THE STATE OF SOUTH CAROLINA
In the Supreme Court

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.

TRAVELERS' REPLY TO THE RECEIVER'S RETURN

As Aristotle observed: "The law is reason, free from passion." Litigation is intended to achieve honest outcomes based on the facts of a case and the governing law. Despite its adversarial nature, it is not political sport, and its outcomes are not meant to be based on *ad hominem* attacks on parties or their counsel. Yet, that is all that is contained in the Receiver's return.

The heated rhetoric of the Receiver's response necessitates a two-part reply: first, to the merits; and second, to everything else, out of a concern that simply ignoring the Receiver's untruthful remarks about Travelers, its co-Appellants, or counsel will somehow be misunderstood as agreement to his outlandish claims.

PART I: THE MERITS

Rule 204(b), SCACR, vests the Court with discretion to certify appeals from the Court of Appeals when "the case involves an issue of significant public interest or a legal principle of major importance." In requesting certification, Travelers and its co-Appellants explained that this appeal involves the propriety of a receivership appointment by a South Carolina circuit court of a South Carolina lawyer at the request of a South Carolina plaintiff over a Texas company that has not existed since 1986, and which has not been susceptible to litigation (either as a plaintiff or as a defendant) as a matter of Texas law since before the Berlin Wall fell.

While a stray receivership appointment may not normally be worthy of this Court's immediate attention, Travelers and its co-Appellants pointed out that receivership appointments have happened at least two dozen times on the Asbestos Docket, without a hearing, without taking evidence, and frequently involving out-of-state or even out-of-country companies, both defunct and active, that have no property in South Carolina.

This is truly unprecedented, and the pervasiveness of the situation—coupled with the fact that the circuit court in this case has allowed a receivership over a long-defunct Texas company with no nexus to South Carolina to continue over numerous objections—qualifies this appeal for Rule 204 certification so that litigants can receive guidance on the controlling issues, including the constitutionality of this foreign receivership, as efficiently as possible from State Judiciary.

The Receiver does not dispute any of this. Despite filing an 18-page return, the Receiver only addresses the merits of the certification request on Pages 2 through 4. In that brief discussion, he does not seriously contest the fact that the issues presented in this appeal are of "significant public interest" or the fact that this appeal involves "a legal principle of major importance." Instead, he expresses concern that a ruling from this Court in this appeal will have a precedential impact on all of the other improper receiverships that have emerged from the Asbestos Docket. (*See* Op. at 3 (arguing against certification because it could provide "general guidance" regarding Asbestos Docket receiverships).)

That is not a basis for opposing certification, but it is akin to a concession that the Receiver is hoping to dodge appellate scrutiny for what's been happening below. As confirmation that the true goal is to dodge appellate scrutiny, the Receiver concludes his brief by passively requesting that the Court simply dismiss this appeal. (Op. at 17.) This throwaway argument, for which the Receiver provides no support or argument, is a nonstarter.

This appeal is expressly authorized by South Carolina Code § 14-3-330(4), through which the General Assembly vested litigants with a right to immediately appeal "[a]n interlocutory order or decree in a court of common pleas . . . granting, continuing, modifying, or refusing the appointment of a receiver." The reason the General Assembly created such broad appellate rights in the receivership context is obvious: a receivership is a state-created entity that seizes private property from a defendant and then redistributes that private property to others.

Not surprisingly, this Court has consistently held that a receivership "is a drastic remedy, and should be granted only with reluctance and caution." *Richland Cty. v. S.C. DOR*, 422 S.C. 292, 313, 811 S.E.2d 758, 769 (2018). The Court has also warned that the "refusal of revocation [of a receivership], under changed circumstances, is also drastic." *Vasiliades v. Vasiliades*, 231 S.C.

366, 376, 98 S.E.2d 810, 815 (1957). Because of the "drastic" nature of a receivership, the Legislature rightly created an appellate mechanism to provide immediate review of orders that create a receivership, that allow a receivership to continue over an objection, or that modify the receivership in any way.

The order on appeal here not only permits the receivership to continue over objections that the appointment is void as a matter of law, but it also modified the initial appointment order instructing the Receiver to "protect the interests of Payne & Keller" to now allow the Receiver to undercut and waive Payne & Keller's absolute legal defenses. It is self-evident that this is a significant legal question of major importance. That order is immediately appealable as a matter of black-letter South Carolina law, and the Receiver does not identify any contrary authority at all.

Travelers noted in its Notice of Joinder that it is pleased to have the Court of Appeals review this appeal first, but that resolution by this Court through certification would "efficiently and expeditiously resolve numerous issues of considerable public importance." (Notice of Joinder at 3 n.1, 7.) The Receiver does not provide any discernible argument in response to the merits of the Motion to Certify, and Travelers respectfully requests that the Court grant the motion and certify this appeal pursuant to Rule 204(b).

PART II: THE *AD HOMINEM* ATTACKS

While not genuinely disputing the merits of the motion to certify, the Receiver does all that he can to malign Travelers, its co-Appellants, counsel, and virtually anyone else who has ever opposed the Receiver. Starting on Page 5 of his opposition, the Receiver provides a survey of his grievances, real and imagined, against his adversaries, and he does so for the apparent purposes of smearing their credibility with this Court, chilling their willingness to advocate their positions, or both.

This is nothing new. The Receiver regularly, indiscriminately denigrates opponents, and his serial sanctions requests have created a cottage industry within the Asbestos Docket.

In Circuit Court Case No. 2019-CP-40-03003 alone, the Receiver filed five sanctions requests against various defendants (including on August 27, 2020; September 25, 2020; October 29, 2020; December 23, 2020; and before this Court on December 31, 2020); and he even filed, without any basis whatsoever, a motion to "reconsider" an order approving a pro hac vice motion (September 10, 2020).

His sanctions requests aren't limited to that case, as they are a frequent litigation tactic when the Receiver has an adversary. *See, e.g.*, Appellate Case No. 2023-001461 (sanctions motion filed on December 11, 2023); Appellate Case No. 2020-000845 (sanctions motion filed on August 10, 2020); Case No. 2020-CP-40-02098 (sanctions motion filed on September 8, 2021); Case No. 2019-CP-42-03968 (sanctions motions filed on June 4, 2020; and February 7, 2020); Case No. 2018-CP-40-04940 (sanctions motions filed on April 20, 2020; and May 18, 2020).

Nor does the Receiver cabin his attacks to sanctions motions. The following is a chart of lawyers and law firms that the Receiver has sued:

Table of Lawyers and Law Firms Sued by the Receiver

Lawyer/Law Firm Sued	Receivership	Case
Wall, Templeton & Haldrup, PA	Covil Corp.	2019-CP-40-02285
Fox Rothschild, LLP	Whittaker Clark & Daniel	2023-CP-40-02034
Stephanie Flynn	Whittaker Clark & Daniel	2023-CP-40-02034
Robert Baum	Whittaker Clark & Daniel	2023-CP-40-02034
McGivney Kluger Clark & Intoccia, P.C.	Whittaker Clark & Daniel	2023-CP-40-02034
Robert Thackston	Whittaker Clark & Daniel	2023-CP-40-02034
Lathrop GPM	Whittaker Clark & Daniel	2023-CP-40-02034
Kenneth C. Baker	Payne & Keller Co.	2023-CP-40-05203
Baker & Patterson, LLP	Payne & Keller Co.	2023-CP-40-05203
Locke Lord, LLP	Cape, PLC	2021-CP-40-02727
Goldfein & Joseph, P.C.	Atlas Turner	2023-CP-40-03540

The point of the above is simple: the Receiver loudly cries foul whenever a litigation adversary dares to oppose him.

This case is no exception to the bullying strategy. The Receiver has moved for sanctions against Travelers and its co-Appellants before the Court of Appeals in this case because of their allegedly "dilatory" conduct. What did Travelers and its co-Appellants do to draw such an attack? They filed a motion with the Court of Appeals to enforce Appellate Court Rule 205, which vests "exclusive jurisdiction" in the appellate court over issues that are pending on appeal, when the circuit court entered an order that purported to impact issues on appeal in this very case. And they did so on an "emergency" basis.

Sanctions are available when a party makes a filing "solely for the purposes of delay." Rule 269, SCACR. It defies all logic to suggest the Appellants are making arguments "solely for the purposes of delay" when they presented their arguments on an "emergency" basis and sought expedited resolution, but that is precisely what the Receiver alleges in yet another motion for sanctions.

Apparently to add oomph to the illusion that Travelers and its co-Appellants are not credible litigants, the Receiver spackles his return with charged rhetoric. He says that Travelers and its co-Appellants have a "continued and blatant disregard for the South Carolina trial and appellate courts" (Op. at 5); that the Appellants will "discredit and ignore orders it does not like" (*id.* at 5 n.5); that the Appellants have been "trying to avoid South Carolina courts" (*id.* at 6); that the Appellants have been engaging in "forum shopping" (*id.* at 8); that the Appellants "and other legacy insurers have dredged our state's appellate courts for procedural mechanisms they could twist" (*id.* at 11); that the Appellants seek "to avoid the discovery of applicable insurance coverage" (*id.* at 12); that the Appellants seek to "delay at all costs" (*id.* at 16); that the Appellants

"abuse the appellate process for the purposes of delay" (*id.*); and that the Appellants have engaged in "dilatory conduct" (*id.* at 17).

This is all false.

As to the notion that Travelers has done anything to prevent the Receiver from learning about Payne & Keller's historic insurance coverage: Travelers began producing to the Receiver policies issued to Payne & Keller before Travelers was even wrongly named a third-party defendant to this case. The suggestion that Travelers has anything to hide or that it has tried to hide anything is pure fiction.

As to the notion that Travelers has gone to Texas for a ruling about how Texas law would govern a situation involving the dissolution of a Texas company in 1986: The Receiver's brief omitted the most critical fact—the Receiver himself initiated proceedings in Texas regarding Payne & Keller's dissolution. (Ex. A.) Travelers did not shop for a different forum; it got dragged out to Texas by the Receiver, so it rightly asked a Texas court to evaluate how Texas law would resolve issues involving Payne & Keller, a Texas company. *Cf.* Rule 244(h), SCACR (authorizing any appellate court to certify questions of law to "the highest court of any state" when those questions arise under that other state's law). Not only is that permissible, it makes complete sense in these circumstances, where the Receiver has no authority to do anything outside of South Carolina as a matter of constitutional law. *See, e.g.*, *Frink v. Nat'l Mut. Fire Ins. Co.*, 90 S.C. 544, 549, 74 S.E. 33, 35 (1912) ("That a receiver has no extra territorial authority is too well settled to require the citation of authority.").

As to the notion that Travelers ignores orders issued by the state's courts: Travelers has no idea what the Receiver is even referencing in these passages. A party does not "impugn[] the validity of an order issued by a judge of the Court of Appeals" when it recites as part of a case's

background that a single judge has issued that order. (Op. at 5–6 n.3.) Nor does a party "disregard" a ruling or "attack" any judge or court by appealing a ruling that it is entitled to appeal as a matter of law. (*Id.* at 5.) Appealing a decision and then following the Appellate Court Rules does not "burden the appellate courts." (*Id.* at 12.) And the only contempt ruling involving any Travelers affiliate was issued in a case in which it wasn't even a party, and a Rule 59 motion to reconsider that ruling has been pending since January 17, 2020—over four years—despite requests for a hearing that were ignored.[1] The Receiver apparently wants the Court to believe that Travelers and its co-Appellants are somehow bad actors simply by engaging in the litigation process; the Court knows better and should not be misled.

And as to the notion that Travelers and its co-Appellants have done anything to delay this matter: It is impossible to square the fact that the Appellants asked the Court of Appeals to address the trial court's refusal to honor the jurisdictional boundaries drawn by Rule 205, SCACR, on an "emergency" basis with the Receiver's suggestion that the Appellants are trying to delay anything. It is likewise impossible to square the fact that the Appellants are trying to expedite this appeal by seeking Rule 204 certification from this Court with the Receiver's suggestion that the Appellants are trying to delay anything.

Truly, the Receiver's posturing finds no basis in reality, and his brief reads as if the Court will assume he is accurately presenting the situation based on the sheer volume of times the Receiver says the words "delay" or "dilatory" or makes other disparaging remarks about the Appellants, their counsel, or anyone else who opposes him. The Court should reject such

[1] That order is the one discussed in Footnote 8 of the Receiver's return brief. The statements contained in that order were drafted by the Receiver, and they are simply not true. Yet, the trial court's sustained failure to rule on the still-pending Rule 59 motion has prevented appellate review of that order for over four years now.

mischaracterizations and resolve this motion and this appeal on its merits alone, not on *ad hominem* attacks or theatrics.

CONCLUSION

This is an important case that raises issues that are currently pervasive at the trial level, but which have been decided contrary to constitutional and state law. Accordingly, Travelers respectfully requests that the Court certify this appeal pursuant to Rule 204(b), SCACR.

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
S.C. Bar No. 74000
todd.carroll@wbd-us.com
M. Elizabeth O'Neill
S.C. Bar No. 104013
elizabeth.oneill@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

STEPTOE & JOHNSON LLP

Harry Lee
Pro Hac Vice
hlee@steptoe.com
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-8112

Attorneys for Appellant Travelers Casualty and Surety Company

February 2, 2024

Exhibit A: Receiver's Pleadings in Texas

CAUSE NO. _____

LENORA CHILDERS, individually and as Personal Representative of the Estate of LEWIS C. CHILDERS,	§	**IN THE DISTRICT COURT OF**
v.	§	**HARRIS COUNTY, TEXAS**
PAYNE & KELLER COMPANY, by and its duly-appointed Receiver, PETER D. PROTOPAPAS,	§	**____ JUDICIAL DISTRICT**

NOTICE OF DOMESTICATION OF A FOREIGN ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Receiver of Payne & Keller Company, by and through the undersigned counsel, and files this Notice of Domestication of a Foreign Order, pursuant to Texas Civil Practice and Remedies Code § 35.001, *et seq.*, implicating Lenora Childers and the Court-Appointed Receiver for Payne & Keller Company.

On October 5, 2023, the Richland County Court of Common Pleas in South Carolina, Civil Action No. 2021-CP-40-03484, issued the attached Findings of Fact and Conclusions of Law on Childers' Motion to Revoke The Termination of Payne & Keller Company. This Order reinstates Payne & Keller as a Texas corporation under Texas Business Organizations Code § 11.153. An authenticated copy of this order is attached hereto.

In connection with this Notice, the undersigned has served on the parties identified below a copy of this Notice and respective accompanying affidavits in accordance with Texas Civil Practice and Remedies Code § 35.005, at their last known addresses, by certified mail, return receipt requested, and by regular mail:

Lenora Childers
c/o Theile McVey, Esq.
KASSEL MCVEY

1330 Laurel Street
Columbia, South Carolina 29201

-and-

Payne & Keller Company
c/o Peter D. Protopapas, Esq.
RIKARD & PROTOPAPAS, LLC
2110 N. Beltline Boulevard
Columbia, South Carolina 29204

WHEREFORE, PREMISES CONSIDERED, the Receiver prays that copies of the Order be filed in accordance with the law and that said Order be domesticated, having the same force and effect as if rendered in the State of Texas.

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: */s/ Brady Edwards*
Brady Edwards
State Bar No. 00793021
Noah M. Horwitz
State Bar No. 24116537
1000 Louisiana Street, Suite 4000
Houston, Texas 77002
Telephone: (713) 890-5000
Facsimile: (713) 890-5001
brady.edwards@morganlewis.com
noah.horwitz@morganlewis.com

ATTORNEYS FOR THE RECEIVER

AFFIDAVIT OF NOAH M. HORWITZ IN SUPPORT OF DOMESTICATION OF FOREIGN ORDER REGARDING PAYNE & KELLER COMPANY

STATE OF TEXAS §
§
COUNTY OF HARRIS §

KNOW ALL MEN BY THESE PRESENTS:

BEFORE ME, the undersigned Notary Public, personally appeared Noah M. Horwitz, who after being duly sworn, deposed and stated the following matters under penalty of perjury:

"My name is Noah M. Horwitz. I am authorized and competent to make this Affidavit. I am over the age of twenty-one (21), am of sound mind, and have never been convicted of a felony or crime of moral turpitude. I swear that the statements contained in this Affidavit are true and correct. The matters attested to herein are within my personal knowledge.

"I am a lawyer at the law of firm of Morgan, Lewis & Bockius LLP. I am duly licensed to practice law in the State of Texas. I am an attorney for the Receiver for Payne & Keller Company.

"I am executing this Affidavit in conjunction with the filing for domestication of the Order issued by the Richland County Court of Common Pleas in South Carolina, Civil Action No. 2021-CP-40-03484, on October 5, 2023, in the case styled *Childers v. Payne & Keller Company, et al.* The Order is the attached Findings of Fact and Conclusions of Law on Childers' Motion to Revoke The Termination of Payne & Keller Company.

"Lenora Childers may be served, by and through her attorney of record, by serving Theile McVey at 1330 Laurel Street, Columbia, South Carlina 29202.

"The duly appointed Receiver, Peter D. Protopapas, may be served at 2110 N. Beltline Boulevard, Columbia, South Carolina 29202.

"The Order filed herewith is an authenticated copy obtained from the Richland County Clerk of Court."

FURTHER AFFIANT SAYETH NAUGHT.

X _____
Noah M. Horwitz, Affiant

SUBSCRIBED AND SWORN TO before me by Noah M. Horwitz on this 12th day of October, 2023, to certify which witness my hand and official seal.

X _____
Notary Public in and for the State of Texas – Commission Expires 11/4/2024

ANGELA D WOODS
Notary Public, State of Texas
Comm. Expires 11-04-2024
Notary ID 126882794

Automated Certificate of eService

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Noah Horwitz on behalf of Noah Horwitz
Bar No. 24116537
noah.horwitz@morganlewis.com
Envelope ID: 80515901
Filing Code Description: Petition
Filing Description: Notice of Domestication of Foreign Order
Status as of 10/12/2023 11:34 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Brady Edwards	793021	brady.edwards@morganlewis.com	10/12/2023 10:18:57 AM	SENT
Noah Horwitz	24116537	noah.horwitz@morganlewis.com	10/12/2023 10:18:57 AM	SENT
Theile McVey		tmcvey@kassellaw.com	10/12/2023 10:18:57 AM	SENT
Peter D.Protopapas		pdp@rplegalgroup.com	10/12/2023 10:18:57 AM	SENT
Lindsay Valek		lindsay@rplegalgroup.com	10/12/2023 10:18:57 AM	SENT

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

FINDINGS OF FACT AND CONCULSIONS 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 TBOC[1] 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

PROOF OF SERVICE

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Travelers Casualty and Surety Company, 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): Travelers' Reply to the Receiver's Return

Parties Served:

Peter D. Protopapas (pdp@rplegalgroup.com)
Brian M. Barnwell (bb@rplegalgroup.com)
John B. White, Jr. (jwhite@johnbwhitelaw.com)
Marghretta H. Shisko (mshisko@johnbwhitelaw.com)
Christopher Jones (cjones@johnbwhitelaw.com)
Griffin Littlejohn Lynch (glynch@johnbwhitelaw.com)
Scott Shutte (scott.schutte@morganlewis.com)
Brady Edwards (brady.edwards@morganlewis.com)
Jonathan M. Robinson (jon.robinson@smithrobinsonlaw.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Shanon N. Peake (shanon.peake@smithrobinsonlaw.com)

Counsel for Respondent Payne & Keller Corp., through its Receiver Peter D. Protopapas

Wesley B. Sawyer (wsawyer@murphygrantland.com)

Counsel for Co-Appellants

Kevin K. Bell (kbell@robinsongray.com)

Counsel for Proposed Intervenor Zurich American Insurance Company

By: /s/ M. Todd Carroll

February 2, 2024