corporation); 19 A.L.R.3d 1279, § 3[a] (collecting cases “recognizing that a court ordinarily does not have jurisdiction of the dissolution or winding up of a foreign corporation”); 17A Fletcher Cyc. Corp. § 8579 (collecting cases for the proposition that “neither through its legislature nor its courts can one state declare the forfeiture of the charter of a corporation of another state or country or otherwise dissolve the corporation, regardless of the amount of business done by the corporation in that state or the amount of property it may have in that state,” as the state “that grants the corporation its franchise has exclusive and supreme power to withdraw it and to forfeit the corporate charter or dissolve the corporation” (footnotes omitted)). As one court explained,

Since a corporation is a creature of the state by which it is chartered, the right to dissolve the corporation without its consent belongs exclusively to the state. The existence of a corporation cannot be terminated except by some act of the sovereign power by which it was created. Accordingly, *the courts of one state do not have the power to dissolve a corporation created by the laws of another state.*

Young, 423 S.E.2d at 892 (emphasis in original) (citations omitted). *See also*, *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (“No principle of corporation law and practice is more firmly established than a State’s authority to regulate domestic corporations” (citation omitted)); *Hadeed v. Advanced Vascular Res. of Johnstown, LLC*, No. 3:15-cv-22, 2017 WL 4998663, at *20 (W.D. Pa. Oct. 30, 2017) (Full Faith and Credit Clause requires each state to respect the sovereign acts of other states, including as respects the creation and dissolution of corporations).

The South Carolina Supreme Court has recognized this limitation as well. *See Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 650, 817 S.E.2d 273, 278 (2018) (“In South Carolina, our Legislature has made clear that this state is ‘not authorize[d]’ to ‘regulate the organization or internal affairs of a foreign corporation’ even if the corporation *is* registered to conduct business

in South Carolina, which Lake Point and Beachfront are not.” (citing S.C. Code Ann. § 33-15-105(c))) (brackets and emphasis in original). Accordingly, questions involving Payne & Keller’s 1986 dissolution must be decided by Texas courts under Texas law. Any attempt by this Court to undo Texas’s decision to terminate Payne & Keller’s existence under the law of Texas—the state where Payne & Keller was created—runs afoul of the Full Faith and Credit Clause, the Due Process Clause, and the Dormant Commerce Clause.

As a matter of Texas law, Payne & Keller’s ability to sue or be sued lapsed in 1989, three years after its dissolution. *See* Tex. Bus. Orgs. Code Ann. §§ 11.356, 11.359. That means the Receiver, standing in Payne & Keller’s shoes, cannot sue Travelers here, and Payne & Keller cannot be sued by Plaintiff or anyone else. Having decided to create itself under Texas law, Payne & Keller is entitled to the statutory protections provided by Texas law, including Texas’s statute of repose, which blocks and any all claims against Payne & Keller three years after its termination under Texas law. This is all the more so here because Payne & Keller has virtually no connection to South Carolina. Payne & Keller was formed in Texas and it was dissolved in Texas. *See* Dissolution Papers for Frentex Enterprises Company of Texas, f/k/a Payne & Keller Company dated Nov. 25, 1986. As the Receiver for Payne & Keller acknowledges in a recently-served set of discovery objections, “Payne & Keller has never owned, leased, rented or otherwise operated or used any real or personal property, facility, store or distribution center located in the State of South Carolina.” *See* Payne & Keller Response to Depo. Notice, Topic 5. The Receiver’s objections also observe that “Payne & Keller never owned, operated, or controlled any facilities that had any connection to the manufacture, sale, purchase, distribution, advertisement, application, installation, removal, marketing, development and/or use of asbestos or asbestos-containing materials/products in the state of South Carolina.” *See* Payne & Keller

Response to Depo. Notice, Topic 6; *see also id.* at Response to Topic 11 (“Payne & Keller has never initiated any lawsuits in South Carolina.”). Plaintiff has not offered a shred of evidence to contradict these objections. Moreover, all Payne & Keller property is Texas property. Any effort to purport to administer it violates clear Texas law. Tex. Civ. Prac. & Rem. Code Ann., § 64.001, *et seq.* Given these circumstances, this Court simply has no authority consistent with the Constitution, South Carolina and Texas law to change Payne & Keller’s Texas dissolution status.

B. The Texas Statute on Which Plaintiff Relies Does Not Apply Retroactively

Even if it were constitutionally permissible for this Court to revive a Texas corporation—and it is not—the Texas statute relied upon by plaintiff does not authorize the relief sought here. Under Texas law, a terminated corporation continues its corporate existence for a period of three years from the date of termination. *See* Tex. Bus. Orgs. Code §§ 11.356, 11.359. Payne & Keller’s ability to sue or be sued thus lapsed in 1989. Plaintiff argues that under a *new* Texas law, Payne & Keller may still be subject to suit if its dissolution was fraudulent. Plaintiff is wrong as a matter of law. The provision of the Texas Business Organizations Code on which Plaintiff relies for her (unpled) termination-by-fraud claim was not added to the Code until 2021, decades after Payne & Keller’s dissolution. The provision cannot be applied retroactively to disrupt vested substantive rights.

Since before 1986, Section 11.359(a) of the Code, “Extinguishment of Existing Claim,” has provided that “an existing claim by or against a terminated filing entity,” *i.e.*, a terminated Texas corporation like Payne & Keller, “is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity.” *See* Tex. Bus. Orgs. Code § 11.359(a); *see also, e.g., Boudreaux v. C J R Framing Inc.*, 744 Fed. Appx. 208, 211 (5th Cir. 2018) (“only ‘existing claims’ survive a corporation’s dissolution; even

if a plaintiff has an ‘existing claim,’ all claims are ‘extinguished’ if not brought within three years.”).

The Code was amended in 2021 to add a provision that states in part: “Notwithstanding Subsections (a) and (b), the extinguishment of an existing claim with respect to a terminated filing entity as provided by this section is nullified if . . . the filing entity’s termination is revoked with retroactive effect under Section 11.153[.]” Tex. Bus. Orgs. Code. § 11.359(c)(1). Section 11.153(a), in turn, provides that “a court may order the revocation of termination of an entity’s existence that was terminated as a result of actual or constructive fraud,” and “[t]he secretary of state shall take any action necessary to implement an order under this section.” Relying on this new Texas statute, Plaintiff suggests that this Court can somehow revoke Payne & Keller’s 1986 dissolution because it may have been the result of fraud. Plaintiff also implicitly seems to suggest that this Court can then instruct the Texas Secretary of State accordingly. Plaintiff is wrong.

A statutory amendment cannot be retroactively applied to revive potential claims that were extinguished nearly 40 years ago. The Texas Constitution forbids changes to state law to be applied retroactively. *See* Tex. Const. art. I, § 16 (“No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.”). This is hornbook Texas law. *See generally Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 145–50 & n.122 (Tex. 2010) (explaining that the Texas Constitution prohibits retroactively applying new statutes when doing so would disrupt settled expectations, terminate existing claims, or revive barred claims, and noting that the Texas Supreme Court has “invalidated statutes as prohibitively retroactive” in several instances “involving extensions of statutes of limitations”); *Baker Hughes, Inc. v. Keco R.&D., Inc.*, 12 S.W.3d 1, 4 (Tex. 1999) (“To permit barred claims

to be revived years later would undermine society's interest in repose, which is one of the principal justifications for statutes of limitations. Thus, we have written that a statute extending the limitations period of a claim already barred by limitations violates the Texas Constitution's prohibition against retroactive laws, which is article I, section 16."). In short, even if the Texas Legislature wanted to make the 2021 amendment operate retroactively, it cannot do so.

C. Plaintiff Does Not Have Standing

Plaintiff also lacks standing to bring her motion to revoke the Payne & Keller dissolution. "To have standing, one must have a personal stake in the subject matter of the lawsuit." *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001) (C.J. Toal); *see also Michael P. v. Greenville Cnty. Dep't of Soc. Servs.*, 385 S.C. 407, 415-16, 684 S.E.2d 211, 215 (Ct. App. 2009) (same). "Standing is comprised of three elements: (1) the plaintiff must have suffered an injury-in-fact that is concrete and particularized, and actual and imminent as opposed to hypothetical; (2) the injury and the conduct complained of the defendant must be causally connected; and (3) it must be likely that the injury will be redressed by a favorable decision." *Michael P.*, 385 S.C. at 415–16, 684 S.E.2d at 215; *see also Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014) (same).

Here, Plaintiff has no standing to seek any remedy against Payne & Keller, including revocation, because she cites no admissible evidence that Payne & Keller has ever harmed her, much less that it acted fraudulently vis-à-vis Plaintiff when it dissolved almost 40 years ago. *See infra* § III.F. Without a particularized and concrete injury-in-fact to Plaintiff—none of which has been shown here with any evidentiary support—she cannot bring any action against Payne &

Keller, including her motion to revoke. Certainly no opportunity to test her “evidence” has been afforded.

Plaintiff also has no standing to seek revocation of Payne & Keller’s corporate termination as some sort of “representative” of other, unspecified claimants that *may* have been harmed by Payne & Keller. *See Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40, 43 (2012) (“[A] private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom.”) (citation omitted). Any such injuries are not particularized or concrete, and they certainly are not the province of Plaintiff to assert. Absent certain narrow exceptions not present here, “an individual seeking to litigate someone else’s claims is without standing and cannot bring a lawsuit.” *See, e.g., Manship v. Thomson*, No. 5:11CV00030, 2011 WL 1479880, at *1 (W.D. Va. Apr. 19, 2011). Indeed, South Carolina state courts recognize only one very limited circumstance in which a private individual has standing to bring a case on behalf of others—that is the “public importance” exception by which a private citizen can sue to vindicate the rights of others “when an issue is of such public importance as to require its resolution for future guidance.” *Freemantle*, 398 S.C. at 193, 728 S.E.2d at 44. “[F]or a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance.” *Id.*, 398 S.C. at 194, 728 S.E.2d at 44 (citation omitted). Here, there is nothing rising to “public importance” that could bestow standing on Plaintiff to pursue the rights of un-named others that might have been injured by Payne & Keller’s allegedly fraudulent dissolution. An attempt to forum shop and strip duly enacted Texas statutes of meaning and effect does not rise to the level of the legitimate public importance Plaintiff must demonstrate.

Plaintiff appears to claim that her standing is based on the fact that Payne & Keller did not make provision for future, unknown lawsuits that may be brought by asbestos plaintiffs such as herself. However, under the Texas Business Organizations Code, there is no requirement for a dissolving corporation to make provisions for unknown claims that will not be brought within three years of dissolution—and, in this case, did not even exist until decades after Payne & Keller dissolved. Rather, the Texas Legislature chose to address the problem of unknown, future claims by creating a three-year statute of repose for dissolving corporations so that corporations could wind up in an orderly fashion. To the extent Plaintiff claims Payne & Keller’s alleged failure to provide for claims that existed within that three-year period somehow supports her claim of fraud, she has no standing to challenge the dissolution on those grounds because she did not have a claim that arose during that time period and she has not offered any evidence that she suffered any actual harm from that alleged conduct.

D. Plaintiff’s Claim is Entirely Unpled

Even if this Court could revoke the termination of Payne & Keller for engaging in some sort of fraud when it dissolved in Texas back in 1986, the Court cannot do so in this case because Plaintiff did not plead any such claim. *Cf. Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 574, 743 S.E.2d 778, 785 (2013) (“It is elementary that the principal purpose of pleadings is to inform the pleader’s adversary of legal and factual positions which he will be required to meet on trial.”) (citation omitted). Where there is no allegation about an issue—much less a request for draconian relief such as revocation of the termination of a foreign corporation—the pleadings are deficient and cannot support such an unpled request for relief. *See id.* There is not a single allegation about Payne & Keller’s supposedly fraudulent conduct, much less the particularized allegations of fraud required by the South Carolina rules. *See* Rule 9(b), SCRC (“In all

avermments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”). These additional due process defects defeat Plaintiff’s attempts here.

Plaintiff’s Complaint includes just one paragraph that relates specifically to Payne & Keller. She alleges that Payne & Keller “was a Texas corporation with its principal place of business in Texas, and was authorized to do business in the State of South Carolina.” Plaintiff’s Second Amended Compl., dated May 9, 2023, at ¶ 80. She sued Payne & Keller “as a Product Defendant” and “for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos.” *Id.* Plaintiff fails to include any allegations of any kind directed to her current speculation that Payne & Keller committed fraud. Nor is there any claim that Payne & Keller’s termination should be revoked as a result of any such fraud. Plaintiff’s revocation-by-fraud claim is entirely unpled and must be rejected on that basis.

Further, claims sounding in fraud are highly fact-based and must be resolved by a jury, not a court on the papers by way of a “motion to revoke.” Because Plaintiff has not pled any claim for fraud, or a claim to revoke Payne & Keller’s termination based on such fraud, any judgment would be void. *See, e.g., Chandler v. Merrell*, 291 S.C. 227, 229 (S.C. 1987) (“A judgment must conform to the pleadings and be in accordance with the theory of action upon which the case was tried.” (citation omitted)).

E. There is No Evidence—Let Alone Clear and Convincing Evidence—of Fraud

Even if Plaintiff had pled a revocation-by-fraud claim, there is no competent evidence that Payne & Keller dissolved as a result of fraud. Plaintiff’s motion is based entirely on speculation, cut-and-pasted from the Receiver’s opposition to Travelers’ motion to dissolve. *Compare* Plaintiff’s Motion to Revoke at 2-6, *with* the Receiver’s Opposition to Travelers’

Motion to Dismiss and Dissolve at 9-13. This Court has already held that such “evidence” is *not* conclusive proof of fraud. *See* Order Denying Travelers’ Motion to Dismiss and Dissolve, dated Mar. 30, 2023 (filed Mar. 31, 2023), at 5.

According to Plaintiff’s reiteration of the Receiver’s speculation about Payne & Keller’s decision to dissolve in Texas in 1986, “[e]vents surrounding Payne & Keller’s dissolution *suggest* that the company terminated its corporate existence to avoid liability for both current and future toxic tort, silica, and asbestos personal liability claims, and Payne & Keller was keenly aware of those claims when the decision to dissolve Payne & Keller was made.” Mot. at 6 (emphasis added). Plaintiff goes on to argue that these events might mean that “constructive fraud occurred in connection with Payne & Keller’s dissolution.” *Id.* But the “evidence” on which Plaintiff relies is nothing more than conjecture about Payne & Keller’s decision to dissolve almost 40 years ago. And regardless of the irrelevant, inadmissible nature of the evidence cited, an argument that the evidence “suggests” fraud is not sufficient to revoke a company’s termination. Fraud must be proven by clear and convincing evidence going directly to the Payne & Keller and the asbestos claim presented by Plaintiff here. No such evidence has been presented.

Indeed, contrary to Plaintiff’s speculation that Payne & Keller may have “dissolved with an intent to avoid (or, at the very least, ignore)” asbestos-related claims and liabilities, Mot. at 1-2, the evidence offered by Plaintiff merely indicates that a company facing potential *non-asbestos liabilities* went out of business as part of a sale of corporate assets:

- Exhibit 1 is a Construction Labor Report from 1982, which indicates that in 1981 Payne & Keller worked on an insulation project for Archer Daniels, which was “renovating the former Hiram Walker distillery in Peoria [, Illinois] to convert it to a gasohol plant.” Ex. 1 (Construction Labor Report, Vol. 28 at 878). This document proves nothing, is unauthenticated hearsay, and bears no relation to Plaintiff or South Carolina.

- Exhibit 2 is the cover page of a Harris County, Texas docket sheet from 1985, apparently for a case styled *Hanagriff v. Brown & Root Inc.* in which Payne & Keller was named as a defendant. Ex. 2 (Harris County Docket Sheet, Cover Page Printout). Again, this document proves nothing, is unauthenticated hearsay, and bears no relation to Plaintiff or South Carolina.
- Exhibit 3 is a one-page Order from the *Hanagriff* case dated May 21, 1986, which dismissed the plaintiff's claim against Payne & Keller with prejudice, without any discussion or explanation. Ex. 3 (Order). This document is not only unauthenticated hearsay that bears no relation to Plaintiff or South Carolina, if it shows anything, it demonstrates that the claim was not legitimate and could have had no negative bearing on the decision to dissolve.
- Exhibit 4 is a Specific Guaranty dated September 29, 1986, indicating that Payne & Keller's parent company (Dumez) guaranteed to Payne & Keller's buyer (Jacobs) certain aspects of Payne & Keller's performance under a Purchase Agreement between Payne & Keller, Dumez, Jacobs, and others dated October 7, 1986. Ex. 4 (Specific Guaranty ¶ 1). It is a typical corporate document, and does not reflect fraud of any kind.
- Exhibit 5 is the October 7, 1986 Purchase Agreement. Ex. 5 (Purchase Agreement). Plaintiff cites a provision indicating that Payne & Keller and the other sellers agreed to indemnify the buyer, Jacobs, for certain pre-closing claims and liabilities. *Id.* ¶ 9.1(c). Like the Specific Guaranty, the Purchase Agreement is a typical corporate document and does not prove fraud of any kind.
- Exhibit 6 is a copy of the Articles of Amendment to the Articles of Incorporation of Payne & Keller Corporation dated October 20, 1986, which were filed with the Office of the Texas Secretary of State on October 23, 1986. Ex. 6 (Articles of Amendment). The Articles officially changed the name of Payne & Keller Corporation to Frentex Enterprises Corporation as of October 7, 1986. It is unclear why Plaintiff's motion cites this document, other than as background, but it is yet another typical corporate document that proves nothing, let alone fraud.
- Finally, Exhibit 7 is a copy of the Articles of Dissolution that Frentex adopted on October 27, 1986, and filed with the Office of the Texas Secretary of State on December 3, 1986. Ex. 7 (Articles of Dissolution). The Articles state in part: "Pursuant to the provisions of Article 6.06 of the Texas Business Corporations Act, the undersigned corporation adopts the following Articles of Dissolution for the purpose of dissolving A written consent to dissolve . . . has been signed by all shareholders" *Id.* Plaintiff cites paragraph 5 of the Articles, which states: "All debts, obligations and liabilities of the corporation have been paid, discharged, or adequate provision has been made therefor." Plaintiff seems to suggest that this statement was somehow false because Payne & Keller knew of potential "dioxin claims" and other unspecified "future liabilities" around the time it dissolved and

failed to adequately account for them. Mot. at 4-5. But there is no proof of this attached to Plaintiff's motion. And regardless, the document proves the opposite. The parties to the Purchase Agreement and Specific Guaranty entered into an arm's length deal that adequately accounted for known claims and liabilities, as demonstrated by the fact that no claimant of any kind has ever sought to revoke Payne & Keller's termination for the last 40-plus years. Regardless, the document does not reflect any intent to defraud anyone and certainly is not the type of clear and convincing evidence necessary to prove a fraud claim, if it were ever pled.

Plaintiff also cites a few inapposite cases:

- Plaintiff says that Payne & Keller "worked on valve replacements at a Citgo Petroleum Corporation facility in Westlake/Lake Charles, Louisiana, *see Seeney v. Citgo Petroleum Corp.*, 848 F.2d 664, 666 (5th Cir. 1988), which has since been the subject of asbestos litigation. *See Bourque v. Anco Insulations, Inc.*, 25 So. 3d 1008 (La. App. 3 Cir. 2009)." Mot. at 2. The *Seeney* case has nothing to do with asbestos, and *Bourque* has nothing to do with Payne & Keller. It is entirely unremarkable that Citgo "has been the subject of asbestos litigation." Mot. at 2.
- Plaintiff cites *In re Charter Co.*, 63 B.R. 568, 570 (Bankr. M.D. Fla. 1986), for the proposition that "some of Payne & Keller's excess-level insurance policies expressly excluded coverage for asbestos-related claims, and, in the years before its dissolution, Payne & Keller agreed, in its service contracts, to indemnify companies from financial responsibility for any property damage or personal injury claims arising from the work completed by Payne & Keller employees." Mot. at 2. This case is also inapposite. It involved dioxin-related personal injury claims against Charter relating to work Payne & Keller did at a Houston refinery owned by Charter. Plaintiff says that the court held "that the claims of the dioxin class had not been reduced to judgment and, as 'unmatured' claims, could not be 'offset' against Payne & Keller's matured claim, unless Payne & Keller was insolvent." Mot. at 3. While not entirely clear, Plaintiff appears to suggest that Payne & Keller dissolved to avoid these dioxin class claims. Once again, this is rank speculation, unsupported by any evidence, it does nothing to support Plaintiff's unpled fraud claim in this case, and it is contradicted by the fact that no dioxin claimant sought to challenge Payne & Keller's termination.
- Plaintiff says that "[o]n January 16, 1987, the dioxin class claims in the Charter bankruptcy proceeding matured," "[t]he bankruptcy court entered an order approving settlement of the dioxin class claims against Charter," and "[t]he court authorized an award of \$5.275 million to the 1,105 personal injury dioxin claimants, \$1 million to the State of Missouri, and \$5 million to the United States Environmental Protection Agency for their dioxin-related contamination claims." Mot. at 5 (citing *In re Charter Co.*, 81 B.R. 90, 91 (M.D. Fla. 1987)). Here, again, Plaintiff suggests that Payne & Keller dissolved before the Charter dioxin claims matured in a fraudulent effort to avoid them. But there is absolutely no admissible evidence to support Plaintiff's speculation and conjecture.

- Plaintiff also cites *Thornell v. Payne & Keller, Inc.*, 442 So.2d 536 (La. App. 1st Cir. 1983), cert. denied, 445 So. 2d 1231 (La. 1984), and says that “[i]n 1983, the Louisiana Court of Appeals affirmed that Payne & Keller and its insurer Aetna Surety & Casualty Company (now a Travelers company, the movant [sic] here) were liable for a workers’ compensation claim brought by a former Payne & Keller painter and sandblaster who was permanently disabled by silicosis.” Mot. at 2-3. This is yet another irrelevant case that does nothing to support Plaintiff’s assertion that Payne & Keller may have dissolved to avoid asbestos claims or liabilities.
- Finally, Plaintiff vaguely asserts that by 1986, “asbestos-related personal injury claims were filling court dockets,” and that “[i]n the Eastern District of Texas alone, more than 3,000 asbestos-related personal injury claims had been filed by 1981.” Mot. at 3. As support, she cites *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1354 (E.D. Tex. 1981), reversed in part, 681 F.2d 334 (5th Cir. 1982). *Hardy* has nothing to do with Payne & Keller, South Carolina or Plaintiff. Plaintiff makes no effort to explain its relevance, let alone how it could be clear and convincing evidence of fraud here.

In short, there is not a shred of evidence that Payne & Keller dissolved in order to fraudulently avoid asbestos liabilities. There is no affidavit or testimony from anyone with personal knowledge of Payne & Keller’s dissolution, let alone the reasons behind it, including whether it was motivated by asbestos claims. There is no affidavit or testimony from anyone with a legitimate future asbestos claim against Payne & Keller about their interactions with Payne & Keller before or at the time of dissolution. Nor is there any evidence of constructive fraud, such as a violation of some legal or equitable duty. Plaintiff’s speculation does not suffice. *See, e.g., Foxfire Village, Inc. v. Black & Veatch, Inc.*, 304 S.C. 366, 374 (S.C. Ct. App. 1991) (“Fraud cannot be presumed; it must be proved by clear, cogent, and convincing evidence.” (citation omitted)); *Winburn v. Ins. Co. of N. Am.*, 287 S.C. 435, 441 (S.C. Ct. App. 1985) (“[E]vidence of mere nonperformance of a promise is not sufficient to establish either fraud or a lack of intent to perform.” (citations omitted)); *In re Estate of Kuykendall*, 206 S.W.3d 766, 771 (Tex. Ct. App. 2006) (“With no evidence of any representation by [defendant], much less how or if any of Plaintiffs relied on any representations, there is no evidence of two of the

elements required to prove actual fraud. Similarly, in the absence of any evidence of a fiduciary or confidential relationship, Plaintiffs failed to produce any evidence of constructive fraud.”).

Again, this Court has already held that the very same evidence on which Plaintiff relies to support her unpled fraud claim is *not* “conclusive[] pro[of]” of fraud sufficient to justify the revocation of Payne & Keller’s corporate dissolution: “This Court does not, however, find that fraud has been conclusively proven, nor does the Court order the revocation of Payne & Keller’s termination at this time. Such a determination will be made after the parties have had the opportunity to explore this issue through the discovery process.” *See* Order Denying Travelers’ Motion to Dismiss and Dissolve, dated Mar. 30, 2023 (filed Mar. 31, 2023), at 5. The parties have not conducted any discovery on this issue, and they cannot do so now, because the issues embedded in Plaintiff’s motion to revoke are on appeal. *See supra* at 2-3. And even if they could pursue discovery, the passage of time makes it impossible to develop the evidence necessary to prove fraud. Regardless, nothing has changed since March 30, 2023, that could possibly justify the extraordinary relief Plaintiff now requests. The evidentiary record has not change, let alone improved, since the Court made its previous observations. There is simply no factual basis for this Court to find that Payne & Keller dissolved as a result of fraud, much less clear and conclusive evidence of fraud.

E. Plaintiff’s Motion Is Barred by Laches and Estoppel

Finally, Plaintiff’s unreasonable delay in seeking revocation and her prior positions related to Payne & Keller’s dissolution bar her new, unpled claim that Payne & Keller’s corporate termination should now be revoked. “Laches is an equitable doctrine defined as ‘neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.’” *Strickland v. Strickland*,

375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007) (C.J. Toal) (*quoting Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988)). “In order to establish laches as a defense, a defendant must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the defendant.” *Id.*

Plaintiff alleges that “Decedent Lewis C. Childers was diagnosed with lung cancer on or about April 2, 2020, and died from lung cancer on May 13, 2020.” Plaintiff’s Sec. Am. Compl. ¶ 106. By April 2020, she had all of the information she needed to seek to revoke Payne & Keller’s corporate dissolution under Texas law. She apparently believed that Payne & Keller may have caused her injury. Payne & Keller’s 1986 dissolution was publicly available information. And any circumstances leading to the 1986 dissolution would have already happened and been knowable by reading the public record that Plaintiff has put before the Court. Despite the availability of that information, which is the entire basis of her motion to revoke, Plaintiff waited years to make her motion. There is no reasonable justification for that delay. And, as the Payne & Keller Receiver admits, relevant witnesses with knowledge are now unavailable, which prejudices any ability to defend a challenge to the termination. Plaintiff’s delay coupled with the spoliation of relevant evidence and resulting prejudice establishes the required elements of a laches.

In addition to the equitable defense of laches, Plaintiff is also estopped from seeking to revoke Payne & Keller’s corporate dissolution. “In its broadest sense, equitable estoppel is a means of preventing a party from asserting a legal claim or defense that is contrary or inconsistent with his or her prior action or conduct.” *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017). The South Carolina Supreme Court has laid out the elements of equitable estoppel:

- (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;
- (2) the intention that such conduct shall be acted upon by the other party; and
- (3) actual or constructive knowledge of the real facts.

Id.

Here, Plaintiff moved to appoint a receiver for Payne & Keller explicitly based on the fact of its corporate termination. *See* Plaintiff’s Motion to Appoint a Receiver Over Payne & Keller Company Pursuant to S.C. Code §15-65-10(4) dated Aug. 23, 2021, at 1 (“Payne & Keller is a dissolved Texas corporation.”); *id.* at 2 (asking this Court to appoint a receiver over Payne & Keller pursuant to S.C. Code §15-65-10(4), which provides that a receiver may be appointed “[w]hen a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the property within this State of foreign corporations,” and stating “[i]t is undisputed that Payne & Keller, because of its dissolution/suspension, has forfeited their rights to do business in South Carolina.”). This Court based its decision to appoint the Receiver on that same alleged fact, *i.e.*, Payne & Keller’s status as a terminated Texas entity. *See* Order dated Aug. 27, 2021, at 1 (“This Court finds that the application [*i.e.*, Plaintiff’s motion to appoint a receiver over Payne & Keller] is meritorious under the applicable statute because Payne & Keller Company (‘Payne & Keller’) dissolved and Payne & Keller, a Texas Corporation, has forfeited its charter and has further failed to answer this case”). Requesting appointment of a receiver based on a corporation’s termination, and then later seeking to revoke its terminated status when that contrary position is more beneficial, is a clear reason to invoke estoppel. No party should be able to benefit twice from taking opposite positions in the same case.

IV. CONCLUSION

For the foregoing reasons and others appearing in the record, Travelers respectfully requests that this Court deny Plaintiff's motion to revoke the termination of Payne & Keller, with prejudice. Alternatively, and at a minimum, the Court should hold the motion in abeyance pending resolution of Travelers' appeal of this Court's order denying Travelers' motion to dissolve the Payne & Keller Receivership.

Respectfully submitted,

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 Company

July 7, 2023

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LENORA CHILDERS, Individually and as
Personal Representative of the Estate of
LEWIS C. CHILDERS

Case No. 2021-CP-40-03484

Plaintiff,

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

v.

Davis Mechanical Contractors, Inc., et al.,
Defendants.

Flame Refractories, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., Payne & Keller Company, and
PBI QSF, LLC, By and Through Their Duly
Appointed Receiver Peter D. Protopapas,

Third-Party Plaintiffs,

v.

Zurich American Insurance Company
(Individually and as Successor to Northern
Insurance Company of New York, Maryland
American General Insurance Company, and
Maryland Casualty Company), et al.,

Third-Party Defendants.

**ZURICH AMERICAN INSURANCE COMPANY'S JOINDER IN TRAVELERS
CASUALTY AND SURETY COMPANY'S OPPOSITION TO PLAINTIFF'S MOTION
TO REVOKE THE TERMINATION OF PAYNE & KELLER COMPANY**

Defendant Zurich American Insurance Company (“Zurich”) joins and supports Travelers Casualty and Surety Company’s (“Travelers”) Opposition to Plaintiff’s Motion to Revoke the Termination of Payne & Keller Company filed on July 7, 2023. For each of the reasons set forth in Travelers’ opposition, Zurich respectfully requests that the Court deny Plaintiff’s motion with prejudice, or alternatively, that the Court stay the disposition of Plaintiff’s motion during the pendency of the appeal of the denial of Travelers’ motion to dissolve the Payne & Keller receivership.

s/ Kevin K. Bell

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***Counsel for Zurich American
Insurance Company***

July 7, 2023

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Richland	)	2021-CP-40-03484
	)	
	)	
LENORA CHILDERS, INDIVIDUALLY)		
and as Personal Representative)		
of the Estate of LEWIS C.)		
CHILDERS,)		
	)	
PLAINTIFF,)		
	)	
vs.)		TRANSCRIPT OF RECORD
	)	
DAVIS MECHANICAL CONTRACTORS,)		
INC.,)		
FLAME REFRACTORIES, INC.,)		
GENERAL BOILER CASING COMPANY,)		
INC., HEFCO, INC.,)		
J.R. DEANS COMPANY, INC.,)		
PAYNE & KELLER COMPANY,)		
SFB, INCORPORATED,)		
STAFFORD INSULATION COMPANY,)		
STANDARD INSULATION COMPANY OF)		
N.C., INC.,)		
UNITED CONSTRUCTION CO. OF)		
ROME, INC.,)		
	)	
DEFENDANTS,)		

July 10, 2023
Charleston, South Carolina

BEFORE:

THE HONORABLE JEAN TOAL, JUDGE.

APPEARANCES:

THEILE MCVEY, ESQ.
Attorney for the Plaintiff

HARRY LEE, ESQ.
WESLEY SAWYER, ESQ.
TODD CARROLL, ESQ.
Attorneys representing some of the Defendants

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T S

INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

1 THE COURT: Ladies and gentlemen of the asbestos bar,
2 we'll begin with Childers, the Estate of Lewis C. Childers
3 against Davis Mechanical and many others. This is
4 2021-CP-40-03484. This is Plaintiff's motion to revoke
5 the termination of Payne & Keller.

6 Who will speak?

7 MS. MCVEY: Good afternoon, Your Honor, Theile McVey
8 for the Childers family.

9 THE COURT: You may proceed.

10 MS. MCVEY: Thank you, Your Honor. First, Judge, let
11 me say it's been a long time since I've been to the
12 Charleston County courthouse, and it is much nicer than
13 the Richland County courthouse.

14 THE COURT: Oh, my Lord.

15 MS. MCVEY: Thank you for hearing us today. You are
16 familiar with a lot of the issues that this motion seeks
17 to have you address, but just for clarity of the record
18 and for everybody's benefit, I thought it would be
19 helpful to go through a little bit of the history about
20 what's been going on with this case.

21 Your Honor, as you know, Payne & Keller was sued in
22 this case. They did not answer the complaint. They went
23 into default. And Mr. Protopapas was appointed on the
24 motion as a receiver for Payne & Keller. That happened on
25 August 27th, 2021.

1 Payne & Keller is a dissolved Texas corporation. As
2 part of his duties, he went through and did significant
3 research, including kind of the circumstances around why
4 Payne & Keller resolved.

5 Your Honor, the Receiver's team briefed this issue
6 extensively when Travelers filed their motion to dismiss
7 the third-party complaint and to revoke the receivership.
8 So you had a lot of this in front of you before, but
9 there's some new information you didn't have.

10 THE COURT: Just to be sure the record is complete
11 for purposes of review, this matter -- Travelers' piece in
12 this matter was heard. I made a ruling adverse to
13 Travelers. The matter was then appealed and is awaiting
14 disposition at the Court of Appeals?

15 MS. MCVEY: Yes, ma'am. We're not part of that
16 appeal, but my understanding is that the Court of Appeals
17 has asked for briefing related to whether or not the
18 orders that they appealed are appealable.

19 THE COURT: Are appealable, right, so that's still
20 there?

21 MS. MCVEY: That's right.

22 THE COURT: But just making it clear, that case is a
23 different case from what you are arguing here. And your
24 arguments here are addressed in the Childers case and the
25 defaulting defendant Payne & Keller?

1 MS. MCVEY: That's right. And, Your Honor, those
2 motions were brought in the third-party case in this case,
3 but to be clear, they're different issues. The issues on
4 appeal in that case are Travelers' motion to dismiss and
5 the motion to, I think it's called revoke the
6 receivership, if I'm using that language correctly. And I
7 know that Mr. Robinson is here for the Receiver if you
8 have questions. And, of course, Mr. Carroll for
9 Travelers.

10 THE COURT: Right. And just to, I guess, complete
11 the clarifications that I'm sure Travelers will want to
12 have made on the record at the appropriate time, nothing
13 about the participation, the continuing participation in
14 this matter as it impacts Payne & Keller waives the rights
15 that have been asserted in the third-party case with
16 respect to jurisdiction and all the other things?

17 MS. MCVEY: I think that's right, Your Honor. In my
18 view, it's two separate cases. And so, Your Honor, we
19 represent the Childers family in the underlying asbestos
20 case where we allege that his disease was caused by some
21 acts or omissions from Payne & Keller itself.

22 But I think the history of Payne & Keller is
23 important for us all to remember. They operated for
24 decades building and maintaining kind of major petro
25 chemical and heavy industrial facilities. The way I

1 thought about it that we're familiar with here is a little
2 bit of a Daniel-type corporation.

3 They abruptly dissolved just as a flood of asbestos
4 claims are being filed, including thousands in Texas.
5 Immediately after Payne & Keller learned that it could
6 face significant liability as a creditor in a pending
7 bankruptcy case back in 1986, they dissolved. Payne &
8 Keller had a significant historic insurance to address
9 those issues and they still dissolved.

10 The evidence in the record before you, and, Judge,
11 it's the only evidence in the record before you is that
12 Payne & Keller dissolved with an intent to avoid or ignore
13 those liabilities in violation of the statutory duty to
14 creditors to make adequate provisions for those
15 liabilities.

16 So in our exhibits that we've sent to you in a
17 notebook, we have examples of past jobs. For example, in
18 1981, Payne & Keller worked on an insulation replacement
19 project for Archer Daniels. That's Exhibit 1 to our
20 brief. They also worked on a wall replacement at Citgo
21 Petroleum Corporation in Louisiana. We cited those two
22 cases in our brief.

23 Your Honor, by 1983, some of Payne & Keller's own
24 insurance policies explicitly excluded coverage for
25 asbestos-related claims. In the years before its

1 dissolution, Payne & Keller agreed in service contracts to
2 indemnify companies from financial responsibility for any
3 property damage or personal injury claims resulting or
4 arising from the work completed by Payne & Keller. And
5 that's in that in re Charter bankruptcy case that we cited
6 to you in our briefs.

7 During the 1980s, Payne & Keller defended itself
8 against a variety of tort claims arising from occupational
9 exposures. In fact, in 1983, the Louisiana Court of
10 Appeals affirmed that Payne & Keller and its insurer,
11 Aetna, which is now a Travelers Corporation were liable
12 for a Workers' Compensation claim bought by former
13 employee of Payne & Keller. The disability in that case
14 was silicosis.

15 In 1986, Payne & Keller was a defendant in a Texas
16 asbestos case brought by the law firm of Barron and Budd.
17 That's Exhibit 2. The claim was dismissed on May 21, 1986
18 with prejudice. And, Your Honor, although I don't know
19 the specifics of that, in my experience, a claim is
20 dismissed with prejudice when a settlement is paid.

21 By then, asbestos personal injury claims were filling
22 court dockets. In the Eastern district of Texas alone,
23 there were more than 3,000 asbestos claims that had been
24 filed by 1981.

25 In the weeks before Payne & Keller's dissolution,

1 Payne & Keller was alleged to be liable for significant
2 personal injury claims. Those were arising from toxic
3 occupational exposure to the Houston refinery.

4 In a bankruptcy proceeding, which is where we got a
5 lot of this information, filed by Charter International
6 Oil, Payne & Keller sought payment for services it had
7 provided.

8 Charter objected on the grounds that Payne & Keller
9 agreed to indemnify Charter for the personal injury claims
10 then totaling more than a 1,000. The Bankruptcy court
11 denied Charter's objection quoting the claims had not been
12 reduced to judgment and an unmatured claim could not be
13 also against Payne & Keller's mature claim unless Payne &
14 Keller was insolvent.

15 Payne & Keller told the Court that it was not
16 insolvent and asserted that it maintained insurance that
17 would cover any indemnification obligation owed to
18 Charter. Immediately after this decision was ordered by
19 the bankruptcy court, July 31 of 1986, Payne & Keller then
20 took steps to dispose of its assets and dissolve.

21 So just briefly, Your Honor, not to wear everybody
22 out, but a timeline. So the Bankruptcy court order
23 happens in July of 1986. September 29th, 1986, Payne &
24 Keller parent company executed a specific guarantee with
25 Payne & Keller.

1 They didn't even purchased its aspects guaranteeing
2 certain aspects of Payne & Keller's performance, and
3 that's Exhibit 4 to our motion. September 30th, 1986, the
4 sale was intended to close, but it was delayed.

5 October 1st, 1986, Charter filed a proof of claim on
6 behalf of plaintiffs in the bankruptcy proceeding.

7 October 7th, 1986, Payne & Keller executed its agreement
8 selling substantially all of its assets.

9 Payne & Keller retained liabilities, including those
10 arising from its operations. They agreed to indemnify and
11 hold us harmless for a range of claims, including NEPI
12 claims.

13 They agreed to maintain \$6 million of insurance
14 coverage for those claims for two years at the closing.
15 And they capped its overall liability to \$5 million in the
16 aggregate. Again, that's found in the guarantee, Exhibit
17 4.

18 October 7th, 1986, Payne & Keller changed its name to
19 Premtex Enterprise Corporation. They filed amended
20 articles of incorporation October 20th, 1986. It's found
21 in Exhibit 6. October 27th, 1986, Premtex adopted its
22 articles of dissolution. That's Exhibit 7.

23 On December 3rd of 1986, Premtex filed its articles
24 of dissolution and certification of dissolution
25 representing, and I quote, all debts, obligations and

1 liabilities of the corporation have been paid, discharged
2 or adequate provisions have been made thereof.

3 At the time they made that certification, there were
4 potentially thousands of Dioxin claims pending. The
5 guarantee was the only provision made for the payment of
6 significant known current and decades of future liability.

7 January 16th, 1987, the bankruptcy court entered an
8 order approving settlement of Dioxin claims against
9 Charter. The court ordered 5.275 million to the 1,000
10 plus PI claimants, one million to the State of Missouri,
11 five million to the US EPA.

12 Payne & Keller dissolved despite knowing those claims
13 were out there, contrary to the representation it made to
14 the secretary of state and failed to make adequate
15 provisions for the payment of those claims. And they knew
16 there would be claims going forward because, of course,
17 there were already pending asbestos claims.

18 Your Honor, you had this timeline in front of you
19 when Travelers filed their motion, but what you, also, did
20 not have in front of you and what Travelers did not come
21 forth and put forward is any contrary facts to what I've
22 just given you.

23 The Receiver filed a report this week. I assume the
24 court has seen that. And in that, he filed many of the
25 insurers for Payne & Keller, their discovery responses.

1 And in those discovery responses, the Receiver asked them
2 what information do you have about the facts surrounding
3 the dissolution? Do you have anything? Without
4 exception, they all answered no, we don't have any
5 contrary facts to what you have.

6 The Receiver, also, in his report put forth evidence
7 that the time of its dissolution, Payne & Keller had
8 extraordinary amounts of insurance and the receiver put
9 forth in its report that there were hundreds of millions
10 of dollars on its face of available insurance to cover
11 claims, future claims, including asbestos claims.

12 So, Your Honor, the only evidence, the uncontroverted
13 evidence in this record is that Payne & Keller at the time
14 of its dissolution knew that there were claims currently
15 pending in Bankruptcy court and there would be more
16 coming. And they knew that. And in spite of that, they
17 wanted to dissolve anyway without providing appropriate
18 monies for future claims.

19 Your Honor, the Texas business organization code TBOC
20 11.153 of the code authorizes the court to revoke
21 corporations termination of its own corporate existence if
22 that termination was, and I quote, a result of actual or
23 constructive fraud.

24 And it further goes on to say, notwithstanding any
25 provision of this code to the contrary, a court may order

1 the revocation of termination of its existence that is
2 terminated as a result of actual or constructive fraud.
3 The revocation of the corporate termination under the
4 Texas business code enables a corporate entity to pursue
5 claims as if it were never dissolved.

6 11.153 BI-2 says, and I quote, the revocation relates
7 back to the affected date of the termination and takes
8 effect as of that date and the entity's status as an
9 entity continues in effect as if that termination of the
10 entity's existence had never occurred.

11 So what I'm asking you to do, I'm asking you to find
12 -- and I'm going to go through what constructive and
13 actual fraud means. I'm asking you to find that Payne &
14 Keller dissolved and its dissolution was part of the
15 actual or constructive fraud.

16 So I looked to -- and it's just a red herring that --
17 let me say this. No other party has filed an objection to
18 my motion other than these insurance carriers. And their
19 only goal is that they don't have to pay any money out of
20 their policies, policies that Payne & Keller paid for.

21 Now, they can go and argue all they want that their
22 policies don't cover whatever claims that claimants are
23 making, but their only goal is they don't have to pay any
24 money for insurance that they acknowledge they had and
25 that Payne & Keller paid for.

1 So we look to see what the Texas Supreme Court has
2 said about what is the actual and constructive fraud?
3 Judge, we said it to you in our brief, but the Castleberry
4 vs. Branscum, and it's 721 S.E.2d 270, a Supreme Court of
5 Texas opinion from 1986.

6 It says, and I quote, actual fraud usually involves
7 dishonesty with purpose or intent to deceive, whereas
8 constructive fraud is the breach of a legal or equitable
9 duty, which irrespective of moral feelings, the law
10 declares fraudulent because of its tendency to deceive
11 others to violate confidence or to injure public interest.

12 And then we look at other Texas cases. There's
13 another case called Latham vs. Burgher, B-U-R-G-H-E-R, 320
14 S.W.3d 602. And there, the Court -- this case is about
15 dissolving a company after an attorney threatens to file
16 suit for damages. And the court in that case said a
17 rational juror could have decided that Latham's conduct in
18 dissolving a corporation in the face of Burgher's claims
19 represented dishonesty or purposes or an actual intent to
20 deceive, i.e. actual fraud.

21 There is ample evidence and, Judge, it's the only
22 evidence before you that Payne & Keller engaged at a
23 minimum of constructive fraud, and I would argue even
24 actual fraud.

25 The company terminated its corporate existence to

1 avoid liability for both current and future toxic torts,
2 silica and asbestos personal injury claims. And Payne &
3 Keller was keenly aware as demonstrated of those claims
4 when the decision to dissolve was made.

5 The historical record developed today suggests that
6 Payne & Keller's work included significant construction
7 projects and industries and time periods where we know
8 they used asbestos and we know that asbestos disease has a
9 long latency period from the date of exposure. That's not
10 disputed.

11 Now, in your order where you deny Travelers' motion
12 to dismiss, the parties in that case did not ask you to
13 make a finding of fraud. They simply asked you to say
14 based on what we have before us, the motion to dismiss
15 should be denied.

16 We have put forth all the evidence. We have put
17 forth information about insurance policies, about
18 potential claims and that has not been disputed. No
19 carrier has come forth in their briefing and said here's
20 an affidavit. Here's a different fact. They just make
21 procedural arguments.

22 The one thing they want you to apply is Texas
23 three-year statute of repose, but they don't want you to
24 apply the fraud exception to the Texas business code.

25 We know that Payne & Keller had hundreds of millions

1 of dollars of insurance and that this dissolution was
2 fraudulent, constructive or actual as defined by the Texas
3 business organization code. Revoking the dissolution is
4 the appropriate step.

5 Payne & Keller cannot dispute the facts that we have
6 put forth and they don't say that our facts are wrong.
7 The insurers have not put forth alternative facts. They
8 don't say that our facts are wrong. There's no affidavit,
9 no witness, no other discovery. I think you should hear
10 from these carriers. I want you to do that. They filed
11 an objection. But I do question what standing they have
12 in this case to argue about.

13 One question I would have for the carriers is if they
14 were to agree, they never will, but if they were to agree
15 we have put forth facts that establish constructive or
16 actual fraud, would they agree that the revocation would
17 be the right thing to do? I don't think they'll answer
18 your question when you ask them that, but I think it's an
19 important question to ask.

20 Many of their procedural points you've addressed in
21 other orders, so I don't want to get into them too much.
22 But I do want to address a moment -- unless you want me
23 to, I want to address for a moment the South Carolina ties
24 Payne & Keller has.

25 They make a big deal out of that. Judge, we put

1 forth in the brief that Payne & Keller was registered to
2 do business in South Carolina beginning in 1967 and was
3 here for decades.

4 Payne & Keller subsidiary, M & W Equipment maintained
5 a sales office in Rock Hill, South Carolina. Daniel
6 corporation purchased a Payne & Keller affiliate in 1977.
7 Other than insurance assets, the receiver's investigation
8 has not uncovered any provision that Payne & Keller made
9 for any of its known or expected creditors at the time of
10 dissolution.

11 Your Honor, I'm sure you're aware of this, but I
12 think it was just two weeks ago, June 27th, 2023, the
13 United States Supreme Court in the Mallory versus Norfolk
14 Southern Railroad case, it was a personal jurisdiction
15 case, but in that case Norfolk Southern had registered to
16 do business in the State of Pennsylvania. Nothing else
17 happened in Pennsylvania at that time other than them
18 registering to do business. And the Supreme Court said
19 that's enough. Your Honor, I would argue that is enough
20 here, too. And we have more than that in this case.

21 Your Honor, the only other defense I'll address, a
22 lot of the other ones I think are red herrings, but
23 Travelers makes the point at the beginning of the case
24 that we should not be able to go forward with this motion
25 because my case is stayed as a result of the pending

1 appeal to the Court of Appeals. And, Your Honor, as we
2 discussed at the beginning of the case, it is two separate
3 issues. The issues they have on appeal are different than
4 what I'm asking you to do here.

5 So let me be clear what I think we would ask this
6 court to do. We are asking you to make a finding of
7 constructive fraud as defined under the statute in Texas
8 and Texas law.

9 We're asking you to make that finding that Payne &
10 Keller dissolved and that it was constructive fraud with
11 all the pending cases out there. And then we're asking
12 that you order the receiver to go to Texas and file with
13 the Texas secretary of state to reconstitute this company
14 under Texas business code 11.153. That's what we'd ask
15 you to do. I'm happy to address any other defenses that
16 Travelers raised you'd like me to or I can sit back and
17 come back in reply.

18 THE COURT: Very well.

19 Mr. Lee. Mr. Carroll.

20 MR. CARROLL: With your permission, my colleague,
21 Harry Lee, who I believe has appeared in front of you
22 before.

23 THE COURT: Yes.

24 MR. CARROLL: Thank you.

25 THE COURT: Thank you.

1 MR. LEE: Thank you, Your Honor, may it please the
2 Court. Harry Lee, Steptoe and Johnson, for Travelers
3 defense. I'd like to start out, Your Honor, with the
4 jurisdictional point. Your Honor, raised that point.
5 Ms. McVey spoke a little bit about it at the end, but I
6 think that's where we should begin.

7 Your Honor asked whether the claims at issue in the
8 motion to dissolve the receivership are in the same case
9 as the claims at issue here for the motion to revoke the
10 termination. Yes, they're in the same case.

11 There's an original complaint and then there's third
12 party claims. So we're in the same case. And that case
13 with respect to the motion to consolidate receivership is
14 on appeal.

15 Your Honor is correct, Ms. McVey was correct, there
16 is a question that's been asked by the South Carolina
17 Court of Appeals as to appealability, submissions have
18 been made on that issue and we are awaiting word from the
19 South Carolina Court of Appeals as to whether we're going
20 forward and what the schedule would be. But the Notice of
21 Appeal has been filed.

22 THE COURT: All right. Let's be clear what you
23 appealed. What did you appeal?

24 MR. LEE: I appealed all the issues that were
25 raised --

1 THE COURT: What ruling of mine?

2 MR. LEE: Yes.

3 THE COURT: What did I rule?

4 MR. LEE: You ruled for various reasons that the
5 motion to dissolve the receivership was denied.

6 THE COURT: The motion to dissolve was denied.

7 MR. LEE: Right. And there are --

8 THE COURT: And --

9 MR. LEE: There were various findings made in order
10 to reach that decision.

11 THE COURT: And the denial of a motion is not
12 ordinarily appealable. What makes this an appealable --
13 because you're asking me to stay as you contend that this
14 is an appealable issue.

15 MR. LEE: Well, I'm asking you to --

16 THE COURT: Well, I take that back. You say as long
17 as I've got an appeal up there and they haven't said it's
18 not an appealable issue it's stayed, right?

19 MR. LEE: Well, it's not just stayed, but this court
20 is deprived of jurisdiction to handle the issues that are
21 on appeal. That's Rule 205. The State Rule is 241.

22 So the effect of your ruling, Your Honor, if -- if
23 you said as a result of my ruling, Harry, you need to go
24 down the street and do this. Theoretically, under 241, I
25 don't have to go down the street and do this unless

1 there's an exception to the stay rule of 241 or someone
2 moves to lift the stay if I've appealed.

3 THE COURT: But I didn't do anything.

4 MR. LEE: You're right.

5 THE COURT: You wanted to dissolve the receivership.

6 MR. LEE: Correct.

7 THE COURT: So the whole issue before me was the
8 legitimacy of the receivership.

9 MR. LEE: Correct.

10 THE COURT: The matters we're talking about today
11 have nothing to do with the dissolving of the
12 receivership.

13 MR. LEE: Your Honor, I --

14 THE COURT: They have to do with the status of Payne
15 & Keller, whom you do not represent. You represent an
16 insurance company.

17 MR. LEE: I do.

18 THE COURT: And this thing has to do with the status
19 of Payne & Keller as a dissolved Texas corporation.

20 MR. LEE: And the basis for the motion to dissolve
21 the receiver --

22 THE COURT: And it has to do with the management of
23 the receivership, which I created several years ago with
24 respect to Payne & Keller. It asked for certain
25 directives to the receiver in a receivership, right?

1 MR. LEE: It did, but the --

2 THE COURT: And what does that have to do with your
3 motion to dissolve the receivership?

4 MR. LEE: The grounds for the motion to dissolve the
5 receivership were the status of Payne & Keller. That was
6 the basis for dissolving the receivership. The
7 receivership should not have existed in our view because
8 Payne & Keller doesn't exist. And it doesn't exist
9 because it was terminated through a dissolution process.
10 Your Honor ruled that that dissolution process was prima
11 facie fraudulent.

12 We've appealed that issue. Your Honor ruled that the
13 revocation statute, which was issued in 2021, which we
14 believe cannot be applied retroactively, that it could be
15 applied retroactively. We've appealed that. Those issues
16 are embedded in the grounds for this motion.

17 They're the same issues. And under Rule 205, not
18 Rule 241, but Rule 205, diversity is divested in this
19 court on those issues. They are necessary issues to
20 deciding this motion.

21 And with respect to whether anyone can sue Payne &
22 Keller after 1989 decided by Your Honor in the motion for
23 the dissolution of receivership is the basis for this
24 motion. They've argued that it can be. We've argued it
25 can't be.

1 The retroactivity of the 2021 revocation statute, we
2 believe it cannot be retroactive. Your Honor said it was
3 and that issue is on appeal. It's required to decide that
4 issue here again.

5 And the whole point of 205 is when issues have been
6 decided that the trial court will not go on with the case,
7 will not go on with the issues and will not make further
8 decisions and provide further relief while the issues are
9 pending before the Court of Appeals.

10 The Court of Appeals has the notice. It's going to
11 decide those issues. It's going to say who's right and
12 who's wrong on those issues. And then when the trial
13 court is advised of that, the trial court will go on. It
14 may be that Travelers loses, and it may be the Court will
15 go on at that point, but it can't go on now is our point,
16 Your Honor, under Rule 205.

17 And that, also, includes the evidentiary presentation
18 you've heard today. That presentation was made to Your
19 Honor with respect to the motion to dissolve the
20 receivership because the status of this company, Payne &
21 Keller, is at issue as to whether there should be a
22 receiver or not.

23 THE COURT: That's not what the Court of Appeals is
24 asking you to resolve at this moment at all.

25 MR. LEE: We are --

1 THE COURT: You are asking something preliminary to
2 that. They're asking -- they don't want any briefing on
3 all this stuff about actual and constructive fraud and
4 dissolution of Payne & Keller and all that kind of thing.
5 They only want to know whether the denial of your motion
6 is appealable.

7 MR. LEE: Which depends on whether Payne & Keller was
8 dissolved fraudulently.

9 THE COURT: No, sir, it does not. Your appeal
10 doesn't depend on that one bit. Your appeal is an appeal
11 of a denial of your motion. They're not going to get into
12 whether Payne & Keller should be dissolved. That's not
13 before them at all. What is before them is strictly a
14 procedural matter, which is if you make a motion before a
15 trial judge and the motion is denied, is that an
16 appealable matter?

17 MR. LEE: The denial of the motion continuing the
18 receivership, which we believe is immediately appealable,
19 and the grounds for that will be argued. One of the
20 grounds Your Honor wrote in Your Honor's order was that
21 the evidence presented to her had made out a prime facie
22 case of constructive fraud.

23 THE COURT: Right. Just like if I deny a motion to
24 dismiss, I will deny it on the basis that the pleadings
25 make out a prime facie case. That's not the final ruling

1 in the case at all.

2 MR. LEE: Agreed.

3 THE COURT: You're trying to characterize it that way
4 because that's the only way you can get the Court of
5 Appeals to address it.

6 MR. LEE: Well, let me --

7 THE COURT: If I had made a final ruling, they could
8 address it, but they can't address something that's not a
9 final ruling.

10 MR. LEE: Your Honor, with respect to the
11 appealability of whether a receivership is continued, I
12 believe that we can make the arguments as to why that
13 receivership should not be continued and to refute --

14 THE COURT: Well, I'd be amazed if they let you do
15 that. I've been proved wrong many times by appellate
16 courts and I'm just a trial judge.

17 MR. LEE: Understood --

18 THE COURT: They get to do what they --

19 MR. LEE: And I fully understand that --

20 THE COURT: All they ought to be doing is deciding
21 whether or not the denial of the motion, which simply
22 allows the matter to go forward for further adjudication
23 is sufficient to give them complete jurisdiction to decide
24 if these matters or this thing has been constructively
25 little fraudulent or acted in a fraudulent way. I don't

1 find that it was. I find that there is sufficient
2 material in the pleadings and other information presented
3 to make that finding.

4 MR. LEE: The finding that you're being asked to make
5 today is that as a matter of law there was fraud. As a
6 matter of law --

7 THE COURT: Right.

8 MR. LEE: -- summary judgment fraud occurred.

9 THE COURT: That's right.

10 MR. LEE: And our point --

11 THE COURT: Now, what you're asking me to do in the
12 other case is to dissolve the receivership.

13 MR. LEE: Yes, because there was no constructive
14 fraud.

15 THE COURT: Because there was no constructive fraud.

16 MR. LEE: And Your Honor said --

17 THE COURT: And I said no, I'm not going to do that.
18 Now, I'm going to take up the merits of what I said no,
19 I'm not going to bypass the merits and simply dissolve the
20 receivership. That's what you want, dissolve the
21 receivership, Judge, and then you won't make any of these
22 decisions.

23 Well, all I did was say no, we're going to continue
24 on receivership. There's a bunch of static for all kind
25 of reasons, one of which is this, but not all of them.

1 There's a merits claim quite apart from whether this P and
2 K should have been dissolved.

3 I have many receiverships involving dissolved
4 corporations that are not going to be undissolved or
5 anything else. They were dissolved for abandonment of
6 their certificate or whatever reason. But they have
7 legacy insurance, that's the real situation involving this
8 file because that is who is paying for your victims' fund.
9 All right. Very, very able argument. That's the real
10 deal in this thing.

11 I created these receiverships because as long as
12 these defunct corporations are in the hands simply of
13 carrier's lawyer, their assets will not be marshaled for
14 protection and claims. They were hiding the ball. That's
15 what happened with Coble. That's what happened a bunch of
16 these other things. I said, well, we're going to get
17 somebody independent in there, a receiver, to act in the
18 best interest of the corporation. And that's what's being
19 done here. That's what you're trying to prevent being
20 done because then we'll have a specific discussion of
21 these charts that show all this insurance.

22 So that's what we're really talking about. We're not
23 talking about the Texas law or anything else or
24 receivership itself.

25 MR. LEE: Well --

1 THE COURT: We're talking about an attempt to evade
2 any kind of examination of potential insurance that Payne
3 & Keller, even if it was completely dissolved. And my
4 ability to look at that, the merits of the matter is not
5 at all impacted by whether Payne & Keller was dissolved or
6 not and, frankly, it's not even impacted by whether Payne
7 & Keller is a receivership.

8 Payne & Keller is a defendant in this lawsuit.
9 That's all that needs to be said. And I am, at this
10 point, dealing with that defendant and its potential
11 insurance.

12 MR. LEE: I believe I do understand all that, Your
13 Honor. I understand you want to keep it to the basics and
14 I fully appreciate the job that Your Honor is undertaking,
15 not just this matter --

16 THE COURT: I know you do. Listen, you've got fine
17 counsel in this room, Todd Carroll in principle and
18 honesty and so you don't have to apologize for the
19 position you take. I'm not suggesting that one darn bit.
20 You're doing a good job, as you should be.

21 MR. LEE: But just to understand, the South Carolina
22 Court of Appeals may disagree with us, but we do intend to
23 brief whether the decision that the evidence presented to
24 Your Honor before, which is exactly the same evidence
25 today, it hasn't changed one bit, is prima facie evidence

1 of constructive fraud in a situation where the facts are
2 what they are.

3 THE COURT: And that will be so contrary to the way
4 the appellate practice system is set up in this state.
5 What you're asking them to do is on an undeveloped issue
6 where I've only made a preliminary decision that the
7 pleadings allowed them to go forward and not decide
8 whether constructive fraud or actual fraud, you're asking
9 the Court of Appeals to make that decision. That's what
10 you're asking me to do.

11 MR. LEE: It may be unique, Your Honor. I understand
12 if there was a Rule 12 motion and it was simply a motion
13 to dismiss that wouldn't be appealed, but here because
14 whether the receivership should continue is appealed and
15 is based --

16 THE COURT: How is -- if I deny it, how is that
17 appealable? That's not a final decision.

18 MR. LEE: Because there's a statute that says in
19 South Carolina that one of the immediately appealable
20 things is when a trial judge continues a receivership over
21 the objection of a party. That's immediately appealable.
22 It has to go up. It is now up. The Court of Appeals will
23 tell us whether we're wrong or not.

24 THE COURT: Well, that's a South Carolina
25 receivership, is it not? You're talking about the South

1 Carolina receivership law --

2 MR. LEE: Yes, yes. Yep, but that's immediately
3 appealable. It has been appealed and the decision about
4 whether that receivership should exist or not depends upon
5 whether Payne & Keller exists or not. And so all the
6 issues as to whether Payne & Keller exist, that was the
7 argument.

8 THE COURT: It can exist or not exist. Receiverships
9 can be had for active corporations, dissolved
10 corporations --

11 MR. LEE: Understood.

12 THE COURT: That's yet to be determined exactly what
13 they are.

14 MR. LEE: But it's in front of the Court of Appeals
15 now is my issue. And I don't want to beat a horse. I
16 said what I've said. I'm not here to argue with Your
17 Honor.

18 THE COURT: I understand. I understand. I'm
19 probably being unfair for pushing this. You continue your
20 argument.

21 MR. LEE: One of the other issues that was in the
22 motion to dissolve the receivership issue, and is in this
23 issue is also whether this Court has the power to do what
24 Ms. McVey is asking you to.

25 Now, she said something for the first time, not in

1 her papers, at the end of her presentation and Your Honor
2 was busily writing that down at the end, which was what I
3 want you to do, Your Honor, after you grant our motion is
4 I want you to order the receiver to go to Texas and ask
5 the Texas Comptroller for accounts, Secretary of State to
6 revoke the termination of Payne & Keller. That had never
7 been suggested before. That's a different take.

8 We don't believe that -- we believe that what had
9 been asked before was that Your Honor revoke the
10 termination of Payne & Keller. And one of the arguments
11 we made before is Your Honor doesn't have been the power,
12 no South Carolina court has the power to do that.

13 We still believe in that. We still have that as one
14 of the issues on appeal with respect to the receivership
15 issue, but that's something that I need to think about
16 because that would then have the matter decided in Texas.
17 That would then have a Texas proceeding where Texas agency
18 folks and anybody interested in Payne & Keller would then
19 have to figure out whether that order justifies the
20 revocation. But Your Honor isn't ordering the revocation,
21 that's a different suggestion by Ms. McVey. I honestly
22 need to think about that, as to whether that's a procedure
23 that gets away from or gets around the power of this Court
24 and limits the power of this Court.

25 THE COURT: You're going right to the heart of the

1 thing I've been concerned about most of all, it's not the
2 Court of Appeal's business. You're going right to the
3 heart of it. That's why I'm fighting so hard because
4 that's the first time I heard about that, too.

5 I have a lot of questions about whether I on my own
6 albeit applying Texas law had the authority to undo the
7 Texas dissolution by order of this Court. And I think
8 there's a lot of difference between that and what is now
9 being asked, which is that I direct the receiver to pursue
10 a certain course of action before the proper tribunal.

11 In that connection, you may know, and I'm sure you
12 all do know because you follow these things all over the
13 country, but the Receiver has been directed to go into a
14 lot of different courts to pursue matters that relate to
15 receiverships in South Carolina, that is not unusual at
16 all.

17 I remember the first receivership I ever knew about,
18 which was the reason I came to brainstorm about these
19 defunct corporations and receiverships with Gann
20 (phonetic) and Coble was an old case involving New South
21 Life Insurance Company in South Carolina. And my senior
22 partner and I created a receivership for New South to
23 defend against what was going to be a bunch of claims,
24 just like P and K did, just like P and K did.

25 MR. LEE: Well, Your Honor, it's our view that the

1 Texas court is the one that should be doing what's --

2 THE COURT: They're saying, look, Judge, we think you
3 should direct the receiver to go to Texas and get their
4 determination about this dissolution. How could you
5 possibly fuss about that? That's what I don't understand.

6 MR. LEE: Tell you the truth, I'm remarking that I've
7 heard it for the first time today because until now,
8 they've been asking this court to revoke the termination.

9 THE COURT: Now, they're asking something different.

10 MR. LEE: And if they're going to go to Texas and
11 file this motion in a proceeding and then get factual
12 determinations and get people whose got personal
13 jurisdiction and get witness testimony from them and so
14 forth because there is no personal knowledge information,
15 there's nothing suggesting --

16 THE COURT: I don't know what that procedure will
17 involve and I don't think you do either, Mr. Lee, but I
18 doubt it's going to involve what you think it's going to
19 very, which is this factual hearing down here.

20 I don't know that that's at all what's going on. Be
21 that as it may, all this stern and burn about whether
22 there is evidence of constructive fraud has resolved
23 itself today into a request to direct a receiver to revoke
24 the dissolution of P and K. What's wrong with that?

25 MR. LEE: Well, for one, on this point here, it

1 should be done in Texas. A Texas court will tell a Texas
2 agency what it should and shouldn't do.

3 THE COURT: Well, in a way, I'm going to be making
4 that determination because what they're asking me to do is
5 say constructive fraud. Now, I want you to do the
6 administrative thing by going to Texas and asking Texas to
7 on behalf of your corporation to revoke the dissolution
8 admitted by you, the corporation, constructive fraud.
9 Now, how can you -- what's your -- what kind of -- I just
10 don't understand how you --

11 MR. LEE: I don't think Payne & Keller has said they
12 committed constructive fraud.

13 THE COURT: That's what they're planning on doing.

14 MR. LEE: They said it might have. That's the --

15 THE COURT: No, what they're saying is they want me
16 to make that determination. They want me to take that
17 determination down to Texas and say please exercise your
18 administrative duty and revoke this dissolution. We've
19 got it, a judge has found it. That's what they're asking.

20 MR. LEE: I don't know that Payne & Keller has yet
21 asked you to do that.

22 THE COURT: The receiver for Payne & Keller.

23 MR. LEE: The receiver for Payne & Keller -- I have
24 not seen a motion for you to revoke from the receiver to
25 revoke the termination. It's coming from the plaintiff.

1 THE COURT: Well, exactly. It is. It is.

2 MR. LEE: So the receiver has not made a motion
3 saying we committed constructive fraud, Payne & Keller did
4 and we'd like you to find that.

5 THE COURT: That's correct. That's correct.

6 MR. LEE: The plaintiff has done that. And it's a
7 very significant difference.

8 THE COURT: Exactly, and that puts it a step away
9 from this third party and Court of Appeals, as well, does
10 it not?

11 MR. LEE: Well, if there's an order to the receiver,
12 go on down to Texas, start a proceeding and decide whether
13 you think there was constructive fraud or not or find
14 out --

15 THE COURT: That's not what he's going to do at all.
16 He's going to do just like I would do as the secretary of
17 State if I'm going to represent a corporation that's
18 already dissolved. I'm going to file revocation papers.
19 It's an administrative act for the Secretary of State to
20 then revoke the dissolution. That's what he's going to
21 do.

22 MR. LEE: If he has a finding that the secretary will
23 accept the fraud.

24 THE COURT: Well, if I make that finding, Texas --

25 MR. LEE: And my only point coming full circle is we

1 don't believe Your Honor has the right to make that -- a
2 South Carolina court has a right to make that finding.

3 THE COURT: The Court of Appeals is going have the
4 right to make that finding.

5 MR. LEE: Well, the Court of Appeals could
6 potentially make the finding that the evidence they
7 presented doesn't come close or even anywhere near a prime
8 face case of fraud. I can go through that, Your Honor, as
9 to why because --

10 THE COURT: They can make that as a reversal of my
11 ruling, right?

12 MR. LEE: Yes.

13 THE COURT: Well, I haven't ruled that yet.

14 MR. LEE: Your Honor did write in an order that there
15 is a showing of a prima facie case of fraud.

16 THE COURT: Yes. That's not a permanent finding.

17 MR. LEE: Understood, but it is where we are and
18 it's the reason for continuing the receivership.

19 THE COURT: I understand.

20 MR. LEE: Let me turn, Your Honor, to the evidence.

21 THE COURT: All right.

22 MR. LEE: Because I think it's important to go
23 through that.

24 THE COURT: Let's look at it.

25 MR. LEE: This is a fraud claim, fraud.

1 THE COURT: Yes.

2 MR. LEE: 9(b) particularly requirements to plead
3 nowhere to be found. No reply to the affirmative defense
4 that Payne & Keller raised to the statute of repose. No
5 reply to that under 8(c) with any pleading of
6 particularity to fraud.

7 There's no pleading at all. Nothing for us to shoot
8 at, nothing for us to investigate. Simply someone
9 gathering documents back from 1986 and trying to tell a
10 story.

11 That story has almost nothing to do with asbestos,
12 nothing to do with asbestos. It's a story about a company
13 that's involved in the industry that worked in a lot of
14 places. That in 1986, got sidled with somebody about
15 Dioxin claims, not asbestos claims. As of that point in
16 time, they had one asbestos claim made against it that was
17 dismissed and no record or evidence suggesting that it was
18 paid, just that it was dismissed.

19 In the three years after the dissolution, from '86 to
20 '89, no record of any asbestos claims, no outrage, no
21 wondering why did Payne & Keller do this, no effort to
22 revoke the termination, no effort to revoke the
23 termination for 35 years or more until now. Payne &
24 Keller, big company, everybody knows about them.

25 All the plaintiffs' lawyers are real good at naming

1 folks and making sure every defendant is named. There is
2 a smattering of claims. They are dealt with by the
3 insurance, and they are paid. No one has been shorted.

4 THE COURT: Let me stop you right there one minute.

5 MR. LEE: Okay.

6 THE COURT: Payne & Keller was dissolved in Texas.

7 MR. LEE: With parents who have agreed to indemnify.
8 So you have people taking care of the claims, not Payne &
9 Keller.

10 THE COURT: Well, is that how your insurance company
11 and you lawyers like you and Todd got into this thing is
12 through insurance companies for the indemnitors?

13 MR. LEE: No, we are insurance companies for Payne &
14 Keller.

15 THE COURT: Exactly. That means you're insurers for
16 Payne & Keller, at least, the argument is because that was
17 before asbestos claims were excluded from the policies.
18 And at a time when policies were written as per current --

19 MR. LEE: Right.

20 THE COURT: -- not as claims made policy. That's
21 what gets you in this picture.

22 MR. LEE: Yes.

23 THE COURT: So you're directly in it as an insurer of
24 Payne & Keller. And you can't on the one hand tell me oh,
25 Payne & Keller is doing nothing. They're completely

1 dissolving everything. But you're acting for them as a
2 lawyer. The defendant in the lawsuit is not Travelers or
3 Aetna. It's Payne & Keller. And you as their insurer are
4 acting for Payne & Keller. So what gives you --

5 MR. LEE: Well, Mr. Carroll and I aren't involved in
6 any of that, okay? We're not involved in any defense --

7 THE COURT: But that's what's happening for your
8 company --

9 MR. LEE: So --

10 THE COURT: -- where these claims are being defended
11 and you're the one arguing.

12 MR. LEE: So let me tell you what happens.

13 THE COURT: All right.

14 MR. LEE: Payne & Keller gets named. Their status
15 has been revoked. They've been terminated. They get
16 dismissed. They name the right company, okay, and the
17 insurers for that company get involved. But in the
18 meantime, we have to get involved to get Payne & Keller
19 dismissed. And they're always dismissed. No one seeks to
20 revoke the termination. No one challenges it, 35 plus
21 years. No one is shorted any money. That's what
22 happened.

23 And Mr. Carroll and I weren't involved in this until
24 a year or two ago. So all that has happened way before we
25 got anywhere near. We're arguing on the coverage issues.

1 We're arguing, obviously, on the termination issues. And
2 yes, when you have a Texas insurer and you have a
3 dissolution statute that has a three-year statute of
4 repose that goes not just to 2003, but all the way before
5 1986 through the predecessor of the statute, section 7.12
6 provides that there's a three-year statute of repose.

7 And certain states, not all of them, but certain
8 states do this. They have decided for their corporations
9 that form there are going to have this finality and they
10 expect that the other states in the country will respect
11 that.

12 Now, whether they do or they don't, but that's the
13 expectation. Certainly, the South Carolina authorities
14 here knew when the Payne & Keller signed up to be
15 registered to do business here, which appears that they've
16 never done, by the way.

17 There's no evidence of anyone doing business here for
18 Payne & Keller, but we'll get to that in a minute. But
19 South Carolina knew they were a Texas company and they
20 would know that Texas has statute of repose. So that
21 three-year cut off claims by anybody is going to apply to
22 that company doing business in this state. And yet, they
23 let them do business in this state.

24 There's no condition that says you can't do business
25 in the state as a Texas company because we have a statute

1 of repose and we don't like it. It applies and it applied
2 all the way back to 1986.

3 THE COURT: The Secretary of State doesn't make any
4 determination of that domestication of foreign
5 corporations for the purposes of doing business in the --

6 MR. LEE: I'm sure they don't look into it.

7 THE COURT: Nobody does.

8 MR. LEE: But the statutes are what the statutes are
9 and they existed. And I'm sure Texas expects that they
10 will be respected. Whether they are or they aren't, I
11 don't know. But like I said, there are other states like
12 this. Not that many, but they exist. There are many
13 states that have dissolution, but you can still sue them
14 after the three-year period.

15 But turning back to the evidence, the evidence here,
16 as I said, is there was not when they dissolved. When
17 Payne & Keller dissolved, there was no evidence. There
18 was no evidence of a single asbestos claim pending against
19 them or a threat to be filed against them. Not one. Yet,
20 what's being asked here is a determination that Payne &
21 Keller defrauded this asbestos claim when it terminated.
22 This asbestos claim that was filed 35 years later. It
23 should have been expected. It should have made provision
24 for it. And somehow that was fraud by dissolving in that
25 manner.

1 This is an action mostly by the plaintiff. It's not
2 made upon a motion of every other asbestos claim. It's
3 not made on behalf of other kinds of plaintiffs. This is
4 this person's asbestos claim. And this person is saying I
5 was defrauded in 1986 when Payne & Keller didn't have a
6 single asbestos claim against it or a single threat of an
7 asbestos claim against it.

8 All it knew was that there were asbestos claims
9 against lots of companies, not Payne & Keller and not
10 Payne & Keller in the three years afterwards.

11 In addition, with respect to the claims it knew about
12 or that were threatened, it handled them in the three-year
13 repose period. They got paid. They didn't get stiffed.
14 The officers and directors made provisions for those
15 claims and they paid them.

16 THE COURT: Well, now, how does that line up with the
17 fact that you say there's this indemnity out there that
18 continues to pay claims all the way, asbestos claims? I
19 mean, link those two up for me.

20 MR. LEE: Well, Your Honor, I don't know why the
21 indemnity isn't the resolution. Maybe there's some sort
22 of cap, maybe there's some sort of argument that those
23 companies are making about what they pay or what they
24 don't pay. They're not my clients.

25 THE COURT: Well, you started this off by arguing

1 that you all relate to these indemnitors. You get these
2 things dismissed because you can send them to the
3 indemnitors. This is not some hands off relationship you
4 have with these people.

5 If you're not doing what lawyers do to the Coble
6 Corporation and trying to pass them off as somebody that's
7 making an active decision, then you're handing it off to
8 someone that can make an active decision on behalf of
9 whoever is responsible for the dues of P and K. And what
10 you're saying is it's indemnitors. I mean, that's an
11 ongoing relationship that y'all have with them.

12 MR. LEE: I don't think that P and K can have a
13 relationship with anybody. They're dissolved. They're --

14 THE COURT: Well, how are you as the insurer going to
15 these indemnitors and getting them to take over the
16 settlement for claims against Payne & Keller if what you
17 just said is true?

18 MR. LEE: Based upon the sale documents. The sale
19 documents provide that these companies are going to pick
20 this up and Payne & Keller is going to go away.

21 THE COURT: But the way you get into it is somebody
22 sues Payne & Keller and you're their insurer and that's
23 how you get into it.

24 MR. LEE: My client is their insurer and has been for
25 years and still is today.

1 THE COURT: And you're still taking some very active
2 measures on behalf of this dissolved corporation to keep
3 from paying claims yourself.

4 MR. LEE: Your Honor, with respect, we're not doing
5 anything on behalf of Payne & Keller. We're not
6 representing them, we're not advocating for them.

7 THE COURT: You're sending the claims against Payne &
8 Keller to indemnitors for them to pay, are you not? I
9 mean, that's what you said.

10 MR. LEE: I think maybe there's a misunderstanding.
11 When Payne & Keller gets named, a lawyer after the verdict
12 being paid by the insurance company shows up and says
13 Payne & Keller is not a company.

14 THE COURT: Right.

15 MR. LEE: So we're specially appearing to let the
16 court know that and have the court aware of the
17 arrangements Payne & Keller made.

18 THE COURT: Which is indemnity arrangements.

19 MR. LEE: With other companies that we don't
20 represent and we don't control what Travelers doesn't
21 insure.

22 THE COURT: But you tell through the indemnitors --

23 MR. LEE: We tell the plaintiff and then the
24 plaintiff goes out and sues however it wants to and Payne
25 & Keller goes away and nobody attempts to revoke its

1 termination.

2 THE COURT: Well, that's a lot of present involvement
3 in the affairs of a company you say you don't have
4 anything to do with is all I got to say. And the reason
5 is because it owes the insurance policies, the legacy
6 policies, still cover matters that began with an exposure
7 when the policies are in existence, but has a long latency
8 period and, therefore, goes back to that time. It can't
9 be that way for purposes of coverage and at the same time
10 say we don't have anything to do with it.

11 MR. LEE: Well, Your Honor, if the company is
12 terminated, you can't legally quote, unquote represent it.

13 THE COURT: Oh, yes, you can. You can have
14 receiverships for the first purpose of marshaling the
15 assets of that defunct or dissolved corporation in aid of
16 protection of claims.

17 MR. LEE: I don't disagree with you, but I think
18 there's a difference between dealing with assets and
19 acting for a company that doesn't exist.

20 THE COURT: Well, you act for a company that doesn't
21 exist because you have the assets. You're the insurance
22 company. So you can do it in one sense, but not in
23 another? That doesn't make any sense, Mr. Lee, with great
24 respect for your intellect and your knowledge on coverage
25 matters, although I have done it many times.

1 MR. LEE: Your Honor, the facts that we are presented
2 with is -- and we didn't do it. We weren't involved with
3 it. Payne & Keller dissolved. There's a statute that
4 says after three years, they can't be sued.

5 THE COURT: But their insurance is still viable and
6 that's who you're representing.

7 MR. LEE: Their insurance is viable to the extent
8 they can be held liable.

9 THE COURT: Right.

10 MR. LEE: And they can't be held liable anymore.
11 That's just a simple -- you can say we're taking advantage
12 of it or whatever you like, but that's fact. They can't
13 be held liable anymore, so there's nothing for us to pay.
14 They can't have a judgment against them. They can't --

15 THE COURT: Then why in the world do you do any of
16 this? Why does Travelers hire you to represent them to
17 file these claims against Payne & Keller? Because if
18 they're defunct and you don't have to do anything, then
19 why do they hire you at all?

20 MR. LEE: Because of the arguments being made in this
21 case, that they shouldn't be terminated. That they should
22 come back to life. They should have a judgment be allowed
23 to be entered against them.

24 THE COURT: This is a fairly unique set of
25 circumstances and arguments being made, but you've been

1 defending them for a long time in cases where you can make
2 exactly the argument you're making.

3 They're defunct, they're out of business, they're
4 gone, they're dissolved, therefore, we have no
5 responsibility. And that's what you tell the plaintiffs
6 when you tell them here's where you get your money. But
7 the insurance company is paying you to do that why?

8 MR. LEE: Well, they're not paying me to do that.
9 I'm not involved with that. That's --

10 THE COURT: Well, they're paying somebody to do it.

11 MR. LEE: I'm sure they have to pay somebody to do it
12 because there's nobody around to say it except for them.
13 There's no one around to tell the court hey, the plaintiff
14 is suing somebody that is terminated.

15 THE COURT: Well, why would it matter? If they're
16 out of business and can't be sued or anything else, they
17 can get a judgment for 34 million dollars against Payne &
18 Keller the next time one of these cases is tried and you
19 wouldn't have any problem with it up at Travelers. I bet
20 Travelers wouldn't want that --

21 MR. LEE: So long as the termination is upheld and
22 that judgment will be vacated, but it shouldn't get to a
23 judgment because all you do is tell the court Payne &
24 Keller is dissolved. It doesn't exist anymore, so you
25 need to stop court and the court says okay. Because

1 nobody can test it and nobody has for years because nobody
2 thinks anybody ever got defrauded.

3 THE COURT: The problem with that argument as I see
4 it, you have contractual -- and this is why they hired
5 you, so let's quit fooling. That Travelers policy or
6 Aetna policy was written back in the 80s when the exposure
7 occurred --

8 MR. LEE: Yes.

9 THE COURT: -- still applies to those obligations as
10 that occurred because of torts committed at that time.
11 And the fact that they are now no longer in existence
12 won't make any difference because the plaintiff can still
13 collect that insurance. That's why you're still in this
14 case.

15 MR. LEE: And I'm not -- again, fully respecting the
16 court and I don't want to argue with the court and I'll
17 move on as a result of this, but the insurance obligations
18 are to pay judgments or to pay settlements that can only
19 be entered into by a company that exists.

20 It can only be entered against a company that exists.
21 There is no obligation of an insurance company to pay
22 something that can't be incurred. It can't be incurred by
23 our insured. Texas has said so. It can't be incurred.
24 That company cannot incur anymore liabilities after 1989,
25 so there's nothing --

1 THE COURT: They occurred these liabilities before
2 1989. That's the point.

3 MR. LEE: Not these liabilities.

4 THE COURT: Oh, yeah. I mean, this case is not
5 existing in a vacuum. The reason for the Childers case is
6 because -- and the reason you're involved in this case is
7 because they are claiming injuries that occurred during a
8 time when Payne & Keller was alive and had insurance.

9 MR. LEE: Had injuries, yes, not judgments.

10 THE COURT: Well, the judgments relate back to that
11 time in terms of getting money from the insurance company.

12 MR. LEE: The way the Texas statute is written, Your
13 Honor, it says no liability after the dissolution repose
14 period. There's no liability.

15 THE COURT: Well --

16 MR. LEE: And, Your Honor, again, I know that the
17 court cares deeply about people who have been injured and
18 should and the court cares deeply --

19 THE COURT: Don't hang that on me. I was the first
20 member of the South Carolina Supreme Court to ever be
21 primarily a defense lawyer and a member of the South
22 Carolina Defense Lawyers Association. I care about
23 fairness of these proceedings and that's all.

24 MR. LEE: It's not --

25 THE COURT: If they end up getting a judgment for

1 nothing, that's as it should be. don't go hanging it on me
2 that I'm making these determinations because of some
3 concern for the plight of the plaintiffs. That's not it
4 at all. It's what the corporate law requires. That's
5 what drives me.

6 MR. LEE: I meant no disrespect. I actually meant it
7 as a compliment because I would say that about myself and
8 I'm a defense lawyer. You should care and I understand.
9 I understand you're trying to be fair, but the statute
10 says what it says and the facts are what they are.

11 These facts don't come close, Your Honor,
12 respectfully. They can't because there's no known or
13 threatened asbestos claims that Payne & Keller knew about
14 during that time period.

15 Beyond, Your Honor -- and I'll finish up now, beyond
16 the lack of any pleading and the evidence being
17 insufficient, Your Honor, we have also raised a latches
18 and estoppel issue. I'm not going to bother arguing that
19 and I'll be happy to answer any further questions or reply
20 to Ms. McVey if there is any.

21 THE COURT: Thank you, sir.

22 Ms. McVey, any reply?

23 MS. MCVEY: Your Honor, I don't know if you want to
24 hear from the Receiver or not. The only thing I would
25 say --

1 THE COURT: Well, yeah, I do want to hear from the
2 Receiver.

3 Mr. Robinson, are you here for the receiver?

4 MR. ROBINSON: Yes, Your Honor. You want me to come
5 up there or can I talk --

6 THE COURT: No, I'm just speaking as a batter with
7 being on the bench.

8 MR. ROBINSON: I am here for the Receiver, Your
9 Honor.

10 THE COURT: No, you come to the podium. I don't
11 think you can -- Mr. Kinard, that passed right over him.
12 I'm suggesting you need to be right up here on the bench.

13 MR. ROBINSON: I got a big bench, Your Honor.

14 THE COURT: I do that for all my former clerks.

15 MR. ROBINSON: Your Honor, John Robinson here for
16 Peter Protopapas, the Receiver for Payne & Keller. As the
17 Court is aware, the Receiver filed last week a report, the
18 Receiver's report on July 6th, 2023, along with a motion
19 to seal certain exhibits.

20 THE COURT: Yes.

21 MR. ROBINSON: We've also filed a notice of filing of
22 discovery responses, which the receiver is in -- which the
23 receiver received, and we filed a notice of filing of
24 policies of insurance.

25 Your Honor, we did that because, of course, once the

1 plaintiff filed the motion, we wanted to have all of these
2 things in the record as they may be relevant to the
3 court's consideration. And as the court-appointed
4 receiver, we wanted to make that information available to
5 the court and any parties that would be reviewing the
6 information of the receiver.

7 Your Honor, first of all, to be clear that the --
8 we're here today for the plaintiff's motion to
9 reconstitute Payne & Keller under a statute, the Texas
10 statute that allows such action to take place if a Court
11 finds constructive or actual fraud.

12 The carriers are in this case as a defendant in a
13 coverage action. They are here by virtue of them being
14 named as a defendant in a coverage action which the
15 receiver has filed against them. And that is not unusual.
16 The carriers are in a number of receivers --

17 THE COURT: The receiver starts off representing
18 Payne & Keller?

19 MR. ROBINSON: Correct.

20 THE COURT: The receiver then on behalf of Payne &
21 Keller third party, the insurance company in that case
22 assigned coverage?

23 MR. ROBINSON: That's correct.

24 THE COURT: So as Mr. Lee, quite ably began in this
25 matter, it's all in this case?

1 MR. ROBINSON: Correct.

2 THE COURT: Different aspects of this case. One is a
3 different action. It's a third-party action. And then
4 there is the main action, which is the plaintiff's action
5 against Payne & Keller?

6 MR. ROBINSON: Correct. And to that point, Your
7 Honor, the carriers are here today as named defendants in
8 a coverage action.

9 Now, they have filed an objection to the plaintiff
10 is -- to the plaintiff's petition for a motion to -- for a
11 finding of constructive fraud. And they have been
12 speaking on that today, which, you know, certainly, is
13 their right, they're a third party to the case. But I
14 want to at the outset say that the receiver has no
15 interest in being part of continuing any fraud if a fraud
16 has occurred. That is not his role in this case and I
17 don't think the court would instruct him to do so.

18 So what we have is the evidence that has been
19 presented to the court through discovery responses,
20 through public filings by the plaintiff and, also, by what
21 the receiver has found in his own investigation. And as
22 we have said in the report, the receiver has not uncovered
23 any facts that are inconsistent with the facts alleged by
24 the plaintiff or that are inconsistent with the receiver's
25 prior filings in response to the carrier's motion to

1 dissolve.

2 The issue of constructive fraud, as the plaintiff has
3 illustrated through the Texas Supreme Court, says
4 constructive fraud is the breach of some legal or
5 equitable duty, which irrespective of moral guilt, the law
6 declares fraudulent because of its tendency to deceive
7 others, to violate confidence or to injure public
8 interest.

9 Your Honor, based on the information that the
10 receiver has uncovered and based on the filings of the
11 report, the receiver has not received any evidence
12 contrary to the allegations that have been made, including
13 as late as Friday when the carriers filed their objections
14 to the plaintiff's motion, there were no facts that were
15 alleged that were contradicted.

16 So in the sense of where we are today versus where we
17 were back in January, which I want to talk about in a few
18 minutes, the receiver is not in possession nor is any
19 party of evidence not presented to the court of any facts
20 that contradict facts being alleged by the plaintiffs
21 today as it relates to a dissolution.

22 THE COURT: Let me stop you right there. Here's the
23 big pitch as I see it with respect to the dissolution of
24 Payne & Keller. They say at the time Payne & Keller was
25 dissolved, there were no asbestos cases. You say there

1 were 3,000 asbestos cases -- or the plaintiff says there
2 were 3,000 asbestos cases. Help me through that.

3 MR. ROBINSON: So, Your Honor, in our report, we have
4 identified -- and these are in the public record. There
5 is -- the plaintiff -- I want to lead up and answer that
6 question if I may.

7 So let's not forgot that it is the carriers who have
8 brought this issue to the forefront, and it's the carrier
9 who prevailed upon this Court to take -- undertake an
10 in-depth analysis of the Texas business statute when they
11 filed their motion to dismiss and their motion to dissolve
12 the receivership.

13 THE COURT: Right. And in that connection, what
14 they're saying, Mr. Robinson, is when you can't -- they
15 say it's a complete negative. They say at the time that
16 Payne & Keller receivership was -- I mean, dissolution was
17 filed way back when that there were no -- Payne & Keller
18 was not aware of nor were there any asbestos claims
19 pending against Payne & Keller.

20 MR. ROBINSON: Your Honor, I don't think that's true.
21 I think if you look at the bankruptcy case that is cited
22 both in the receiver's motion to -- or response to the
23 carrier's motion to dismiss and if you look at our report,
24 there are a number of cases that were filed in the -- from
25 1983 all the way up through their dissolution in 1986

1 against Payne & Keller.

2 THE COURT: Yeah. Now, here's what they say about
3 that. They say with respect to in re Charter, that's the
4 bankruptcy case, these were personal injury claims arising
5 from refinery work.

6 They were Dioxin, Dioxin, however you pronounce it.
7 They were Dioxin claims, not asbestos claims. So what I'm
8 asking is where are the asbestos claims? Now, what you
9 say in the report here is that they were a defendant in a
10 Texas asbestos case filed by the law firm of Baron & Rudd
11 -- or Budd.

12 MR. ROBINSON: Baron & Budd, yes.

13 THE COURT: Hank Hanniger against Brown and Roof
14 (phonetic).

15 MR. ROBINSON: Yes, Your Honor.

16 THE COURT: And that the case that Payne & Keller --
17 the claims filed against Payne & Keller in that case were
18 dismissed on May 21st, 1986, but by then, asbestos related
19 personal injury claims filled the court's docket in the
20 Eastern district of Texas alone more than 3,000
21 asbestos-related personal injury claims have been filed by
22 1981. See the party of John Mansfield. What I'm asking
23 is this, how many of those -- do any of those involve
24 directly Payne & Keller?

25 MR. ROBINSON: I don't know the answer to that off

1 the top of my head, Your Honor, but --

2 THE COURT: That's what they're asserting. There
3 were asbestos claims around, but there were none against
4 Payne & Keller.

5 MR. ROBINSON: So, Your Honor, we have a couple of
6 things that were going on between 1980 and their
7 dissolution in 1987. There were a number of toxic tort
8 claims that were being brought against Payne & Keller.

9 THE COURT: Dioxin.

10 MR. ROBINSON: And by 1986, they had been involved
11 in, at least, one --

12 THE COURT: Asbestos case.

13 MR. ROBINSON: -- asbestos, which we didn't talk
14 about. During that same time period, we also know that
15 there were thousands of claims pending relating to
16 asbestos.

17 THE COURT: Yeah, but, I mean, asbestos cases, but
18 any of them pertaining to Payne & Keller, do we know?

19 MR. ROBINSON: Again, I'm going to have to -- I'll
20 confer in a minute. I don't know the answer to that. I
21 do know that they filed with the secretary of state's
22 office a statement stating that they had made adequate
23 provisions for claims. We know that is not the case.

24 THE COURT: Well, as I understood what the argument
25 was about this is because there were asbestos claims and

1 because Payne & Keller's leadership knew that yeah,
2 they're fighting actively Dioxin, but they knew they had
3 been dealing with asbestos products and the predict was
4 that there were going to begin to be a whole bunch of
5 them, they changed their name to Premtex and attempted to
6 sell themselves and, ultimately, dissolved. The question
7 is were they making provision for impure asbestos claims?

8 MR. ROBINSON: Well, Your Honor, again, I'm going to
9 have to confer in a moment, but I think the question you
10 raised and the statements that you just said is they were
11 aware of claims and they didn't make adequate provisions
12 for them.

13 The statute from what I understand the plaintiff is
14 moving under is if there was constructive fraud in the
15 dissolution, whatever that fraud might be would be the
16 reason that the court would be reconstituting, whether
17 it's an asbestos claims, dioxin claims.

18 Whatever constructive fraud -- and there's a fairly
19 broad definition under the Texas Supreme Court. Whatever
20 that constructive fraud might be, whatever provisions or
21 liabilities that they were aware of but did not make
22 adequate provisions for, under the Texas statute, as I
23 read it, would allow for the reconstituting of the
24 company.

25 I know we are talking specifically about the asbestos

1 claims that may have been pending at the time in 1986, but
2 I don't think only asbestos claims could support a finding
3 of constructive fraud. Again, once I sit down, I'll try
4 to find out the answer if there are any pending, but I
5 don't think that the Texas statute excludes any other type
6 of claims from the constructive fraud part of the statute.

7 THE COURT: What you're arguing is even if there
8 weren't asbestos claims, if they committed constructive
9 fraud by trying to avoid the dioxin claims or whatever
10 other claims they thought they were going to avoid and not
11 making adequate provisions for the payment of those
12 claims, then they committed constructive fraud.

13 MR. ROBINSON: So, Your Honor, again, the receiver
14 does not want to be and it does not intend to be a part of
15 continuing any fraud if it occurred, whether it's an
16 asbestos claim, a Dioxin claim, we're appointed by the
17 court.

18 THE COURT: I understand.

19 MR. ROBINSON: The receiver is appointed by the court
20 to identify marshal assets. The only reason we're here on
21 this issue is because the plaintiff in January was before
22 -- I'm sorry, the carriers in January were before this
23 court trying to dissolve a corporation. And there was
24 some discussion at that time regarding the different
25 states and the dissolution statutes we talked about, for

1 instance, in Coble, you required a publication. That's
2 not required, I don't believe, in Texas and I believe
3 Mr. Carroll made that point that Texas has a different
4 statute.

5 But one of the differences, which I think they're
6 wanting to pull back from in the Texas statute is that
7 while there's no publication requirement, there is an
8 avenue after the Fifth Circuit, as this court nows,
9 determined that even in the face of fraud, you could not
10 allow a company or a carrier for that company to honor any
11 claims for the company itself and the Texas legislature
12 said no, no, we're not -- that is not what our law should
13 be. So they actually amended it in 2021 to put this exact
14 exception in here, which the plaintiffs knew about. And,
15 again, the receiver brought it up in defense of a motion
16 to dissolve.

17 The Receiver did not affirmatively file a pleading
18 saying there was fraud. They're just saying there is a
19 Texas statute that allows a company to be reconstituted,
20 which based on --

21 THE COURT: And based on what the Plaintiffs are
22 asking you to do, you're asking that you be allowed to do
23 what you need to do so that you can pursue available
24 assets.

25 MR. ROBINSON: Well, that's correct, Your Honor. I

1 want to make sure I understand exactly what you just said.
2 I think what the receiver is saying is that we have not
3 received any evidence to contradict what the filings are
4 in this case that appear to and do meet the statutory
5 requirements of the finding of constructive fraud. And
6 the carriers in their role as the third party defendants
7 or in their role today on behalf of Payne & Keller, they
8 have not presented any evidence contradicting what has
9 been put in the record.

10 I will say I want to -- I've heard it a couple of
11 times and, Your Honor, I just think we probably ought to
12 address it. I've heard a couple of times that there's no
13 connections to South Carolina, Payne & Keller. I will
14 point out that in Exhibit O of the receiver's memorandum
15 in opposition of the carrier's motion, original motion to
16 dismiss, the -- and this is in the record because it was
17 Exhibit O.

18 This is a letter from John Wartharson (phonetic)
19 dated 9/29/73 to -- it says, subject, Payne & Keller, and
20 it was produced in discovery Z-A-I-C P & K 0281. It says,
21 Recently, P and K has been awarded new jobs in South
22 Carolina and Tampa, Florida.

23 Richardson will also be involved in South Carolina
24 because of these new jobs. Please endorse the 9173 to add
25 South Carolina and Florida to P & K's WC and CL policies

1 using the same clause, presumably, for North Carolina.
2 So, Your Honor, we have this incidentally 1973. Again,
3 the --

4 THE COURT: Yes, I was trying to look at this.
5 They're giving insurance coverage for things in South
6 Carolina, that document makes that clear.

7 MR. ROBINSON: Your Honor, then the policies --

8 THE COURT: Of course, you got the regular holders,
9 which is if you domesticate yourself in South Carolina,
10 that is enough and even the US Supreme Court is now
11 agreeing with that. That's been something that's been
12 continued for years.

13 The Supreme Court recently said hey, if you -- as
14 part of a corporation, domesticate yourself in the form of
15 a corporation in a particular state, that's all you need
16 to have presence in the state, to do business in a
17 particular state.

18 MR. ROBINSON: That's correct, Your Honor, and I
19 received some of the filings over the weekend by carriers.
20 I went back and looked at our prior notice of filings of
21 the policies. And in our Receiver's report, we include
22 the Exhibit C, which is an add of imdenible [sic]
23 companies in Rock Hill, South Carolina.

24 THE COURT: Yeah.

25 MR. ROBINSON: So in our notice of filings of

1 policies in the Hartford policy, which is Page 25 of our
2 notice of filing, M and W is named as an additional
3 insurer.

4 In the Hartford broker document, which was Page 47 of
5 that filing, M and W was a holding yard for the equipment.
6 And then in the Travelers policy, interestingly, in 1978,
7 which was filed in our notice of filing on Page 107 of the
8 receiver's policy, M and W is again referenced.

9 So this whole idea that, you know, they just weren't
10 here, I just don't know that the evidence supports that.
11 I know that's not the issue before this court today. The
12 issue before this court is whether there is sufficient
13 evidence -- have the plaintiffs submitted sufficient
14 evidence for a finding of constructive fraud. I think this
15 Court has already determined it has the ability to make
16 that judgment.

17 Importantly, this court did not previously make that
18 judgment at the January hearing and, in fact, said it was
19 not making that judgment and asked the parties to conduct
20 discovery.

21 The Receiver went through the discovery that had been
22 produced, none of which was in the record in January and
23 receiver, I believe, received two additional pieces of
24 discovery and introduced those into evidence through its
25 notice of filings for this Court's consideration. Those

1 issues, as you pointed out, were not decided by this court
2 in January.

3 As we understand what the Plaintiff has done now --
4 incidentally, the responses from the carriers, who have
5 not identified anything in their discovery responses that
6 contradicts the timeline of the allegation of the
7 plaintiff or of the public documents that have been
8 referenced.

9 So with that, Your Honor, I'm going to sit down and
10 see if I can find out the answer to your question unless
11 the court has any other questions.

12 THE COURT: Go right ahead.

13 MR. ROBINSON: Thank you, Your Honor.

14 THE COURT: All right. One moment, Ms. McVey.

15 MR. ROBINSON: Your Honor, in response to the
16 question regarding pending asbestos cases in 1986, we
17 have, as you know, submitted -- well, first of all, there
18 was not one asbestos case prior to 1986. We know that's
19 not true because we've identified the one.

20 Also, Barron and Budd has filed numerous cases as
21 direct action lawsuits in Louisiana, which, incidentally,
22 are still valid claims because of the direct action
23 against carriers in Louisiana. They are one of the few
24 states that have a direct action against the carrier. But
25 those claims are still being defend by Payne & Keller's

1 carriers on the direct action statute that Louisiana has.
2 As for any other specific cases, I'm going to have to go
3 back and take a look at them. Again, Your Honor, I don't
4 think that issue is dispositive of whether there was
5 constructive fraud, but the cases that we have found are
6 in our report.

7 THE COURT: Okay.

8 MR. ROBINSON: All right.

9 THE COURT: Ms. McVey.

10 MS. MCVEY: Your Honor, I'll just be very brief. I
11 don't think there's anything that requires the pending
12 cases to be the exact same injury that Mr. Childers had.
13 I don't think it has to be asbestos, nothing that says
14 that. But, Your Honor, they knew there were going to be
15 asbestos claims.

16 They worked with asbestos. They knew that there's a
17 latency period. It's 1986. It's not like this happened
18 in 1950 where they didn't know about it. They, of course,
19 knew about it. They knew it was coming. OSHA had been
20 passed. I mean, it was out there. It's unreasonable.

21 Mr. Lee is a very good lawyer and he said we know all
22 these claims have been paid. We know they were. They
23 provided for them. There's not one shred of evidence of
24 that in the record. What we do have is a guarantee,
25 right? And the guarantee -- and I'll give it up to Your

1 Honor, but it's in one of the exhibits to our thing.

2 There was a guarantee for \$6 million.

3 THE COURT: That was in the dissolution.

4 MS. MCVEY: This is the guarantee for the parent --
5 you know, they said the parent company is going to take
6 care of all these claims. \$6 million. Well, we know in
7 1987 that the bankruptcy court ordered over one \$1 million
8 against Charter. And Charter had a right to go back after
9 Payne & Keller. And the dissolution requires and they
10 signed off on it -- not they, the insurance carrier, Payne
11 & Keller, all debts, obligations and liabilities of the
12 corporation have been paid, discharged or adequate
13 provision have been made thereof. That didn't happen,
14 Your Honor.

15 They knew there were going to be years and years of
16 asbestos claims coming, and it's not a surprise they
17 didn't have anybody in 1986. There's a long latent
18 period. That's the problem. That's the constructive
19 fraud.

20 Your Honor, we would ask you to make a finding of
21 constructive fraud today. Make that factual finding.
22 There's been no evidence contrary to that. And then ask
23 the Receiver to go to Texas and file with the Secretary of
24 State.

25 THE COURT: Let me ask you this. Biggest piece of

1 heartburn I've got about this whole thing, what to do
2 about the Court of Appeals now.

3 MS. MCVEY: Yes, ma'am.

4 THE COURT: Help me with that.

5 MS. MCVEY: Sure. I believe it's totally separate
6 issues. They filed a motion to dismiss saying the court
7 had dissolved and receivership. That has nothing to do
8 with my case against Payne & Keller. It's totally
9 separate.

10 Payne & Keller is not coming here and saying that to
11 you, the carriers are. I'm not even sure they have
12 standing to do that in this case. I believe it's two
13 separate and distinct issues.

14 THE COURT: So the fact it's a third-party claim in
15 this case, in your view, does not sufficiently integrate
16 with the things against Payne & Keller?

17 MS. MCVEY: Well, they were asking for separate
18 things. Nobody asked you to make a finding of
19 constructive fraud.

20 THE COURT: All I was asked to do was say whether
21 there was sufficient information in the pleadings to
22 justify denying their motion to -- they wanted to dissolve
23 it, get rid of it. And I said we're going to keep on
24 going because there's sufficient allegations here that
25 have to be pursued.

1 MS. MCVEY: Yes, ma'am.

2 THE COURT: But, of course, now, we're dead center on
3 the allegations and if I were to rule for you, then how
4 does that impact the appeal and the denial of the motion
5 to dismiss?

6 MS. MCVEY: I don't think it does affect the appeal.
7 I think the appeal -- either the Court of Appeals is going
8 to say this is not immediately appealable motion to
9 dismiss, but even if they do, that appeal goes on.

10 They may reverse what you ruled and say the
11 receivership shouldn't have been put in place. But for
12 me, it doesn't affect what I am doing in this underlying
13 case. They put forth no evidence, nobody else has other
14 than what we have put forth. It's uncontroverted.

15 THE COURT: But they're appealing, essentially, the
16 failure to -- it's not a motion to dismiss. It's a motion
17 to get rid of the Receiver.

18 MS. MCVEY: Well, it was two things, I think. I'm
19 not even in that case. I understood it to be a motion to
20 dismiss the third party complaint.

21 THE COURT: Right.

22 MS. MCVEY: And a motion to revoke the receivership.

23 THE COURT: Right. And I denied them both.

24 MS. MCVEY: Right. I have nothing to do with -- I
25 mean, what I'm asking you today in my view has nothing to

1 do with those two issues.

2 THE COURT: All right. I understand the argument.

3 MR. LEE: Your Honor, may I very briefly?

4 THE COURT: Certainly. Certainly. I'm struggling.

5 MR. LEE: Honestly, very briefly. The question, Your
6 Honor --

7 THE COURT: I am acutely aware of my role as a
8 circuit court judge. I am not supposed to get outside my
9 guard rails and that's what I don't want to do in
10 connection with something that's pending in front of an
11 appellate court.

12 MR. LEE: It's matters affected by the appeal, not
13 the same case, not the same claim, not the same motion,
14 but --

15 THE COURT: It does say that.

16 MR. LEE: Secondly, Your Honor, with respect to the
17 3,000 claims. I think you saw a shift here because I said
18 there were no asbestos claims pending or threatened
19 against Payne & Keller --

20 THE COURT: That doesn't give me as much heartburn --

21 MR. LEE: Okay.

22 THE COURT: I mean, if the claim is they permitted a
23 fraud on -- because they had all these claims pending,
24 they knew what the future was going to hold because they
25 knew asbestos has a much longer latency period. Dioxin

1 was, man, there was a direct exposure and the claim was
2 made.

3 The asbestos is unique in that, in that it takes so
4 long. The claim is they knew what was in front of them.
5 They were trying to get out of -- they were trying to get
6 out of the Dioxin claims, too, but they knew that the
7 other things was looming.

8 MR. LEE: Well, I would think that Ms. Childers
9 doesn't have standing to say that other people were
10 defrauded because failure to provide for Dioxin claims,
11 which, by the way, they were resolved. No Dioxin claim
12 ever moved to revoke the termination. No Dioxin claim
13 ever sued --

14 THE COURT: She's got a coverage against you people
15 and that's why Ms. Childers wants to keep the receivership
16 going.

17 MR. LEE: Absolutely, but I don't think she has
18 standing to keep the receivership going because of Dioxin
19 claims. And if she doesn't have --

20 THE COURT: She says that is evidence they knew of
21 what the future held.

22 MR. LEE: All right. So --

23 THE COURT: Asbestos was just going to take longer to
24 manifest. They knew if they were having all these Dioxin
25 claims that asbestos was next.

1 MR. LEE: And I understand that and I would posit,
2 Your Honor, respectfully, that if you're going to declare
3 fraud, you have to know they knew. You can't do it
4 through some circumstantial inference of claims against
5 other people and what's going on in the industry.

6 I think fraud requires a much more heightened set of
7 evidence than the connecting of a few dots that are
8 indirect, don't even involve a known or threatened
9 asbestos claim against Payne & Keller at the time. And
10 I'll stop there with that argument, Your Honor.

11 Lastly, with respect to the receiver's discussion --

12 THE COURT: Well, let me just stop you there for a
13 minute. I mean, what the plaintiff is trying to do is to
14 get the receiver to take certain action with respect to
15 Payne & Keller's status of being a dissolved corporation,
16 but whether they are dissolved or not, they still got a
17 coverage claim against you, they say.

18 MR. LEE: Yes, they do.

19 THE COURT: And that's going to continue.

20 MR. LEE: Well, it will continue if Payne & Keller
21 can be held liable. If Payne & Keller can't be held
22 liable, there's no reason to ever bother the carrier. And
23 they can't be held liable because it's revoked and under
24 Texas law, they can't. There is nothing to do.

25 THE COURT: Well, how does the 2021 amendment affect

1 that?

2 MR. LEE: Well, the 2021 amendment allows for -- as
3 of 2021 under the Texas constitution for folks to attempt
4 to revoke termination.

5 THE COURT: Which is exactly why they're doing this.

6 MR. LEE: And under the Texas constitution, having
7 the statute of repose already passed, it is
8 unconstitutional for them to allow --

9 THE COURT: That hasn't been determined.

10 MR. LEE: Well, Your Honor actually ruled against us
11 on that and that's going to be up on appeal. That's one
12 of the newest issues that's going to be up on appeal.
13 That's going to be a decision that are matters affecting
14 that appeal. Your Honor wrote in your order that you
15 disagreed with us, that they could apply it retroactively.
16 The appellate court is going to have to decide whether
17 that's right or wrong. It's going to decide that matter
18 for this purpose. And it's going to decide that matter
19 for the prior purpose, which is the receivership. Again,
20 no disrespect, Your Honor, but that's an issue that's
21 going to be dead center because you decided it.

22 Your Honor, lastly, with respect to the issue of
23 whether Payne & Keller was in South Carolina.

24 THE COURT: You know, you're just not going to change
25 my mind on that.

1 MR. LEE: Well --

2 THE COURT: They were domesticated here. They had a
3 subsidiary or a live corporation that had advisements all
4 over Rock Hill.

5 MR. LEE: I just want to explain, Your Honor, we
6 didn't know that until Friday. The receiver did not tell
7 us that until Friday.

8 THE COURT: Okay.

9 MR. LEE: What the receiver did tell us is with
10 respect to this plaintiff, who is the one making this
11 motion. That with respect to this plaintiff, they have
12 been on a diligent search and there is no evidence with
13 respect to this plaintiff there is any proximity, product
14 ID at all with respect to any of the job sites he pleads.

15 Now, I know Your Honor tends to wait till right
16 before trial to see what gets developed. And I understand
17 that in the context of a motion for summary judgment, what
18 I'll call prior, but here, it matters to standing. Here,
19 it matters as to whether a plaintiff can go so far as to
20 ask this court to revoke termination of a Texas company
21 without any evidence that this plaintiff ever came in
22 contact with this company.

23 There can't be fraud if the plaintiff wasn't harmed
24 by this company. And there's not a shred of evidence and
25 the receiver says there isn't any, affirmatively says

1 there isn't any. So we would ask that that issue be
2 decided or dealt with now because it decides standing for
3 this plaintiff.

4 THE COURT: I feel you want me to decide some things
5 and other things, not at all.

6 MS. MCVEY: Your Honor, sorry to interrupt, but I
7 don't know what he's reading from for that information.

8 MR. LEE: It's from Payne & Keller's responses and
9 actions to plaintiff's first amended notice of 30(b)(6)
10 deposition of Payne & Keller Company and subpoena duces
11 tecum. It was sent to the court this morning by
12 Mr. Carroll, or maybe last night, I'm not sure, and served
13 on others. It's page 28.

14 THE COURT: Hang on a minute. Don't speak so
15 quickly.

16 MS. MCVEY: Your Honor, it's Payne & Keller's
17 objections.

18 THE COURT: Let me look at it.

19 MR. LEE: It's on Page --

20 THE COURT: I think Todd sent it.

21 MR. LEE: It was cited in our papers.

22 THE COURT: No, this was something different.

23 MS. MCVEY: I sent this yesterday evening. It's a
24 separate email.

25 THE COURT: Twenty-eight.

1 MR. LEE: The second full paragraph, second sentence.

2 THE COURT: Hang on.

3 (Pause.)

4 I'm not much persuaded by the merits arguments,
5 Mr. Lee, I'll be honest with you, but I am still concerned
6 about the timing of granting this thing in the face of
7 this appeal.

8 So I am going to hold my ruling in abeyance until we
9 hear from the Court of Appeals. In the meantime, I am
10 going to cogitate upon some of these other matters
11 Mr. Carroll has sent me and kind of look back over the
12 receiver's report in the light of that.

13 I'll be very candid with you. I'm not much persuaded
14 by the merits of what's being argued on your behalf, but I
15 don't want to step beyond my boundaries with the Court of
16 Appeals. That's what's got me held up. So I am going to
17 hold it in any abeyance.

18 I would really appreciate if y'all would keep me
19 advised, both sides, about what's happening with that
20 because that's really more -- who is going to be most
21 directly impacted about that, not the plaintiffs. They're
22 more the receiver and the insurance company.

23 MR. LEE: We'll be happy to let you know immediately.

24 THE COURT: So you guys need to keep me posted as to
25 what is going on. And I don't mean when something final

1 comes down. I want to know all along the line. I would
2 appreciate y'all updating me with filings that have been
3 made in this appeal so that I understand better exactly
4 what's going on. That's another thing that I hadn't
5 thought to do was to sit down and look over the Court of
6 Appeals record in this thing, but I ought to do that.
7 Before I decide, I'm going to plunder and make these
8 rulings.

9 So that's what I'm going to do. I don't normally do
10 that. I apologize, y'all have the right to expect me to
11 rule from the bench like I ordinarily do, but I'm
12 concerned about it.

13 MR. ROBINSON: Your Honor, on behalf of the receiver,
14 if I may, the document that was e-mailed to you last
15 night -- of course, this came up in the January hearing.
16 It was mistakenly represented in the January hearing that
17 that document was prepared by a lawyer hired by
18 Mr. Protopapas. The documents that they are referring to,
19 of course, are prepared by lawyers they hired.

20 THE COURT: I understand. And I think that was an
21 honest mistake, apparently.

22 MR. ROBINSON: Right, but this is the same document
23 that they're allowing --

24 THE COURT: Yes, that's kind of what I thought when I
25 looked at it. I got that other thing marked from my other

1 hearings.

2 MR. ROBINSON: Your Honor, also, I just want for the
3 record, there was a reference that they didn't know about
4 this until Friday, their work in South Carolina. Of
5 course, these were their documents, some of which I was
6 referring to. The Travelers policy --

7 THE COURT: Yeah, but I understand that Mr. Robinson
8 and you're making the very correct argument in that
9 regard, no doubt about it. But there's been so much back
10 and forth between the parties and this discovery is
11 exactly what I anticipated and the reason why I
12 anticipated it, very strange and bizarre.

13 What all this is about is discovery and forth and,
14 ultimately, we'll get back to where we can rule. That's
15 why I have a little heartburn about whether there's
16 something else out there that will impact my ruling with
17 regard to Ms. McVey's motion.

18 Mr. Sawyer, now, you're going to come in here as a
19 complete third-party to everything?

20 MR. SAWYER: We're joining in the motions, Your
21 Honor. Everything is going in the appeal. So we were
22 involved, Your Honor. Just for point of clarification in
23 terms of --

24 THE COURT: Hang on, it's not fair for you to just
25 stand up. When you get to the podium, you tell them who

1 you are and who you're representing.

2 MR. SAWYER: Thank you, Your Honor. Wesley Sawyer,
3 and I represent National Union Fire Insurance Company and
4 five other carriers. They're all listed on my card. For
5 the ease of time, I'll do it in a way, Your Honor.

6 Just for point of clarification, the impact holding
7 pending a ruling by the court, will there be another
8 hearing. I have points I wanted to put on the record, but
9 I don't want to waste the court's time if we're going to
10 have the Court of Appeals.

11 THE COURT: Yes, I should say that and make that
12 clear, that this is an adjourned proceeding, not a --

13 MR. SAWYER: We're not closing the book.

14 THE COURT: Or a paused proceeding, I guess you could
15 say. I am not declaring the hearing at an end. I am
16 pausing it or adjourning it until I receive further
17 information.

18 Right now, my main concern is the Court of Appeals
19 and my authority. But if there are other things from the
20 plaintiff or from the insurance companies with respect to
21 what they're trying to do right now or from the receiver,
22 for that matter, I will certainly take those into account.
23 But I will reconvene these proceedings at an earlier time
24 if what I'm submitted from the Court of Appeals dictates
25 so or, at least, when the Court of Appeals has decided

1 whether they're going to do it.

2 MS. MCVEY: Your Honor, I would just ask --

3 THE COURT: I'll say the thing that gives me great
4 heartburn about that, I don't think they have any business
5 doing this. And I know what the very next thing that's
6 going to happen, they rule against you, y'all are going to
7 go to the Supreme Court.

8 I've already said several times on the record and
9 they're tired of this, taking what is clearly unappealable
10 orders and delaying proceedings in these complex cases for
11 that reason. So I just tell you, I'm trying to be
12 differential to my appellate brothers and sisters, but
13 it's not easy.

14 MS. MCVEY: Your Honor, I would just state our
15 frustration with these -- we believe the interrogatory
16 appeal is slowing down my case.

17 THE COURT: Yeah, slowing down my docket.

18 MS. MCVEY: It's pretty frustrating. The other point
19 I would make is Mr. Sawyer and others only filed joinders
20 to Travelers motions. If he has other points he wants to
21 make, he ought to file something so I know what they are.

22 THE COURT: I agree with that completely.

23 MR. SAWYER: Your Honor, it would have been points
24 that would have piggy backed part of what was discussed in
25 the briefs and then addressing the Mallory case, which was

1 not addressed at all until the arguments this morning.

2 So --

3 THE COURT: Mr. Sawyer, you knew what was going on
4 and you should have filed something.

5 MR. SAWYER: That's fine. I had no idea that Mallory
6 would come up, Your Honor. And I apologize for that.

7 THE COURT: Well, it's like a lying dog over there.

8 A: I got a real interest in this thing. Y'all don't have
9 a ruling.

10 MR. SAWYER: Well, we did argue, also, at the other
11 hearing, too. I stood up and make points in that argument
12 as well, Your Honor.

13 THE COURT: You look at that chart of existing
14 insurance, it's all over it.

15 MR. SAWYER: I understand. Thank you, Your Honor.

16 THE COURT: Thank you.

17 MR. LEE: Thank you for your time, Your Honor.

18 (Whereupon, the proceedings were concluded.)

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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the
5th Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of Common Pleas for
Richland County, South Carolina, on the 10th day of July,
2023.

September 6, 2023

Karen Ambroziak

Karen Ambroziak, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

LENORA CHILDERS,

Plaintiff,

vs.

C.A. No.: 2021-CP-40-03484

PAYNE & KELLER COMPANY, INC.,
ET AL.,

Defendants,

vs.

U.S. RISK, LLC, ET AL.

Third-Party Defendants.

MOTIONS HEARING

BEFORE THE HONORABLE
CHIEF JUSTICE (RET.) JEAN TOAL

DATE TAKEN: Monday, August 21, 2023

TIME START: 1:15 p.m.

TIME END: 2:32 p.m.

LOCATION: Richland County Judicial Center
1701 Main Street
Columbia, South Carolina

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E X H I B I T S

(None were proffered.)

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Page 5 1 - - - 2 P R O C E E D I N G S 3 - - - 4 THE COURT: Okay. Now, we got one more. 5 It's Payne & Keller. 6 Okay. Let's get real with each other about 7 Payne & Keller. How long is this going to take? 8 Let's get everybody lined up here. 9 Wes, I know you're the main one for one 10 side. 11 Mr. Robinson? 12 MR. ROBINSON: 15, 20 minutes for me. 13 Depends on what kind of questions I get. 14 THE COURT: I tell you what, the BBM can 15 come down and sit in this room and take more 16 time to do it and go 15 minutes, but -- 17 MR. ROBINSON: I'm hoping much less. 18 THE COURT: Okay. 19 MR. ROBINSON: It could be five minutes. 20 THE COURT: All right. You may proceed. 21 This is Childers against Payne & Keller, 22 P-A-Y-N-E & Keller, with a third-party thing 23 with U.S. Risk, LLC. It's 2021-CP-40-03484. 24 This is Expedited Second Motion to Clarify 25 Insurer's Responsibility.	Page 7 1 THE COURT: Yes, I have it. 2 MR. ROBINSON: And then National Union's 3 objections with exhibits, which was filed last 4 night. And so this is just a hard copy. 5 I've shown Mr. Sawyer a copy. And for the 6 court's convenience, I have a hard copy and a 7 notebook. 8 THE COURT: Yes. 9 MR. ROBINSON: Your Honor, on an earlier -- 10 earlier today in one of the hearings, the Court 11 stated, and I think it would be beneficial in 12 this case, to go through just a very short 13 procedural history of how we got to where we are 14 today. 15 THE COURT: You may proceed. 16 MR. ROBINSON: And I will do that as 17 expeditiously as possible. 18 On August 27th, 2021, the Court appointed 19 Mr. Protopapas as the receiver for Payne & 20 Keller. In that appointment, he granted him the 21 power and authority to fully administer all 22 assets of Payne & Keller, including the right 23 and obligation to administer any insurance 24 assets of Payne & Keller as well as any claims 25 related to the action or failure to act of
Page 6 1 Let me get my hands on it. 2 MR. ROBINSON: Your Honor, I prepared a 3 notebook with the motion along with -- 4 THE COURT: I had some little something -- 5 Mr. Childers has got me so out of hand here, 6 I've got it spread out all over creation. Hang 7 on. 8 All right. I warn you, Mr. Robinson, don't 9 ever say it's going to take five minutes -- here 10 are my notes from 7-10-23 -- and don't tell me 11 five minutes, and then Wes Sawyer will get up 12 here and say, Oh, Judge ... 13 MR SAWYER: Your Honor, I have no idea how 14 long it will take. I'm not sure what I'm going 15 to hear from them yet. 16 THE COURT: All right. You may proceed, 17 Mr. Robinson. 18 MR. ROBINSON: Your Honor, John Robinson 19 here for Payne & Keller. Just as a preliminary 20 matter, I provided to the Court a copy -- a hard 21 copy of the filings from August the 17th, which 22 is Payne & Keller's Expedited Second Motion to 23 Clarify the August 18th Receiver's Notice of 24 Filing. Travelers objection, which was filed 25 last night.	Page 8 1 Payne & Keller. 2 Shortly thereafter, on September 30th, the 3 Court clarified the receiver's authority and 4 extended that to certain specifically identified 5 entities that were related to Payne & Keller 6 operations and their predecessor, successors, 7 affiliates, parents, assigned and subsidiaries 8 that may be discovered in the future. 9 Now, again, those first two orders were 10 August 27th of 2021, and the subsequent order 11 was September 30th of 2021. 12 On May 16th of 2022, the receiver filed a 13 motion to clarify his responsibilities. And 14 we'll call this the Louisiana issue. After his 15 appointment, the receiver became aware of 16 certain actions, direct actions that were filed 17 in Louisiana against the carriers, as this Court 18 is aware, which Louisiana prevents. 19 The receiver also became aware, however, 20 that those actions were proceeding without his 21 knowledge and involvement. 22 So the Court -- the receiver filed a motion 23 requesting a number of things relating to his 24 involvement in Payne & Keller, and that resulted 25 in a June 23rd, 2022, consent order. And

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1 importantly, a number of carriers were parties 2 to that consent order. The carriers that were 3 parties to that consents order -- 4 THE COURT: This was the one ... 5 MR. ROBINSON: This was June 23rd, 2022. 6 And this is -- it's labeled Consent Order, and 7 it is in response to the Receiver's Motion to 8 Clarify His Responsibilities. 9 And, again, Your Honor, when the receiver 10 became aware that these direct actions were 11 proceeding against the carriers in Louisiana 12 without the receiver's knowledge or involvement, 13 the receiver brought it to this Court's 14 attention, and as well as the carriers. 15 The carriers entered into a consent order 16 which was reduced to an order of this Court. 17 And the carriers that entered into that consent 18 order were Zurich -- and they're long names, but 19 Zurich American; Birmingham Fire; Lexington 20 Insurance; London Market companies; Berkshire 21 Hathaway, formerly known as Stonewall; Stonewall 22 Surplus Lines; importantly, National Union Fire 23 Insurance Company, which has filed something 24 last night; Continental Insurance Company, 25 individually and as successor in interest to	Page 9 1 taken in the matter." 2 The order concludes that "The participating 3 insureds will provide to the receiver copies of 4 these publicly filed papers. In addition if 5 such a claim may impact the policy limits 6 available to another Payne & Keller plaintiff, 7 the participating insurer will notify the 8 receiver and will provide to the receiver 9 contact information for the insured." 10 So, again, Your Honor, that was in 2022. 11 The consent order was entered into on June 23rd, 12 2022. 13 Now, I want to step back to February 23rd, 14 2022, where the receiver filed a third-party 15 action against those carriers. That's where the 16 third-party action happened. So February 2022, 17 third-party action. June, we'll call it the 18 Louisiana situation. And then in August, the 19 third-party defendants, Travelers and others, 20 filed a motion to dismiss the receiver 21 third-party claims and dissolve P&K. 22 And this Court is, of course, aware that 23 that motion was denied on March 31st, 2023, and 24 that matter is on appeal. This Court's denial 25 of their motion.
Page 10 1 Harbor Insurance Company; Medmarc Casualty; 2 Dependable Insurance Company; First State 3 Insurance; Hartford Accident and Indemnity 4 Company; Travelers, which also filed something 5 last night; Casualty and Surety Company, known 6 as the Aetna Casualty and Surety Company. 7 Now, Your Honor, in that consent order and 8 agreement, it states "Specifically the receiver 9 and the participating insurers agree that in 10 connection with any pending or future direct 11 action suits where claimant has sued the 12 participating insurer as an insurer of a Payne & 13 Keller entity, subject to the receiver, the 14 participating insurer will provide to the 15 receiver the following," and it has a list. 16 "Copies of publicly filed court papers." 17 Number two, "Information on settlement offers 18 made, settlement discussion with the plaintiff." 19 And number three, "Subject to any 20 prohibition arising from confidentiality issue 21 in a given case. Facts developed regarding a 22 direct action for Plaintiff's work history in 23 connection with Payne & Keller, including 24 discovery materials such as plaintiff's 25 responses to written discoveries and depositions	Page 12 1 THE COURT: The denial of Motion for 2 Summary Judgment or Motion to Dissolve and 3 Dismiss, which is not an appealable issue, of 4 course. 5 MR. ROBINSON: So that motion was denied, 6 and it was appealed. On June 14th, the 7 plaintiff, the underlying plaintiff represented 8 by Ms. McVey, filed a motion to revoke the 9 termination of Payne & Keller. That matter was 10 heard in Charleston on I believe it was 11 July 10th, which was a Monday, Your Honor. 12 And at that hearing, the plaintiff's motion 13 to terminate the revocation or to revoke the 14 termination of Payne & Keller at that hearing, 15 as this Court may recall, evidence was presented 16 by the plaintiff and a report was filed by the 17 receiver, which included insurance policies 18 along with other historical information. 19 At that hearing, the plaintiff -- I'm 20 sorry, the underlining carriers argued against 21 this Court hearing that motion based on the fact 22 that there was an automatic stay presumably on 23 all things receivership. And while the evidence 24 that the plaintiff presented regarding fraud and 25 constructive fraud -- I think I used the word

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Page 13 1 was "uncontested," perhaps the better word was 2 "uncontradicted." 3 While that evidence was uncontradicted, the 4 Court decided at that hearing to hold in 5 abeyance any decision regarding a finding of 6 constructive fraud based upon this Court, I 7 believe, said it wanted to consider the issue of 8 stay. And that matter is still pending before 9 Your Honor. 10 So, again, that was July 10th. 11 Your Honor, we filed this motion -- this 12 expedited motion on the 17th, and I want to 13 provide a bit of context to the motion. First 14 of all, this is the fifth year that the 15 receivership has been -- the fifth year of 16 receivership litigation before this Court. This 17 is the fifth year. 18 And if you think back, Your Honor, to the 19 beginning of the first receivership, the Court 20 will remember that the receivership was made 21 necessary because Covil's insurers, including 22 Travelers and one of the ones represented -- 23 that Mr. Sawyer represents, has spent decades 24 pretending that Covil did not exist. 25 Covil's insurers were not transparent with	Page 15 1 plaintiffs, the claimants' counsels. And 2 transparency has been the key that this Court 3 has required this receiver to participate in. 4 I bring that up, Your Honor, because when 5 we were in Charleston on July 10th considering 6 whether Payne & Keller should be reconstituted 7 based on the allegations of constructive fraud, 8 all of the carriers appeared -- or the ones that 9 did appear on July 10th, argued ferociously that 10 this Court could not make any determinations 11 regarding the receivership, regarding anything 12 relating basically to Mr. Protopapas's 13 appointment, because of Rule 241, because of 14 their appeal of a Motion to Dismiss. 15 And I will point out to the Court that the 16 Court of Appeals has agreed to consider the 17 appeal. Now, in the filings last night, the 18 carriers champion this order that the Supreme -- 19 that the Court of Appeals has agreed to consider 20 the appeal -- and I think probably rightfully 21 so. It is one of the few orders that has not 22 been summarily dismissed. One of the few 23 appeals that has not been summarily dismissed. 24 The carriers' approach to the Court 25 considering the appeal is that the receivership
Page 14 1 the status of Covil with this Court. They were 2 not transparent with the status of Covil in 3 North Carolina. And as a result, this Court 4 appointed Mr. Protopapas to be the receiver of 5 Covil in November 2018. 6 And according to that first appointment 7 order, the receiver was tasked with marshaling 8 assets and managing liabilities. He was not 9 appointed to make the parties happy. He was not 10 appointed to make this Court -- to serve as this 11 Court's receiver, for any other reason than to 12 marshal assets and manage liabilities. He was 13 appointed to serve as this Court's receiver. 14 Your Honor, in the years that have followed 15 in Covil, Mr. Protopapas, as this Court is well 16 aware, has identified a number of insurance 17 policies, has marshaled those assets. He has 18 resolved cases. He has settled cases. And he 19 has tried cases that were contested. 20 But the one thing -- and the one thing 21 that's been constant during his appointment in 22 Covil and in every receivership throughout the 23 five years, he has been transparent with this 24 Court. He has been transparent with the 25 carriers. He's been transparent with the	Page 16 1 no longer exists, is that they were correct on 2 the appeal. 3 As this Court is well aware, most of the 4 carriers' appeals have been dismissed as 5 unappealable, as interlocutory. We have cited a 6 number of cases in our previous filings in Payne 7 & Keller that outline the number or the amount 8 of the appeals that the carriers have presented, 9 including the Supreme Court warning carriers of 10 the interlocutory and frivolous appeals. 11 But the Court is considering this appeal. 12 The appeal of the denial of the Motion to 13 Dismiss and the denial of the Motion to 14 Dissolve. 15 I want to put that in the record because 16 the Court mentioned it. So that matter is now 17 being briefed. 18 What the Court of Appeals is not aware of 19 yet, and what this Court may not be aware of, on 20 July 10th, when we were before this Court in 21 Charleston, and the carriers were arguing that 22 this Court did not have jurisdiction to make 23 certain determinations regarding the 24 receivership, the carriers, approximately two 25 weeks later, went before a Texas court and

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Page 17 1 instructed their new counsel, not the Bowman & 2 Brooke counsel that was here in South Carolina, 3 and that has also a presence in Texas, the 4 carriers retained new counsel in Texas that 5 filed an answer to a complaint that was filed 6 against Payne & Keller. 7 Now, that complaint in Texas was provided 8 to Mr. Protopapas by the plaintiff's attorney in 9 that case. Mr. Protopapas tendered that 10 complaint to the carrier. The carriers hired a 11 new law firm, not Bowman & Brooke, a new law 12 firm in Texas. 13 And on August the 4th, the carriers 14 instructed their counsel, without 15 Mr. Protopapas's knowledge or consent, to move 16 to dismiss, or as an affirmative defense, 17 dismiss the claim against Payne & Keller on the 18 very issues that they -- for the very reasons 19 that they argued this Court could not make any 20 determination, and that was that the Texas 21 statutes barred the claims. 22 They also filed a motion for summary 23 judgment in Texas on that very same issue in 24 August of 2023. 25 Your Honor, when Mr. Protopapas became	Page 19 1 referenced today and previously in Charleston. 2 I'm addressing Rule 62, Your Honor, because 3 the carriers last night in their filing 4 maintained their position that this Court may 5 not act on anything while they are pursuing 6 those issues in Texas but are alleging in 7 South Carolina those issues were stayed. 8 Rule 62 was read earlier, 62(a), and, Your 9 Honor, perhaps I misheard it, but I thought that 10 I understand it read to say that there for some 11 reason was a ten-day stay on execution of 12 judgments, which is not what the rule says. 13 And so with the Court's permission, Rule 14 62(a), automatic stay, exceptions are listed as 15 injunctions, receiverships, and accountings. 16 Now, there is a ten-day stay that is in the 17 first sentence. "Except as stated herein, no 18 execution shall issue upon a judgment nor shall 19 proceedings be taken for its enforcement until 20 the expiration of ten days after its entry." 21 That sentence says what it says. No 22 execution until the expiration of ten days after 23 its entry. But, Your Honor, it goes on as it 24 relates to this matter. "Unless otherwise 25 ordered by the Court, an interlocutory or final
Page 18 1 aware that an answer had been filed, he wrote 2 the counsel in Texas who filed that answer and 3 asked him for a copy of his file. 4 Again, Mr. Protopapas had not had any 5 contact with this attorney who filed an answer 6 on his behalf. And we have seen where this 7 goes. We've heard Covil 2.0, maybe Covil 3.0, 8 where the carriers have taken it upon themselves 9 to file responses to pleadings and motions 10 unbeknownst to this court-appointed receiver. 11 Mr. Protopapas on August the 17th, and this 12 is filed with the Court -- I'm sorry, on the 13 16th asked for his filing. The very next day, 14 Resolute wrote that attorney and said, "Please 15 forward the as-filed Motion for Summary Judgment 16 and let me know if there's a hearing. Let me 17 know if a hearing date has been set." 18 So with this knowledge, Your Honor, 19 Mr. Protopapas filed this expedited motion to 20 clarify the receivership. 21 Your Honor, where we are, and I know this 22 Court has addressed this issue today and on 23 previous occasions, but I think with the Court's 24 indulgence, I would like to hand up, if I may, a 25 copy of two rules and a statute that has been	Page 20 1 judgment in an action for an injunction or in a 2 receivership action, or a judgment or order 3 directing an accounting, shall not be stayed 4 during the period after its entry and until an 5 appeal is taken" and most importantly, Your, 6 Honor, "or during the pendency of an appeal." 7 Your Honor, Rule 62 is important as it 8 relates to this receivership. The carriers may 9 have discovered a new venue or a new procedure 10 to try to slow down this Court and the 11 receivership actions, but as has been stated, 12 receiverships are a unique, statutory creation. 13 Rule 62 specifically excludes it from the 14 automatic stay. And for good reason. 15 Receiverships are appointed in 16 extraordinary circumstances. To appoint a 17 receiver and then have that receiver -- a party 18 just appeal that appointment while the matters 19 that were of concern that resulted in that 20 receivership appointment can continue without 21 any type of oversight from the Court while the 22 matter is tied up in appeals wouldn't make any 23 sense. And, in fact, it is contrary to the 24 plain language of Rule 62. 25 The ten-day stay has nothing to do with

Page 21 1 what we're talking about here. This is a 2 receivership action that the courts have 3 determined specifically is not stayed. 4 So, Your Honor, what we're asking is fairly 5 simple. I will note that there was a statement 6 about the Rule 11 certification. I filed one 7 today as Rule 11 permits. Once a party is -- or 8 an attorney is made aware of the absence of a 9 Rule 11 certification, it was filed today. This 10 morning. 11 And, of course, it states that -- something 12 to the effect that a Rule 11 consultation would 13 serve no useful purpose. And I think the 14 filings that came Sunday night are evidence of 15 that, but I did file that today. 16 So, Your Honor, what are we asking? Your 17 Honor, we're asking, number one, we'll call it 18 the Louisiana situation, if the carriers have 19 agreed to keep the receiver informed of actions 20 that are directly against them that impact the 21 receiver, shouldn't they keep the receiver 22 informed and provide copies of the pleadings 23 that are actually against the receiver? 24 And their counsel -- shouldn't their 25 counsel keep his client presumably informed of	Page 23 1 the Motion for Summary Judgment was not included 2 in the production. It was found -- we found it. 3 There was correspondence with Resolute and that 4 attorney about the Motion for Summary Judgment, 5 but the motion itself was not produced to 6 Mr. Protopapas. 7 We have filed all this with the Court, the 8 correspondence and the pleadings. So it is in 9 the Court's notebook. 10 One second, Your Honor. 11 As the receiver has pointed out, this is 12 the same request we had of you when Wall 13 Templeton would not tell us what they were doing 14 on the receiver's behalf. 15 So with that, Your Honor, I will say -- and 16 I hope that the Court will consider the Rule 62 17 issue perhaps in a different light than what was 18 represented back in Charleston and even earlier 19 today. 20 I know this Court has Ms. McVey's motion 21 also under consideration. And I believe that 22 Rule 62 has perhaps just been overlooked and 23 certainly misinterpreted and perhaps misstated. 24 But we believe this Court has jurisdiction 25 over these receiverships even while these
Page 22 1 his filings in other states? 2 Your Honor, you know, it's very troubling 3 that leaving that hearing in Charleston, and 4 certainly understanding the Court's concern 5 relating to the stay and the appeal, it's very 6 troubling that while all of that was taking 7 place, as has often happened, the carriers -- 8 and I don't put this on their lawyers, I 9 understand that. -- the carriers sought new 10 lawyers to take positions and try to circumvent 11 this Court's jurisdiction, try to circumvent 12 this Court's receivership. 13 And so we ask, number one, that the 14 requirements that are outlined in that consent 15 order, where they agreed to keep the receiver 16 informed, be duplicated as to the receiver 17 himself when he is named as a party and when 18 they're hiring people to defend him and hiring 19 and -- and seeking motions and making statements 20 on his behalf in other courts. He's entitled to 21 know that, Your Honor. He's entitled to those 22 pleadings. 23 I will point out -- and I can only presume 24 that it was unintentional -- when Mr. Protopapas 25 asked for his file from the attorney in Texas,	Page 24 1 appeals continue. Some of which have been 2 dismissed, some of which are proceeding, none of 3 which have been returned in favor of the 4 appellants. 5 I'll be happy to answer any questions, Your 6 Honor. 7 THE COURT: Thank you, Mr. Robinson. 8 Mr. Sawyer. 9 MR. SAWYER: Good afternoon, Your Honor. 10 May it please the court. Wesley Sawyer. I 11 represent National Union Fire Insurance Company 12 of Pittsburgh, Berkshire Hathaway Specialty 13 Insurance Company, the Continental Insurance 14 Company, certain as yet unnamed London Market 15 insurers, AIG Property Casualty Company, and 16 Lexington Insurance Company. 17 And as an administrative matter, 18 Your Honor, the brief was filed by National 19 Union because they're the primary carrier to 20 pick up the defense when it was tendered to 21 them. 22 But all of my other clients, obviously, 23 join in on the arguments. We also join in on 24 the arguments of Travelers in their memorandum 25 that was filed last night as well. Just want to

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Page 25 1 get that out of the way for preservation 2 purposes, Your Honor. 3 I'd rather get, of course, to the more meat 4 of the substance, which is, of course, Your 5 Honor, the issue of the stay that followed the 6 order from this Court. And by way of 7 background, that order was a motion to dismiss 8 and dissolve the receivership that dealt with 9 the matters of the dissolution of Payne & 10 Keller; the allegations of constructive fraud, 11 which were raised in the response by the 12 receiver on that motion for the first time; 13 issues of standing of the receiver to pursue an 14 action because of the dissolution. All of those 15 issues were ruled upon by Your Honor and it fell 16 to the Court of Appeals. 17 There was a lengthy discussion about this 18 at the hearing on the July 10th. I don't want 19 to rehash all of those arguments, but they are 20 up there. The only development that's happened 21 since your decision on July 10th to obey any 22 rulings while we wait on the appellate court to 23 decide what to do -- at that time the issue of 24 appealability was before the Court of Appeals. 25 The parties on both sides briefed whether it was	Page 27 1 is a motion to clarify the receivership. 2 So it looks like we at least agree on that 3 point. This is a motion as to the receivership, 4 not the insurers' responsibilities, Your Honor. 5 Which just puts it more in the forefront that if 6 the entirety of the receivership and its 7 propriety before the Court of Appeals, that's 8 where that issue stays for the time being. It 9 may well come back. 10 THE COURT: How does the consent order 11 impact these things? 12 MR. SAWYER: Certainly -- 13 THE COURT: Entered into a consent order, 14 National Union did, and the rest of these 15 companies did. I don't care what you now think 16 about this receivership or you're contesting it 17 or anything else, but well before any of that 18 got into the picture, you entered into a consent 19 order specifically involving Protopapas as the 20 receiver, agreeing to keep him informed about 21 these matters. 22 MR. SAWYER: And I will give you the 23 background of that consent order. 24 THE COURT: You entered into it, did you 25 not?
Page 26 1 immediately appealable, and it was pending when 2 Your Honor heard those arguments on July 10th. 3 Since that time, earlier this month, the 4 Court of Appeals issued its order stating it was 5 going to allow the appeal to proceed. So those 6 matters are before the Court of Appeals by order 7 of the Court of Appeals and merits briefings are 8 underway. The first deadline for the briefs is 9 just a few weeks away, Your Honor. So it's all 10 there. 11 And for all the reasons that were argued 12 very articulately by Mr. Lee at the July 10th 13 hearing, under Rule 205 and all of its 14 constituents' rules, Your Honor, those matters 15 are currently in the hands of the appellate 16 courts, not this Court. 17 I really think that should end our 18 discussion. But, of course, I'm prepared to 19 address the additional arguments, Your Honor. 20 The motion was -- was a motion to clarify the 21 insurers' responsibilities. We argued in 22 response, Your Honor, it's really a motion to 23 expand or report or clarify the receivership. 24 In fact, Mr. Robinson stated during 25 arguments and said that's what they were doing	Page 28 1 MR. SAWYER: I did, exactly. And I'll get 2 to background that helps me answer your 3 question, Your Honor, if you will indulge me. 4 Zurich was named -- who is not my client, 5 represented by Mr. Bell, who is here -- was 6 named in a direct action in Louisiana. The 7 receiver brought this to everyone's attention. 8 We had Rule 11 communications, and we were 9 able to resolve the issue in agreeing that we 10 would provide nonprivileged, publicly filed 11 documents to the receiver. And if a case and a 12 settlement would implicate and erode available 13 limits that may be available for other 14 South Carolina claims, then they would keep him 15 informed of those negotiations of that progress. 16 That's what was consented to. 17 The Texas suit, first of all, is not a 18 direct action at all, but the receiver received 19 the text. 20 THE COURT: It didn't say direct action. 21 It said -- 22 MR. SAWYER: It does, Your Honor. 23 THE COURT: It says "Nonprivileged publicly 24 filed material." 25 MR. SAWYER: Your Honor, I'll read from

Page 29 1 page 3, which is really the first substantive 2 page of the consent order. "Specifically, the 3 receiver and the participating insureds agree 4 that in connection with any pending or future 5 direct action suits." 6 So that was the context of the consent 7 order, respectfully, Your Honor. 8 But getting to the broader picture, Your 9 Honor, a suit was tendered to the carrier. The 10 carrier accepted the tender, communicated to 11 Mr. Protopapas in writing that they were 12 accepting the defense and were not reserving 13 their rights. That was communicated. And the 14 identity of the defense counsel who was retained 15 was communicated to the receiver. That was done 16 via email to Mr. Protopapas on I believe 17 July 25th. If I'm one day off on it, I 18 apologize. But roughly July 25th. 19 So he was told that they were defending 20 without a reservation of rights and given the 21 entity of defense counsel. 22 THE COURT: But you thought it was 23 perfectly okay if you styled it in a different 24 way as some kind of third-party action seeking 25 to challenge his status of receivership. You	Page 31 1 throughout, and it hasn't changed. So, frankly, 2 I'm not going to spend a lot of time with that 3 argument, but I think it's in defiance of what 4 you all well understand is the ruling this Court 5 has made. 6 And it just doesn't make any sense as a 7 matter of politeness and policy that when you 8 dealt with this receiver and made certain 9 representations in a document about the 10 receiver, and beyond that, sent the receiver 11 certain information, that you decide, well, but 12 if we take this up, a little a kind of sideways 13 action here in Texas that involves -- directly 14 involves the receiver, we don't have to notify 15 them. That is not satisfactory to me. 16 MR. SAWYER: A few points on that, 17 Your Honor. First of all, when the receiver 18 asked for the filings, they were given to them 19 within 48 hours. This motion was filed within 20 24 hours of an email asking for the filings 21 without any communication about the motion. 22 But those documents were -- he filed the 23 documents with the Court on Friday night after 24 this hearing had been set. So they were 25 provided in short order. So they hadn't been
Page 30 1 did not give him any information about those 2 filings, right? 3 MR. SAWYER: Judge, I'm not sure that I 4 follow that. The Texas action is a lawsuit 5 against Payne & Keller. And the answer was 6 filed by defense counsel for Payne & Keller, and 7 all it did was assert an answer in a Texas 8 statutory defense. 9 THE COURT: Who is the receiver for Payne & 10 Keller? 11 MR. SAWYER: The receiver for Payne & 12 Keller property located in South Carolina is 13 Mr. Protopapas. 14 THE COURT: Well, Mr. Sawyer, I'm telling 15 you, I am not going to get into that yet one 16 more time. The basis of Payne & Keller's 17 receivership is that its assets are present 18 here, and its principal asset is its insurance 19 policies. 20 And if those insurance policies cover its 21 potential responsibility in South Carolina from 22 an alleged tort, those policies are 23 South Carolina present assets. Sangamo, et 24 cetera. 25 That's been my position about this thing	Page 32 1 hidden from him. They had been given to him at 2 his request. 3 Again, the identity of defense counsel was 4 provided to him in the acceptance -- 5 communication accepting the tenor of the courts. 6 So I want to be clear about that. 7 I also want to be very clear that while I 8 recognize and obviously dispute but recognize 9 Your Honor's prior rulings as to whether the 10 insurance policies are assets in the state, a 11 Texas lawsuit is absolutely not an asset within 12 the state of South Carolina. 13 And the receiver at this point over a 14 dissolved foreign corporation, the statute that 15 authorizes a receivership in South Carolina in 16 that context is very narrow. He's allowed to be 17 a receiver over property within this state. 18 That's it. That's what the statute says. 19 THE COURT: Don't argue that further to me. 20 I understand your position. You understand 21 mine. But when that insurer funds a lawsuit in 22 Texas regarding these various issues, you know, 23 I don't care how you skin that cat, it is 24 improper in every way, in my view, to play these 25 games with the insurers and not keep -- I mean,

Page 33 1 with the receiver and not keep the receiver 2 advised. 3 If you ultimately have some victory in this 4 state with respect to this issue, that's fine. 5 But before that happens, it is improper not to 6 inform -- and particularly for an insurer of the 7 very corporation the receiver is appointed as 8 fiduciary for. That's not acceptable to me. 9 MR. SAWYER: Your Honor, my client will 10 provide copies of anything that's filed for the 11 receiver in Texas. I don't have a problem with 12 public filings. 13 THE COURT: Well, I don't really regard 14 that as honoring your client. Your client is an 15 insurance company. 16 MR. SAWYER: That's correct. 17 THE COURT: It owes a direct obligation to 18 Mr. Protopapas, as the receiver, to keep him 19 advised, to not file lawsuits until 20 Mr. Protopapas is given a chance to react to 21 them. He is, until he is relieved of any 22 further responsibility, the receiver for this 23 corporation. 24 And the insurance company is acting at its 25 peril when it deliberately ignores its fiduciary	Page 35 1 insurance company and the insurance company 2 accepts that tender without a reservation of 3 rights under Texas law, the insurance company 4 controls that defense. 5 THE COURT: Well, I -- South Carolina also 6 has certain positions with regard to how a 7 defense is controlled, but they do not include 8 failure to keep the policyholder advised before 9 certain action is taken. 10 You may control how the defense goes, and 11 that's particularly pertinent in settlements, of 12 course. But not keeping the client advised as 13 to what's being done, that doesn't have a 14 blooming thing to do with this insurance company 15 controls. You owe a duty of candor and in the 16 passage of information, you need the insurance 17 company to its insured. 18 MR. SAWYER: Your Honor -- 19 THE COURT: That fiduciary duty goes back 20 to Meinhard v. Salmon and all of those cases. 21 So, you know, a high court may say differently, 22 but until it does in this court, those basic 23 lines of fiduciary responsibility are going to 24 be enforced by me. 25 MR. SAWYER: Your Honor, two points. One,
Page 34 1 responsibility to the receiver. 2 MR. SAWYER: Your Honor -- 3 THE COURT: We can litigate all these 4 things, but I'm not going to have it that 5 matters pending in this Court, where orders 6 included -- that put him in a fiduciary 7 position, that in order to play games, you're 8 going to file things in Texas and not inform 9 him. 10 What should be done is he should be asked 11 his position about these matters before they 12 file them. Shame on the lawyers who don't do 13 that. 14 I regard that as part of their fiduciary 15 duty because they're representing the 16 corporation. 17 MR. SAWYER: And, Your Honor -- 18 THE COURT: They have the 19 insurance-selected lawyer, not to represent the 20 insurance company, but to represent Payne & 21 Keller. 22 MR. SAWYER: To be clear, Your Honor, even 23 if Payne & Keller was a stand-alone corporation 24 that was currently viable, did not have a 25 receiver, once it tenders a defense to the	Page 36 1 again, when asked, it was given. They -- 2 THE COURT: It's not a question of when 3 asked, Mr. Sawyer. 4 MR. SAWYER: I will say we will provide 5 it -- from here on out, our clients will provide 6 anything that is filed to Mr. Protopapas. 7 THE COURT: Well, that's what you need to 8 do and without having to first file it and beat 9 him over the head with it and then he finds out 10 about it and asked it and then you reluctantly 11 give it to him. That's not the way fiduciary 12 responsibility is supposed to work. 13 MR. SAWYER: And that gets to a second 14 point, Your Honor. Because of the limited 15 nature of a receivership where it is resolved 16 corporation being limited to property within 17 this state, there may be problems with providing 18 him everything beforehand in a Texas lawsuit. 19 Because while the insurance policies may be an 20 asset in this state, we may dispute that, but 21 recognizing your prior opinions, that's your 22 position. That's -- I understand that, but -- 23 THE COURT: But the vehicle you're using -- 24 the vehicle you're using in the Texas court to 25 have it act on this matter is Payne & Keller.

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Page 37 1 It's not -- National Union's not the party in 2 this thing or any other insurance company. You 3 are taking action on behalf of an outfit to whom 4 you owe fiduciary responsibilities as its 5 insurance company. 6 And those -- the fact that you may control 7 the defense does not absolve your basic 8 fiduciary responsibilities to notify it before 9 you take action. 10 MR. SAWYER: But, Your Honor, the receiver 11 is not a receiver in Texas or in Texas 12 litigation. 13 THE COURT: Oh, no, I disagree with that 14 completely. A receiver is a receiver. And he 15 is a receiver because of the presence of assets 16 in this state. And if that receiver's situation 17 then presents itself in a Texas court, the 18 receiver is entitled to know before action is 19 taken. 20 Furthermore, I don't understand on a common 21 sense basis why you operate like that. It's not 22 only offensive to me as a matter of fiduciary 23 responsibilities as they were taught to me many, 24 many years ago, but it doesn't make any common 25 sense to me that lawyers would operate like that	Page 39 1 owes a fiduciary obligation to its receiver. 2 MR. SAWYER: All right. Your Honor, I 3 would just incorporate the arguments we made in 4 our brief about custodian versus receivership, 5 from ShapeMaster, as well as was recognized in 6 Whittaker Clark. The order that came down 7 recently this year that a receiver doesn't 8 control a company. They only receive the assets 9 of the company and distribute those assets. 10 He has not been appointed as a custodian. 11 South Carolina law doesn't provide the provision 12 for appointment of the custodian over a foreign 13 dissolved corporation. 14 So I note that, and I realize Your Honor's 15 rulings. I just want to make sure I'm clear -- 16 THE COURT: Custodial relationship has 17 nothing do with what I'm talking about. What I 18 am talking about is the basic obligation that an 19 insurance company has to its policyholder. Its 20 policyholder is Payne & Keller. The policy is 21 an asset held in South Carolina for the benefit 22 of claims against Payne & Keller. 23 And the fact that the insurance company has 24 now taken the strange position that it's going 25 to litigate those things in Texas is -- when
Page 38 1 and companies the same as National Union 2 disappoints the heck out of me. 3 So let's not talk about it anymore. I can 4 just tell you in terms of what happens here, 5 basic notification of the insured is a 6 requirement in my view. 7 MR. SAWYER: And, Your Honor, so I can be 8 clear with the order that we will receive from 9 you so there's no ambiguity -- 10 THE COURT: It will be very precise. But 11 I'm not going to be nailed down to a cross 12 debate with you about that at this time. 13 MR. SAWYER: I just want to communicate 14 clearly, then, when I leave this room today, 15 Your Honor. Is it my understanding that your 16 order is going to be not only do they have to 17 provide public filings as soon as they are 18 filed, but also documents prior to filing that 19 they intend to file? 20 THE COURT: Yes, absolutely. 21 MR. SAWYER: I want to advise them 22 correctly. 23 THE COURT: Yes. Absolutely. They've got 24 to inform the receiver as to what action is 25 being taken on behalf of the company to which he	Page 40 1 they involve South Carolina claims is something 2 I don't understand either. 3 MR. SAWYER: It's a Texas claim, to be 4 clear. 5 THE COURT: Well, if they're just Texas 6 claims, it's all the more reason why you need to 7 be notifying these people that you're acting on 8 their behalf. 9 MR. SAWYER: Yes, Your Honor. 10 THE COURT: I mean, you're talking about a 11 conflict of interest as to the asset itself, 12 then? There are just so many other complexities 13 about what's happening here that I don't 14 understand how a reputable law firm wouldn't 15 understand. And it's easy to do. 16 It doesn't mean you have to agree with 17 Rikard about everything -- or with Protopapas 18 about everything. But you've got to notice 19 these people. They are directly involved in the 20 existence of that asset and its protection. 21 And whether you decided that there's some 22 other principle of law that overrides that 23 fiduciary relationship you claim is one thing, 24 but the idea that you can sneak around and go on 25 and file something first and then tell them

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Page 41 1 afterwards just doesn't make any sense to me. 2 MR. SAWYER: Okay, your Honor. Understood. 3 THE COURT: All right, sir. 4 MR. SAWYER: Thank you for your time. 5 THE COURT: All right. Ms. McVey. 6 MS. MCVEY: Yes, ma'am. Also in the 7 hearing that you had on July 10th, which was my 8 motion, to make a finding of constructive fraud 9 and to reconstitute the company. 10 I am distraught that my friends over here 11 arguing on July 10th that my case, my case, the 12 third -- the first party case, Mr. Childers' 13 case, was stayed as to my ability to even seek a 14 finding of constructive fraud. 15 And you didn't rule on that. You told me 16 let me think about it for a minute. Because if 17 the issues on appeal are not whether or not 18 Payne & Keller engaged in constructive fraud. 19 That's not what's on appeal. 20 I am distraught that they said I couldn't 21 seek that finding and then turned around and 22 snuck in a filing so that maybe it could be 23 decided in Texas when I'm first in line. 24 THE COURT: Well, that's what I was 25 alluding to in the conversation I had with	Page 43 1 fraudulently sought the termination or 2 dissolution? 3 MS. MCVEY: That's right. Without 4 providing for their known and future creditors. 5 THE COURT: Right. Right. And so what do 6 you think the posture of the matter would be if 7 I granted your motion in Childers? 8 MS. MCVEY: Then I think you have made a 9 factual finding of constructive fraud. And this 10 Texas statute says a court can revoke the 11 termination. That's you. That's how I think it 12 should be. 13 Now, they can go on and appeal whether or 14 not a receiver is appropriate or deny the motion 15 to dismiss. I don't think that affects their 16 appeal at all. But I think I'm entitled to that 17 finding. 18 MR. SAWYER: Your Honor, I will read from 19 your order that is on appeal. Relying on 20 Robinson -- and I'll skip the cite -- Travelers 21 argues that applying Section 11.153 -- which is 22 the section that Ms. McVey is relying upon under 23 Texas law -- to Payne & Keller's dissolution for 24 violating Article 1, Section 16 of the Texas 25 Constitution.
Page 42 1 Mr. Sawyer about the complexities of entitlement 2 to that asset vis-a-vis the situation with 3 Lenora Childers and with the third party action 4 that's pending in her case. 5 MS. MCVEY: And the real issue is that 6 Ms. Childers can come to this court, because I 7 have my own lawsuit, and say, Judge -- I'm 8 saying to you, Judge, we gave you all this 9 evidence that Payne & Keller engaged in 10 constructive fraud, and I would like you to 11 reconstitute or revoke the termination. 12 THE COURT: Yes, I understand. 13 MS. MCVEY: That's what I'm asking you to 14 do. And I think what they've shown you to do is 15 they can go do it in Texas, I can certainly do 16 it here when the issues that I'm dealing with 17 are not on appeal. 18 Your Honor, I would ask you to consider 19 that again. You haven't ruled yet, and I 20 understood why, but now we know what they're 21 going to do. And they're not playing by the 22 same rules, and so we would like to get that 23 finding. 24 THE COURT: Well, let me ask you this: 25 What you contended is that is Payne & Keller	Page 44 1 And then the Court goes on to say -- 2 disagrees with that. That issue is squarely 3 before the Court of Appeals. That is the order 4 that's on appeal. The Court of Appeals has said 5 after briefing on appealability, we are going 6 forward. It is squarely in there. It can't be 7 argued it's not a matter affecting the appeal. 8 It is a nut and bolt of the order. 9 And I'll also note, Your Honor, that that 10 order noted that discovery would take place. So 11 if it gets remanded, there's supposed to be 12 discovery on that issue. Not just race off to 13 the finish line. 14 That's why Your Honor made that ruling on 15 July 10th because there's no avoiding what the 16 order that's on appeal says. It's squarely 17 within the confines of that. 18 THE COURT: I didn't make a ruling. I 19 declined to make a ruling. 20 MR. SAWYER: Fair enough, Your Honor. And 21 another thing I'll note, even after the 22 July 10th hearing, where you declined to make a 23 ruling, you said there would be opportunity down 24 to road to address these issues when it came 25 before the court. So that the door was not

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Page 45 1 closed. In fact, if you will recall, I stood up 2 to preserve issues. And Your Honor said you 3 don't need to worry about that right now. 4 THE COURT: And then the very next thing 5 you all do is to sneak over to the Texas court, 6 after I thought this was going to be handled in 7 an orderly way here, and file that other lawsuit 8 with no information to the receiver until after 9 it's done. 10 MR. SAWYER: Your Honor -- 11 THE COURT: That's the part that's sticking 12 in everybody's crawl right now, and it's 13 certainly sticking in mine. You can't have it 14 both ways. I'm an innocent little guy that's 15 trying to enforce these the stay rulings, that 16 this is what the things say, and you stay in 17 your own -- well, I stay in my guardrails. And 18 then you sneak back around to Texas, no notice 19 to the policyholder, file a -- 20 MR. SAWYER: Answer. 21 THE COURT: -- file a pleading that is not 22 in the best interest of Payne & Keller and its 23 receiver, and it's directly contrary to what the 24 receiver is trying to achieve here in 25 South Carolina. And then say, oh, but now you	Page 47 1 raising a statutory defense -- by the way, 2 defense counsel here in South Carolina has 3 raised in the answers, including as recently as 4 in July -- 5 THE COURT: Enough, Mr. Sawyer. 6 MR. SAWYER: Thank you, Your Honor. 7 THE COURT: Thank you. 8 MR. ROBINSON: Your Honor, I just want to 9 point out two things in response to -- this is 10 John Robinson for Payne & Keller. 11 Your Honor, unfortunately, the carriers are 12 treating this Texas judge like they treated this 13 Court in Covil. 14 You brought up something interesting about 15 sneaking and filing something with Texas. What 16 has not yet been disclosed to this Court and 17 there doesn't appear to be anything in the 18 record in Texas that the carriers even disclosed 19 the existence of a receivership to the Texas 20 judge. That the carriers do not appear to have 21 disclosed the fact that there had been a motion 22 to reconstitute for constructive fraud to this 23 Texas judge. The carriers have not disclosed to 24 this Texas judge that the motion to dissolve the 25 receivership is on appeal in this court.
Page 46 1 can't do anything about this because you've got 2 to stay in your guardrails. 3 I don't see matters that way, but I 4 specifically feel like my -- I go and try to be 5 tempered about the way I rule about these 6 things. If you all took advantage of that by 7 sneaking around and not keeping Rikard informed, 8 as you promised the receiver -- I mean 9 Protopapas informed -- as you promised in the 10 consent action or certainly made him feel as if 11 he was going to be kept in the loop. You 12 deliberately don't tell him anything about this 13 Texas action. Why? Because you are trying to 14 further prop up your position in South Carolina 15 that you don't owe any duties to anybody. 16 And Ms. McVey is the one that's stuck in 17 the crosshairs of all this because she 18 represents the claimant, who is counting on 19 having assets preserved for possible use in the 20 lawsuit she's brought. So I'm über put out with 21 you all about that. And it's not saved by you 22 trying to wave my order around in my face. 23 MR. SAWYER: Your Honor, my client did not 24 file a suit in Texas. My client hired a defense 25 counsel to file an answer and a motion in Texas	Page 48 1 There's nothing in the record that I found. 2 And, again, Your Honor, we're looking at a 3 needle in a haystack. We know what they did, 4 but there's nothing in the record where this -- 5 the existence of these proceedings have even 6 been disclosed to the Texas judge. 7 So, you know, Judge, you're right, there 8 are two parallel paths going. And it's going 9 to -- as it relates to the carriers, it's the 10 one of least resistance and the fastest one to 11 get the results they're looking for that is 12 being pursued. 13 I also point out the issue -- I know the 14 Court's addressed. This is in Texas. This has 15 nothing to do with us. These suits are aware of 16 the policies, and the policies are the property 17 of the receiver. So this idea that all of these 18 suits outside of the borders of this state have 19 nothing to do with this state, that's just not 20 true, Your Honor. 21 You know, also I wanted to -- one of 22 esteemed appellate lawyers in the audience has 23 sent me something. I want to make sure that I 24 get it on the record. I think there's an 25 important distinction in Atlas and that one of

Page 49 1 the orders is an appeal in that case. One of 2 the orders appointing the receiver is on appeal 3 in that case. 4 And the Payne & Keller case, it's the order 5 denying the Motion to Dismiss and Dissolve that 6 is on appeal. So the stay analysis is a little 7 bit different. Here, the receiver was 8 appointed, and that order is still in effect. 9 There was no appellate attack on that order. 10 The receivership is valid. 11 And if the Court of Appeals determines it 12 should be dissolved, then it would be dissolved 13 from that date, not retroactively. 14 So I just want to point out that I believe 15 there is a difference in the order that's been 16 appealed in Atlas, which has been discussed, and 17 the order in this case. 18 As it relates to Ms. McVey's underlying 19 Motion for Constructive Fraud, Payne & Keller 20 either was dissolved as a result of constructive 21 fraud or wasn't, regardless of the receivership. 22 I mean, the receiver -- the existence of a 23 receivership does not determine whether Payne & 24 Keller was dissolved as a result of constructive 25 fraud.	Page 51 1 what's happening is being argued to you that you 2 can't rule on those things related to a 3 receivership, number one, I think 62 throws that 4 out the window. I think you can rule on things 5 while this receivership -- and I think you can 6 require the carriers, at a minimum, to keep your 7 receiver informed of all of their -- 8 THE COURT: With that -- 9 MR. ROBINSON: -- activities. 10 THE COURT: With that said, I'm going to 11 certainly do. The question is whether to now 12 that I've declined twice to rule on the stay 13 hoping that in one consolidated place there 14 would be a way to do it, you know, I'm 15 confronted with, again, what Mr. Carroll said 16 this morning is not exactly accurate. 17 This thing is not just a reference to the 18 ten-day deal at all. A, in the first -- in the 19 first sentence says, "Except as stated herein, 20 no execution upon a judgment nor shall 21 proceedings be taken for its enforcement until 22 after expiration of ten days from its entry." 23 That's that the ten-day rule you can give 24 judgment. You just have to wait ten days to 25 execute on it. That's one freestanding thing.
Page 50 1 So I know they want everything stayed here, 2 and -- but that is not -- that is not what is 3 happening. It is moving forward, and it is 4 moving forward all around us, Your Honor. 5 THE COURT: Well, of course, you know, 6 there's so many ways to turn this kaleidoscope. 7 But the problem with dissolving the receivership 8 because it was -- well, wait a minute. 9 Yeah. The problem with dissolving is that 10 you redo the whole thing then. You start from 11 scratch again. And that's what I don't want to 12 have to do. This is a decent vehicle. I don't 13 care exactly what transpired in connection with 14 the creation of the receivership. 15 The receivership was created to protect the 16 assets of Payne & Keller, and that hasn't 17 changed. I don't care under what circumstances 18 it was obtained. And that's what I'm concerned 19 about is how to be sure that these assets are 20 protected. Because they're not being protected 21 if you can take secret and parallel tracks 22 towards discussing these issues in another 23 jurisdiction when the receivership itself is 24 under active litigation here. 25 MR. ROBINSON: Correct, Your Honor. And	Page 52 1 Then the next thing says "Unless otherwise 2 ordered by the Court, an interlocutory or final 3 judgment in an action for an injunction or a 4 receivership action, or a judgment or order 5 directing an accounting, shall not be stayed 6 during the period of its entry and until appeal 7 is taken or during the pendency of an appeal." 8 Second freestanding sentence. 9 And it's my mistake not to look at that 10 more clearly when Mr. Carroll was arguing that. 11 And then it says, final section of (a), the 12 provisions of (c) of this rule, governing, 13 suspending, modifying, restoring, granting an 14 injunction are the ones that govern -- (c) 15 governs the provisions regarding the suspension 16 or modifying, restoring of an injunction during 17 an appeal. 18 And that the (c), of course, is the bond 19 section. Simply says you've got to in certain 20 circumstances put up a bond, an appeal bond. 21 But the more I look at (a), the more I am 22 convinced that the arguments that were made this 23 morning are the correct ones. 24 Now, Mr. Carroll, you've got a dog in this 25 particular fight?

Page 53 1 MR. CARROLL: Well, I do, Your Honor. 2 Well, I've heard my client indirectly described 3 as sneaking around, doing stuff behind people's 4 backs, making disillusionary arguments -- 5 THE COURT: Well, you just have to take 6 that sometimes. 7 MR. CARROLL: There are a couple of things 8 here, Your Honor. I'm standing up right at this 9 moment because of this Rule 62(a) issue. 10 THE COURT: Well, you've had your time to 11 argue that in the previous case, Mr. Carroll. 12 MR. CARROLL: Yes, ma'am. I was just going 13 to say there's a sentence in the note to the 14 rule that reads as if the two sentences that you 15 just read should be blended together. So I just 16 want to -- because -- 17 THE COURT: The note says it's drawn from 18 the federal rule. 19 MR. CARROLL: Yes, ma'am. 20 THE COURT: Provides an automatic stay for 21 ten days and all but injunctive actions, all 22 those involving a receivership or accounting, 23 which is exactly what I'm saying, provides a 24 stay except for those involving receiverships. 25 Stays endorsed proceedings as well as motions	Page 55 1 colleague, Mr. Lee, who is on a flight right now 2 and can't be here, so I'm coming up from the 3 minors to bat today. 4 THE COURT: Yeah. I doubt that. 5 MR. CARROLL: The argument had nothing to 6 do with a stay. It wasn't a Rule 62 issue or a 7 Rule 241. It was a Rule 205 issue. It was a 8 jurisdictional issue. And this is in the 9 Tillman v. Oaks case, Court of Appeals case, 10 Judge Few, I think, wrote the decision. But he 11 talks about the interplay between 241 and 205 12 and how sometimes issues aren't matters affected 13 by the appeal, and a trial court retains the 14 discretion to stay or not stay. 15 But if something -- if there is an issue 16 before the trial court that could affect a 17 matter on appeal, then that's beyond the trial 18 court's jurisdiction under Rule 205. That was 19 our argument then. And the order -- the order 20 that is on appeal says, "This Court finds the 21 receiver has made a prima facie showing that 22 Payne & Keller was terminated as a result of 23 actual or constructive fraud." And it cites a 24 Texas statute. 25 We take -- we disagree with that. We don't
Page 54 1 for a new trial, et cetera, are discretionary 2 with the court. 3 So I don't think this helps your argument 4 when you read this whole note, and it certainly 5 doesn't help your argument when you read the 6 sentence, which is a freestanding sentence all 7 by itself. 8 MR. CARROLL: Yes, ma'am, but I disagree. 9 But that's okay. The reason I wanted to pop up 10 just now because you were referencing my 11 argument and telling the room that you didn't 12 think my argument was correct. 13 THE COURT: Right. That happens a lot. 14 MR. CARROLL: It happens to me a lot, 15 unfortunately. 16 But I wanted to interject that the note was 17 what I was relying on to blend the two sentences 18 together. 19 THE COURT: Yeah. 20 MR. CARROLL: I think that was the way the 21 record is intended them to be read, not as 22 freestanding sentences, but as one consistent 23 thought. 24 But, Your Honor, as it relates to this 25 Payne & Keller issue, when we argued this, my	Page 56 1 believe that there's anything anywhere in the 2 record that suggests actual or constructive 3 fraud, and we intend to make that argument at 4 the Court of Appeals. 5 Ms. McVey's client is taking the -- 6 THE COURT: Well, what's the ruling in the 7 order? 8 MR. CARROLL: That showing that Payne & 9 Keller dissolved -- that the documents that show 10 the dissolution and what led to the dissolution 11 actually states a claim for fraud. We disagree. 12 And we're handing that issue to the Court of 13 Appeals. 14 That's -- Ms. McVey has come forward with 15 not one bit of evidence that I'm aware of that 16 varies from what the receiver had already put in 17 front of the Court when you made this ruling. 18 THE COURT: What was the ruling in this 19 thing, Mr. Carroll? That was the discussion. 20 What was the ruling? 21 MR. CARROLL: That was the ruling. They 22 made -- so here's how the whole thing -- here's 23 how the whole thing works. 24 THE COURT: The denial of the motion, is it 25 not?

Page 57 1 MR. CARROLL: We filed a motion to dissolve 2 the receivership. The basis for the dissolution 3 was -- the dissolution of the receivership was 4 Payne & Keller was a Texas company, Payne & 5 Keller dissolved. 6 THE COURT: And I denied that motion. 7 MR. CARROLL: Payne & Keller dissolved as a 8 matter of Texas law. As a matter of Texas law, 9 the statute proposed on claims against -- 10 THE COURT: I denied that motion. 11 MR. CARROLL: So there's nothing for the 12 receiver to marshal. There can be no claims. 13 THE COURT: I understand that, but I denied 14 that motion. And the denial of a motion is not 15 an appealable issue. 16 MR. CARROLL: But the denial resulted in 17 the receivership continuing, and that's what we 18 argued at the Court of Appeals and they said -- 19 THE COURT: I understand all that. I can't 20 do anything about how you change your arguments 21 when you get up there. 22 MR. CARROLL: We have not changed our 23 arguments. That was our argument from the 24 git-go. 25 THE COURT: This is not a fruitful	Page 59 1 MR. BELL: Your Honor, if I may, Kevin Bell 2 on behalf of Zurich American Insurance Company. 3 I will be incredibly brief. 4 I emailed -- the first is housekeeping. I 5 emailed you on Friday afternoon and said I had a 6 matter in North Carolina and could not be here. 7 I got an email at 6:30 this morning, my neutral 8 has COVID, so here I am. 9 The second is Your Honor outlined what you 10 think the carriers should be doing in terms of 11 sharing information with Mr. Protopapas. Zurich 12 is happy to -- we are absolutely happy to do 13 what Your Honor outlined. 14 That said, I do want to put on the record, 15 Zurich has no role in the pleadings that were 16 filed or motions that were filed in Texas. We 17 had no role in that. And the reason that I 18 point that out is because the references that 19 fall in to, quote, the carriers, end quote, 20 doing these things in Texas. 21 And I just think we need to be more careful 22 about that because that's not factually correct, 23 and it's really not a fair characterization of 24 the situation. 25 THE COURT: I'll agree with you and
Page 58 1 discussion, Mr. Carroll, with all due respect to 2 you. I'm not getting back into that whole 3 appeal right now. Whatever the Court of Appeals 4 does, they will do. 5 But, please, it is now 2:20. I got an 6 appointment at 3:00 that I'm going to keep. 7 MR. CARROLL: Yes, ma'am. 8 THE COURT: So I'm not -- this is not 9 helpful in terms of resolving the issue that 10 Mr. Sawyer and Mr. Robinson have put in front of 11 me right now. So I would ask you to conclude. 12 MR. CARROLL: Yes, ma'am. And I will tie 13 this all up because it sounds like they're 14 asking you to revisit what you did on July 10th. 15 THE COURT: No, I didn't do anything. 16 They're asking me -- Ms. McVey is saying you 17 ought not to reserve ruling on it. Go ahead and 18 reserve it and rule on the thing. 19 MR. CARROLL: Yes, ma'am. 20 THE COURT: And I have decided what to do 21 about that, and I don't need any more argument 22 from you about it. 23 MR. CARROLL: Yes, ma'am. 24 THE COURT: Thank you. 25 MR. CARROLL: Thank you.	Page 60 1 specifically say it doesn't apply to Zurich. 2 MR. BELL: Thank you. 3 THE COURT: The carriers that are involved 4 understand where they are and what they are 5 doing. 6 MR. BELL: Thank you, Your Honor. 7 Appreciate it. 8 MR. ROBINSON: And, Your Honor, we'll note 9 that in the Louisiana situation, Zurich was very 10 forthcoming -- 11 THE COURT: Exactly. 12 MR. ROBINSON: -- entering that consent 13 order regarding the information once it was 14 brought to their attention. 15 THE COURT: Exactly. 16 MR. ROBINSON: We'll put that on the 17 record. 18 The Court did ask about the ruling that was 19 under appeal, you are correct. You specifically 20 did not make a finding of constructive fraud, 21 and I think those were your words. You said 22 there was prima facie evidence. 23 THE COURT: I said there was a prima facie 24 case. I declined to use it as the basis for 25 doing what Ms. McVey asked me to do. She said

Page 61 1 that the prima facie case would be plenty enough 2 to justify dissolving. 3 MS. MCVEY: And, Your Honor, in addition, I 4 heard the comment that we didn't put forth 5 additional evidence of what the receiver put 6 forth. And that's not true. There were a bunch 7 of discovery responses filed where we asked the 8 carriers, do you have any information about what 9 happened during the time period? 10 All of that in addition to the various 11 documents we put forth that showed that Payne & 12 Keller at the time of dissolution was in the 13 midst of claims and knew it would have future 14 claims going forward. 15 So, Your Honor, we believe strongly that, 16 number one -- I disagree with Mr. Carroll. The 17 whole basis for them saying you can't rule is 18 that I was stayed. You didn't decide that on 19 that issue. You took it under advisement. 20 And, Your Honor, we believe that you are 21 not stayed, that you ought to make a finding for 22 constructive fraud and to reconstitute this 23 company. 24 THE COURT: All right. 25 MR. HAYES: Your Honor, if I may very	Page 63 1 would wait and see what the appellate courts did 2 with this matter. 3 The Court of Appeals have now taken this 4 matter. I sincerely believe, number one, it's 5 not an appealable issue, denial of a motion. 6 Number two, I am more and more convinced 7 the more I look at Rule 62 that it flat-out says 8 that a freestanding matter unless otherwise 9 ordered by the Court, an interlocutory or final 10 judgment in an action for a receivership action 11 shall not be stayed during the period after its 12 entry and until an appeal is taken or in the 13 pendency of appeal. I think that language 14 clearly says that. 15 That being said, the Court is being asked 16 to rule upon that, and it stretches my patience 17 badly to feel that the more I reserve rights and 18 try to be careful about not overstepping my 19 boundaries, the more certain of these parties in 20 this matter take advantage of the Court's 21 consideration in this regard and do things that 22 they don't inform the receiver about, and they 23 don't inform this Court about until after the 24 fact. 25 And I think that is well below the level of
Page 62 1 briefly. 2 THE COURT: You know, I can conduct these 3 things without hearing any argument from anyone. 4 It's really not fair to just keep popping up one 5 by one because somebody else says something. 6 Identify yourself to begin with if you are 7 going to have anything to say, and say who you 8 represent. 9 MR. HAYES: Yes, Your Honor. Aaron Hayes 10 on behalf of First State Insurance Company. We 11 are in the same boat as Zurich. I just wanted 12 to note that for the record that we do not 13 participate in the defense of the Texas action 14 because we don't have a duty to defend and are 15 not doing so in Texas. We just wanted to 16 clarify that for the purposes of the forthcoming 17 order. 18 THE COURT: Appreciate the clarification. 19 Sorry I'm a little short with you. 20 I am firmly convinced the more I read 21 Rule 62, that it does not interfere with my 22 ability to make a ruling as I'm being called and 23 asked to make in this receivership matter. 24 Having said that, I have conducted the 25 hearing on July 10th in Charleston. I said I	Page 64 1 what is acceptable conduct for litigants as 2 sophistication as these insurance companies and 3 well below the level of what ought to be 4 expected of attorneys appearing here. 5 But I am going to stay with what I did. I 6 am going to hold in abeyance any ruling with 7 respect to this stay or to further clarifying 8 the position of the parties. 9 I will tell you, I don't regard this stay 10 as inhibiting the receiver one bit in continuing 11 to pursue the existence of these policies and 12 the coverage provided for them for actions that 13 are pending here in South Carolina. Which is 14 what the receiver was empowered to do and what 15 the receiver is doing. 16 I fully expect these insurance companies 17 to -- that are not being cooperative, whose 18 conduct has been revealed in this hearing today, 19 to follow the example of Zurich and the others 20 who are being fair with this Court and candid 21 with all courts in which these complex matters 22 are being litigated. 23 But my patience is not endless, and I know 24 this litigation well enough to know that 25 something else is going to crop up here before

1 too much longer, where the same kind of
2 machinations are going to be done. And I can
3 tell you my patience and my prudence is not
4 going to be endless in these matters.

5 I still regard it as the prudent thing for
6 me to do as a circuit court judge, reserve
7 rulings on matters that may be matters that
8 should be decided by the appellate courts with
9 respect to these claims of stay.

10 So that is my position on the matter, and
11 this matter -- this hearing is adjourned.

12 MR. ROBINSON: Your Honor, may I ask a
13 quick question based on what you just said?

14 THE COURT: Yes, sir.

15 MR. ROBINSON: As much as the carrier has
16 indicated that they would keep the receiver
17 informed --

18 THE COURT: I get that, that all of them,
19 even the ones that have not been in my view
20 behaving as they should, I am hearing from every
21 one of these carriers that's represented by
22 these lawyers that they will be forthcoming with
23 the receiver.

24 MR. ROBINSON: Would be an order for a
25 consent order similar to the Louisiana consent

1 order that would allow them and require them to
2 have the same obligations to the receiver during
3 the pendency of this appeal or any matter that
4 they keep him informed about the --

5 THE COURT: I think that would be a great
6 idea. Why don't you pursue it with them. If
7 they don't do it, let me know and we'll at least
8 try to put something in place that will require
9 that. I feel like that's a minimum.

10 MR. ROBINSON: Thank you, Your Honor.

11 - - -

12 (The hearing concluded at 2:32 p.m.)

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CERTIFICATE OF REPORTER

I, Sheri L. Byers, Registered Professional Reporter and Notary Public of the State of South Carolina at Large, do hereby certify:

That the foregoing proceedings were taken before me on the date and at the time mentioned on page 1 and the proceedings were recorded stenographically by me and were thereafter transcribed under my direction; that the foregoing transcript as typed is a true, accurate and complete record of the proceedings to the best of my ability.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 23rd day of August, 2023, at Lexington, Lexington County, South Carolina.

Sheri L. Byers,
Registered Professional Reporter,
Notary Public
State of South Carolina at Large
My Commission expires:
October 30, 2023

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Chief Justice Toal-

On July 10, 2023, you heard plaintiffs' motion to revoke the termination of Payne & Keller. During that hearing you indicated that you needed guidance from the appellate court as to whether the matter was stayed while the appeal is pending. As you know, the receiver then sought clarification from the Court of Appeals which the Court of Appeals provided. The Court of Appeals clarified that receivership actions are not stayed during the pendency of the appeal.

As a result, we have drafted a proposed order for the court's consideration on the plaintiffs motion for a finding of constructive fraud and to revoke the termination. The proposed order is attached. By copy of this email, I am notifying counsel for the Defendants of my communication with the Court. If you have any questions or concerns, please do not hesitate to contact me.

Theile McVey

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Chief Justice Toal,

We were surprised to see Ms. McVey's email of earlier this week, as jurisdiction over the issues raised in her client's motion/proposed order is exclusively at the Court of Appeals, which Your Honor acknowledged when we were together in July and again in August discussing this same motion. Respectfully, if the Court is inclined to even consider this proposed order, we would request ten days to respond to it. Best regards,
Todd

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
LENORA CHILDERS , Individually and as	)	C/A NO. 2021-CP-40-03484
Personal Representatives of the Estate of	)	
LEWIS C. CHILDERS ,	)	<i>In Re:</i>
	)	Asbestos Personal Injury Litigation
Plaintiffs,	)	Coordinated Docket
	)	
v.	)	
	)	
DAVIS MECHANICAL	)	
CONTRACTORS, INC. , et al.	)	
	)	
Defendants.	)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFFS' MOTION TO
REVOKE THE TERMINATION OF PAYNE & KELLER COMPANY**

Before the Court is Plaintiffs' Motion to Revoke the Termination of Payne & Keller Company ("Payne & Keller") pursuant to Section 11.153 of the Texas Business Organizations Code ("TBOC"). As the parties know, Payne & Keller has appealed this Court's refusal to terminate the appointment of a receiver and dismiss the underlying receivership. As set forth below this matter is not stayed on appeal. Moreover, the Court does find that, based on the evidence below, Payne & Keller committed, at a minimum, constructive fraud when dissolving and thus revocation of the termination of Payne & Keller pursuant to Section 11.153 of the Texas Business Organizations Code is appropriate.

STATUS OF RECEIVERSHIP ON APPEAL

At the outset, and following the hearing on this matter, this Court asked for further clarification of the status of this matter during the pendency of the appeal. Specifically, this Court requested clarification on whether it retained jurisdiction to issue orders in this matter and whether the matter or portions thereof were stayed. As a result, the receiver sought clarification

from the Court of Appeals. On September 8, 2023, the Court of Appeals issued an order clarifying that under the law and statutes of South Carolina, that while the appeal of this Court's orders proceeds, the Receivership action is not stayed. *See Order, Childers v. Davis Mechanical*, 2023-000727 (S.C. App., Sept. 8, 2023). That matter having been resolved, a decision on the question of whether a finding of constructive fraud as to Payne & Keller's Texas dissolution is appropriate.

BACKGROUND

On August 27, 2021, this Court entered an order appointing Peter D. Protopapas ("Receiver") over this dissolved Texas Corporation. The Receiver has conducted substantial research regarding Payne & Keller, including the reasons for Payne & Keller's purported dissolution and the underlying reasons for that dissolution. Much of that history is set forth in the Receivers' Response to Third Party Defendant Travelers Casualty & Surety Company's Motion to Dismiss Third Party Claims and Dissolve the Payne & Keller Receivership filed January 13, 2023 and subsequently repeated in the instant motion. Large portions of those undisputed facts and the applicable law are reiterated here in whole or in part.

After operating for decades building and maintaining major petrochemical and heavy industrial facilities, Payne & Keller abruptly dissolved just as a flood of asbestos-related personal injury claims were being filed (including in Texas) and immediately after the company learned it could face significant toxic tort liability as a creditor in a pending bankruptcy proceeding. Despite the existence of significant historic insurance to address these liabilities, there is evidence that Payne & Keller dissolved with an intent to avoid (or, at the very least, ignore)

these liabilities in direct violation of the statutory duties it owed creditors to make adequate provision for these liabilities.

For example, in 1981, Payne & Keller worked on an insulation replacement project for Archer Daniels Midland (“Archer Daniels”). Archer Daniels initially awarded this project to another firm. After its workers went on strike, Archer Daniels cancelled that initial contract and assigned the remainder of the work to Payne & Keller. Payne & Keller also worked on valve replacements at a Citgo Petroleum Corporation facility in Westlake/Lake Charles, Louisiana, *see Seeney v. Citgo Petroleum Corp.*, 848 F.2d 664, 666 (5th Cir. 1988), which has since been the subject of asbestos litigation. *See Bourque v. Anco Insulations, Inc.*, 25 So. 3d 1008 (La. App. 3 Cir. 2009).

By 1983, some of Payne & Keller’s excess-level insurance policies expressly excluded coverage for asbestos-related claims, and, in the years before its dissolution, Payne & Keller agreed, in its service contracts, to indemnify companies from financial responsibility for any property damage or personal injury claims arising from the work completed by Payne & Keller employees. *See, e.g., In re Charter Co.*, 63 B.R. 568, 570 (Bankr. M.D. Fla. 1986).

During the 1980s, Payne & Keller defended itself against a variety of toxic tort claims arising from occupational exposures. In 1983, the Louisiana Court of Appeals affirmed that Payne & Keller and its insurer Aetna Surety & Casualty Company (now a Travelers company, the movant here) were liable for a workers’ compensation claim brought by a former Payne & Keller painter and sandblaster who was permanently disabled by silicosis. *See Thornell v. Payne & Keller, Inc.*, 442 So.2d 536 (La. App. 1st Cir. 1983), *cert. denied*, 445 So. 2d 1231 (La. 1984). In 1986, Payne & Keller was also a defendant in a Texas asbestos case filed by Baron & Budd. The claims against Payne & Keller filed in that case were dismissed on May 21, 1986, but by then, asbestos-

related personal injury claims were filling court dockets. In the Eastern District of Texas alone, more than 3,000 asbestos-related personal injury claims had been filed by 1981. *See Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1354 (E.D. Tex. 1981), *reversed in part*, 681 F.2d 334 (5th Cir. 1982).

In the weeks before it began its hasty dissolution process, Payne & Keller was alleged to be liable for significant personal injury claims arising from toxic occupational exposures at a Houston refinery. In a bankruptcy proceeding filed by the Charter International Oil Company (“Charter”), Payne & Keller sought payment for services provided to Charter, which were secured by mechanic’s and materialmen’s liens against the refinery. *See In re Charter Co.*, 63 B.R. 568 (Bankr. M.D. Fla. 1986). Charter objected to the claim on the grounds that Payne & Keller had agreed to indemnify Charter for personal injury claims arising from the refinery work and that this indemnification obligation encompassed more than a thousand claims arising from occupational dioxin exposure. The bankruptcy court denied Charter’s objection, holding that the claims of the dioxin class had not been reduced to judgment and, as “unmatured” claims, could not be “offset” against Payne & Keller’s matured claim, unless Payne & Keller was insolvent. *Id.* at 571. No such allegation had been made. To the contrary, Payne & Keller asserted that it maintained insurance that would cover any indemnification obligation it owed to Charter. *Id.* at 570. The court ordered Charter to pay Payne & Keller’s bankruptcy claim.

Immediately after this decision was issued (on July 31, 1986), Payne & Keller began taking steps to dispose of its assets and dissolve. On September 29, 1986, Payne & Keller’s parent company executed a Specific Guaranty with Payne & Keller and the entity that purchased its assets, guaranteeing certain aspects of Payne & Keller’s performance under a purchase

and sale agreement. The sale was initially intended to close the next day, on September 30, 1986, but was delayed. In the interim, on October 1, 1986, Charter filed a proof of claim on behalf of the dioxin plaintiffs in the bankruptcy proceeding. Only six days later, Payne & Keller sold its assets and began completing the rest of its dissolution-related paperwork:

- On October 7, 1986, Payne & Keller executed its purchase and sale agreement, selling substantially all of its assets.
- Payne & Keller retained liabilities including those arising from its operations. Payne & Keller agreed to indemnify and hold its Buyer harmless for a range of claims, including “[c]laims for injury to or death of any person or damage to property relating to the business, operations or assets of Sellers or Shareholder or any of them or any subcontractor or supplier, regardless of tier, or any of them whether related to the Assigned Contracts or the Purchased Assets or otherwise based on facts, omissions or events that occurred prior to Closing.” (Exhibit H, Purchase & Sale Agreement, ¶ 9(c).) Payne & Keller’s parent agreed to maintain \$6 million in insurance coverage for these claims for two years after closing and capped its overall liability to the Buyer to \$5 million in the aggregate.
- On October 7, 1986, Payne & Keller changed its name to Frentex Enterprises Company (“Frentex”). Frentex filed its amended articles of incorporation on October 20, 1986.
- On October 27, 1986, Frentex adopted its articles of dissolution.
- On December 3, 1986, Frentex filed its articles of dissolution and certificate of dissolution representing that “[a]ll debts, obligations and liabilities of the corporation have been paid, discharged, or adequate provision has been made thereof.” (*Id.* at ¶ 5.) With thousands of potential dioxin claims pending, the limited parental guaranty was the only provision made for the payment of significant known current and decades of future liabilities.
- On January 16, 1987, the dioxin class claims in the Charter bankruptcy proceeding matured. The bankruptcy court entered an order approving settlement of the dioxin class claims against Charter. The court authorized an award of \$5.275 million to the 1,105 personal injury dioxin claimants, \$1 million to the State of Missouri, and \$5 million to the United States Environmental Protection Agency for their dioxin-related contamination claims. *See In re Charter Co.*, 81 B.R. 90, 91 (M.D. Fla. 1987).

Payne & Keller dissolved before the Charter dioxin claims matured and, contrary to the representations it made to the Secretary of State, failed to make adequate provision for the payment of either those claims or the variety of other occupational injury claims that it had faced—

and reasonably expected that it would face for many decades in the future. Because the company therefore dissolved as a result of (at the very least) constructive fraud, the termination of its corporate existence should be revoked, and pursuant to section 11.153 of TBOC.

LAW AND ANALYSIS

Section 11.153 of the TBOC¹ authorizes a court to revoke a corporation's termination of its own corporate existence if that termination was "as a result of actual or constructive fraud." § 11.153(a) ("Notwithstanding any provision of this code to the contrary, a court may order the revocation of termination of an entity's existence that was terminated as a result of actual or constructive fraud."). Revocation of the corporate termination enables the corporate entity to pursue claims as if it were never dissolved. "[T]he revocation relates back to the effective date of the termination and takes effect as of that date . . . [and] the entity's status as an entity continues in effect as if the termination of the entity's existence had never occurred." *Id.* at §11.153(b)(1)–(2).

In interpreting another provision of the TBOC imposing liability for "actual fraud," the Texas Supreme Court addressed the distinction between "actual fraud" and "constructive fraud":

Actual fraud usually involves dishonesty of purpose or intent to deceive, whereas constructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests.

Castleberry v. Branscum KM, 721 S.W.2d 270, 273 (Tex. 1986), *superseded on other grounds by statute, as recognized in SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444,

¹ Of note, Section 1.053 of the TBOC states the "code applies to the conduct of affairs with foreign countries and the other states of the United States only to the extent permitted under the United States Constitution."

455 (Tex. 2008) (citations omitted). For example, dissolving a company after an attorney threatens to file a suit for damages suggests an intent to avoid liability and is evidence of actual fraud. See *Latham v. Burgher*, 320 S.W.3d 602, 610 (Tex. App.—Dallas 2010, no pet.) (“A rational juror could also have decided Latham’s conduct in dissolving the corporation in the face of Burgher’s claim represented dishonesty of purpose or an intent to deceive, i.e., actual fraud.”).

The story of Payne & Keller’s dissolution appears clear, there is ample evidence supporting a claim that, at the very least, constructive fraud occurred in connection with Payne & Keller’s dissolution. Events surrounding Payne & Keller’s dissolution suggest that the company terminated its corporate existence to avoid liability for both current and future toxic tort, silica, and asbestos personal liability claims, and Payne & Keller was keenly aware of those claims when the decision to dissolve Payne & Keller was made.

The historical record developed to date suggests that Payne & Keller’s work included significant construction projects in industries and time periods where the use of asbestos-containing products was prevalent, including manufacturing facilities and petrochemical facilities.

Finally, no party opposing Plaintiffs’ motion has come forth with any evidence to suggest that the facts as set forth in Plaintiffs’ motion are not accurate. Indeed, the receiver sent discovery to numerous insurance carriers seeking to learn what they knew, or did not know, about Payne & Keller’s history. See Receiver’s Notice of Filing of Insurer Discovery Responses, June 30, 2023. In each of those discovery responses, the various insurance carriers disclaimed any knowledge of the facts surrounding Payne & Keller’s dissolution. Thus, to the extent that this Court thought

that further discovery on the issue of constructive fraud needed to take place, it already has. And the facts remain the same, and uncontroverted.

CONCLUSION

In light of the evidence presented and the clear implication of that historical evidence, it is clear to this Court that, at the time it dissolved, Payne & Keller, as a result of the circumstances facing it, was constructively aware that it was leaving behind thousands of workers whose injuries from asbestos and other toxic diseases would manifest themselves over the next decades. It is precisely this type of knowledge, constructive or otherwise, and the resulting fraud, that Texas law provides for the revocation of a company's dissolution. Therefore, for all of the reasons set forth above and after review of all the evidence, Plaintiffs' motion for revocation of the dissolution of Payne & Keller is GRANTED and this Court orders that Payne & Keller Company be reinstated as provided by Section 11.153 of the TBOC.

IT IS SO ORDERED.

[JUDGE'S E-SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

Case Caption: Lenora Childers , plaintiff, et al vs Davis Mechanical Contractors ,
defendant, et al

Case Number: 2021CP4003484

Type: Order/Other

So Ordered

Jean H. Toal

Electronically signed on 2023-10-04 15:09:19 page 9 of 9

PROOF OF SERVICE

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellant, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specific below by emailing them at the addresses below:

Pleading(s): Appellants' Emergency Motion to Clarify and Enforce Rule 205 and
Accompanying Appendices I-III

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October 23, 2023