

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable Jean H. Toal  
Acting Circuit Court Judge

Appellate Case No. 2023-000727  
Circuit Court Case No. 2021-CP-40-03484

RECEIVED

Apr 11 2024

S.C. SUPREME COURT

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 Their Duly Appointed 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 of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; and Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company;

and

Travelers Casualty and Surety Company, f/k/a the Aetna Casualty and Surety Company, are the ..... Appellants.

---

**APPENDIX OF EXHIBITS IN SUPPORT OF APPELLANTS'  
PETITION FOR REHEARING**

---

## **DOCUMENTS**

|                                                                                  |     |
|----------------------------------------------------------------------------------|-----|
| Second Amended Third-Party Summons and Complaint.....                            | 1   |
| August 27, 2021 Order Appointing Receiver .....                                  | 82  |
| March 31, 2023 Circuit Court Order Denying Motion to Dissolve Receivership ..... | 86  |
| May 15, 2023 Respondent’s Appealability Memorandum .....                         | 96  |
| August 9, 2023 Court of Appeals Order Permitting Appeal to Proceed.....          | 123 |
| January 24, 2024 Texas Trial Transcript .....                                    | 126 |
| January 26, 2024 Return to Motion for Certification .....                        | 190 |
| February 2, 2024 Reply in Support of Motion for Certification.....               | 208 |
| March 27, 2024 Order Dismissing Appeal .....                                     | 223 |

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”).<sup>1</sup> 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

---

<sup>1</sup> 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 Refractories<sup>2</sup> 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.

---

<sup>2</sup> 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 Arrowood<sup>3</sup>***

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

---

<sup>3</sup> 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](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.

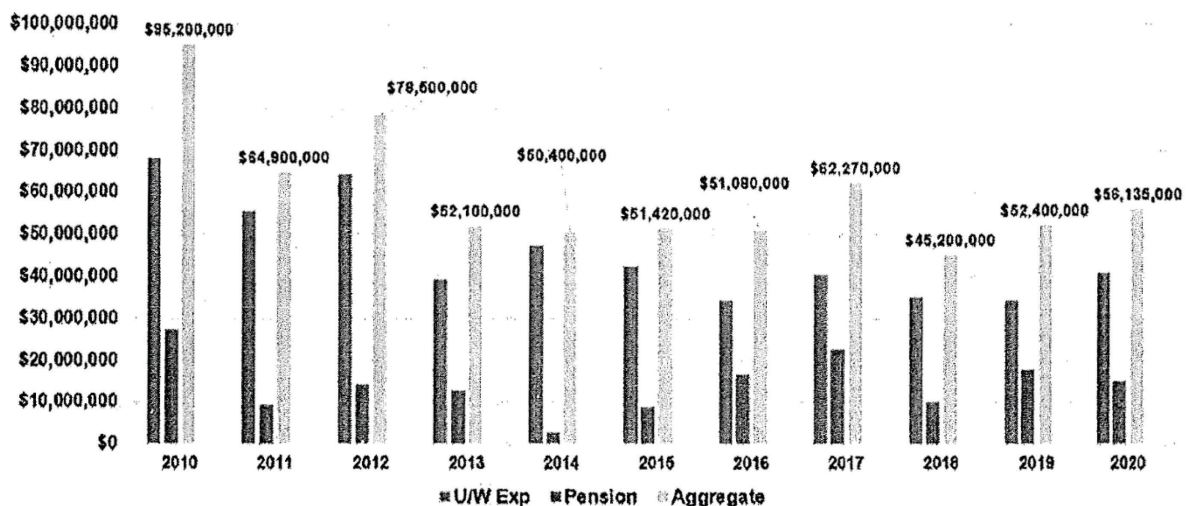
107. Arrowood Indemnity was the 100% owner of another insurer, Arrowood Surplus Lines Insurance Company (“ASL”). As of December 31, 2011, ASL had a Policyholders’ Surplus of \$184 million. The Arrowood Third-Party Defendants implemented a strategy to slowly upstream the \$184 million surplus of ASL. 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.

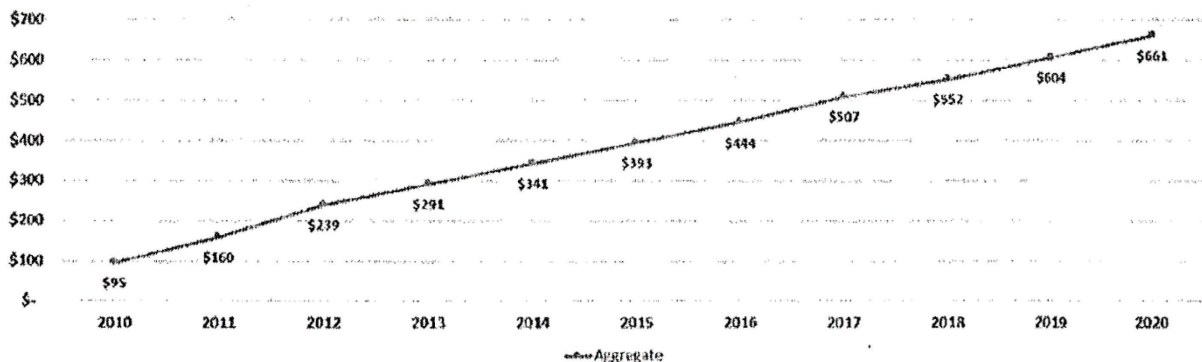
109. The below charts, produced by Arrowood in its publicly filed Annual Statements, quantify some of the material amounts, both annually and in the aggregate, of untoward management

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            |
| <b>Total</b> | <b>\$248,326,594</b> | <b>\$45,457,963</b>    |

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].<sup>4</sup>"

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.

---

<sup>4</sup> 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 23<sup>rd</sup> 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,

Dated: July 14, 2022

**RIKARD & PROTOPAPAS, LLC**

By: s./ Brian M. Barnwell

Brian M. Barnwell (SC Bar 78249)

Rikard & Protopapas, LLC

2110 N. Beltline Blvd.,

Columbia, South Carolina 29204

803.978.6111

bb@rplegalgroup.com

*Attorney for Third-Party Plaintiffs*

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

---

CAME ON \_\_\_\_\_, 2021, to be heard the Plaintiff's Motion to Appoint a Receiver Over Flame Refractories, Inc., pursuant to S.C. Code §15-65-10(4). This Court finds that the application is meritorious under the applicable statute because Flame Refractories, Inc. ("Flame Refractories") has dissolved and Flame Refractories, a Florida 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 Flame Refractories, accept service on behalf of Flame Refractories, engage counsel on behalf of Flame Refractories and take any and all steps necessary to protect the interests of Flame Refractories whatever they may be. This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Flame Refractories as well as any claims related to the actions or failure to act of Flame Refractories' 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 Flame Refractories 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 08:30:22 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,

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.<sup>1</sup> Payne & Keller Company, by and through its duly

<sup>1</sup> 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.<sup>2</sup> 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.

<sup>2</sup> 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.<sup>3</sup> 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

---

<sup>3</sup> 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**.<sup>4</sup> Travelers' November 16, 2022 Motion for Protective Order and to Dissolve Receivership, which relies solely on the standing arguments rejected above, is also **DENIED**.

---

<sup>4</sup> 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

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Jean Hoefer Toal, Chief Justice (Ret.) and Acting Circuit Court Judge

Case No. 2021-CP-40-03484

---

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.; and 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 All 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; 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.; and Compass Risk Services, LLC, Third-Party Defendants,

Of which, Payne & Keller Company, By and Through its Duly Appointed 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 of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; and Continental Insurance Company, Individually and as Successor in interest to Harbor Insurance Company;

and

Travelers Casualty and Surety Company, f/k/a the Aetna Casualty and Surety Company, are Appellants.

---

**RESPONDENT'S  
MEMORANDUM ON APPEALABILITY**

---

Respondent Payne & Keller Company ("Payne & Keller"), by and through its duly appointed receiver, Peter D. Protopapas ("the Receiver"), respectfully submits the following memorandum on the issue of appealability as requested by the Court in its May 5, 2023 letter. Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the Receiver respectfully requests that the Court dismiss the appeal brought by Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company ("Travelers"), as well as the appeal brought by: 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; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company (collectively, “the Joining Insurers”) because the trial court’s order denying their motions for dismissal and protection from discovery is not immediately appealable, and Appellants are not aggrieved parties.

### **BACKGROUND**

Payne & Keller, a Texas corporation, dissolved in 1986. While active, its operations included the installation, repair, replacement, removal, and/or disturbance of thermal insulation and other building materials, which allegedly exposed individuals to asbestos. As a result of these alleged exposures, Payne & Keller is a defendant in asbestos-related bodily injury lawsuits in South Carolina state court. After it failed to answer complaints filed against it, and because it is a dissolved corporation, the circuit court appointed Peter D. Protopapas as Payne & Keller’s receiver on August 27, 2021, with the authority and obligation to (among other things) marshal Payne & Keller’s assets, including all insurance policies and benefits that may provide coverage and defense for the asbestos suits.

In order to fulfill this obligation, the Receiver filed a third-party complaint in the underlying bodily injury lawsuit, *Childers v. Davis Mechanical Contractors, Inc. et al.*, C.A. No. 2021-CP-40-03484, bringing declaratory judgment claims against Payne & Keller’s known insurers and several related entities concerning the terms of Payne & Keller’s insurance coverage and the relationships and obligations of the other third-party defendants. On August 24, 2022, Travelers moved to dismiss Payne & Keller’s claims against it and dissolve the Payne & Keller receivership, and on September 19, 2022, the Joining Insurers filed a joinder to Travelers’ motion. On November 16, 2022, Travelers filed an additional motion, seeking protection from discovery requests propounded by the Receiver and again asking the circuit court to dissolve the

Payne & Keller receivership and dismiss Travelers from the action. The circuit court held a hearing on Appellants' motions on January 27, 2023, during which it orally denied them. Following the oral rulings, Travelers requested a written order, which the court entered on March 31, 2023 ("the Order").

In the Order, the circuit court ruled (1) the Receiver has standing to bring his claims against Appellants because Payne & Keller has property within South Carolina and its 1986 dissolution does not preclude the current receivership under Texas law, (2) Appellants are subject to the personal jurisdiction of South Carolina courts, (3) the Receiver's third-party claims were properly brought under Rule 14(a), SCRCP, and (4) Rule 12(b)(8), SCRCP, does not prohibit the Receiver from asserting his third-party claims in the underlying action. Because Travelers' motion for protection from discovery relied on the standing arguments raised in its motion to dismiss, the Order also denied that motion.

On April 28, 2023, Travelers and the Joining Insurers separately appealed the Order, and this Court subsequently consolidated the appeals.

## **DISCUSSION**

### **I. The Order is not immediately appealable.**

"The right of appeal arises from and is controlled by statutory law." *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). "An appeal ordinarily may be pursued only after a party has obtained a final judgment." *Id.* "The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by [section] 14-3-330 [of the South Carolina Code]." *Id.* "Absent a specialized statute, an order must fall into one of several categories set forth in [s]ection 14-3-330 in order to be immediately appealable." *Id.*

Here, the Order—which denied (1) Travelers’ motion to dismiss, (2) the Joining Insurers’ joinder to Travelers motion to dismiss, and (3) Travelers’ motion for protection from discovery—is neither final<sup>1</sup> nor an interlocutory order from which appeal may now be taken under section 14-3-330. As a result, the Order is not appealable. The Receiver respectfully requests that this appeal be immediately dismissed.

Section 14-3-330 allows immediate appellate review of only the following classes of interlocutory orders:

1. Those “involving the merits,” § 14-3-330(1);
2. Those “affecting a substantial right” when the order also “in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action,” “grants or refuses a new trial,” or “strikes out an answer or any part thereof or any pleading,” § 14-3-330(2);
3. Those “affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment,” § 14-3-330(3); and
4. Those “granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver,” § 14-3-330(4).

Additionally, “[t]he provisions of section 14-3-330 are narrowly construed and serve the underlying policy favoring judicial economy by avoiding ‘piecemeal appeals.’” *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019) (quoting *Hagood v. Sommerville*, 362

---

<sup>1</sup> See *Levi v. N. Anderson Cnty. EMS*, 409 S.C. 374, 385, 762 S.E.2d 44, 50 (Ct. App. 2014) (“The denial of a motion to dismiss has been consistently held not to be a final decision.”); *Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005) (“[A] discovery order is not a final order because it leaves some further act to be done by the court before the rights of the parties . . . are determined.”).

S.C. 191, 196, 607 S.E.2d 707, 709 (2005)); *see also Tillman v. Tillman*, 420 S.C. 246, 250, 801 S.E.2d 757, 760 (Ct. App. 2017) (“To avoid circuitous litigation and needless appeals, we construe section 14-3-330 narrowly . . .”).

Because the Order does not fall under any of these categories when properly construed, Appellants’ appeals should be dismissed.

**1. The Order is not appealable under section 14-3-330(1), (2), or (3).**

First, the Order does not “involve the merits” under section 14-3-330(1). “An order [that] involves the merits is one that ‘must finally determine some substantial matter forming the whole or a part of some cause of action or defense.’” *Edwards v. SunCom*, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006) (quoting *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)). Here, the Order does not finally determine *any* matter concerning *any* party’s causes of action or defenses—it merely allows this case to proceed to the discovery phase of the litigation. *See McLendon v. S.C. Dep’t of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994) (“Like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue[s] raised by the motion can be raised again at a later stage of the proceedings. Therefore, the denial of a motion to dismiss is not directly appealable . . . .” (citation omitted)); *Hamm v. S.C. Pub. Serv. Comm’n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994) (“Discovery orders . . . are interlocutory and are not immediately appealable.”).

Next, the Order does not affect any of Appellants’ substantial rights and does not also “in effect determine[] the action and prevent[] a judgment from which an appeal might be taken or discontinue[] the action,” “grant[] or refuse[] a new trial,” or “strike[] out an answer or any part thereof or any pleading.” § 14-3-330(2). As a result, the Order is not immediately appealable

under section 14-3-330(2). *See, e.g., Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991) (“Avoidance of trial is not a ‘substantial right’ entitling a party to immediate appeal of an interlocutory order.”); *Du Pont v. Du Bos*, 33 S.C. 389, 394, 11 S.E. 1073, 1074-75 (1890) (“It is quite clear that the order here under review is not appealable . . . ; for even granting that it affects a substantial right, that is not sufficient, for it must also, in effect, determine the action and prevent a judgment from which an appeal might be taken, and this it certainly does not do.”).

Similarly, because the Order does not affect a substantial right of Appellants, it also does not fall within section 14-3-330(3). The Order was also not entered in a “special proceeding” or “after judgment.” § 14-3-330(3). Instead, the Order was entered in a typical civil action before judgment, and so section 14-3-330(3) is inapplicable. *See Allen v. Partlow*, 3 S.C. 417, 418 (1872) (observing a special proceeding is “any remedy *other than an action or ordinary proceeding* in a Court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence” (emphasis added)); *see also Smith v. Saye*, 131 S.C. 378, 381, 127 S.E. 568, 569 (1925) (distinguishing between a “special proceeding” and a “civil action”); Rule 3, SCRCPP (“A civil action is commenced when the summons and complaint are filed with the clerk of court . . .”).

## **2. The Order is not appealable under section 14-3-330(4).**

The Order also falls outside the scope of section 14-3-330(4) because it does not “grant[, continu[e], modify[, or refus[e] an injunction or grant[, continu[e], modify[, or refus[e] the appointment of a receiver.” § 14-3-330(4). No injunctions have been sought or entered here, and although the third-party claims in the underlying action are brought by Payne & Keller’s Receiver, the Order did not alter or affect the Receiver’s appointment in any way.

Based on the notices of appeal filed with this Court, Respondent expects that Appellants will argue the Order is appealable under section 14-3-330(4) because it “continues” and “modifies” Payne & Keller’s receivership.<sup>2</sup> However, Appellants are incorrect, and their attempts to manufacture appealability where none exists and frustrate the Receiver’s court-ordered efforts to marshal Payne & Keller’s assets—its insurance policies covering asbestos-related personal injury claims—should not be allowed.

**a. Section 14-3-330(4) is concerned with “appointments,” not “receiverships.”**

As an initial matter, the appealability statute only provides for immediate appellate review of orders affecting “the *appointment of a receiver.*” § 14-3-330(4) (emphasis added). Critically, the statute does not allow the interlocutory appeal of an order affecting “a receivership.” *See Aiken v. S.C. Dep’t of Revenue*, 429 S.C. 414, 420, 839 S.E.2d 96, 99 (2020) (“A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . .” (quoting *State v. Smith (In re Decker)*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995))); *Hartford Accident & Indem. Co. v. Lindsay*, 273 S.C. 79, 85, 254 S.E.2d 301, 304 (1979) (“Full effect must be given to each section of a statute, giving words their plain meaning, and, in the absence of ambiguity, words must not be added or taken away.”).

Although, upon first glance, the distinction between orders affecting the appointment of a receiver and a receivership *per se* may appear illusory, upon closer examination, the distinction is real, reflected in the language of the appealability statute, and has been acknowledged as legally significant by South Carolina courts, which have recognized that the creation of a

---

<sup>2</sup> Both Travelers’ and the Joining Insurers’ notices of appeal assert the Order “is immediately appealable pursuant to South Carolina Code § 14-3-330(4) because it specifically continues a receivership despite a motion to dissolve the receivership, and it modifies the scope of the receivership by authorizing the Receiver to investigate whether the Payne & Keller Company was properly dissolved in Texas in 1986.”

receivership and the appointment of a receiver are separate acts. *See, e.g., In re Citizens' Exch. Bank*, 140 S.C. 471, 493, 139 S.E. 135, 143 (1927) (“The power of the Circuit Judge to designate a receiver is, clearly, a matter of discretion; perhaps even of more enlarged discretion than that of deciding in the first instance whether or not there should be a receivership.”); *S. Tr. Co. v. Cudd*, 166 S.C. 108, 113-14, 164 S.E. 428, 429-30 (1932) (“That the power to appoint a receiver is inherent in a Court of equity is fully realized and approved. Also that the matter of ordering a receivership is very much within the discretion of the Circuit Judge, is likewise well realized.” (citations omitted)).

A receiver acts on behalf of, as an officer of, the appointing court. *See Ex parte Cusaac*, 244 S.C. 572, 580, 137 S.E.2d 764, 768 (1964) (“A receiver represents the Court appointing him; he is an officer of the Court and is the agency through which the Court acts.”). Thus, the appealability statute rightly focuses on, and allows immediate appellate review of, orders conferring the authority of the court on an individual. *See Shapemasters Golf Course Builders, Inc. v. Shapemasters, Inc.*, 360 S.C. 473, 479, 602 S.E.2d 83, 87 (Ct. App. 2004) (“The refusal of a trial court to appoint a receiver should be immediately appealable because of the potential harm in not having an unbiased party to protect a corporation’s assets.”). Admittedly, orders concerning receiverships often will affect both the receivership itself and the appointment of a receiver simultaneously—for example, when a receivership is created and a receiver appointed, or when a receivership is dissolved and a receiver relieved of the appointment. However, such is not the case here. In the circuit court, Appellants argued Payne & Keller’s receivership itself was improper and sought the dissolution of the entire receivership. None of Appellants arguments related to the appointment of the Receiver as such; thus, the Order, which rejected those

arguments, does not fall within the ambit of section 14-3-330(4) when carefully read and properly interpreted.

**b. Even if section 14-3-330(4) applies to “receiverships,” the Order did not “modify” or “continue” anything.**

Even assuming section 14-3-330(4) applies to “receiverships” *per se*, the Order is nonetheless not immediately appealable because it did not “modify” or “continue” anything—either the Receiver’s appointment or Payne & Keller’s receivership as a whole.

**i. The Order did not “modify” anything.**

First, the Order did not “modify[] . . . the appointment of [Payne & Keller’s] receiver,” § 14-3-330(4), or Payne & Keller’s receivership generally. Appellants may contend that the Order expanded the scope of the receivership by authorizing the Receiver to investigate Payne & Keller’s 1986 dissolution; however, the Receiver was already authorized to conduct such an investigation when the Order was entered. *Cf. In re Fifty-Four First Mortg. Bonds*, 15 S.C. 304, 314 (1881) (“The authority of a receiver rests . . . in the orders of the court by which he is appointed.”).

When Payne & Keller’s receivership was created, the Receivership Court<sup>3</sup> conferred very broad authority on the Receiver to act in Payne & Keller’s interest, giving him:

the power and authority [to] 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

---

<sup>3</sup> The Supreme Court has ordered “that the Honorable Jean Hoefer Toal, retired Chief Justice of the Supreme Court, is hereby appointed to serve as the Chief Judge for Administrative Purposes over all asbestosis and asbestos litigation filed within the state court system.” S.C. Sup. Ct. Order dated May 28, 2019. Incidental to this appointment, Justice Toal has established several receiverships over now-defunct companies whose operations are alleged to have caused bodily injury to individuals through asbestos exposure.

claims related to the actions or failure to act of Payne & Keller's insurance carriers.

(Aug. 27, 2021 Order Appointing Receiver at 1, attached as Exhibit A (emphasis added).)

Investigating Payne & Keller's history, including its dissolution in 1986, is clearly encompassed by the powers the Receivership Court conferred upon the Receiver when he was initially appointed in August of 2021. Accordingly, the Order did not grant him such authority, nor did it "modify" the scope of Payne & Keller's receivership in any other way.

**ii. The Order did not "continue" anything.**

Similarly, the Order did not "continu[e] . . . the appointment of [Payne & Keller's] receiver," § 14-3-330(4), or Payne & Keller's receivership generally. In arguing the Order "continued" Payne & Keller's receivership, Appellants rely on an overly broad interpretation of section 14-3-330 that is contrary to precedent and would ultimately lead to numerous improper appeals out of the asbestos Receivership Court and from unrelated actions involving receiverships. *See Tillman*, 420 S.C. at 250, 801 S.E.2d at 760 ("To avoid circuitous litigation and needless appeals, we construe section 14-3-330 narrowly . . .").

The language of section 14-3-330(4) was first enacted into South Carolina law in 1901 (through Act 358) as section 11(4) of the Code of Civil Procedure.<sup>4</sup> At the time, South Carolina

---

<sup>4</sup> *See* 1901 S.C. Acts 623 ("Be it enacted by the General Assembly of the State of South Carolina: That section 11 of the Code of Civil Procedure of this State relating to the jurisdiction of the Supreme Court, be and the same is hereby amended by the addition thereto of the following subdivision to be numbered '4.'"); *id.* ("4. An interlocutory order or decree in the Court of Common Pleas, granting or continuing or modifying or refusing an injunction, or else granting or continuing or modifying or refusing the appointment of a Receiver hereafter granted in any action . . ."); *see also Williams v. Jones*, 62 S.C. 472, 481, 40 S.E. 881, 884 (1902) (ruling an order "was appealable before the act of 1901, 23 Stat., 623--for it involved the merits; and secondly, it was appealable under said act just quoted, for that act provides that the Supreme Court may review 'An interlocutory order or decree in the Court of Common Pleas, granting or continuing or modifying or refusing an injunction, or else granting or continuing or modifying or refusing the appointment of a receiver hereafter granted in any action'"). Although it has been

courts commonly appointed receivers on a temporary basis,<sup>5</sup> and it was likewise common for such temporary receiverships to be extended or made permanent—or “continued.”<sup>6</sup> This practice of “continuing” temporary receiverships still takes place in South Carolina. *See, e.g., Wilmington Trust Nat’l Assoc. v. Piedmont Center Owner, LLC et al.*, 2019 S.C. C.P. LEXIS 513, \*1 (S.C. Ct. Comm. Pl., Greenville Cnty., Mar. 8, 2019) (“At the hearing held on March 8, 2019, Plaintiff submitted evidence and testimony from the interim Receiver in support of the **continued**

---

recodified several times, the relevant language of section 14-3-330(4) has remained a part of South Carolina’s statutory scheme from 1901 to the present day.

<sup>5</sup> *See, e.g., Montgomery & Crawford, Inc. v. Arcadia Mills*, 173 S.C. 464, 483, 176 S.E. 589, 596 (1934) (“Judge Stoll signed the order making H. A. Ligon temporary receiver . . . .”); *Moore v. S. Mut. B. & L. Ass’n*, 50 S.C. 89, 93, 27 S.E. 543, 545 (1897) (“[O]n the 12th of February, 1897, a temporary receiver of the defendant association was appointed . . . .”); *Hughes v. Edisto Cypress Shingle Co.*, 51 S.C. 1, 21, 28 S.E. 2, 9 (1897) (“C. B. Free was, under the order of Judge Witherspoon, appointed as temporary receiver . . . .”); *Tillinghast v. Bos. & Port Royal Lumber Co.*, 39 S.C. 484, 486, 18 S.E. 120, 121 (1893) (noting a party “applied for and obtained an order for the appointment of a temporary receiver”); *see also Hand v. Savannah & C. R. Co.*, 17 S.C. 219, 274 (1882) (“It can hardly be necessary to say, what has been so often held, that the objects for the appointment of a receiver are temporary in their character.”); *see also* 1930 S.C. Civil Code § 5564 (“If it appears to the Court that the corporation is insolvent or in imminent danger of insolvency the Court may appoint a temporary receiver of the corporation pending dissolution.”); *Tardy’s Smith on Receivers* 2d, § 3 (1920) (distinguishing temporary and permanent receivers).

<sup>6</sup> *See, e.g., Carroll v. Cash Mills*, 125 S.C. 332, 336, 118 S.E. 290, 291 (1923) (“On February 21, 1921, the temporary receivership was made permanent, by order of the Circuit Judge.”); *Wylie v. Commercial & Farmers’ Bank*, 63 S.C. 406, 408, 41 S.E. 504, 505 (1902) (“After answers were in, an application was made to have the temporary receiver made permanent receiver. This was ordered in June, 1899.”); *White v. Commercial & Farmers’ Bank*, 60 S.C. 122, 123, 38 S.E. 453, 454 (1901) (noting “a temporary receiver was appointed on the 3d day of February, 1900 (afterwards made permanent)”); *State v. Port Royal & Augusta R.R. Co.*, 45 S.C. 470, 477, 23 S.E. 383, 384 (1895) (“On the same day such temporary receiver was made permanent receiver.”); *see also* 75 C.J.S. *Receivers* § 79 (“According to the showing made, the court may make, or refuse to make, an order **continuing** a temporary receiver previously appointed.” (emphasis added)); *Stair v. Meissel*, 207 Ind. 280, 283, 192 N.E. 453, 454 (1934) (“It is, therefore, ordered by the court that the receivership herein be and the same is hereby **continued** and made permanent pending the determination of the main cause of action in this cause.” (emphasis added)); *Singer v. Goff*, 334 Mich. 163, 167, 54 N.W.2d 290, 292 (1952) (“Equity courts have inherent power to appoint a receiver, and it is a matter of discretion whether a receivership shall be **continued** or discontinued. The record in the instant case shows that, after the expiration of the 1-year period, the court issued various orders which necessarily imply a **continuance** of the Singer receivership.” (emphasis added) (citations omitted)).

Receivership, and requested that the Court extend the Receiver Order until subsequent order of this Court, in accordance with the terms of the Receiver Order, which are incorporated herein.” (emphasis added)). Accordingly, the language in section 14-3-330(4) allowing for the immediate appeal of orders “continuing . . . the appointment of a receiver” was not intended to apply to the current circumstance, in which a court simply rejects a third party’s attempt to challenge and dissolve a receivership. Instead, it was intended to apply to instances where a temporary receivership was explicitly extended in duration, whether made permanent or remaining as a temporary receivership with a later termination date.

For section 14-3-330(4) to allow the instant appeals of the Order—which did not “continue” Payne & Keller’s receivership, and at most,<sup>7</sup> simply declined to dissolve it—the statute would need to contain appropriate alternative language, as other jurisdictions have done. *See, e.g.*, Okla. Stat. tit. 12, § 993(4) (allowing the immediate appeal of an order that “refuses to vacate the appointment of a receiver”); Mo. Rev. Stat. § 512.020(2) (allowing the immediate appeal of an order “refusing to revoke, modify, or change an interlocutory order appointing a receiver or receivers”); Kan. Stat. Ann. § 60-2102(a)(3) (allowing the immediate appeal of “[a]n order that . . . refuses to wind up a receivership”); 4 V.I.C. § 33(b) (“The Supreme Court of the Virgin Islands has jurisdiction of appeals from . . . (2) Interlocutory orders . . . refusing orders to wind up receiverships . . .”).

---

<sup>7</sup> “[A]n appellate court should look to the effect of an interlocutory order to determine its appealability . . .” *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011). Here, the Order had *no* effect on Payne & Keller’s receivership, whether to its duration, scope, the identity of the Receiver, or otherwise. Consequently, the Order does not warrant review by this Court. *See, e.g., Cobb v. Maccaro*, 310 S.C. 303, 306, 423 S.E.2d 156, 157 (Ct. App. 1992) (ruling the refusal to dissolve a mechanic’s lien was not immediately appealable).

Underlying and reinforcing Respondent’s interpretation of section 14-3-330(4) is an important consideration: that receivers, once appointed, should be able to carry out their court-ordered duties without other entities interfering by filing unnecessary, improper, and time-consuming appeals. If Appellants’ view of section 14-3-330(4) is accepted, insurers in the asbestos Receivership Court,<sup>8</sup> and debtors to entities in receivership elsewhere, could invent any number of reasons why a receivership or a receiver’s appointment is improper, regardless of merit, move for dissolution of the receivership on that basis, and appeal the denial of such motions as orders “continuing” the receivership. In fact, under such a broad interpretation as Appellants would have this Court adopt, ordinary motions to dismiss and motions for summary judgment against a receiver’s claims containing a perfunctory argument that, upon dismissal or adjudication of the claims, the receivership should be dissolved, would be immediately appealable. This would upend foundational appealability law in South Carolina. *See Silverman v. Campbell*, 326 S.C. 208, 211, 486 S.E.2d 1, 2 (1997) (recognizing “it is well-settled that the

---

<sup>8</sup> Regrettably, the non-meritorious appeal of unappealable orders has become common practice in South Carolina asbestos receivership litigation. *See, e.g., Ex Parte: Zurich Am. Ins. Co.*, Appellate Case No. 2019-001651 (appealing discovery orders directly to Supreme Court; appeal dismissed Oct. 16, 2019 upon initial review of appealed orders); *Ex parte: Hartford Accident & Indem. Co.*, Appellate Case No. 2019-001764 (appealing discovery order; dismissed Nov. 1, 2019 following motion to dismiss and subsequent withdrawal of appeal); *Ex Parte: U.S. Fid. & Guar. Co.*, Appellate Case No. 2020-000845 (appealing orders in case where appellant was not a party; dismissed July 30, 2020 upon motion); *Finch v. U.S. Fid. & Guar. Co.*, Appellate Case No. 2020-001663 (appealing bifurcation order; appeal dismissed Jan. 6, 2021 upon motion; certiorari denied July 6, 2021 in Appellate Case No. 2021-000462); *Covil Corp. v. Penn. Nat’l Mut. Cas. Ins. Co.*, Appellate Case No. 2022-000761 (appealing discovery orders; appeal dismissed Aug. 9, 2022 upon motion; certiorari denied Jan. 12, 2023 in Appellate Case No. 2022-001764); *Covil Corp. v. Penn. Nat’l Mut. Cas. Ins. Co.*, Appellate Case No. 2022-000785 (appealing same discovery orders directly to Supreme Court; certiorari denied Aug. 23, 2022); *Covil Corp. v. Penn. Nat’l Mut. Cas. Ins. Co.*, Appellate Case No. 2022-001722 (appealing order confirming non-jury trial; appeal dismissed Feb. 8, 2023 upon motion; petition for rehearing pending); *S. Insulation, Inc. v. OneBeacon Ins. Grp., Ltd.*, Appellate Case No. 2023-000252 (appealing order denying dismissal; appeal dismissed Apr. 13, 2023 upon motion; petition for rehearing pending).

denial of summary judgment is not directly appealable”); *McLendon*, 313 S.C. at 526 n.2, 443 S.E.2d at 540 n.2 (observing “the denial of a motion to dismiss is not directly appealable”).

Allowing such appeals would also stymie actions involving receiverships in the circuit court, as each appellant would argue that the receivership’s propriety affects the viability of the entire action. This is not what the legislature intended with respect to receiverships in enacting section 14-3-330(4), nor would it be consonant with the general rule that section 14-3-330 should be narrowly construed. *See Stone*, 426 S.C. at 295, 826 S.E.2d at 870; *Tillman*, 420 S.C. at 250, 801 S.E.2d at 760. The appropriate time to challenge the propriety of a receivership is at its outset—which section 14-3-330(4) explicitly allows by providing for the immediate appeal of orders “granting . . . the appointment of a receiver”—not now, years after the receivership has been established and the Receiver appointed.

In sum, section 14-3-330(4) does not afford Appellants any basis to appeal the Order, and their appeals should be immediately dismissed.

## **II. Appellants have no right to appeal the Order because they are not aggrieved parties.**

Even assuming *arguendo* that the Order is appealable under section 14-3-330(4), Appellants are unable to seek appellate review because they are not aggrieved by the Receivership Court’s refusal to dissolve Payne & Keller’s receivership. *See* Rule 201(b), SCACR (“Only a party aggrieved by an order, judgment, sentence or decision may appeal.”); *State v. Looper*, 421 S.C. 384, 390, 807 S.E.2d 203, 206 (2017) (“Whether based on statute or case law, the overarching point remains—absent the presence of an exception to the final judgment rule, appealability is determined by a final judgment and an aggrieved party.”).

Although appellants undoubtedly would like Payne & Keller’s receivership to be dissolved and the underlying action against them dismissed, this desire does not give rise to a

right to appeal.<sup>9</sup> Payne & Keller’s receivership, in and of itself, does not operate on Appellants’ rights of property or bear directly upon their interests. The creation of the receivership and the Receiver’s appointment merely put the Receiver in the place of Payne & Keller vis-à-vis Payne & Keller’s property.<sup>10</sup> However, this affected only Payne & Keller’s property—it did not affect the property or any other right held by Appellants. The fact that Payne & Keller’s assets are its insurance policies, contracts to which Appellants are also parties, does not change this fact. The Receiver only possesses Payne & Keller’s rights and obligations under the policies, and the separate but corresponding rights and obligations of the Appellant insurers were unaffected by the creation of the receivership and the Receiver’s appointment.<sup>11</sup>

---

<sup>9</sup> See *State v. Cox*, 328 S.C. 371, 373, 492 S.E.2d 399, 400 (Ct. App. 1997) (“[A]ppellate review is limited to parties aggrieved by a judgment, order, or sentence below, and an aggrieved party is one who is injured in a legal sense or has suffered an injury to person or property.” (citations omitted)); *Ralph v. McLaughlin*, 432 S.C. 640, 649, 856 S.E.2d 154, 158 (2021) (“[A]n aggrieved party is one who is injured in a legal sense; one who has suffered an injury to person or property. . . . [A]n aggrieved party with[in the meaning of the] statute relating to appeals is a person who is aggrieved by the judgment or decree when it operates on his rights of property or bears directly upon his interest, the word aggrieved referring to a substantial grievance, a denial of some personal or property right or the imposition on a party of a burden or obligation.” (quoting *Cisson v. McWhorter*, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970))).

<sup>10</sup> 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 with respect to the property of the latter . . . .”); *In re Am. Slicing Mach. Co.*, 125 S.C. 214, 217-18, 118 S.E. 303, 304 (1923) (“The Receiver of an insolvent corporation represents, not only the corporation, but also its stockholders and creditors, and it is his duty to assert and protect the rights of each of these several classes of persons; he is regarded as a Trustee for them. . . . The property becomes a trust fund for the payment of debts, and the Receiver simply holds it for the benefit of those ultimately entitled, in law or equity, to it.”); *Bates v. S.C. Nat’l Bank*, 280 S.C. 599, 601, 313 S.E.2d 361, 362 (Ct. App. 1984) (“The property in the hands of the receiver is *in custodia legis*; the possession of the property by the receiver is the possession of the court which appointed him.”).

<sup>11</sup> See *Carwile v. Metro. Life Ins. Co.*, 136 S.C. 179, 195, 134 S.E. 285, 290 (1926) (“A receiver can acquire no other, greater, or better interest than the debtor had in the property.” (quoting *In re Am. Slicing Mach. Co.*, 125 S.C. at 218, 118 S.E. at 304)); *Nat’l Cash Register Co.*, 217 S.C. at 313, 60 S.E.2d at 617 (providing that property in a receiver’s possession “is subject to valid liens and other contractual obligations”); *id.* at 313-14, 60 S.E.2d at 617 (“The general rule is that the appointment of a receiver will not change any existing contractual relation or create any

That third parties are not injured in a legal sense by the establishment of a receivership is also reflected in the statutes governing receiverships. For example, before a receivership is created, notice of the application for the receivership must be given to the entity being placed into receivership and others claiming an interest in that entity's property. *See* S.C. Code Ann. § 15-65-20 (“No receiver of the property of any person or corporation shall be appointed by any court or judge, either in term time or at chambers, without notice of the application for such appointment to the party to the action whose property is sought to be put in the hands of a receiver and to any party to the action in possession of such property claiming an interest therein under any contract, lease or conveyance thereof from the alleged owner.”). These are the parties that may be aggrieved by an order such as the one currently on appeal; however, notice need not be given to third parties like Appellants because they would not be similarly aggrieved.

And although the Receiver has brought claims against Appellants, that does not render the receivership *per se* as legally injurious to Appellants. *See Looper*, 421 S.C. at 389, 807 S.E.2d at 205 (“We, of course, take no exception to the notion that Petitioner was adversely impacted by the circuit court’s order remanding the case for trial, but he was not aggrieved in a legal sense. *Cf. Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991) (‘Avoidance of trial is not a ‘substantial right’ entitling a party to immediate appeal of an interlocutory order.’).”). Consequently, the circuit court’s refusal to dissolve Payne & Keller’s receivership does not, standing alone, aggrieve Appellants.<sup>12</sup>

---

new contractual relation or right of action thereon, and a receiver can do nothing to impair a contract as between the parties thereto.”); *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 343, 745 S.E.2d 90, 93 (2013) (holding an “[i]nsurer still retains all of its defenses and rights under [an] insurance contract” when an insured’s rights under the contract, including claims against the insurer, are assigned to a third party).

<sup>12</sup> *See, e.g., Wildflower Nursery, Inc. v. Beasley*, No. 2016-UP-082, 2016 S.C. App. Unpub. LEXIS 98, at \*3 (Ct. App. Feb. 24, 2016) (“As to the denial of Beasley’s motion for the

In addition to the above South Carolina cases supporting Respondent’s position, other jurisdictions have consistently held that a third party is not aggrieved by the imposition of a receivership.<sup>13</sup> An opinion by the North Carolina Court of Appeals is particularly instructive. In *Haarhuis v. Cheek*, 820 S.E.2d 844 (2018), the defendant hit and killed a pedestrian with her

---

appointment of a receiver, we find Wildflower was not aggrieved by the circuit court’s denial of that motion.”); *cf. Powell v. Bank of Am.*, 379 S.C. 437, 448, 665 S.E.2d 237, 243 (Ct. App. 2008) (“Because the Bank has no interest in the escrowed funds, the Bank is not aggrieved by the trial court’s apportionment of the funds between Cody and Elizabeth. We dismiss the Bank’s appeal.”); *Burns v. Gardner*, 328 S.C. 608, 617, 493 S.E.2d 356, 361 (Ct. App. 1997) (“The assessment of sanctions in this case does not affect any property right of the appellants, nor does it impose any burden or obligation on the appellants. Thus, we cannot say that the appellants are aggrieved by the imposition of sanctions against their attorney.”); *Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 120-21, 754 S.E.2d 486, 490-91 (2014) (holding parties could not appeal the circuit court’s approval of a settlement because they were not “aggrieved in any way by the settlement agreement”).

<sup>13</sup> See *MW Capital Funding, Inc. v. Magnum Health & Rehab of Monroe LLC*, No. 16-14459, 2019 U.S. Dist. LEXIS 127463, at \*10 (E.D. Mich. July 31, 2019) (“The court is doubtful that a non-party creditor like MDHHS has standing to challenge the imposition of a receivership. MDHHS was not directly harmed by the imposition of the receivership, which affected *Defendants’* assets.” (footnote omitted)); *Luckenbach v. Laer*, 212 P. 918, 920 (Cal. 1923) (“The appellants were in exactly the same position after the appointment of the receiver and the granting of permission to sue [appellants] as they were before. They were, or were not, liable to the Krempel-Preston Company and to its creditors, as the facts exist. The receiver is merely the minister of the corporation, acting under the direction of the court, in attempting to enforce such liability. In any action brought thereon by him, the appellants may interpose every defense they would have against the corporation. If they have a meritorious defense, they will, we may assume, defeat any recovery.”); *Exch. Tr. Co. v. Okla. State Bank*, 259 P. 589, 593 (Okla. 1927) (“The Bank is not a party aggrieved. It is not, and was not, the owner or in possession of the mortgaged premises or crops raised thereon. It is not, under the order of appointment of the receiver, chargeable with any expense in connection with the receivership.”); *Med. Device All., Inc. v. Ahr*, 988 P.2d 308, 310 (Nev. 1999) (“Where a receiver is appointed to oversee the operations of a corporation, the corporation is the aggrieved party and has a right to appeal from that order.”); *Brenda Sue Steuer Revocable Tr. v. Strauss*, 2022-Ohio-3484, ¶ 13 (Ct. App. 2022) (“Strauss has asserted no interest in the property of Fairport Real Estate subject to the receivership. Accordingly, he cannot claim to be aggrieved by the imposition of the receivership.”); *Needle v. Perfection Const. Co.*, 154 A. 878, 879 (N.J. 1931) (“It is to be observed that the corporation defendant has not appealed and is not complaining of the order appointing a statutory receiver. Just how the appellant as mortgagee is aggrieved by that order has not been made to appear. The order appointing a receiver had the legal effect of transferring property of the corporation to the receiver and it is not apparent that any injury will result to her by this change of position and title.”).

vehicle while driving intoxicated. Plaintiff, the pedestrian's husband and administrator of her estate, received and accepted an offer by the defendant's insurer to release his claims against the defendant in exchange for payment within ten days of \$50,000, the defendant's insurance policy limits. However, soon after receiving the plaintiff's acceptance of the settlement offer, the insurer retained counsel to represent the defendant. The settlement payment was not timely made, and the plaintiff filed suit against the defendant. At trial, the jury entered a verdict against the defendant for \$4.25 million in compensatory damages and \$45,000 in punitive damages. When the judgment went unsatisfied, the plaintiff filed a motion to appoint a receiver for the defendant, who "possessed property in the form of unliquidated legal claims against [the insurer] and [counsel] for their actions in causing [the] defendant to be encumbered with a judgment of nearly \$4.3 million." *Id.* at 847. At a hearing on the motion, the trial court allowed, over the objections of the plaintiff, the insurer and counsel to argue against appointing a receiver. The trial court denied the request for a receiver, and on appeal, the North Carolina Court of Appeals considered whether the insurer and counsel had standing to challenge the appointment of a receiver. The *Haarhuis* court observed, "It is well settled that the debtor of a judgment-debtor lacks standing to object to the appointment of a receiver, as the debtor is not the 'party aggrieved' in the underlying action." *Id.* at 848. The court noted that the interests of the insurer and counsel were "entirely antagonistic" to those of the defendant because they were her potential debtors, and it added that they were not "legally aggrieved in the instant case by the appointment of a receiver." *Id.* at 849. Here, as in *Haarhuis*, the entity in receivership (Payne & Keller) possesses rights of action against its insurers, who oppose the receivership. And, as in *Haarhuis*, Appellants are not aggrieved by the mere existence of Payne & Keller's receivership.

Furthermore, assuming Appellants are aggrieved by the Order's denial of their requests for dismissal and protection from discovery, those rulings are clearly not appealable at this time. Therefore, those rulings in the Order do not render Appellants aggrieved parties with respect to the dissolution of Payne & Keller's receivership. *See Burns v. Gardner*, 328 S.C. 608, 617-18, 493 S.E.2d 356, 361 (Ct. App. 1997) ("Because the appellants are not aggrieved by the assessment of sanctions, they cannot pursue *the issue* on appeal. . . . Accordingly, *that portion* of the appellants' appeal relating to the sanctions assessed against their attorney is hereby dismissed." (emphasis added)); *Dunson v. Dunson*, 278 S.C. 210, 212, 294 S.E.2d 39, 40 (1982) ("The failure to sustain the wife's allegation of desertion has not prejudiced any of her rights. The award of the divorce on the ground of separation for one (1) year has not denied to her any personal or property right, nor has it imposed on her any burden or obligation. She has been properly declared entitled to alimony, from which there is no appeal. She is simply not an aggrieved party *in so far as this issue is concerned*." (emphasis added)).

Because Appellants are not aggrieved by the refusal to dissolve Payne & Keller's receivership, and the circuit court's other rulings in the Order are clearly not appealable, their appeals should be immediately dismissed.<sup>14</sup>

---

<sup>14</sup> *See Cisson v. McWhorter*, 255 S.C. 174, 177-78, 177 S.E.2d 603, 605 (1970) ("Our statutory provision limiting appellate review to those who have been aggrieved by the judgment below is, in our opinion, a wise and well reasoned requirement, as our court is concerned with correcting errors that have practically wronged the appealing party. It, therefore, follows that it is our duty to reject an appeal that is prosecuted by a party who is not aggrieved in a legal sense by the judgment of the trial court."); *First Union Nat'l Bank v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 378 (Ct. App. 1998) ("A party cannot appeal from a decision which does not affect his interest, however erroneous and prejudicial it may be to the rights and interests of some other person.").

**III. If these appeals are not immediately dismissed, consideration of Appellants' other grounds for dismissal in the circuit court is unwarranted.**

As stated above, the denial of a motion to dismiss and orders concerning discovery are not immediately appealable. However, Respondent recognizes that this Court can, in its discretion, decide to consider non-appealable issues alongside an issue or order properly appealed. *See Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) (“An order that is not directly appealable *may be* considered if there is an appealable issue before the court.” (emphasis added)). Notwithstanding this discretion, the South Carolina Supreme Court has explained that such non-appealable issues should have “a sufficient nexus or companionship [to the appealable issue(s)] to justify [the] exercise of immediate appellate review.” *Brown v. Cnty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005). Here, there is no nexus between Appellants’ arguments concerning Payne & Keller’s receivership and their other arguments in pursuit of dismissal. Accordingly, if this Court decides to consider the receivership issue, it should decline to review Appellants’ remaining arguments ruled upon in the Order.

**CONCLUSION**

Because the Order is not appealable and did not aggrieve Appellants, Respondent respectfully requests that this Court immediately dismiss these appeals.

Respectfully submitted,

/s/ Christopher R. Jones

John B. White, Jr. (S.C. Bar No. 5996)  
Marghretta H. Shisko (S.C. Bar No. 100106)  
Christopher R. Jones (S.C. Bar No. 101265)  
John B. White, Jr., P.A.  
291 S. Pine Street  
P.O. Box 2465 (29304)  
Spartanburg, SC 29302  
(864) 594-5988

[jwhite@johnbwhitelaw.com](mailto:jwhite@johnbwhitelaw.com)  
[mshisko@johnbwhitelaw.com](mailto:mshisko@johnbwhitelaw.com)  
[cjones@johnbwhitelaw.com](mailto:cjones@johnbwhitelaw.com)

*Attorneys for Respondent*

May 15, 2023

# **EXHIBIT A**

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

## The South Carolina Court of Appeals

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. 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 All 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; 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.; and Compass Risk Services, LLC, Third-Party Defendants,

Of which, Payne & Keller Company, By and Through Their Duly Appointed 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 of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; and Continental Insurance Company, Individually and as Successor in interest to Harbor Insurance Company;

and

Travelers Casualty and Surety Company, f/k/a the Aetna Casualty and Surety Company, are Appellants.

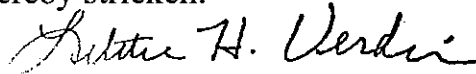
---

ORDER

---

After careful consideration of the parties' memoranda on appealability, this appeal shall proceed. However, nothing in this order prevents the parties from raising the issues of appealability and standing in their briefs.

Respondent's motion to strike Appellants' May 25, 2023 filings is granted. The May 25, 2023 filings which were designated by Appellants as returns to Respondent's "motion to dismiss," are hereby stricken.



---

FOR THE COURT

Columbia, South Carolina

cc:

Wesley Brian Sawyer, Esquire  
Matthew Todd Carroll, Esquire  
Mary Elizabeth O'Neill, Esquire  
Harry Lee, Esquire  
Brian Montgomery Barnwell, Esquire  
John Belton White, Jr., Esquire  
Marghretta Hagood Shisko, Esquire  
Brady Edwards, Esquire  
Scott Shutte, Esquire  
Christopher Rutledge Jones, Esquire

**FILED**  
**Aug 09 2023**

---

REPORTER'S RECORD  
VOLUME 1 OF 1 VOLUMES

TRIAL COURT CAUSE NO. 2023-70875

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

v.

PAYNE & KELLER COMPANY, by  
and through its duly  
appointed receiver, PETER  
D. PROTOPAPAS,

\*\*\*\*\*

NATIONAL UNION FIRE  
INSURANCE COMPANY OF  
PITTSBURGH, PA, and  
TRAVELERS CASUALTY AND  
SURETY COMPANY

v.

LENORA CHILDERS,  
individually and as  
Personal Representative of  
the Estate of LEWIS C.  
CHILDERS and TEXAS  
SECRETARY OF STATE

§ IN THE DISTRICT COURT OF

§ HARRIS COUNTY, TEXAS

§ 127TH JUDICIAL DISTRICT

-----  
HEARING  
-----

On January 24, 2024, the following proceedings came  
on to be heard in the above-entitled and numbered cause  
before the Honorable R. K. Sandill, Judge presiding, held  
in Houston, Harris County, Texas;

Proceedings reported by machine shorthand.

A P P E A R A N C E S

FOR THE INTERVENOR AND THIRD-PARTY PLAINTIFF, NATIONAL  
UNION FIRE INSURANCE COMPANY:

GIBBS & BRUNS LLP

Ross M. MacDonald State Bar No. 24087956

Caitlyn Cowan - State Bar No. 24120778

1100 Louisiana Street, Suite 5300

Houston, Texas 77002

E-mail: rmacdonald@gibbsbruns.com

ccowan@gibbsbruns.com

FOR THE RECEIVER:

Brady Edwards - State Bar No. 00793021

Noah Horwitz - State Bar No. 24116537

MORGAN, LEWIS & BOCKIUS, LLP

1000 Louisiana Street, Suite 4000

Houston, Texas 77002

E-mail: brady.edwards@morganlewis.com

Daniel Patton - State Bar No. 24013302

SCOTT PATTON PC

5301 Katy Freeway, Suite 201

Houston, Texas 77007

E-mail: dpatton@scottpattonlaw.com

FOR INTERVENOR, TRAVELERS CASUALTY AND SURETY COMPANY  
F/K/A THE AETNA CASUALTY AND SECURITY COMPANY:

Robert B. Gilbreath - State Bar No. 07904620

HAWKINS, PARNELL & YOUNG, LLP

6301 Gaston Avenue, Suite 1444

Dallas, Texas 75214

E-mail: rgilbreath@hpylaw.com

Mary E. O'Neill

WOMBLE BOND DICKINSON (US) LLP

301 S. Colledge Street, Ste Fargo

Charlotte, North Carolina 28202

E-mail: elizabeth.oneill@wbd-us.com

FOR TEXAS SECRETARY OF STATE:

Thomas Belvilacqua - State Bar No.:00793342

OFFICE OF THE ATTORNEY GENERAL

P.O. Box 12548

Austin, Texas 78711

1 P R O C E E D I N G S

2 THE COURT: And then 2023-70875; Childers v.  
3 Payne & Keller Company. Counsel, if you'll please make  
4 your appearance.

5 MR. EDWARDS: Brady Edwards for Morgan Lewis  
6 on behalf of the receiver, Peter Protopapas.

7 MR. PATTON: Dan Patton as well, Your Honor.

8 MR. BEVILACQUA: Thomas Bevilacqua with the  
9 Office of the Attorney General on behalf of the Secretary  
10 of State.

11 MR. MACDONALD: Ross MacDonald along with  
12 Conor McEvily and Caitlin Cowan of Gibbs & Bruns on behalf  
13 of National Union.

14 MS. O'NEILL: Elizabeth O'Neill at Womble  
15 Bond Dickinson on behalf of Travelers.

16 MR. GILBREATH: Robert Gilbreath on behalf  
17 of Travelers.

18 THE COURT: Okay, great.

19 MR. PATTON: Your Honor, before we begin,  
20 your camera is pointed down. I didn't know if you wanted  
21 that but it's showing your desk.

22 THE COURT: Oh.

23 MR. PATTON: Just to let you know.

24 THE COURT: Thank you. I'll just turn my  
25 camera off.

1 MR. PATTON: You're welcome.

2 MR. MACDONALD: And Your Honor, we submitted  
3 some slides a couple days ago. Would you like a hard copy  
4 of those slides?

5 MR. BEVILACQUA: Your Honor, on behalf of  
6 the Secretary of State, I wondered -- before we got to the  
7 slides decks -- if it didn't make sense in terms of logics  
8 of the pending matters, if we dealt first with the effect  
9 of yesterday's first amended petition against the  
10 Secretary of State, if we took that up first and how that  
11 affects at all the pending plea to the jurisdiction.

12 THE COURT: Sure. I mean, and there was an  
13 argument here that the plea not be heard until Ms. Najam  
14 was available, correct?

15 MR. MACDONALD: We did ask that, yes, Your  
16 Honor. We also amended our petition which I think mooted  
17 their plea to the jurisdiction.

18 MR. BEVILACQUA: And I'd be prepared to talk  
19 to that because I did, in fact, look at that and we  
20 wondered precisely whether or not that was going to render  
21 the PTJ moot and we've looked at it and I'm prepared to  
22 speak a couple minutes on how it, in fact, changes  
23 nothing, that there's no ultra vires claim that's been  
24 alleged. And so we think that the PTJ as filed remains  
25 fully operative and the arguments are fully valid.

1 I'm happy to walk the Court through five,  
2 ten minutes on why the ultra vires claim is --

3 MR. MACDONALD: Your Honor, this is not set  
4 for hearing today. We would appreciate that we'll be able  
5 to move forward on our motion to vacate.

6 MR. BEVILACQUA: We did ask for it to be set  
7 for hearing today.

8 THE COURT: I'm trying to figure out how  
9 this postjudgment hearing has anything to do with an  
10 affirmative claim, if any.

11 MR. MACDONALD: So there are two different  
12 things happening here, like in the same case caption,  
13 right. There's a postjudgment hearing motion to vacate --

14 THE COURT: I understand that but I'm trying  
15 to out -- they're wholly separate. Nothing -- nothing  
16 with the affirmative claim takes place unless the  
17 postjudgment issue is resolved, correct? I mean, the post  
18 -- the affirmative claim doesn't exist. You can't have an  
19 affirmative claim on a final judgment.

20 MR. MACDONALD: Well, we have a separate  
21 affirmative claim just against the Secretary of State  
22 alleging --

23 THE COURT: On an intervention on a final  
24 judgment. You don't have a separate petition. You  
25 haven't instituted a new lawsuit. There is no lawsuit by

1 your client. Your client has intervened in a final  
2 judgment.

3 MR. MACDONALD: I agree the motion to vacate  
4 is an intervention in the final judgment but separate from  
5 that we've pled a separate declaratory judgment action  
6 against the Secretary of State.

7 THE COURT: So should I sever that out  
8 because I don't want to deal with it today.

9 MR. MACDONALD: Your Honor, I don't think we  
10 would oppose severing that out if you don't want to deal  
11 with it today but we could also take that up -- take up  
12 their plea to the jurisdiction at a later date.

13 MR. BEVILACQUA: So --

14 MR. EDWARDS: No, go ahead.

15 MR. BEVILACQUA: If I could say --  
16 obviously, we have the PT on file. No other party has  
17 seen fit to respond to it. I think by their silence  
18 they've acknowledged the merits of it. I think by --

19 THE COURT: Yeah, but, I mean, I also didn't  
20 respond to the letter.

21 MR. MACDONALD: And it wasn't set for  
22 hearing so we haven't responded to it.

23 MR. BEVILACQUA: National Union's re-filing  
24 is an implicit acknowledgment of its validity and I think  
25 the fact that it was filed -- the new pleading was

1 filed -- petition was filed yesterday, two days before the  
2 Court's jurisdiction expires is, in fact, an attempt to  
3 drive the Secretary of State along through appeal in a  
4 case where it has no interest -- where they're, in fact --  
5 it doesn't have a dog in the fight.

6                   Ultimately -- I know at the last hearing  
7 there was some discussion about remedies and I'm prepared  
8 today to discuss what Secretary of State is prepared to  
9 do.

10                   THE COURT: What's -- what's the opposition  
11 from the State on a severance?

12                   MR. BEVILACQUA: Well, we're going to raise  
13 the same --

14                   THE COURT: Because the issue is -- this  
15 is -- regardless of what I do today, this is the last time  
16 I'm going to see this case. It's going to go right down  
17 the street to 301 Fannin, correct?

18                   MR. MACDONALD: As far as the motion to  
19 vacate is concerned.

20                   THE COURT: Correct.

21                   MR. MACDONALD: But not necessarily --

22                   THE COURT: But the issue is -- the State's  
23 issue is one that has nothing to do with what happened in  
24 South Carolina. Mr. Edwards?

25                   MR. EDWARDS: Your Honor, we filed a letter

1 brief on this before the amended petition motion came in  
2 yesterday.

3 THE COURT: I saw that.

4 MR. EDWARDS: And I think the nexus between  
5 the motion to vacate and the Secretary of State is  
6 reflected in the proposed order that National Union  
7 submitted yesterday. Because the amended motion changes  
8 the party from "the Secretary of State" to the individual  
9 who is serving currently as the Secretary of State.

10 So that change happened yesterday. Their  
11 proposed order today -- National Union's proposed order  
12 that was submitted yesterday that they're asking you to  
13 sign today directs that individual to take action. She  
14 has not made a formal appearance.

15 THE COURT: So that's -- I mean, that's a  
16 mandatory injunction, right. The standard is so different  
17 on the mandatory injunction.

18 MR. MACDONALD: Your Honor, we brought three  
19 different orders with us today depending on how Your Honor  
20 is feeling and what Your Honor decides.

21 THE COURT: What I'm feeling is I want to  
22 get through this issue.

23 MR. BEVILACQUA: If I may, the change of  
24 party is a cosmetic change. Under the law there's  
25 strictly no difference between naming the Secretary of

1 State and naming the actual Secretary of State in her  
2 official capacity.

3 THE COURT: But asking the Secretary of  
4 State to take action is a mandatory injunction. And the  
5 standard on a mandatory injunction is way higher than a  
6 TRO or a TI, right. I mean and that's a full on  
7 evidentiary hearing.

8 MR. EDWARDS: And to your point --

9 THE COURT: I mean, are we putting on  
10 evidence?

11 MR. MACDONALD: Well, we don't think this  
12 issue between us and the Secretary of State is before you  
13 today. We're not asking for you to hold an evidentiary  
14 hearing today. We're asking for you to kick that can down  
15 the road and let us -- to the extent it becomes relevant  
16 -- litigate against the Secretary of State --

17 THE COURT: Who is opposed to this Court's  
18 -- show of hands -- who is opposed to this Court's  
19 severing out anything related to the Secretary of State  
20 until this issue is resolved today?

21 MR. EDWARDS: If the Secretary of State is  
22 not ordered to do anything at the end of the motion to  
23 vacate, we have no opposition to that.

24 Our concern is that the order that National  
25 Union submitted yesterday directs the Secretary of State

1 to take affirmative action.

2 THE COURT: Of course.

3 MR. EDWARDS: And the Secretary of State was  
4 added --

5 THE COURT: This is a sua sponte severance.  
6 This would be this Court acting on it's own motion to  
7 sever the case.

8 So there's no opposition from the Receiver?

9 MR. EDWARDS: If the order on the motion to  
10 vacate doesn't direct the Secretary of State to do  
11 anything, there's no opposition.

12 THE COURT: Any opposition from the State?

13 MR. BEVILACQUA: If we are severed out of  
14 the case as it currently is just the motion to vacate, we  
15 will not have argued for/against what we can do in terms  
16 of remedies. If there's no order against the Secretary of  
17 State then we will be confronted with an entirely new  
18 lawsuit which we'll answer in due course. So, in fact --

19 THE COURT: Y'all know this better than me.  
20 The procedural posture that you've put this case in is so  
21 twisted and turned. I don't -- there isn't a new lawsuit.  
22 There's one lawsuit. There's a lawsuit to -- basically,  
23 to -- you know it better than I do. Y'all have filed a  
24 lawsuit for me to --

25 MR. EDWARDS: Domesticate.

1 THE COURT: -- domesticate a judgment.  
2 That's the lawsuit. There's not -- I mean, whatever act  
3 you take is a ministerial act in accordance with the law.

4 MR. BEVILACQUA: Correct.

5 THE COURT: And so I don't know what exactly  
6 is happening here, the machinations that the insurers are  
7 going through but let me ask Travelers.

8 Travelers, is there any opposition to this  
9 Court sua sponte severing the Secretary of State?

10 MS. O'NEILL: There is no opposition.

11 THE COURT: Okay. This Court hereby orders  
12 that the Secretary of State is severed out and is put into  
13 2023-70875A.

14 So I'll ask Mr. Edwards if he'll get me an  
15 order to that after this hearing is done.

16 MR. EDWARDS: Yes, sir.

17 THE COURT: And then we'll take up --

18 This is going to go up, I imagine, tomorrow  
19 morning to the Court of Appeals. When is the appellate --  
20 you guys have already filed a notice of appeal, correct?

21 MR. MACDONALD: So out of an abundance of  
22 caution there's some jurisdictional -- we have filed a  
23 notice of appeal and that brief is due -- there was a  
24 30-day extension some time in February.

25 THE COURT: Okay. So you're good. You we

1 may never see you again but we may see you some time next  
2 year.

3 MR. BEVILACQUA: Very good. Thank you, Your  
4 Honor.

5 THE COURT: Thank you, sir. Sorry for  
6 making you come down.

7 MR. BEVILACQUA: No worries.

8 THE COURT: All right. So the motion to  
9 vacate.

10 MR. MACDONALD: Yes, Your Honor. May I  
11 proceed?

12 THE COURT: Sure. I don't want you -- this  
13 is more than I would read just in a motion. So just pick  
14 up the high points. You don't need to go through all  
15 15 pages of Power Point.

16 MR. MACDONALD: So Your Honor, Ross  
17 MacDonald on behalf of National Union. What we're here  
18 today is about whether or not the South Carolina court --

19 THE COURT: So Mr. MacDonald, let me ask  
20 this question. Every argument that you're making to me  
21 today did you make in front of the South Carolina court?

22 MR. MACDONALD: No, we did not.

23 THE COURT: Which ones did you not? And if  
24 you haven't made those there did you not waive them?

25 MR. MACDONALD: So no. So there are, I

1 think, three arguments we're going to make today.

2 THE COURT: Okay. Which ones did you not  
3 make in front of the South Carolina court?

4 MR. MACDONALD: So there are a number of  
5 reasons why one court --

6 THE COURT: Which ones did you not make --  
7 I'm going to keep asking the same question until you  
8 answer the question I asked.

9 MR. MACDONALD: And I appreciate that, Judge  
10 Sandill.

11 So one argument is that under Texas law you  
12 do not have to go full faith and credit if there are  
13 competing interest of Texas sovereignty and Texas interest  
14 and that could not be made to a South Carolina court.  
15 Whether or not Texas has competing interest about not  
16 giving validation to a South Carolina order is not  
17 something that could possibly be brought up in South  
18 Carolina.

19 Two, Travelers, Ms. O'Neill here, is going  
20 to argue that this order is not a final judgment. No  
21 liability has been found against anyone. It's currently  
22 sitting on a motion to reconsider in front of the trial  
23 judge. It's not and could not be appealed at this current  
24 time. So it's an interlocutory judgment which is a  
25 separate ground for -- and that cannot be brought in front

1 of the South Carolina court.

2 Our third argument is that the South  
3 Carolina court lacks jurisdiction and that argument was  
4 brought although we don't think it was fully and fairly  
5 litigated in front of the South Carolina court which is an  
6 exception and we also think even if it was fully and  
7 fairly litigated, the order that the South Carolina court  
8 is so beyond what a South Carolina court what a South  
9 Carolina court is allowed to do, that's void on it's face  
10 which again is a separate exception to the full faith and  
11 credit requirement.

12 So even if it was litigated there it does  
13 not matter because the South Carolina court simply does  
14 not have the power to do what it purported to do which is  
15 to reanimate this company that had been for 40 years.

16 And Payne & Keller, Your Honor, the facts, I  
17 think, about the company are not disputed. It was founded  
18 in 1961. It operated as a Texas corporation and operated  
19 for 25 years. It was losing money. It sold all of it's  
20 assets and it's name to a company called Jacobs  
21 Engineering and having no operating assets it then  
22 dissolved.

23 The law that existed at the time -- it is  
24 undisputed that you have a three-year statute to propose  
25 after which there were no claims that could be brought.

1 THE COURT: So let's talk about the -- it's  
2 not a final judgment. Travelers?

3 MS. O'NEILL: Sure. Good morning, Your  
4 Honor. Elizabeth O'Neill on behalf of Travelers. This is  
5 not a final judgment and that is, of course, the threshold  
6 question and it's a pretty simple question. It's one  
7 which I don't believe our opponents have ever directly  
8 responded to. It's not a final judgment because it does  
9 not -- it's not a final order because it does not resolve  
10 all of the issues between the parties. It was filed in  
11 the Childers lawsuit and the Childers lawsuit will be at a  
12 final resolution when there is determination as to whether  
13 there is liability by Payne & Keller to the Childers.

14 THE COURT: So if it's not a final judgment  
15 -- y'all were pretty fast to let the Secretary of State  
16 out. Like if it's not a final judgment and the Secretary  
17 of State has now acted, why would you let them out?

18 MS. O'NEILL: So the reason --

19 THE COURT: Because then they have acted  
20 ultra vires.

21 MS. O'NEILL: The reason that we agreed to  
22 sever is because I think that this threshold issue is one  
23 which affects the domestication, which is not a Secretary  
24 of State issue. The Secretary of State responded to what  
25 they believed was a proper domestication. Had we been on

1 the domestication -- had we gotten notice of that and had  
2 we been participating in this and had we had an  
3 opportunity to say to the Secretary of State at the time  
4 it was presented to them, Wait a minute, not a final  
5 order, I would not have consented to sever. But because  
6 the Secretary of State was acting essentially in a vacuum  
7 of incomplete and in our opinion inaccurate information I  
8 think it's appropriate to have severed them here while  
9 this issue is resolved.

10 THE COURT: And what's the judgment that's  
11 being domesticated, what exhibit is that of y'all's?

12 MS. O'NEILL: That's not a question I can  
13 answer off the top of my head. Just give me one minute.

14 THE COURT: Everyone agrees that's the order  
15 that controls, correct?

16 MS. O'NEILL: Yes.

17 MR. MACDONALD: The October 5th order.

18 MS. O'NEILL: The October 5th order. And  
19 I'm sorry, I just don't know the exhibit number. I have  
20 this giant binder that I can rifle through.

21 THE COURT: I'm glad you're rifling through  
22 it and not me.

23 Do you have a copy?

24 MR. EDWARDS: May I approach?

25 THE COURT: Please.

1 MS. O'NEILL: It's Exhibit 15 to the  
2 National Union motion, Your Honor.

3 THE COURT: Okay. Mr. Edwards, why do you  
4 believe that this is a final judgment?

5 MR. EDWARDS: Your Honor, the order is an  
6 order in -- under South Carolina -- well, it's an order in  
7 "a receivership action." The plaintiff in this case, Mr.  
8 Protopapas, is the receiver. South Carolina law provides  
9 as different treatment for orders in receivership actions.  
10 You see that in Rule 62 of the South Carolina Rules of  
11 Civil Procedure. You see that in the rules of appellate  
12 procedure and you've seen that in the appellate rulings in  
13 the Payne & Keller case in South Carolina. The reason for  
14 that, and I mentioned this briefly at our last hearing, is  
15 that a receivership is not a final outcome. It is a  
16 status of court supervised management. And so it does  
17 not -- a receivership does not result in an order that one  
18 party owes the other party \$1,000 and the dispute ends.

19 And so you see in the South Carolina rules  
20 exceptions for purposes of appeal, exceptions for purposes  
21 of stay for matters like receiverships, accountings and  
22 injunctions because the status is what's important. The  
23 supervision is what's important.

24 The problem with their argument, it's not  
25 recognized in South Carolina. The problem with their

1 argument is if it's true --

2 THE COURT: What is "it"? Sorry, Mr.  
3 Edwards, I missed that.

4 MR. EDWARDS: Sure.

5 THE COURT: You said it's not recognized in  
6 South Carolina. What is "it"?

7 MR. EDWARDS: The different treatment of a  
8 receivership order is recognized throughout the rules in  
9 South Carolina and throughout the rulings that we've had  
10 in the Payne & Keller receivership. It's different than a  
11 final monetary judgment because the outcome is different.  
12 The outcome in a receivership is the status of court  
13 supervision.

14 The problem with the argument they're making  
15 is if followed to it's logical conclusion you could never  
16 domesticate a receivership, you could never domesticate an  
17 accounting. It would be localized in a single stay and  
18 that can't be the law. And so as they've made these  
19 arguments in South Carolina to both the trial court and  
20 the appellate courts, they've been rejected. They make  
21 these arguments about stays and about the pendency of  
22 appeals, staying interlocutory judgments and those have  
23 all been rejected.

24 The reason they won't answer your question  
25 of which argument was not made in South Carolina is

1 because they were all made in South Carolina up and  
2 down --

3 THE COURT: Mr. MacDonald just told me there  
4 were three arguments that weren't made in South Carolina.

5 MR. MACDONALD: Your Honor, I said there  
6 were two arguments that weren't made in South Carolina and  
7 one argument that we don't think was fully and fairly  
8 litigated in South Carolina.

9 MS. O'NEILL: May I respond to Mr. Edwards  
10 statement, Your Honor, because I don't think it's a  
11 correct statement of the case for South Carolina law and  
12 I'm the only person standing in the courtroom who is both  
13 a South Carolina and a Texas lawyer.

14 THE COURT: Sure. I'm looking at the Court  
15 of Appeals opinion dated September 8, 2023.

16 MS. O'NEILL: Uh-huh.

17 THE COURT: And so at some point -- what  
18 procedure takes precedence here, South Carolina procedure  
19 or Texas?

20 MS. O'NEILL: In terms of determining the  
21 final order it is whether it was final in South Carolina.

22 THE COURT: Okay.

23 MS. O'NEILL: But I will tell this Court  
24 it's the same standard. That when you look at the case  
25 law in South Carolina about what constitutes a final

1 judgment and what constitutes it in Texas, it's  
2 essentially the same standard.

3           And what Mr. Edwards said to you about how  
4 receiverships work in South Carolina, generally true.  
5 But -- and I understand why Mr. Edwards has the perception  
6 that he does about this all being related to a  
7 receivership in South Carolina because his involvement is  
8 as the receiver's lawyer. But the order that was  
9 domesticated, the receiver didn't ask for and the receiver  
10 didn't get and it wasn't in the third party lawsuit the  
11 receiver did. It was issued in a tort action at the  
12 request of Ms. Childers, a tort plaintiff, against a tort  
13 defendant in the wrongful death personal injury case.

14           THE COURT: So Mr. Edwards has just said  
15 that the Court of Appeals have treated it differently; is  
16 that incorrect?

17           MS. O'NEILL: The Court of Appeals has not  
18 -- in South Carolina has not looked at this particular  
19 question of whether -- when you get a revocation, is that  
20 a receiver order or a tort plaintiff order?

21           THE COURT: But y'all have tried to stay  
22 this order in South Carolina.

23           MS. O'NEILL: We did try to stay in South  
24 Carolina and the court said no.

25           THE COURT: Correct.

1 MS. O'NEILL: Well, actually, that's not --  
2 let me be precise because it's very import. We got a  
3 one-judge -- the Court of Appeals didn't say anything. We  
4 got a one-judge order that said the underlying matter is  
5 not stayed. It didn't define what the underlying matter  
6 was. It didn't comment on the fact that the order was  
7 Childers, tort plaintiff, against Payne & Keller, tort  
8 defendant.

9 THE COURT: Okay. Is that question up or  
10 did y'all just leave it?

11 MS. O'NEILL: That question is not up yet  
12 because we have this motion for reconsideration pending in  
13 the trial court.

14 THE COURT: So wait a minute, you're telling  
15 me that this isn't final. There's an order saying that,  
16 "Accordingly, the receivership action and the receiver's  
17 ability to carry out his duties are not stayed."

18 MS. O'NEILL: The receiver --

19 THE COURT: And y'all haven't taken that up  
20 in South Carolina because even though they're arguing it's  
21 final under South Carolina law, you want me to intervene  
22 in Texas?

23 MS. O'NEILL: And here's why -- here's why.  
24 And if I can hand this up -- it's because, if I may, there  
25 was a motion for reconsideration of the order filed in

1 South Carolina. And Travelers joined that --

2 May I hand this up, Your Honor?

3 THE COURT: Sure. When was that filed?

4 MS. O'NEILL: It was filed on October 16th,  
5 2023, and Travelers joined the same day.

6 THE COURT: Sure.

7 MS. O'NEILL: And I've got a copy --

8 Mr. Edwards, would you like -- would you like some more  
9 paper, Mr. Edward?

10 MR. EDWARDS: No, thank you.

11 MR. MACDONALD: Your Honor, can I just  
12 clarify something. Oh, go ahead.

13 MS. O'NEILL: And under South Carolina  
14 procedure unless and until Judge Toal rules on this motion  
15 to reconsider, we are precluded from taking it up. Once  
16 she rules we are permitted to take this issue up.

17 THE COURT: I mean, does she not have  
18 deadlines?

19 MS. O'NEILL: She does not. You could go  
20 forever.

21 MR. EDWARDS: Your Honor, they've not  
22 requested --

23 THE COURT: Is it not set?

24 MR. EDWARDS: They've not requested it be  
25 set. The next motion docket is February 2nd.

1 THE COURT: Is that true? Have y'all not  
2 set it? Because that happens in this court all the time.

3 MS. O'NEILL: No.

4 MR. EDWARDS: Your Honor, the next motion  
5 docket in South Carolina is set for February 2nd. There  
6 are 42 defense motions set on that docket. They didn't  
7 ask to have that set.

8 MS. O'NEILL: Your Honor --

9 MR. MACDONALD: Your Honor, can I just  
10 clarify two things.

11 THE COURT: Can I see the settings.

12 MS. O'NEILL: Sure. Go ahead.

13 MR. MACDONALD: I would like to clarify two  
14 things.

15 THE COURT: Actually, can I see the settings  
16 for the February 2nd docket in South Carolina.

17 MR. EDWARDS: Your Honor, I think her  
18 argument is dispositive of this whole matter because what  
19 she started with was, this didn't happen in the Childers  
20 coverage case, this didn't happen in the third party case.  
21 What she said is exactly what I said the first day we  
22 showed up. This was between Childers and Payne & Keller,  
23 the asbestos tort defendant. And if that's true, our  
24 service was appropriate and your plenary jurisdiction has  
25 ended. She just conceded the whole case in making that

1 argument.

2 MS. O'NEILL: I disagree with that Your  
3 Honor because while the initial order from Judge Toal was  
4 in the tort action. The receiver is the one who asked to  
5 have it --

6 THE COURT: Well, did Travelers -- Travelers  
7 and National Union aren't part of the tort action?

8 MS. O'NEILL: No --

9 MR. EDWARDS: If you --

10 MS. O'NEILL: -- no --

11 MR. EDWARDS: -- if you look --

12 MS. O'NEILL: -- there's no direct action in  
13 South Carolina.

14 MR. EDWARDS: If you look at the caption for  
15 the hearing that she just described, it's Childers v.  
16 Asbestos Defendants. The hearing -- during the hearing  
17 the Travelers lawyer asked for permission to appear and  
18 Chief Justice Toal said, Yes, you can speak. You're not  
19 making an appearance. So that argument is true, that  
20 argument is dispositive, and that argument means plenary  
21 jurisdiction expired 30 days after we made our filing.

22 THE COURT: Okay.

23 MR. MACDONALD: Your Honor, If I can just  
24 clarify a few things that I think are getting confused.

25 THE COURT: Please.

1 MR. MACDONALD: One, there are two different  
2 orders that are -- that are kind of getting mixed around.  
3 There was a March 31st, 2023, order which was the insurers  
4 trying to dissolve the receivership. That is on appeal  
5 and that September 8th order from the Court of Appeals is  
6 about staying that order.

7 Then there was an October 5th, 2023, order,  
8 which was the order that was purported to be domesticated  
9 here -- that purported to reanimate Payne & Keller. That  
10 order is not before the Court of Appeals and the Court of  
11 Appeals in their November 21, 2023, order specifically  
12 says that order is not before us. They have not weighed  
13 in on it. And if you look, we've actually attached a  
14 transcript from a status conference --

15 THE COURT: That order hasn't been appealed  
16 or tried to be stayed?

17 MR. MACDONALD: It can't be appealed because  
18 it's on -- it's set for reconsideration.

19 And if you look at our transcript --

20 MR. EDWARDS: It's not set.

21 MR. MACDONALD: In front of the trial judge  
22 to a status conference --

23 THE COURT: Can I see the settings? Can I  
24 see where it's set.

25 MS. O'NEILL: It's not set, Your Honor.

1 MR. MACDONALD: It can't be set because the  
2 judge specifically says that she's going to sit on it.

3 MS. O'NEILL: So we did --

4 MR. MACDONALD: If you look at the  
5 transcript I put on the screen, he's the status conference  
6 where the judge says, The March order is on appeal, not  
7 the order of October and I'm going to wait until further  
8 occurrences develop on that front before I go further. So  
9 that's what I'm going to do, I'm going to defer them on  
10 the motion for reconsideration that's still pending --  
11 still alive and we'll see what happens. The judge is  
12 sitting on that motion, Your Honor.

13 MR. EDWARDS: Now --

14 MS. O'NEILL: Which is why it's not set.

15 MR. MACDONALD: Which is why it's not set.

16 MS. O'NEILL: And to answer Your Honor's  
17 earlier question, in South Carolina there is no limit. I  
18 have another totally different receiver case with a matter  
19 with a motion for reconsideration and we're at four years  
20 and one week waiting for my hearing.

21 MR. EDWARDS: Your Honor, may I approach and  
22 hand you a couple of documents we're all talking about?

23 THE COURT: Sure. As long as I get to hand  
24 them back.

25 MR. EDWARDS: This is a one-way street.

1 This is the prior order. This is the caption of the  
2 hearing she referenced.

3 Your Honor, motions are set in South  
4 Carolina by the request of the parties. There are 42  
5 motions set on February 2nd. They haven't asked this be  
6 set. But I think all of this becomes moot by virtue of  
7 the argument that Ms. O'Neill just made about notice. The  
8 case that she identified correctly Childers v. The  
9 Asbestos Defendants is the caption in your hand.

10 THE COURT: Yeah.

11 MR. EDWARDS: That's how we provided notice  
12 of the domestication. It went to all parties which  
13 reverts back to the law of they're trying to intervene  
14 before -- after judgment and the law is they have 30 days  
15 to get the judgment lifted and to have relief achieved.  
16 And by her very argument, they didn't do that. She says  
17 our service was right. That caption say it's right. That  
18 mean your jurisdiction is expired and all of this is moot.

19 MS. O'NEILL: And I disagree with that, Your  
20 Honor, because your plenary power does not depend on  
21 whether South Carolina has direct action for insurers and  
22 whether or not Travelers or the other insurers are  
23 defendants in the tort action.

24 MR. EDWARDS: That has nothing to do with  
25 this.

1 MS. O'NEILL: I agree. It depends on --  
2 your plenary jurisdiction depends on our intervention in  
3 this case, which is proper because we are a real party in  
4 interest here as the Court has already determined and as  
5 insurers we have standing to address this issue.

6 Let's be honest, the whole point here is  
7 reanimating this company which hasn't done business since  
8 before the Berlin Wall was taken down is to get at  
9 insurance money. And so we are the real parties in  
10 interest in that and we know it's not a final order and  
11 that is why we haven't been included in all of these  
12 things.

13 MR. EDWARDS: Your Honor --

14 MS. O'NEILL: We're served everything else  
15 that the receiver files in every other case.

16 MR. EDWARDS: -- our service was proper  
17 according to her argument, that caption. That means that  
18 they had to inter- -- intervene within 30 days. Travelers  
19 did intervene within 30 days and then they sat on their  
20 rights for 17 of those days and then to your power ended  
21 at the 30th day. They didn't do anything. They were  
22 required to lift the judgment, get their relief and start  
23 taking actions. They filed. They sat for 17 days. They  
24 did nothing. National Union filed on the last day. But  
25 her argument is accurate. The underlying case is

1 Childers, asbestos plaintiff v. Payne & Keller. That's  
 2 where the judgment was rendered. We brought it over and  
 3 domesticated it and served those parties. We then filed  
 4 it in South Carolina so everyone could see it and they  
 5 popped in with 17 days left to go and did nothing. She's  
 6 right but it means they lose.

7 MS. O'NEILL: And I disagree with that  
 8 because what our appearance -- our intervention was a  
 9 motion to vacate which immediately invoked this Court's  
 10 plenary power because it --

11 MR. EDWARDS: It does not.

12 MS. O'NEILL: -- it extends this Court's  
 13 plenary power because it's a motion for new trial.

14 MR. EDWARDS: That is not the law.

15 MR. MACDONALD: Your Honor, we're rearguing  
 16 the last hearing here. You've already ruled on this. You  
 17 haven't heard anything from the receiver about why this is  
 18 not an interlocutory order other than that receiverships  
 19 never end and so --

20 MR. EDWARDS: Your Honor --

21 MR. MACDONALD: -- everything must be final.

22 MR. EDWARDS: Your Honor, your concern at  
 23 the first hearing was that we didn't notice it  
 24 appropriately and so you found that they could intervene  
 25 after the time period although Travelers had intervened

1 timely with 17 days to go and they intervened with one  
2 day.

3 Her concession here brings us right back to  
4 that issue. We did it right. They intervened on time.  
5 They sat on their rights and your jurisdiction ended. So  
6 the mandamus is moot. The appeal is moot. The Secretary  
7 of State case -- it's all over because what she said is  
8 accurate and dispositive.

9 MS. O'NEILL: The motion --

10 MR. EDWARDS: Look at the caption.

11 MS. O'NEILL: The motion extended the time,  
12 Your Honor.

13 MR. EDWARDS: It doesn't. It was --

14 MS. O'NEILL: And motion can still be --

15 MR. EDWARDS: -- post judgment --

16 MS. O'NEILL: -- heard for 75 days.

17 MR. EDWARDS: No, it doesn't.

18 MS. O'NEILL: You know what, I guess -- Your  
19 Honor, Mr. Edwards and I are clearly not going to agree on  
20 this.

21 THE COURT: Yes.

22 MS. O'NEILL: We believe that the Texas law  
23 is very clear that the motion can be heard for 75 days and  
24 even another ten days after that and Mr. Edwards doesn't  
25 agree with that, I understand that.

1 MR. EDWARDS: Your Honor --

2 MS. O'NEILL: But you previously ruled that  
3 we were here and that we were proper.

4 THE COURT: And y'all are here so I'm not  
5 quite sure --

6 MS. O'NEILL: And that -- and that -- and  
7 that you have the authority to do this. So I think we're  
8 back to the question -- which as National Union's counsel  
9 pointed out -- you asked the question, Your Honor, Is this  
10 a final order? And the answer from the receiver is, All  
11 receiver orders are final orders because receiverships  
12 never end and we don't believe that that's correct and we  
13 don't believe that it's correct because it doesn't meet  
14 the definition of a final order. It does not resolve all  
15 the issues between all the parties.

16 It's a pretty simple threshold question.  
17 Does it resolve all the issues between all the parties?  
18 Whoever those parties are. And it does not. And thus it  
19 is not a final order. And thus under clear Texas  
20 precedent, and frankly, South Carolina precedent, it's not  
21 a final order and therefore cannot be domesticated.

22 You couldn't have taken this order to the  
23 Secretary of State in South Carolina and gotten it to  
24 undue a dissolution of a South Carolina corporation. So  
25 it 's not proper to bring that nonfinal order here right

1 now and try to have it -- have a Texas court say we're  
2 going to undue it for a Texas corporation.

3 MR. EDWARDS: Your Honor, let me address  
4 both points. The first point as to the appellate timing,  
5 she's right if she was a party but she's not a party. The  
6 party -- as she conceded, the case as you reflected in  
7 that caption is between the asbestos plaintiff and the  
8 tort defendant. It's not a direct action state. She's  
9 right. The insurers have no place. There are car wreck  
10 cases between the drivers, right. And so our notice was  
11 appropriate. And we gave them a heads up about it, they  
12 made an appearance as a nonparty -- as their papers  
13 reflect -- it's a petition in intervention. And as a  
14 nonparty the 75 days doesn't work. You have to get  
15 something done within 30 days but they filed it on time  
16 and sat on it and your jurisdiction, with respect, expired  
17 at the 30th day.

18 The Court was troubled about the way we had  
19 done notice at the first hearing and so you granted them  
20 party status here. But what she says is accurate. They  
21 weren't parties. So the 75, 105, that doesn't apply to  
22 them -- it just doesn't, right.

23 With respect to the stay, if you look at  
24 Rule 62 of South Carolina Rule of Civil Procedure, look at  
25 the way the appellate court treated our motion to clarify.

1 So the receiver --

2 THE COURT: So Mr. Edwards --

3 MR. EDWARDS: Yes.

4 THE COURT: Let's assume you're right,  
5 they're not parties. Who has a right to challenge that  
6 order?

7 MR. EDWARDS: They do and they have in South  
8 Carolina up and down the courts. That's the thing.

9 THE COURT: But you're saying in Texas  
10 there's no party with a right to challenge the  
11 receivership order issued by South Carolina?

12 MR. EDWARDS: I think they had a right as  
13 they did intervene in the domestication if they wanted to  
14 have something heard in the domestication, they didn't.

15 The decider -- if you look at the law --  
16 full faith and credit, the United States Constitution  
17 requires sister states to recognize sister state  
18 judgments. You see in the transcript I gave you at the  
19 first hearing Chief Justice Toal acknowledged that and  
20 told us, Go file the paperwork in Texas. So the Secretary  
21 of State was left with the decision on what to do. We  
22 talked to them. We gave them the paper. They made the  
23 decision to revoke the dissolution based on our order.  
24 And all of these concerns that you hear, A, they've raised  
25 in South Carolina already and lost, so they're treating

1 this court like an appellate court in South Carolina.

2 THE COURT: Is that true?

3 MS. O'NEILL: No.

4 MR. MACDONALD: No, Your Honor.

5 MR. EDWARDS: It's --

6 MS. O'NEILL: Your Honor, there's a motion  
7 for reconsideration pending and --

8 THE COURT: But it's been raised in South  
9 Carolina?

10 MS. O'NEILL: Whether this is a final order?  
11 No.

12 MR. MACDONALD: Your Honor --

13 MR. EDWARDS: Look at the order I handed up  
14 with the transcript.

15 MS. O'NEIL: This specific question you're  
16 being asked --

17 MR. EDWARDS: The South Carolina court --

18 THE COURT: There's two things you handed  
19 me.

20 MR. EDWARDS: The previous -- I handed you a  
21 transcript and a file stamped order from South Carolina, I  
22 think with the date of March 31.

23 THE COURT: Okay.

24 MR. EDWARDS: That order addresses subject  
25 matter jurisdiction. That subject matter jurisdiction is

1 premised upon facts and law. The facts are Payne & Keller  
2 is registered to do business in South Carolina, it bought  
3 insurance with a view towards coverage in South Carolina,  
4 it owned an equipment distributorship in South Carolina  
5 and we now have verified testimony -- an affidavit and  
6 interrogatory from two guys who said they worked as  
7 employees of Payne & Keller at Bowater Paper Mill in South  
8 Carolina.

9           Those facts trigger law. South Carolina has  
10 a statute that says if you write a policy of insurance  
11 that is protective of lives and interest in South  
12 Carolina, that policy exists in South Carolina --  
13 that's -- that's the statute.

14           The South Carolina Supreme Court in an  
15 opinion written by then Chief Justice Toal says, Doesn't  
16 matter where the policy was written, where it was  
17 negotiated, which citizen of which state is implicated, if  
18 it covers lives and interest in South Carolina, that  
19 policy exists in South Carolina. And in the Covil  
20 receivership -- which we've had with Ms. O'Neill for five  
21 years now -- arguing about a different dissolution  
22 defense. The South Carolina Court of Appeals said the  
23 receiver has control over the receivership company's  
24 insurance policies in South Carolina. Already decided.

25           So we've been arguing with our friends at

1 Travelers about these issues for five years in South  
2 Carolina. There is expansive briefing. There is a huge  
3 track record of rulings at the state and appellate level  
4 and what they're doing is coming here and asking you to  
5 vacate that without the benefit of the five years, without  
6 the benefit of the evidence, without the benefit of  
7 anything but I just don't think the Court has or can --  
8 doesn't have to and cannot reach those issues because of  
9 the concession she made today.

10 MS. O'NEILL: And so, Your Honor --

11 MR. MACDONALD: Your Honor --

12 MS. O'NEILL: -- the question that I believe  
13 you were asking us is: Has the issue of whether this is a  
14 final order been taken up in South Carolina and it has  
15 not. There's a motion for reconsideration pending in the  
16 trial court. The appellate court has not weighed in on  
17 that question which I believe is what the question you  
18 were asking. There's all kinds of other appellate court  
19 rulings on issues related to the receiver and whether he  
20 can act and there's things currently before the Court of  
21 Appeals but the specific question here, the threshold  
22 question, has not been decided by an appellate court in  
23 South Carolina and it is currently subject to a motion for  
24 reconsideration in the South Carolina court.

25 As to the notice, we're here because we've

1 been -- we've been -- our intervention has been granted.  
2 So the issue here is whether your plenary power is  
3 extended by the fact we're parties to this lawsuit.

4           And I think Your Honor identified the core  
5 question here. The receiver's ultimate position is he can  
6 come to Texas and do whatever he wants and we can't do a  
7 thing about it. He can do whatever he wants in Texas. He  
8 can make whatever representations he wants and nobody gets  
9 to say anything. That's not due process and that's why we  
10 believe that this issue is so important because this is  
11 not a final order and it should not have been allowed to  
12 be domesticated under the law. And is it possible for  
13 them to go get a final order? Sure, it is. Entirely  
14 possible. They just haven't done it. A final order is a  
15 totally separate lawsuit between Ms. Childers or the  
16 receiver or whomever saying, Payne & Keller, 40 years ago  
17 when you dissolved you did that fraudulently. Here's our  
18 evidence. Here's our petition, here's our lawsuit.

19           THE COURT: The judge says that.

20           MS. O'NEILL: The judge --

21           THE COURT: The judge says that -- I mean,  
22 and I'm just telling you from what I know findings of fact  
23 and conclusions of law are not normally done in Texas  
24 unless you're a finality.

25           MS. O'NEILL: Yeah, so --

1                   THE COURT: And in that order it says that  
2 there's constructive fraud.

3                   MS. O'NEILL: In South Carolina they're done  
4 all the time and they are written proposed orders by the  
5 parties. There was no hearing on this.

6                   MR. EDWARDS: That's false.

7                   MS. O'NEILL: But --

8                   THE COURT: I find that hard to believe that  
9 there was no hearing.

10                  MS. O'NEILL: There was no hearing -- no  
11 evidentiary hearing, let me put it --

12                  MR. EDWARDS: Your Honor --

13                  MS. O'NEILL: -- that way --

14                  MR. EDWARDS: -- there were --

15                         (Simultaneous crosstalk.)

16                  MR. EDWARDS: There were multiple hearings.  
17 The receiver submitted a great deal of evidence. The  
18 Court told us to go do discovery. We did discovery. The  
19 insurers did not do any discovery. We asked the insurers,  
20 what do you know about the dissolution? And they  
21 unsurprisingly said nothing because really it's none of  
22 their business. It's a corporate event.

23                         And so the judge looked at all of that  
24 evidence, none of which is before you and made factual  
25 findings that are dispositive of the issue of Payne &

1 Keller and constructive fraud. We didn't ask her for  
2 that, the plaintiffs asked her for that. But their  
3 argument taking to it's logical conclusion means  
4 receiverships, guardianships, accountings can never cross  
5 state lines. That can't be the law. It can't be the law.  
6 It doesn't work.

7 MS. O'NEILL: This order is one step in a  
8 final judgment which is a determination of liability and  
9 that has not --

10 THE COURT: I disagree because I just don't  
11 -- in my experience when you have a receivership it -- it  
12 is created in the middle of litigation. It's not created  
13 at the end of litigation.

14 MS. O'NEILL: Correct.

15 THE COURT: Sometimes it is. But usually  
16 it's created during the pendency of litigation to somehow  
17 control the corpus.

18 MS. O'NEILL: Correct. But the issue is  
19 whether it's a -- the fact that there's a receiver does  
20 not make this ruling a final order.

21 Again, I think there's a way this could be a  
22 final order which is a totally separate lawsuit with this  
23 being the only question. But it was one motion as Your  
24 Honor heard this morning several motions in cases which  
25 are motions along the way to a final order in a finding of

1 liability, that's exactly what this is.

2 MR. EDWARDS: These motions --

3 MR. MACDONALD: Your Honor, I -- can I just  
4 say a few things. There's a lot of things and I'd like to  
5 just correct the record on a few things.

6 One, you're correct, receiverships go --  
7 we're not challenging the receivership here. We're  
8 challenging a purported reanimation of a Texas company.  
9 Mr. Edwards says, Well, you know, we found a couple pipe  
10 fitters who worked in South Carolina and we think they  
11 owned a subsidiary in South Carolina. A, that's not true.  
12 Payne & Keller did not own a South Carolina subsidiary.  
13 There are two different M & W companies. One incorporated  
14 in Texas and one incorporated in South Carolina.

15 THE COURT: Mr. MacDonald, what I don't want  
16 to hear is any argument you've made the South Carolina.

17 MR. MACDONALD: This hasn't --

18 THE COURT: This is about the receivership.  
19 This is not about whether or not 11.053 allows the  
20 reanimation because that seems to me that was argued  
21 extensively in South Carolina.

22 MR. EDWARDS: Your Honor --

23 THE COURT: That issue has been briefed and  
24 argued to death in South Carolina. The issue here is  
25 whether or not -- to me, the only issue is whether it's a

1 final judgment.

2 MR. MACDONALD: Your Honor, it wasn't argued  
3 by my client because my client didn't get a chance to  
4 speak at the hearing.

5 THE COURT: I don't --

6 MR. EDWARDS: What more finality could be  
7 reached on this issue? It was briefed. There was  
8 evidence submitted. They had an opportunity to submit  
9 evidence, they declined to do so. It's been -- there were  
10 three or four -- three arguments on this topic, at great  
11 length. The receivership court made the finding and told  
12 us what to do with it and that's why we're here.

13 THE COURT: And not to be dismissive, I  
14 just -- I'm not going to act as Judge Toal's  
15 reconsideration court nor am I going to act as the  
16 appellate court in --

17 MS. O'NEILL: Sure.

18 THE COURT: -- in South Carolina. And the  
19 is if you -- I mean, her order specifically sites 11.053.  
20 She's not -- I have to assume and I always will assume  
21 that a judge does what the law says. And if she believes  
22 something -- the law says something and it doesn't, then  
23 take her or him up on appeal.

24 MS. O'NEILL: Right.

25 THE COURT: I'm not their appellate court.

1                   So she specifically sites the new statute  
2 that says what you state does not allow her to do this, I  
3 mean, there's going to be -- there's going to be panels of  
4 people that look at this again but I'm not the person to  
5 reconsider Judge Toal's.

6                   MS. O'NEILL: But on the threshold issue  
7 that Your Honor is looking at, which is whether this is a  
8 final judgment. You know, the fact that the receiver --

9                   THE COURT: But my concern --

10                  MS. O'NEILL: -- brought it to Texas -- oh,  
11 sorry.

12                  THE COURT: My concern though, Counsel --  
13 no, I interrupted you. I apologize. But my overarching  
14 concern is the -- obstruction isn't the right word. It's  
15 the dilatory way you want this Court to perceive a  
16 receivership. This Court issues receiverships five times  
17 a year maybe. And if this Court can't issue a  
18 receivership and it take action, then the receivership is  
19 superfluous -- then it has no meaning whatsoever. If the  
20 receivership has to be in a final order then there might  
21 as well not be a receivership.

22                  So I have a -- I understand the words you're  
23 saying and I understand the reasoning that you're putting  
24 forward but it doesn't comport with the reality of how a  
25 court functions. A Court can only function through a

1 human and in this case the human is Mr. Brady's client --  
2 Mr. Edwards' client and the issue is that client has to  
3 function during the pendency of litigation in order for  
4 the Court to act in a way in which it feels is  
5 appropriate. If you feel that the Court is acting  
6 inappropriately then you take the Court up.

7 MS. O'NEILL: I understand that. And  
8 here's -- I appreciate the tension that you're seeing and  
9 it is what's difficult about these receiverships and how  
10 they've come to be in South Carolina and we have --

11 THE COURT: These are receiverships as they  
12 exist in the state of Texas as well.

13 MS. O'NEILL: I don't think Texas has 12 or  
14 13 of them like this. But anyway, yes --

15 THE COURT: But I'm saying there's probably  
16 three entities right now that I have under receivership.

17 MS. O'NEILL: So to your point though, Your  
18 Honor, the receiver -- the receivership has to act through  
19 a human being. That human being is Mr. Edwards' client.  
20 Mr. Edwards' client went and got -- Mr. Edwards' client  
21 saw this order and this order has certain things that  
22 allow Mr. Edwards' client in South Carolina in that  
23 personal injury wrongful death lawsuit to do. It tells  
24 him in South Carolina I -- you know, I'm not going to use  
25 this defense. It tells him in South Carolina the

1 plaintiffs when they make their liability arguments here's  
2 the things I can do.

3 But what the difference is, is the receiver  
4 took that order and opportunistically brought it to Texas  
5 which is what brings us here.

6 THE COURT: Let me ask this question -- and  
7 Mr. Edwards has said this multiple times. Your client was  
8 told to come to Texas, correct?

9 MR. EDWARDS: Yes, Your Honor. That's the  
10 transcript I gave you at the last hearing when we were  
11 here in-person. There was a --

12 THE COURT: Do you disagree with that, that  
13 the judge in South Carolina --

14 MR. MACDONALD: We do disagree --

15 MS. O'NEILL: I do, Your Honor.

16 MR. MACDONALD: -- with that, Your Honor.

17 (Simultaneous crosstalk.)

18 THE COURT: -- receivership?

19 MS. O'NEILL: We do.

20 MR. MACDONALD: The order does not say to  
21 come to Texas. There are a variety of things said at that  
22 hearing. At various times they're talking about starting  
23 original proceedings here in Texas and litigating it.  
24 Sometimes they're suggesting, Well, we'll get findings of  
25 constructive fraud and then maybe we can go to the

1 Secretary of State. There was no direct order form the  
2 Court to come to Texas and do anything.

3 MR. EDWARDS: Your Honor, you can --

4 MS. O'NEILL: I do disagree --

5 MR. EDWARDS: -- read the order yourself.

6 MS. O'NEILL: -- and I don't think the judge  
7 could frankly do that. For the same reason that, you  
8 know, respectfully, I don't think --

9 THE COURT: I mean, Mr. Edwards' client  
10 works for the Court. So if the Court even tells them to  
11 do X, Y and Z, they don't need --

12 MR. EDWARDS: Your Honor, we've addressed  
13 this at every hearing we've had. There was a hearing in  
14 Charleston, South Carolina -- which I remember it because  
15 the Court usually sits in Columbia -- and a Travelers  
16 lawyer, not Ms. O'Neill, from Washington D.C. came and  
17 said, You can't order the State of Texas to do anything.  
18 And Chief Justice Toal said, I think the Receiver is just  
19 going to take the paper and file it with the Secretary of  
20 State and looked at us like that's it. And that's what we  
21 did.

22 And I'll also tell the Court we have been  
23 instructed by the receiver to keep -- by the receivership  
24 court to keep her advised about what's going on in this  
25 court. And so every time something happens here we do a

1 notice of filing so the receivership court can see what  
2 we're doing. So she is following this closely. It's not  
3 like we're running around doing something  
4 opportunistically. They were at that hearing. She told  
5 us to do this. We did it. It's not secret. We noticed  
6 it the way we were suppose to under the caption of the  
7 case where it happened. You know, they use terms about  
8 secretly and quietly -- we represent a Court, we work for  
9 a Court. We're doing what we're suppose to do. We're  
10 trying to make this receivership move forward. That's it.

11 MS. O'NEILL: But again, Your Honor, the  
12 question is finality of the order. And again --

13 THE COURT: I just -- the finality -- you've  
14 got to come to me with something more than just the word  
15 finality because when it comes to receivership, finality  
16 is -- give me a situation in which a receivership can  
17 exist with a final judgment.

18 MS. O'NEILL: I think the receiver -- here's  
19 exactly how the receivership could --

20 THE COURT: And how does it exist -- if I  
21 have to take over an apartment complex because they're  
22 failing to keep their people safe, how do I do that and  
23 have that receivership order enforced even though it can't  
24 be final because I haven't figured out the damages.

25 MS. O'NEILL: So the question is -- to your

1 point, Your Honor, as I'm understanding the question  
2 you're asking me, is the appointment of the receiver in  
3 the first instance. And certainly, the example you just  
4 gave me, that has to be a final -- I've made a decision,  
5 I'm appointing a receiver, we're done, it gets to act.  
6 Totally agree. But the issue --

7 THE COURT: But that's not a final judgment,  
8 that's an interlocutory judgment.

9 MS. O'NEILL: Right. But that's not the  
10 finality of the question we're here on. We have some  
11 issue about whether a receiver was appropriate, yes, for  
12 sure. Okay. Those are South Carolina issues that are  
13 getting dealt with in South Carolina. The question here  
14 is: Is this order saying revoke the termination? Is that  
15 a final order? And that doesn't relate to the existence  
16 of the receivership. The question isn't the receiver  
17 versus Payne & Keller. The receiver is Payne & Keller.  
18 And how do you get finality on that? This is exactly how  
19 you get finality. The Childers file a separate lawsuit  
20 and the separate lawsuit is Childers v. Payne & Keller and  
21 the request they ask is, Please find that Payne & Keller's  
22 dissolution was fraudulent and their termination needs to  
23 be revoked, Where for grant me this relief. And then  
24 that -- that ruling gets entered and that's it. That's  
25 the only question in the lawsuit. That's final. But it

1 didn't happen that way. What happened was Childers said  
2 in my -- in the context of all of my case, here's another  
3 motion that I've got on another issue and it's not final  
4 in that context.

5 THE COURT: I have a hard time -- I have a  
6 hard time following that because what you're doing is  
7 you're creating a way in which the purpose of the  
8 receivership is frustrating. You're saying that there has  
9 to be a single moment in time in which one issue is  
10 litigated fully and then based on that issue you can then  
11 move on but that's not how receiverships work in any  
12 instance. A receivership is an organic faith. And it  
13 can't work in the context of litigation unless it has room  
14 to breathe and you're -- you're choking it. You're saying  
15 it has to -- it has to be final. It has to be done. It  
16 has to be terminated in order for it to exist and that's  
17 not how receiverships work.

18 MS. O'NEILL: If it wants --

19 MR. MACDONALD: I have the page of our  
20 instructions from the receivership court if it would be  
21 helpful.

22 THE COURT: Sure.

23 MR. MACDONALD: This is page 35.

24 THE COURT: I mean, y'all are arguing black  
25 and white. You're not talking about a living

1 receivership.

2 MR. MACDONALD: Well --

3 THE COURT: That's not how receiverships  
4 work, I mean, they just don't.

5 MR. EDWARDS: Mr. Lee is a Travelers'  
6 lawyer.

7 MR. MACDONALD: And Your Honor, we'd  
8 instruct you to read the pages beyond that because Judge  
9 Toal -- you know, the page before says something  
10 different, the page after that says something different,  
11 rather than reading in isolation. I mean, we've put up on  
12 the screen where she's saying they're going to go litigate  
13 the issue in Texas and here's another piece of transcript  
14 where she says, I'm going to direct the receiver to pursue  
15 a certain course of action before the proper tribunal,  
16 i.e. file a new action here in Texas and litigate the  
17 issue here.

18 MR. EDWARDS: The tribunal --

19 MR. MACDONALD: But putting that aside --

20 COURT REPORTER: I cannot take all of you  
21 talking at the same time.

22 MR. EDWARDS: I apologize.

23 MR. MACDONALD: We can get back to your  
24 question Your Honor which is we're not treating this as a  
25 living receiver.

1 I think a way to think about this is that  
2 Payne & Keller has certain defenses to suit in South  
3 Carolina. One of those defenses is that it's a dissolved  
4 entity and it can't be sued. Judge Toal has now entered  
5 an order saying, No, that's not a good defense. You --  
6 you can be sued here because you committed constructive  
7 fraud. We think that's wrong. That's fine. But you  
8 can't just take a ruling that a defense has -- isn't a  
9 good defense and come into another state and say, See, now  
10 this company can't make this defense anywhere, this is a  
11 final judgment. It's just a ruling on an affirmative  
12 defense that Payne & Keller had.

13 THE COURT: Yes, but isn't that to  
14 effectuate the purpose of making sure that the insurance  
15 policies are alive and well in South Carolina.

16 MR. EDWARDS: It does. And that point blows  
17 up right in his face, Your Honor. There have been a  
18 number of asbestos cases filed against Payne & Keller in  
19 Texas during the receivership. These insurers -- these  
20 insurers hire defense counsel in Texas to defend those  
21 cases. What do they raise? The dissolution defense. The  
22 Bowman & Brooke e-mails that they were asking to seal last  
23 time reflect that Bowman & Brooke, the lawyers they hired  
24 for the receivership said don't use that defense, it won't  
25 work and it will be detrimental. They used it anyway.

1 The court says it's a fraudulent defense. They use it  
2 anyway. You can't do that. You can't do that. That  
3 issue has been decided by the receivership court. She  
4 issued findings of fact and conclusions of law. She says  
5 it's fraudulent. We tell that lawyer we're the client,  
6 you can't raise that defense, he ignores us at their  
7 direction. We sue him and say you have to talk to us,  
8 we're the client, you can't ignore us. He files a  
9 Rule 202 petition in Houston to take my deposition, their  
10 lawyer. It just spirals out of control. We're trying to  
11 do the court -- the receivership court's business and  
12 these insurers don't like it and they will go to any court  
13 anywhere, any time to try to challenge what has been  
14 argued in the receivership court.

15           We're just trying to do our job and they're  
16 just trying not to pay claims. By the way, to date,  
17 they've paid zero claims. Zero dollars have moved hands  
18 in Payne & Keller. Every case that has been filed in  
19 Texas we've gone and exerted the Burton doctrine, got it  
20 dismissed. Said if you want to sue us, you've got to sue  
21 us in South Carolina in the receivership court. All seven  
22 of the Lubel Voyles cases and the Mark Lanier case, all  
23 dismissed. We're doing our job. We're trying to do our  
24 job.

25           THE COURT: Okay. Anything else?

1 MR. MACDONALD: Your Honor, whether these  
2 suits are filed here or in South Carolina the fundamental  
3 problem of the reanimation of Payne & Keller doesn't go  
4 away.

5 They're mischaracterizing Bowman & Brooke  
6 e-mail which says that under South Carolina law we don't  
7 think Texas dissolution is a defense in South Carolina.  
8 Obviously those were raised in a Texas court which Bowman  
9 & Brooke thinks is a valid defense in Texas.

10 MR. EDWARDS: No --

11 MR. MACDONALD: It says, Our conclusion is  
12 that it serves to limit claims against a corporation  
13 existing in Texas that are brought in a Texas state court.

14 Any ways, that's what it says. It's  
15 Exhibit 3 to their response.

16 MR. EDWARDS: That's false. Bowman & Brooke  
17 --

18 MR. MACDONALD: Okay. Well, I'll just hand  
19 it to you.

20 MR. EDWARDS: Bowman & Brooke is the firm  
21 that said don't use the defense. Bowman & Brooke was  
22 selected by these lawyers as Payne & Keller's national  
23 counsel. When Payne & Keller got sued in Texas, did they  
24 use Bowman & Brooke? No. They found a different firm.  
25 Bowman & Brooke has two offices in Texas. They went to a

1 different firm that had not told them it's a bad defense,  
2 had not told them it's detrimental. They went to a little  
3 two-person firm and had a guy show up and do the  
4 dissolution fits after the prior lawyers had said it was  
5 bad and after Toal had said it was fraudulent. That is  
6 wording the business of the receivership. It was not  
7 Bowman & Brooke and that's not accurate.

8 MR. MACDONALD: I mean, Your Honor, you have  
9 the letter. That letter has nothing to do with the  
10 constructive fraud, whether the company should be  
11 reanimated. All it's about is whether under South  
12 Carolina law they expect Judge Toal to accept a  
13 dissolution as a defense to liability and it's written in  
14 2021, two years before the company is purported to be  
15 reanimated.

16 I would submit that if the receiver believed  
17 that Bowman & Brooke was accurate they wouldn't have tried  
18 to reanimate the company because it says there that you  
19 can sue them any ways.

20 MR. EDWARDS: We didn't.

21 MR. MACDONALD: You made the original  
22 constructive fraud filing in South Carolina.

23 MR. EDWARDS: We reported evidence that we  
24 located to the receivership court as is our job.

25 Do the investigation, tell the court what

1 you found -- we didn't ask for a finding. We didn't ask  
2 for anything. We said here's what we see and the  
3 plaintiffs made a motion. Our job is not to pretend like  
4 Payne & Keller was a perfect company. It wasn't. Our job  
5 is to manage it's assets and defendant's liabilities and  
6 be honest with the receivership court. We did an  
7 investigation. We found a Baron & Budd meso case. We  
8 told the court, here's what we found. We found dioxin  
9 cases, here's what we found. We found a reported silica  
10 case in Louisiana, here's what we found. All of it before  
11 dissolution.

12                   The question on dissolution is, Did they  
13 dissolve with knowledge of known or anticipated claims and  
14 if they did, did they make provision for them and Toal  
15 found they knew about claims. They had already had an  
16 asbestos case. They had already had a silica case. They  
17 had already had dioxin cases. Their insurers were  
18 excluding asbestos from their coverage, they knew.

19                   Did they make provision for those claimants?  
20 They did not. So she ruled what she ruled, that's it.

21                   MR. MACDONALD: Your Honor, are you aware of  
22 how, kind of, this case all started? In 2021 plaintiff,  
23 Childers, files a lawsuit against exclusively defunct  
24 entities.

25                   MR. EDWARDS: Not true.

1 MR. MACDONALD: Nine defunct entities.

2 MR. EDWARDS: Not true.

3 MR. MACDONALD: Asked that Mr. -- none of  
4 them respond to service, they're all defunct. Mr.  
5 Protopapas -- selects a receiver and that Mr. Protopapas  
6 be appointed the receiver of all those entities. There's  
7 no one there to argue the other side because none of the  
8 companies still exist. Mr. Protopapas is then appointed  
9 and then files all the third party insurance claims.  
10 They've been trying to try this case in absentia since the  
11 beginning. And that's one of the reasons that you can't  
12 do this. You can't just go 40 years in the past and pluck  
13 companies out of existence -- and they mentioned earlier,  
14 Well, you know, the insurers didn't have any evidence so  
15 this wasn't fraud at the hearing. There's a reason for  
16 that -- everyone is dead. Every one of the directors who  
17 made this decision is dead. This is just a dispute of  
18 what the meaning of public filings is from the 1980s.

19 And this is the reasons there are statutes  
20 of limitations and statute of repose so you can't in  
21 absentia 40 years later say, Hey, here's a company, we're  
22 going to bring it back and no one can argue to contrary.  
23 And if this is allowed to stand, this is going to keep  
24 happening. People are going to now start plucking from  
25 the corporate graveyard companies out where no one is

1 alive to talk about what they did and say, Well, you know,  
2 it's a construction company and there was an asbestos case  
3 at some point. This must have been fraudulent, we're  
4 going to bring this one back too.

5 So for a variety of reasons we don't think  
6 that Texas should recognize and allow this to happen and  
7 we certainly agree that there's no final judgment of  
8 liability finding against Payne & Keller. A defense  
9 hasn't found in South Carolina to not be valid.  
10 Eventually there will be a trial on whether Payne & Keller  
11 is liable for asbestos and then the whole thing will go up  
12 on appeal as is done in normal case, Your Honor.

13 For that reason we think at the very least  
14 the effect of this domestication needs to be stayed until  
15 that process is completed.

16 MS. O'NEILL: As the movement, may I have  
17 the last word on something Your Honor asked me before I  
18 haven't responded to?

19 THE COURT: Sure.

20 MS. O'NEILL: You asked me how it is that  
21 the receiver, a living thing, can do his job if this isn't  
22 a final order and I would answer it this way --

23 THE COURT: That was not my question.

24 MS. O'NEILL: I'm sorry.

25 THE COURT: That was not my question.

1 MS. O'NEILL: Then I misunderstood your  
2 question. Okay. Would you --

3 THE COURT: Receiverships are never final  
4 orders.

5 MS. O'NEILL: Right. Right.

6 THE COURT: Usually receivers are dismissed  
7 before the final order is entered.

8 MS. O'NEILL: Yes, correct. And I  
9 understood the Court to ask me before was if this issue --  
10 if this order we're here about is not a final order and I  
11 have to have a final order every time the receiver does  
12 something, how could the receiver do his job? I  
13 understood that was the question the Court was asking  
14 before.

15 THE COURT: That is the question, correct.

16 MS. O'NEILL: Yes. So I'd like to respond  
17 to that question.

18 THE COURT: Please.

19 MS. O'NEILL: And here's how the receiver  
20 does his job. Exactly the way Mr. Edwards described he  
21 just did. You say I am -- I am Payne & Keller and I have  
22 these defenses left, this defense doesn't exist. Can't be  
23 asserted but you continue to do what actually you're  
24 appointed to which is lookout for the best interest of  
25 Payne & Keller, which clearly as you can tell there's a

1 disagreement between the insurers and the receiver as to  
2 whether the receiver is doing it but that's not this  
3 Court's problem. He could still do his job as appointed  
4 by the court of protecting the best interest of Payne &  
5 Keller, of being in charge of determining the defensive  
6 lawsuits in South Carolina -- and yes, there's a dispute  
7 about whether he can do that in other places. But the  
8 fact is all of those things are how he can continue to do  
9 his living, breathing job while this is still not a final  
10 order.

11 THE COURT: And I don't know if I agree or  
12 disagree. I think at the end of the day this is -- at  
13 this point in time much to do about nothing. If all the  
14 litigation that stems from this has to occur in South  
15 Carolina, there will be finality in that court. The  
16 finality has come today but the receivership has to be  
17 allowed to function. And if it is true that South  
18 Carolina has state law that says that any policy that  
19 affects a citizen of South Carolina needs to live and  
20 breathe then by resurrecting the policies is not a bad  
21 thing. There's no finality. All it does is it allows the  
22 receivership to continue to do the job of the  
23 receivership. These cases will be litigated. These cases  
24 will be determined in South Carolina and at this point all  
25 we're allowing the receiver -- the receiver to do is his

1 job. And at the end of the day when this is all wrapped  
2 up in South Carolina, you will figure out whether or not  
3 you're liable. But as of right now, all we know is the  
4 South Carolina court has found that policies issued in  
5 Texas pertain to South Carolina citizens and because of  
6 that we need to bring Payne & Keller back to life for the  
7 time being. She may be right, she may be wrong but that  
8 decision hasn't been made today. You haven't put it up  
9 for reconsideration and it will eventually be made and at  
10 that point we'll figure out what happens. But I will not  
11 disallow a receivership to exist especially when it's put  
12 into effect by another court.

13 MS. O'NEILL: And just to be clear, Your  
14 Honor, we weren't asking you to disallow the receivership  
15 to exist. We're just asking this Court to say that the  
16 domestication isn't proper because it's not a final order.  
17 I appreciate what the Court has said all day today and I  
18 know you're tired of our arguing.

19 THE COURT: No, I don't -- y'all are getting  
20 paid. If y'all want to sit here and argue the same point  
21 that y'all have been arguing for months, I'm happy -- I'm  
22 happy to hear it.

23 MR. MACDONALD: Your Honor, all we're asking  
24 is that until -- you're right, a lot of this is going to  
25 continue to be litigated in South Carolina. All we're

1 asking is that --

2 THE COURT: I don't understand the harm  
3 that's taking place.

4 MR. MACDONALD: Well, the company --

5 THE COURT: I mean, we've spent months --

6 MR. MACDONALD: Two things --

7 THE COURT: -- on briefing in this case.

8 And as of today, there is no harm in Texas.

9 MR. EDWARDS: When this started --

10 MR. MACDONALD: There is two harms in Texas.  
11 One, there are new lawsuits being filed in Texas.

12 THE COURT: I was just -- Mr. Edwards, as an  
13 officer of the court -- just told this court that they've  
14 all been dismissed.

15 MR. MACDONALD: They've been nonsuited  
16 pursuant to a tolling agreement and instructed to re-file  
17 in South Carolina.

18 THE COURT: Okay.

19 MR. EDWARDS: That's the Burton doctrine.

20 MR. MACDONALD: So suits are still being  
21 filed. Two, there are a lot of complicated issues of  
22 Texas corporation law that I don't think anyone --

23 THE COURT: This Court's job is not to  
24 entertain you.

25 MR. MACDONALD: Your Honor, what about the

1 shareholders of Payne & Keller, do they own the company?  
2 They haven't filed franchise taxes for 40 years, do they  
3 have to file franchise taxes for 40 years? Who is  
4 responsible for that? What about the heirs of the  
5 directors who have allegedly committed constructive fraud,  
6 are they now liable despite, you know, in 1989 knowing  
7 they're not liable? This opens a Pandora's box. When the  
8 alternative to just leave the company --

9 THE COURT: Mr. MacDonald, are we -- what  
10 are we talking about?

11 MR. MACDONALD: We're talking about --

12 THE COURT: I mean, I'm not -- my life and  
13 job here is not to delve into a world of eventualities and  
14 what-ifs. My job today is to say whether or not I'm going  
15 to vacate this final judgment and so I'm not -- I don't  
16 want to ponder this world of tomorrow.

17 (Simultaneous crosstalk.)

18 THE COURT: What is the harm in the world of  
19 today?

20 MR. MACDONALD: There's no harm to the  
21 receiver to vacate the judgment and allow him to continue  
22 to represent Payne & Keller in South Carolina -- to  
23 continue to litigate on behalf of Payne & Keller in South  
24 Carolina. There's no harm to anyone. The only harm is  
25 for allowing this company to continue to exist as we let

1 South Carolina work itself out -- as we let the judgment  
2 itself in South Carolina in the litigation --

3 THE COURT: You represent an insurance  
4 company. You don't represent Payne & Keller. So I'm not  
5 sure --

6 (Simultaneous crosstalk.)

7 MR. MACDONALD: Nobody --

8 THE COURT: The --

9 MR. MACDONALD: -- represents --

10 MR. EDWARDS: We --

11 THE COURT: -- the tribute --

12 MR. MACDONALD: -- Payne & Keller, Your  
13 Honor.

14 MR. EDWARDS: -- represent Payne & Keller.

15 THE COURT: -- an interesting one. You  
16 don't have standing to represent these -- you don't -- you  
17 don't represent anybody related to Payne & Keller,  
18 correct? You're an insurer that pays claims against Payne  
19 & Keller.

20 MR. MACDONALD: Yes. And we have a right to  
21 rely on Texas law and Texas law said that Payne & Keller  
22 does not exist and no longer has a right to sue or be  
23 sued.

24 THE COURT: I was taking issue with the  
25 argument about the fantastical world of the families of

1 the poor directors.

2 MR. MACDONALD: But as a Texas state judge  
3 you have a right to weigh Texas' interest in whether this  
4 company should be reanimated after so long.

5 THE COURT: Agreed. Anything else?

6 MS. O'NEILL: No, Your Honor.

7 MR. MACDONALD: Your Honor, I'll remind the  
8 Court that your jurisdiction lapses tomorrow.

9 THE COURT: I understand. I will not be  
10 ruling. All right. Thank y'all.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

REPORTER'S CERTIFICATE

THE STATE OF TEXAS    )  
COUNTY OF HARRIS     )

I, Cynthia M. Grijalva, Official Court Reporter in and for the Harris District Court of Harris County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is \$979.20 and was paid by Morgan, Lewis & Bockius LLP.

WITNESS MY OFFICIAL HAND this the 28th day of January, 2024.

/s/ Cynthia M. Grijalva

\_\_\_\_\_  
Cynthia M. Grijalva, Texas CSR 10996  
Expiration Date: 4/30/2025  
Official Court Reporter  
127th District Court  
Harris County, Houston, Texas  
832-927-2530  
cynthia\_grijalva@justex.net

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

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

Case No. 2021-CP-40-03484

---

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.; and 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 All 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; 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.; and Compass Risk Services, LLC, Third-Party Defendants,

Of which, Payne & Keller Company, By and Through its Duly Appointed 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 of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; and Continental Insurance Company, Individually and as Successor in interest to Harbor Insurance Company;

and

Travelers Casualty and Surety Company, f/k/a the Aetna Casualty and Surety Company, are Appellants.

---

**RESPONDENT'S RETURN TO MOTION FOR  
CERTIFICATION BY THE SUPREME COURT**

---

Respondent Payne & Keller Company, By and Through its Duly Appointed Receiver, Peter D. Protopapas ("the Receiver"), hereby files this Return to Appellants' Motions for Certification by the Supreme Court.<sup>1</sup>

The Receiver disagrees that this matter involves the type of issues of significant public interest and legal principles of major importance required by Rule 204(b) of the South Carolina

---

<sup>1</sup> Appellants 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; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company ("Certain Insurers") filed a Motion for Certification on January 2, 2024. Appellant Travelers Casualty and Surety Company ("Travelers") filed a Joinder to Motion for Certification by the Supreme Court on January 11, 2024. This Return addresses both the initial motion and the joinder.

Appellate Court Rules. A review of the motion for certification and the joinder shows that Appellants paint the issues involved in this appeal with a broad brush, seeking to obtain an advisory opinion from this Court on the asbestos docket as a whole. Appellants not only attempt to skip review by the South Carolina Court of Appeals, they also attempt to wrest issues that are currently under consideration by the circuit court to obtain appellate review before there is even a final order for this Court to review and obtain post-hoc appellate review of numerous orders establishing receiverships that were never challenged or appealed. Under the guise of a motion for certification pursuant to Rule 204, Appellants’ real goal is for this Court to issue general guidance on broad issues not currently before the Court of Appeals in the semblance of an extraordinary writ in this Court’s original jurisdiction.<sup>2</sup>

Appellants identify two issues they believe satisfy Rule 204’s requirements—whether the circuit court can appoint a receiver over companies whose assets are insurance policies and whether the circuit court’s order “reviving” Payne & Keller was proper. Appellants misstate the issues currently before the Court of Appeals, and it is imperative for this Court to understand what is on appeal in this case. It is the narrow issue of whether the circuit court properly denied Appellants’ motions to dismiss the third-party claims brought by the Receiver and dissolve the receivership. In the order on appeal, the circuit court ruled (1) the Receiver has standing to bring his claims against Appellants because Payne & Keller has property within South Carolina and its

---

<sup>2</sup> Travelers admits this in its joinder, stating “That authority is typically exercised through a writ of certiorari, but the result would be the same here if the Court grants the Motion for Certification.” (Joinder at 6.) However, this is not true. Appellants moved to certify this appeal, so this Court’s review would be limited to the issues currently on appeal in this case. Appellants have not moved for an original jurisdiction writ of certiorari and, in order to do so, they would need to identify specific issues from a specific case and properly serve it on all parties involved in that case. Rule 245, SCACR. Appellants cannot piggy-back other issues and cases that they wish to have reviewed into this appeal by way of a motion for certification.

1986 dissolution does not preclude the current receivership under Texas law, (2) Appellants are subject to the personal jurisdiction of South Carolina courts, (3) the Receiver's third-party claims were properly brought under Rule 14(a), SCRCP, and (4) Rule 12(b)(8) of the South Carolina Rules of Civil Procedure does not prohibit the Receiver from asserting his third-party claims in the underlying action.

Despite Appellants' assertions, the March 31, 2023 order did not alter the corporate status of Payne & Keller. Therefore, hypothetical questions as to whether a South Carolina circuit court ultimately may alter the status of a dissolved Texas corporation are not properly before this Court at this time. In the order on appeal, the circuit court stated: "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." (App. 18.) In the order on appeal, the circuit court denied the motion to dismiss and found the Receiver's claims against Appellants could proceed.

While the circuit court did issue a subsequent order revoking the termination of Payne & Keller, that order is not on appeal and not properly before this Court. The circuit court issued that order on October 5, 2023, ruling on Plaintiff Lenora Childers's motion to revoke the termination of Payne & Keller after briefing and a hearing. Appellants and other insurer defendants filed motions to reconsider the October 5, 2023 order, which are still pending before the circuit court. Appellants have not taken any steps to have those motions heard. Appellants' inclusion of this order in the Appendix in this appeal is improper.

This is not the first time Appellants have sought to overturn the October 5, 2023 order without that order being properly before our appellate courts. On November 21, 2023, in this appeal, the Court of Appeals issued an order stating:

After careful consideration of Appellants’ motion to “clarify and enforce Rule 205,” SCACR, the motion is denied. Appellants’ motion was prompted by an order issued by the circuit court on October 5, 2023, which Appellants contend the circuit court lacked jurisdiction to issue. Appellants request that this court “enforce” its exclusive jurisdiction over the matters on appeal, confirm that the circuit court acted outside of its jurisdiction in issuing the October 5 order, and “enjoin[]” the circuit court from proceeding further with regard to matters affected by this appeal. The order that was properly appealed to this court is the circuit court’s March 31, 2023 order denying Appellants’ motion to dissolve the receivership and motion to dismiss. This court will take no action on any order which is not properly before it. *See Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) (“Service of the notice of intent to appeal is a jurisdictional requirement . . . .”). Moreover, further “motions to clarify” filed by any party may not be considered by this court. *See* Rule 221(c), SCACR (“The appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding the party’s appeal.”).

(App. 3–6.) Dissatisfied with the Court of Appeals’ ruling, Appellants filed this motion for certification to this Court, hoping to convince this Court that their appeal includes these issues and have the Court issue an opinion which would effectively overturn the October 5 order of the circuit court without its being properly before the Court.

Also improper is Appellants continued and blatant disregard for the South Carolina trial and appellate courts through the duplicitous filings across multiple jurisdictions seeking to achieve more favorable results, interlocutory and meritless appeals interposed for the purpose of delay, and attacks on the trial judge and appellate judges.<sup>3</sup> Appellants fail to inform the Court that the same

---

<sup>3</sup> Travelers continues to flaunt the Court of Appeals’ September 8, 2023 Order holding that the Receiver can carry out his court-appointed duties during the pendency of this appeal. In a recent hearing in Texas, Travelers’ South Carolina counsel argued the September 8, 2023 Order was not a valid order because it was signed only by Judge Verdin. (App. 7–10.) Travelers continues to go to great lengths to attempt to justify its willful disobedience of orders of courts in this state. Its modus operandi is to discredit and ignore orders it does not like. This is not the first time Travelers

issues they argue are of utmost importance for South Carolina have been feverishly pursued by Appellants in subsequently filed actions in Texas trial and appellate courts. Throughout the nine months this appeal has been pending, Appellants have been trying to avoid South Carolina courts and coordinating efforts in Texas to circumvent the circuit court’s ruling on dissolution. Payne & Keller was sued in a Texas asbestos-related case styled *Daniel D. Williams, individually and as personal representative of the estate of Jimmie Lee Williams, Deceased, Sheila L. Wright, and Jimmietta Williams v. The Dow Chemical Company, et al.*; In the District Court of Harris County, Texas; 11th Judicial District; Cause No. 2023-36960-ASB (Before the Texas Asbestos MDL Pretrial Judge) (“Texas Action”). Rather than appoint Payne & Keller’s South Carolina asbestos defense counsel, Bowman & Brooke, the insurers insisted on retaining the Texas law firm of Baker & Patterson, L.L.P. (“Baker & Patterson”). Unbeknownst to the court-appointed Receiver for Payne & Keller, Baker & Patterson filed pleadings and motions asserting positions contrary those taken by the Receiver in South Carolina and Payne & Keller’s insurer-appointed South Carolina counsel Bowman and Brooke. This Texas pleading sought rulings on dissolution issues already decided in South Carolina and now part of this appeal.

On July 26, 2023, almost two full years after the Receiver’s appointment, months after the instant appeal, and while Travelers and its counsel actively took the position that the instant appeal stayed the South Carolina trial court action because it addressed the dissolution of Payne & Keller,

---

and its counsel have impugned the validity of an order issued by a judge at the Court of Appeals. On January 6, 2021, Judge McDonald issued an order dismissing Travelers-affiliate United States Fidelity & Guaranty Company’s (“USF&G”) appeal from an interlocutory order of the circuit court. *Finch v. United States Fidelity & Guaranty Company*, Appellate Case No. 2020-001663. USF&G filed a petition for a writ of certiorari with this Court discounting the order because it was issued by “a single judge.” *Finch v. United States Fidelity & Guaranty Company*, Appellate Case No. 2021-000462, Pet. for Writ of Cert. at 10. Rule 240(j) of the South Carolina Appellate Court Rules allows individual judges or justices to rule on any motion or petition on behalf of the Court.

the Baker & Patterson firm filed an answer on behalf of Payne & Keller in the Texas Action. (App. 92–93.) Inexplicably, the Baker & Patterson firm filed this answer without any previous communication with the Receiver—its client. In its answer, the Baker & Patterson firm asserted two affirmative defenses: (1) “The Court does not have jurisdiction because Defendant is a terminated corporation. See TEX. BUS. ORG. CODE § 11.359 (formerly Tex. Bus. Corp. Act art. 7.12)”; and (2) “Plaintiff cannot sustain a claim against Defendant because it is a terminated corporation. See TEX. BUS. ORG. CODE § 11.359 (formerly Tex. Bus. Corp. Act art. 7.12).” *Id.* Ignoring their position in South Carolina that these matters are exclusively before the South Carolina appellate courts, some of Payne & Keller’s insurers went to Texas and instructed a new law firm to raise these issues without the Receiver’s knowledge or consent in a court filing that the insurers knew the Receiver did not, and would not, authorize. The answer also did not disclose the existence of this receivership to the Texas Court.<sup>4</sup>

In addition to seeking competing orders in Texas through defense of underlying tort claims against Payne & Keller, Appellants put the same issues on appeal here before a court in Texas once again in a new filing. (App. 95–107.) Travelers sought a declaration from a Texas court that the Receiver was improperly appointed by the South Carolina circuit court and that the Texas statute of repose precludes the filing of any claims by or against Payne & Keller—**the very issues it requests rulings on now from this Court.** Travelers actively sought to have the Texas court dissolve the South Carolina receivership and appoint a new receiver in Texas. One of the Certain

---

<sup>4</sup> Baker & Patterson and its attorney who appeared on behalf of Payne & Keller in Texas are now defendants in a separate action brought by the Receiver relating to their unauthorized filing of pleadings. See *Protopapas v. Kenneth C. Baker, et al.*, Civil Action. No. 2023-CP-40-05203. These insurer-appointed lawyers also have initiated an action in Texas seeking to depose the Receiver’s insurance coverage counsel. *In re Kenneth C. Baker*, In the District Court of Harris County, Texas; 11th Judicial District; Cause No. 2023-82987.

Insurers—National Union Fire Insurance Company of Pittsburgh, PA—also filed a Plea in Intervention, Motion to Vacate Domesticated Judgment, and Petition for Declaratory Judgment in the Texas action naming a South Carolina asbestos plaintiff and the Texas Secretary of State as parties. (App. 110–38.) Recognizing the impropriety of these actions, National Union voluntarily dismissed these claims. (App. 645–50.) Appellants’ forum shopping in hopes of finding any court that will agree with their arguments is improper and should be rejected.

Throughout their filings, Appellants espouse how important they believe this matter is to Texas. However, as noted by the Texas Attorney General, the Texas Secretary of State disagrees. Recently, the Texas Secretary of State declined to be involved in the matter pursued by Appellants in Texas, stating “the Texas Secretary of State has no particular interest in the outcome of this case[.]” (App. 631–44.) As noted above, appellants then voluntarily dismissed their claims against the Texas Secretary of State. Furthermore, the Texas Judge has rejected the Appellants efforts to circumvent the South Carolina courts. The Texas court held a hearing on January 24, 2024, and refused to issue any orders related to Appellants’ attempts to pursue the action in Texas. The Texas Court’s jurisdiction to act lapsed on January 25, 2024, and the insurers’ motions were denied by operation of law.

Appellants’ assertions that this Court should step in because the Receiver is undermining Payne & Keller’s defenses are incorrect. To be sure, the insurers have unequivocally established in the Receivership cases that they will pursue any and all methods necessary to delay and prevent the Receiver from identifying company assets such as insurance policies, in order to avoid their contractual obligations to defend and indemnify their insureds from which they received premiums for decades. Appellants misconstrue the Receiver’s purpose and duties as one of protecting the insurers. The trial court appointed Peter Protopapas as the Receiver of Payne & Keller “pursuant

to the South Carolina Law with the power and authority [to] 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.” (App. 24–27.)

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. . . . It follows that he has no personal interest in the property in his official character, except that which arises out of his responsibility in the faithful and correct discharge of his duties.

*Peurifoy v. Gamble*, 145 S.C. 1, 142 S.E. 788, 790 (1928). The Receiver for Payne & Keller is, therefore, an officer of the Court, deriving his authority from the circuit court and the Order of Appointment. Appellants misunderstand the role of the Receiver who is charged with addressing the past liabilities of Payne & Keller—whether that is good or bad for Payne & Keller’s legacy insurers. He has no obligation to portray Payne & Keller as a model corporation or to gloss over its past mistakes, but instead dutifully evaluates all information available to him to faithfully discharge his obligations to marshal the company’s assets. The Receiver evaluates information gathered through the investigation of historical sources as well as information brought to him by others, including the legacy insurers. When Payne & Keller’s legacy insurers presented the Receiver with their argument that Payne & Keller was dissolved and therefore could not be sued, it was the Receiver’s responsibility to research the insurers’ position—not to take it at face-value. The Receiver did his job and reported his findings to the Receivership Court that appointed him.

The Receiver represents the company seeking to recover its insurance proceeds from its historical insurers. He does not represent the interests of the insurers themselves.<sup>5</sup>

Appellants also fail to inform this Court that the defense counsel the insurers retained to represent Payne & Keller in asbestos litigation in South Carolina closely analyzed this defense and informed the insurers in December 2021 that it believed Payne & Keller did not have a legitimate defense under the Texas dissolution statute.<sup>6</sup> (App. 651–60.) Defense counsel warned the insurers that raising the dissolution defense would be “unsuccessful at best, and detrimental to Payne and Keller at worst.” (*Id.*) Appellants and other legacy insurers in receivership cases continue to try to force the Receiver to raise meritless arguments and defenses to the detriment of the company in receivership all for the purpose of avoiding their own contractual insurance obligations.<sup>7</sup> This is the exact type of conduct that led the circuit court to appoint receivers in these types of cases. *See Finch v. U.S. Fid. & Guar. Co.*, C/A No. 3:19-CV-01827, 2020 WL 2988944, at \*4 (D.S.C. June 4, 2020) (“Nor can it be disputed that the decisions made by [law firm] and the Insurers resulted in a verdict against Covil in excess of \$30,000,000.”); *Protopapas v. Wall, Templeton & Haldrup, P.A.*, C/A No. 2020-001437, 2023 WL 8102870, at \*1 (S.C. Ct. App. Nov. 22, 2023) (“In 2018,

---

<sup>5</sup> In a case involving the Covil receivership and Travelers-affiliate USF&G, Chief Justice Toal (Ret.) held that the “Receiver is certainly under no obligation to advance frivolous arguments or to assert specious defenses to Covil’s asbestos cases,” and that “[n]on-Party USF&G’s contention that the Receiver . . . is undermining Covil’s asbestos defenses by refusing to behave unethically (at USF&G’s behest) is absurd.” (App. 43.)

<sup>6</sup> As another example of their efforts to seek rulings in multiple jurisdictions, the insurers sought an order of the Texas court sealing this communication. However, the Texas court denied their motion to seal. (App. 661–63.)

<sup>7</sup> In fact, in a recent opinion by the Court of Appeals in the Covil Receivership, the court found that a dissolution defense raised by Travelers-affiliate United States Fidelity & Guaranty Company was meritless. *Protopapas v. Wall, Templeton & Haldrup, P.A.*, No. 2020-001437, 2023 WL 8102870, at \*6 (S.C. Ct. App. Nov. 22, 2023) (affirming the circuit court’s ruling that the statute of repose for dissolved companies does not preclude the Covil receivership or claims against Covil). USF&G has filed a petition for rehearing of this opinion.

Covil defaulted in two mesothelioma cases, and in November 2018, the special circuit court appointed Receiver to represent Covil's interests.”); *id.* at \*3 (“The Receiver's need for clarification in considering Covil's potential future liability and proper available defenses relates concretely to the management of Covil's assets and is particularly pertinent to any claims handling or bad faith claims that may remain against USF&G. The record reveals years of concerning conduct on the part of USF&G and others as they prepared for the onslaught of asbestos litigation to come.”).<sup>8</sup>

While the Receiver disagrees that the requirements of Rule 204 are satisfied, the Receiver believes certification could aid the interests of judicial economy and conserve the parties’ time and resources by expediting appellate review. Pursuant to section 14-8-210 of the South Carolina Code, this Court may certify cases pending before the Court of Appeals for other reasons the Court “considers appropriate.” If the Court does certify this appeal, the Receiver requests that the Court reiterate the extraordinary nature of such relief and prevent insurers and other parties in current and future receivership appeals from attempting to delay the appellate process by requesting certification of every appeal involving a receivership. There are currently numerous appeals pending from orders appointing receivers or denying motions to dismiss and dissolve receiverships. *See, e.g.*, Appellate Case Nos. 2023-001461 (consolidated appeal involving seven notices of appeal), 2023-001096.

Throughout the years in various receivership cases, Appellants and other legacy insurers have dredged our state’s appellate court rules for procedural mechanisms they could twist to attempt to circumvent the circuit court’s rulings, delay adjudication in receivership cases, and

---

<sup>8</sup> The extensive conduct of Travelers-affiliate USF&G and other insurers that led to the appointment of a receiver for Covil Corporation is further detailed in the attached January 8, 2020 order of the circuit court and includes intentionally destroying policy-related information to prevent its discovery in anticipation of litigation. (App. 49–71.)

prevent the Receiver from expeditiously fulfilling his court-ordered duties. There is a coordinated effort by insurance carriers to avoid the discovery of applicable insurance coverage, which the Receiver has been tasked to identify and marshal in connection with his appointments. In recent years, our appellate courts have seen an unprecedented number of interlocutory appeals and appellate motions practice filed in receivership actions by Appellants and other insurers in a coordinated attempt to frustrate the purpose of the receiverships and delay the disposition of these cases in the circuit court. The tortured procedural history of this appeal illustrates the escalating widespread efforts by insurers, including Appellants, to burden the appellate courts and halt progress in the circuit court. For instance, the current appeal has been pending for a period of nine months, and the insurers have yet to submit initial briefs.

Almost every time the legacy insurers and other parties involved in these receivership matters have attempted appellate review of trial court orders, their efforts have failed:

| No. | Date       | Case                                                                                                   | Court            | Ruling                                                                                                              |
|-----|------------|--------------------------------------------------------------------------------------------------------|------------------|---------------------------------------------------------------------------------------------------------------------|
| 1   | 10/16/2019 | <i>Zurich American Insurance Company v. CBS Corp.</i> , Appellate Case No. 2019-001651                 | Supreme Court    | Denying petition for writ of certiorari filed by USF&G, Sentry, and Zurich related to interlocutory discovery order |
| 2   | 10/16/2019 | <i>Zurich American Insurance Company v. CBS Corp.</i> , Appellate Case No. 2019-001654                 | Supreme Court    | Denying petition for writ of certiorari filed by USF&G, Sentry, and Zurich related to interlocutory discovery order |
| 3   | 11/1/2019  | <i>Hartford Accident &amp; Indemnity Company v. Covil Corporation</i> , Appellate Case No. 2019-001764 | Court of Appeals | Appellant Hartford withdrew appeal                                                                                  |

|    |            |                                                                                                                                                                            |                  |                                                                                                                 |
|----|------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------|-----------------------------------------------------------------------------------------------------------------|
| 4  | 11/18/2019 | <i>Hartford Accident and Indemnity Company v. Covil Corporation</i> , Appellate Case No. 2019-001758                                                                       | Supreme Court    | Granting request to withdraw petition for a writ of certiorari                                                  |
| 5  | 2/13/2020  | <i>Zurich American Insurance Company v. CBS Corporation</i> , Appellate Case No. 2020-000206                                                                               | Court of Appeals | Dismissing appeal of Zurich and USF&G because timely post-trial motion still pending before circuit court       |
| 6  | 5/22/2020  | <i>Tracy Jolly Pavlish v. Covil, Hutto v. Covil, Hagan v. Covil, Rampey v. Covil, Reilly v. Covil, Jonas v. Covil, and Murphy v. Covil</i> , Appellate Case No. 2020-00749 | Supreme Court    | Denying Zurich's petition for a writ of mandamus to reconsider motion to recuse Justice Toal as not appropriate |
| 7  | 6/17/2020  | <i>United States Fidelity &amp; Guaranty Company v. Protopapas</i> , Appellate Case No. 2020-000791                                                                        | Supreme Court    | Dismissing petition for a writ of supersedeas because no appeal pending                                         |
| 8  | 7/30/2020  | <i>United States Fidelity &amp; Guaranty Company v. Protopapas (In re Roxanne Falls)</i> , Appellate Case No. 2020-000845                                                  | Court of Appeals | Granting motion to dismiss because USFG was not a party to the action                                           |
| 9  | 10/22/2020 | <i>Protopapas v. Wall, Templeton</i> , Appellate Case No. 2020-001322                                                                                                      | Court of Appeals | Appellant's request for dismissal granted                                                                       |
| 10 | 12/15/2020 | <i>Protopapas v. Wall Templeton</i> , Appellate Case No. 2020-001322                                                                                                       | Court of Appeals | Appellant's (Zurich) request to withdraw its appeal granted                                                     |
| 11 | 1/4/2021   | <i>Finch v. United States Fidelity and Guaranty Co.</i> , Appellate Case No. 2020-001670                                                                                   | Supreme Court    | Appellant withdrew its Petition for Writ of Prohibition                                                         |
| 12 | 1/6/2021   | <i>Finch v. United States Fidelity &amp; Guaranty</i>                                                                                                                      | Court of Appeals | Dismissing appeal because underlying order not appealable                                                       |

|    |           |                                                                                                                      |                  |                                                                                                                                                                                                                      |
|----|-----------|----------------------------------------------------------------------------------------------------------------------|------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|    |           | <i>Company</i> , Appellate Case No. 2020-001663                                                                      |                  |                                                                                                                                                                                                                      |
| 13 | 3/9/2021  | <i>Finch v. United States Fidelity and Guaranty Co.</i> , Appellate Case No. 2020-001670                             | Supreme Court    | Supreme Court denied Covil’s Motion for Sanctions but cautioned any “action taken for the purpose of delaying the disposition of this case will, under appropriate circumstances, merit the imposition of sanctions” |
| 14 | 4/5/2021  | <i>Finch v. United States Fidelity &amp; Guaranty Company</i> , Appellate Case No. 2020-001663                       | Court of Appeals | Petition to rehear dismissal of appeal denied                                                                                                                                                                        |
| 15 | 7/6/2021  | <i>Finch v. United States Fidelity &amp; Guaranty Co.</i> , Appellate Case No. 2021-000462                           | Supreme Court    | Denying petition for a writ of certiorari                                                                                                                                                                            |
| 16 | 1/5/2022  | <i>Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company</i> , Appellate Case No. 2020-001239 | Court of Appeals | Affirming partial summary judgment for Covil                                                                                                                                                                         |
| 17 | 5/21/2021 | <i>Protopapas v. Wall Templeton</i> , Appellate Case No. 2020-001437                                                 | Court of Appeals | Appellant consents to the Receiver’s motion to dismiss the <i>Hutto</i> claim in this appeal (remaining issues fully briefed)                                                                                        |
| 18 | 8/9/2022  | <i>Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company</i> , Appellate Case No. 2022-000761 | Court of Appeals | Granting Covil’s motion to dismiss, finding that the discovery orders on appeal are not immediately appealable.                                                                                                      |
| 19 | 8/23/2022 | <i>Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company</i> , Appellate Case No. 2022-000785 | Supreme Court    | Denying petition for a writ of certiorari.                                                                                                                                                                           |

|    |            |                                                                                                                      |                  |                                                                                             |
|----|------------|----------------------------------------------------------------------------------------------------------------------|------------------|---------------------------------------------------------------------------------------------|
| 20 | 11/15/2022 | <i>Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company</i> , Appellate Case No. 2022-000761 | Court of Appeals | Order denying petition for rehearing of August 9, 2022 dismissal of appeal                  |
| 21 | 1/12/2023  | <i>Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company</i> , Appellate Case No. 2022-001764 | Supreme Court    | Denying petition for writ of certiorari                                                     |
| 22 | 2/8/2023   | <i>Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company</i> , Appellate Case No. 2022-001722 | Court of Appeals | Order dismissing appeal                                                                     |
| 23 | 6/6/2023   | <i>Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company</i> , Appellate Case No. 2022-001722 | Court of Appeals | Order denying petition for rehearing from 2/8/2023 dismissal of appeal                      |
| 24 | 4/13/2023  | <i>Southern Insulation Inc. v. OneBeacon, et al.</i> , Appellate Case No. 2023-000252                                | Court of Appeals | Order dismissing appeal as not immediately appealable                                       |
| 25 | 7/6/2023   | <i>Southern Insulation Inc. v. OneBeacon, et al.</i> , Appellate Case No. 2023-000252                                | Court of Appeals | Order denying petition for rehearing from 4/13/2023 dismissal of appeal                     |
| 26 | 11/7/2023  | <i>Covil Corp. v. Pennsylvania National Mutual Casualty Insurance Company</i> , Appellate Case No. 2023-001079       | Supreme Court    | Order denying petition for writ of certiorari from Court of Appeals order dismissing appeal |
| 27 | 11/22/2023 | <i>Covil Corp. v. United States Fidelity &amp; Guaranty Company</i> , Appellate Case No. 2020-001437                 | Court of Appeals | Opinion affirming circuit court                                                             |

|    |           |                                                                            |                     |                                                                                                                             |
|----|-----------|----------------------------------------------------------------------------|---------------------|-----------------------------------------------------------------------------------------------------------------------------|
| 28 | 12/1/2023 | <i>Welch v. Atlas Turner, Inc.</i> ,<br>Appellate Case No. 2023-<br>001096 | Court of<br>Appeals | Order Denying Appellant's<br>Motion to Confirm<br>Automatic Stay or,<br>Alternatively, Verified<br>Petition for Supersedeas |
|----|-----------|----------------------------------------------------------------------------|---------------------|-----------------------------------------------------------------------------------------------------------------------------|

Although non-meritorious, these appellate efforts have succeeded in the insurers' ultimate goal—delay at all costs.

Even in the infancy of the Asbestos Receiverships' efforts to identify assets under the then-newly appointed Asbestos Chief Judge, The Honorable Jean H. Toal, (C.J. Retired), the insurers employed efforts to subvert the trial court and obstruct the Receiver's ability to fulfil his charge through the onslaught of interlocutory and meritless appeals. This conduct was so egregious that it prompted this Court nearly three years ago to warn insurers about litigation tactics undertaken only to delay the disposition of a case:

We, in turn, expect the parties and their attorneys in this and any other case to fully cooperate with the trial court in order to ensure the case is tried or otherwise disposed of in a timely manner. Any action undertaken for the purpose of delaying the disposition of this case will, under appropriate circumstances, merit the imposition of sanctions under Rule 269, SCACR.

(App. 1–2). However, since this admonition, our appellate courts have seen an increase, not decrease, in the number of filings by insurers and parties objecting to the institution of receiverships, attacking the receivership court, disregarding court orders, seeking review of unappealable interlocutory orders, and seeking appellate review simultaneously in different appellant courts; all in an effort to delay the adjudication of receivership cases and prevent the Receiver from engaging in his court-appointed duties.

Appellants continue to abuse the appellate process for the purposes of delay in this appeal. This abuse of the process not only has delayed the disposition of this case but has also wasted the scarce resources of this Court, the Court of Appeals, the circuit court, and the court-

appointed receiver. The Receiver has a motion for sanctions pending in this appeal against Appellants for their dilatory conduct, disregard for orders of the Court of Appeals, lack of candor to tribunals, and attempts to circumvent the courts of South Carolina. (App. 72–428.) The Receiver requests that this Court address and stop this conduct if it chooses to certify this appeal.

Additionally, if the Court certifies the appeal, the Receiver requests the Court dismiss it as interlocutory. Shortly after the notices of appeal were filed, the Court of Appeals requested that the parties file memoranda on appealability. The Receiver filed his memorandum on appealability on May 15, 2023, arguing the appeal should be dismissed because the order denying Appellants’ motions to dismiss and dissolve the receivership was an interlocutory order that was not immediately appealable. (App. 440–65.) Appellants filed memoranda arguing the appeal should proceed under section 14-3-330 of the South Carolina Code because the order continued and modified the receivership. (App. 467–630.) The Court of Appeals issued an Order on August 9, 2023, ruling the “appeal shall proceed.” (App. 11–13.) However, the Court of Appeals *did not find the order appealable*. Instead, it stated: “However, nothing in this order prevents the parties from raising the issues of appealability and standing in their briefs.” (*Id.*) The Receiver renews this request for the Court to dismiss the appeal because the order on appeal is an interlocutory order that is not immediately appealable.

Accordingly, although the Receiver disagrees that this case satisfies the requirements of Rule 204, the Receiver welcomes certification by this Court if the Court believes it is otherwise appropriate to address the concerning abuse of the appellate process perpetrated by Appellants and other insurers in receivership cases.

*(Signature page follows)*

Respectfully submitted,

s/Jonathan M. Robinson

G. Murrell Smith, Jr. (S.C. Bar # 66263)

**Jonathan M. Robinson (S.C. Bar # 68285)**

Shanon N. Peake (S.C. Bar #102723)

Smith Robinson Holler DuBose and Morgan, LLC

2530 Devine Street,

Columbia, South Carolina 29205

John B. White, Jr., P.A.

John B. White, Jr.

Marghretta H. Shisko

Christopher R. Jones

291 S. Pine Street

Spartanburg, SC 29302

*Attorneys for Respondent*

January 26, 2024.

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable Jean H. Toal  
Acting Circuit Court Judge

---

Appellate Case No. 2023-000727  
Circuit Court Case No. 2021-CP-40-03484

---

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 Their Duly Appointed 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 of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; and Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company;

and

Travelers Casualty and Surety Company, f/k/a the Aetna Casualty and Surety Company, are the .....

Appellants.

---

**REPLY IN SUPPORT OF MOTION FOR CERTIFICATION BY THE SUPREME COURT**

---

Appellants 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; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company (collectively “Appellants”) hereby submit this reply in support of their motion to this Court under Rule 204(b), SCACR, to certify this case for review.

### **INTRODUCTION AND SUMMARY**

The Receiver concedes that certification here “could aid the interest of judicial economy and conserve the parties’ time and resources by expediting appellate review.” (Return at 11.) Appellants agree. Certifying this appeal will allow this Court to expedite review of the Circuit Court’s March 31, 2023 Order (the “March 31 Order”), which continued a receivership over Payne & Keller, a Texas corporation that dissolved in 1986 and, under Texas’s statute of repose, could not sue or be sued as of 1989.

As Appellants explained in their motion, the Circuit Court’s March 31 Order erred on two grounds that present important questions of public interest. First, it allowed a receivership based solely on Payne & Keller’s out-of-state insurance policies, even though South Carolina law requires “property within South Carolina” for a receivership. Appx. 3 (March 31 Order at 3); *see* S.C. Code § 15-65-10(4) (limiting receiverships over foreign entities to “property within this State”); *Howard v. Allen*, 254 S.C. 455, 459, 176 S.E.2d 127, 128 (1970) (out-of-state policies are not property in this state and cannot be the basis for attachment in in rem proceedings). Second, the Circuit Court ruled that the Receiver was allowed to continue his receivership based on his unpleaded assertions that Payne & Keller fraudulently dissolved, such that Payne & Keller’s dissolution could be revoked and previously-barred claims against it revived under a new Texas

statute enacted many years after that dissolution. Appx. 0004-0006 (March 31 Order at 4-6). This ruling infringed Texas's authority over its own corporations. *See Mitchell v. Hancock*, 196 S.W. 694, 698 (Tex. App. 1917) (“[t]he power to create a corporation is an attribute of sovereignty, and it is therefore, as to its corporate existence, amenable to and controllable in this respect by the sovereignty which created it and by none other.”) (citation omitted). It also violated Texas's constitution and Texas's established law against the retroactive application of statutes to revive barred claims. *Baker Hughes, Inc. v. Keco R.&D., Inc.*, 12 S.W.3d 1, 4 (Tex. 1999) (“a statute extending the limitations period of a claim already barred by limitations violations the Texas Constitution's prohibition against retroactive laws”).

Because these rulings are indefensible, the Receiver does not address them on their merits. Instead, he devotes most of his Return to *ad hominem* attacks against Appellants and the entire insurance industry. Emblematic of this approach is the chart on pages 12-16 of the Receiver's Return, listing 28 appellate rulings or actions involving requests for appellate review of the Circuit Court's orders. Appellants were not party to any of those rulings or actions.

Nor is the Receiver correct that Appellants are asking this Court to weigh in on “hypothetical questions,” or for an “advisory opinion ... on the asbestos docket as a whole.” (Return at 3-4). The March 31 Order—the matter for which Appellants seek Rule 204 certification—is now on appeal to the South Carolina Court of Appeals. That Order indisputably addressed—and depended on—holdings on the two important questions that are fundamental to this motion for certification.<sup>1</sup> Review of that order is appropriate and, indeed, necessary.

---

<sup>1</sup> Although the Receiver attempts to suggest that the dissolution issue is not properly before this Court (Return at 4), he later concedes that the March 31 Order ruled on “dissolution issues ... now part of this appeal” (Return at 6).

Moreover, the March 31 Order exemplifies an ongoing pattern in the asbestos docket, giving added weight to the important questions of public significance that this case raises. At the behest of asbestos plaintiffs who consistently seek the appointment of the same receiver—Peter Protopapas—the Circuit Court has repeatedly ruled that insurance policies issued to out-of-state defendants by out-of-state insurance companies are property within the state sufficient to justify a receivership. This case presents an even more acute concern as to a breakdown in the adversary process. The Receiver, after being appointed at the behest of the asbestos plaintiff, is aiding the plaintiff by arguing against Payne & Keller’s absolute defense to liability, thereby opening Payne & Keller to potential tort liability to the plaintiff. He has asserted that he controls the defense of Payne & Keller, and he has then exercised that control to strip Payne & Keller of a repose defense.

**I. THE RECEIVER’S RETURN ACCENTUATES THE BREAKDOWN IN THE ADVERSARY PROCESS THAT APPELLANTS DESCRIBED IN THEIR MOTION.**

In their motion to certify, Appellants did not just show that the Circuit Court committed significant legal errors when it allowed the receivership to continue. They also described how the Receiver has undermined Payne & Keller’s defense to underlying tort claims. (Motion 15-16). In his Return, the Receiver acknowledges the steps he has taken to eliminate Payne & Keller’s absolute defense to liability.

When the Receiver was appointed, the Circuit Court directed him to “take any and all steps necessary to protect the interests of Payne & Keller whatever they may be.” (Return at 9). Yet he has done precisely the opposite. His effort to salvage his receivership so that he can pursue claims against Appellants has triumphed over Payne & Keller’s interest in successfully defending against underlying tort litigation.

At every turn, the Receiver has sought to prevent Appellants from establishing that Payne & Keller cannot sue or be sued and has a defense to underlying tort liability. Directly contrary to

his actions, the Receiver has a duty to assure that Payne & Keller can litigate all defenses available to it that are properly asserted for judicial resolution.<sup>2</sup> But when Appellants first argued that Payne & Keller’s dissolution precluded claims by or against it, such that the receivership should be dissolved, the Receiver attacked his charge, asserting that Payne & Keller fraudulently dissolved almost forty years ago such that it could be resuscitated and subject to suit.<sup>3</sup> Then, even though Texas’s constitutional bar on retroactively applying later-passed statutes prohibited the Circuit Court from reviving claims against Payne & Keller, the Receiver ignored that constitutional prohibition so that he could ask the Circuit Court to find a *prima facie* case that Payne & Keller had fraudulently dissolved, and thus save his receivership. In the March 31 Order, the Circuit Court accepted his arguments, allowing the receivership—and thus claims by or against Payne & Keller—to continue.

Payne & Keller’s own defense lawyers have not been immune from the Receiver’s campaign to eliminate its dissolution defense. The Receiver has expressly waived Payne & Keller’s attorney-client privilege and opinion work product protection by publicly filing emails from Payne & Keller’s South Carolina defense counsel in which they discuss the dissolution

---

<sup>2</sup> The Receiver states that in taking these actions he “represents” and is acting on behalf of Payne & Keller. (Return at 10). As an insured, Payne & Keller has a duty to cooperate with its insurers in defending against underlying tort claims, rather than undermining its own defense. *See Vaught v. Nationwide Mut. Ins. Co.*, 250 S.C. 65, 71, 156 S.E.2d 627, 630 (1967). Also, the Receiver makes no effort to explain how revocation of Payne & Keller’s 1986 dissolution protects Payne & Keller’s interests. His only justification is that he is “seeking to recover [Payne & Keller’s] insurance proceeds from its historical insurers” (Return at 10), but Payne & Keller has no need to pursue insurance proceeds if all suits against it are barred due to its dissolution and the statute of repose.

<sup>3</sup> The Receiver’s so-called “evidence” of “fraud” was that asbestos claims were being brought against other companies in the early 1980s; that Payne & Keller faced a potential for three (or at most, twelve) dioxin claims that it might have to indemnify; and that Payne & Keller was sued in a single asbestos matter prior to the company’s 1986 dissolution, which was dismissed without prejudice. *See* March 31 Order at 5 (referring to the Receiver’s briefing and citation to *In re Charter Co.*, 63 B.R. 568 (M.D. Fla. 1986)).

defense. (Return App. 0651-0660). He misrepresents the opinions of the South Carolina lawyer as expressed in those now-public emails, arguing to this Court that the lawyer did not believe the dissolution defense to be “legitimate” “under the Texas dissolution statute.”<sup>4</sup> (Return at 10). In fact, that lawyer stated that the Texas dissolution statute “limit[ed] the dissolved/terminated corporation[']s liability for claims,” and he would “certainly like to apply the Texas dissolution statute in these South Carolina actions,” but he did not believe the defense would be successful for reasons wholly unrelated to the fraudulent dissolution claim first asserted by the Receiver over a year later. (Return App. 0651). The lawyer’s email also never discusses Texas’s bar on the retroactive application of statutes to revive claims. Even after the March 31 Order, the same South Carolina law firm later pleaded a defense on Payne & Keller’s behalf that “Payne & Keller Company is a dissolved entity and therefore lacks the capacity to be sued.” (Payne & Keller Ans. to 2d Am. Complaint ¶ 252). When Payne & Keller’s Texas lawyer asserted that same defense to a Texas action, however, the Receiver sued him in South Carolina. (Return at 7 n.7).

The Receiver defends all this conduct by arguing that he is not obligated to “raise meritless arguments and defenses to the detriment of the company in receivership.” (Return at 10). The dissolution defense is not to the detriment of Payne & Keller, nor is it frivolous or asserted in bad faith. The fact of Payne & Keller’s dissolution is undisputed. So is the Texas statute of repose stating that Payne & Keller could not sue or be sued after 1989. Nor is there any dispute that in 1986, when Payne & Keller dissolved, and in 1989, when all claims by or against it were barred, Texas law did not include any provision permitting a court to revoke a corporate dissolution based on fraud. It is also beyond contest that the Texas Supreme Court has repeatedly applied the Texas

---

<sup>4</sup> By commenting on the contents of these now-public emails, the Insurers are not expressly or impliedly waiving any privilege.

Constitution's bar on retroactive statutes to hold that a subsequently-enacted statute cannot revive already-barred claims. Far from meritless, these facts and law are established and the Receiver does not even dispute them in his Return. Indeed, a defense lawyer who did not pursue a dissolution defense on behalf of Payne & Keller would have been committing malpractice.

The Receiver does not explain how it could threaten Payne & Keller to raise this obvious defense under Texas law. And he does not explain how his attacks on Payne & Keller, opening the company to potential liability, are possibly in the company's "best interest." Nor can he. The Receiver's unprecedented and unusual conduct demands this Court's intervention.

## **II. THE RECEIVER'S LAUNDRY LIST OF GRIEVANCES DOES NOT ELIMINATE THE SIGNIFICANT QUESTIONS PRESENTED.**

Most of the Receiver's return is devoted to grievances against other insurers who are not even party to this appeal, yet the Receiver still includes Appellants in his blunderbuss aspersions. These grievances do not affect the merits of the motion to certify, and the Court may disregard them entirely. Rather than leaving them uncontested, however, Appellants address them briefly.

For example, the Receiver falsely asserts that "the insurers" (apparently including Appellants) will "pursue any and all methods to avoid their contractual obligations to defend and indemnify their insureds from which they received premiums for decades." (Return at 8.) To the contrary, Appellant National Union has defended every lawsuit against Payne & Keller tendered by the Receiver.<sup>5</sup> And it has also defended other named insureds under the policies at issue for over 35 years. Indeed, in his third-party complaint against Appellants, the Receiver does not even allege a breach of the duty to defend or duty to indemnify. Rather, he alleges two claims: a claim

---

<sup>5</sup> National Union is the only primary insurer among Appellants, which is why it has been the entity defending these claims.

that he is entitled to payment of his own fees, and a claim that he is entitled to possession of Payne & Keller's policies. (2d Am. Third-Party Complaint, ¶¶ 176-185).

The Receiver also chastises Appellants for mentioning the Circuit Court's October 5 Order revoking Payne & Keller's dissolution (Return at 4). Then, he changes course and relies heavily on events that postdated the March 31 Order. For example, he makes much of the Court of Appeals' November 21, 2023 Order denying Appellants' motion asking that Court to enforce its exclusive jurisdiction under Rule 205, SCACR, and vacate the Circuit Court's October 5 Order, which addressed the same issues as the March 31 Order now on appeal. The Court of Appeals declined to do so not because Appellants' position on Rule 205 lacked merit, but because the October 5 order was not before it. (Return App. 3-6). This does not mean, however, that Appellants cannot seek review of the earlier March 31 Order in this Court.

The Receiver also accuses Appellants of "duplicious filings across multiple jurisdictions" (specifically, Texas) "seeking to achieve more favorable results." (Return at 5). This accusation ignores the facts of the two Texas proceedings described by the Receiver. Both arose after the March 31 Order, and neither was initiated by Appellants.

In the first Texas proceeding, an asbestos plaintiff sued Payne & Keller. (*See* Return at 6.) The Receiver accepted service and tendered the suit to Payne & Keller's insurers, and National Union accepted the tender and engaged counsel to defend the Texas case. The defense lawyer filed pleadings asserting the dissolution defense on behalf of Payne & Keller—the same defense that Payne & Keller's defense attorneys assert in answers filed in South Carolina. The plaintiff in the Texas suit nonsuited his case shortly thereafter. Astoundingly, the Receiver admits that he "did not, and would not authorize" the assertion of this defense (Return at 7), even though it was plainly

in Payne & Keller’s best interest to do so. As the Receiver also admits (Return at 7 n.4), he even sued the defense lawyer in South Carolina for asserting the defense.

As to the second Texas proceeding, the Receiver initiated that proceeding, not Appellants. On October 12, the Receiver took the Circuit Court’s October 5 Order to Texas and “domesticated” it, without notifying to Appellants, who had opposed entry of that order. He raced to Texas and initiated that action even though the 10-day period for a motion to reconsider had not yet expired and the dissolution issues were also part of this pending appeal. That same day, the Receiver then used the “domesticated” order to obtain a clerical “Certificate of Revocation of Dissolution” from the Texas Secretary of State. No one ordered the Receiver to take those steps before this appeal was completed. He did so of his own volition. Because of these actions, Appellants were left with no choice but to seek to vacate the “domesticated” order in Texas, as well as litigating these issues in South Carolina.

The Receiver also asserts that the Texas Secretary of State has found these issues to be unimportant, so this Court should also ignore them (Return at 8), but that is a mischaracterization of the Secretary of State’s position. The Secretary of State merely sought to be dismissed from the litigation in Texas for lack of subject matter jurisdiction, and Appellants acceded to that request. The Secretary of State expressly *did not* “opine on ... whether the domesticated decision was rendered by a court acting within the limits of its authority and subject matter jurisdiction,” or “on the Order’s apparent domestication in Texas through Texas Civil Practice & Remedies Code Chapter 35 or on the limits, if any, to said Order’s effectiveness in Texas.” (Return App. 0638.) She also did not “make any comment, either in support or in opposition, concerning the findings of fact and law that underlie the October 5, 2023 South Carolina Order.” (*Id.*) Thus, the Secretary

of State’s comments do not refute Appellants’ showing that the Circuit Court exceeded its proper jurisdiction and violated Texas’s constitution and governing precedent.

Next, the Receiver blames Appellants for the “tortured procedural history of this appeal” and the fact that opening briefs have not yet been filed. (Return at 12). Of course, by seeking certification here, Appellants are pursuing an expedited appellate resolution, rather than stringing out the process. The Receiver also glosses over the fact that briefing was delayed because he challenged the immediate appealability of the March 31 Order, necessitating a decision on the appealability issue. Moreover, the Court of Appeals has continued to hold this case in abeyance, even after deciding that the appeal would proceed, because of other motions practice, some of which was initiated by the Receiver. When Appellants are directed to file their opening briefs, they will promptly do so. Actions speak louder than words. Appellants’ motion to this Court to certify this appeal shows they have no desire for delay. To the contrary, Appellants seek a prompt resolution of this appeal on the merits.

Even now, the Receiver is asking this Court to defer a ruling on the March 31 Order, arguing that the order was interlocutory and not “immediately appealable.” (Return at 17). His position should be rejected, as it was when the Court of Appeals ruled that the “appeal shall proceed.” (Return App. 0364). South Carolina Code § 14-3-330(4) states that this Court “shall have appellate jurisdiction” and “shall review upon appeal” an “interlocutory order . . . granting, continuing, modifying, or refusing the appointment of a receiver.” That is precisely what the March 31 Order did—it denied a request to dissolve the receivership and dismiss the Receiver’s claims against Appellants, thereby “continuing” the receivership over Payne & Keller. It also “modif[ied]” the receivership. After the Circuit Court initially ordered the Receiver to “protect[] the interests of Payne & Keller” (Return at 9), its March 31 Order permitted the Receiver to pursue

undoing the corporate dissolution of Payne & Keller, which would turn Payne & Keller from a dissolved entity immune from suit into a live company and potentially viable tort defendant. Although interlocutory, the March 31 Order is plainly appealable now.

Finally, the Receiver paints all “insurers” with the same brush, castigating them for pursuing appeals in receivership cases. (Return at 11). He even goes so far as to suggest that if this Court certifies this appeal, it should do so to prohibit “insurers and other parties” from “requesting certification” in “receivership appeals.” (*Id.*). The Receiver’s laundry list of 28 different “rulings” or actions in other appeals is irrelevant to the merits of this motion. Some of them are not “rulings” at all, as his table at pages 12-16 suggests: they include items like voluntary withdrawals of appeals, withdrawn petitions, and consented dismissals. And none of the 28 items in the Receiver’s table even involved Appellants.

To be sure, the receivership activities in the asbestos docket have led to many appellate proceedings not involving Appellants. But those proceedings illustrate the scope and unprecedented nature of the Receiver’s activities, not a campaign by insurers to “abuse the appellate process.” Indeed, in one order cited by the Receiver denying his request for sanctions, this Court recognized the “complexity of the issues” in receivership litigation. (Return App. 0001-0002). It also acknowledged that parties have the right to protect and further their interests “within the bounds of applicable rules and case law.” (*Id.*). Appellants are acting consistently with that standard. Moreover, Appellants’ interests are aligned with the interest of Payne & Keller in avoiding liability. The Receiver’s abandonment of and attacks on his charge are inconsistent with that interest and should be remedied now.

## **CONCLUSION**

The Court should grant Appellants' motion and certify the March 31 Order for review.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

By: s/Wesley B. Sawyer  
Wesley B. Sawyer, Esquire (SC 100229)  
4406-B Forest Drive (29206)  
P.O. Box 6648  
Columbia, South Carolina 29260  
(803) 782-4100  
[wsawyer@murphygrantland.com](mailto:wsawyer@murphygrantland.com)

*Counsel for Third-Party Defendants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company.*

February 2, 2024

---

PROOF OF SERVICE

---

I, the undersigned of the law offices of Murphy & Grantland PA, attorneys for Appellants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburg, PA, Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company, and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specified below by emailing them to the addresses below:

Pleading(s): REPLY IN SUPPORT OF MOTION FOR CERTIFICATION BY THE SUPREME COURT

Parties Served:

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

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

Theile B. McVey ([tmcvey@kassellaw.com](mailto:tmcvey@kassellaw.com))  
Jamie D. Rutkoski ([jrutkoski@kassellaw.com](mailto:jrutkoski@kassellaw.com))  
Jonathan Marshall Holder ([jholder@dobslegal.com](mailto:jholder@dobslegal.com))

*Counsel for Plaintiff*

M. Todd Carroll ([todd.carroll@wbd-us.com](mailto:todd.carroll@wbd-us.com))  
M. Elizabeth O'Neill ([Elizabeth.oneill@wbd-us.com](mailto:Elizabeth.oneill@wbd-us.com))  
Harry Lee ([hlee@steptoe.com](mailto:hlee@steptoe.com))

*Counsel for Appellant Third-Party Defendant Travelers Casualty and Surety Company*

Kevin K. Bell ([kbell@robinsongray.com](mailto:kbell@robinsongray.com))

*Counsel for Proposed Intervenor Zurich American Insurance Company*

MURPHY & GRANTLAND, P.A.

By: s/Wesley B. Sawyer  
Wesley B. Sawyer, Esquire (SC 100229)  
4406-B Forest Drive (29206)  
P.O. Box 6648  
Columbia, South Carolina 29260  
(803) 782-4100  
[wsawyer@murphygrantland.com](mailto:wsawyer@murphygrantland.com)

*Counsel for Third-Party Defendants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company.*

February 2, 2024

# The Supreme Court of South Carolina

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. 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 All 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; 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.; and Compass Risk Services, LLC, Third-Party Defendants,

Of which, Payne & Keller Company, By and Through Their Duly Appointed 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 of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; and Continental Insurance Company, Individually and as Successor in interest to Harbor Insurance Company;

and

Travelers Casualty and Surety Company, f/k/a the Aetna

Casualty and Surety Company, are Appellants.

Appellate Case No. 2024-000005

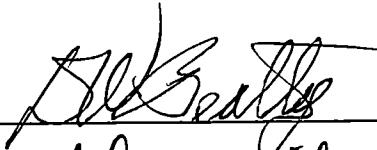
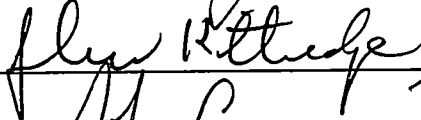
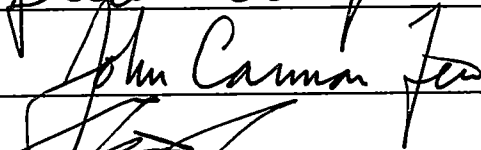
---

ORDER

---

Appellant AIG Property Casualty Company (AIG) has filed a motion for certification of Appellate Case No. 2023-000727 pursuant to Rule 204(b), SCACR. Appellant Travelers Casualty and Surety Company has filed a motion joining AIG's motion for certification.

We grant the motion for certification and motion for joinder, dispense with further briefing, vacate the court of appeals denial of sanctions, and dismiss the appeal because the underlying circuit court order at issue is not immediately appealable.

|                                                                                      |      |
|--------------------------------------------------------------------------------------|------|
|   | C.J. |
|  | J.   |
|  | J.   |
|  | J.   |
|  | J.   |

Columbia, South Carolina  
March 27, 2024

cc:

Wesley Brian Sawyer  
Brian Montgomery Barnwell  
John Belton White, Jr.  
Marghretta Hagood Shisko  
Scott Shutte  
Christopher Rutledge Jones

G. Murrell Smith, Jr.  
Jonathan M. Robinson  
Shanon N. Peake  
Matthew Todd Carroll  
Mary Elizabeth O'Neill  
Harry Lee  
The Honorable Jenny Abbott Kitchings