

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

APR 23 2024

Jean H. Toal, Circuit Court Judge

SC Court of Appeals

Case No. 2020-CP-40-02098

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

Respondent,

v.

Pennsylvania National Mutual
Casualty Insurance Company,

Appellant.

(3) Final Order on Findings of Fact and Conclusions of Law as to Covil Corporation Against
Pennsylvania National Mutual Casualty Insurance Company, dated March 1, 2024, and received
by Appellant on March 1, 2024

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

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

Plaintiff,

v.

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

**FINAL ORDER ON FINDINGS OF
FACT AND CONCLUSIONS OF LAW
AS TO COVIL CORPORATION
AGAINST PENNSYLVANIA
NATIONAL MUTUAL CASUALTY
INSURANCE COMPANY**

RECEIVED

Defendants.

APR 23 2024

SC Court of Appeals

Before the Court are two matters: (1) the non-jury trial of Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas (“Covil”), against Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) to resolve disputes regarding the interpretation, meaning, and application of insurance policies issued by Penn National related to underlying asbestos claims; and (2) an evidentiary hearing on spoliation.¹ The proceedings commenced on November 27, 2023 and concluded on November 28, 2023. The parties made post-trial submissions on January 12, 2023, after which the matter was taken under advisement.

For the reasons explained below, the Court holds that the Receiver is entitled to judgment on his declaratory relief claims. The evidence in the record also demonstrates that Penn National

¹ The parties withdrew their motions *in limine*, stipulated all trial exhibits were admissible, and agreed to admit all deposition designations without objection. Trial Tr. Day 1, Morning Session, at 11, 15–16.

has, deliberately or with gross negligence, destroyed historic comprehensive general liability insurance policies, and a spoliation order is justified. Finally, the Court finds that the Receiver is entitled to his reasonable attorneys' fees and costs.

I. INTRODUCTION

This Court is deeply concerned with Penn National's repeated discovery misconduct in this insurance coverage action. Throughout the course of the litigation, Penn National's recalcitrance to meet its discovery obligations has been well documented.² Penn National forced the Receiver to file numerous motions to compel and this Court to issue multiple discovery and sanction orders for Penn National to comply with its basic discovery obligations.^{3,4} However, the evidentiary hearing on spoliation, conducted between November 27, 2023 and November 28, 2023, revealed additional, profound abuses of discovery, culminating in the corporate representative of Penn National testifying during the evidentiary hearing and making demonstrably inaccurate statements to this Court.⁵

The evidence in the record in affidavits, deposition testimony, trial testimony, and other documentary evidence is clear and unequivocal, and it paints a disturbing picture of Penn National's discovery misconduct with respect to Covil. Penn National had a duty to preserve insurance policies and policy-related documents evidencing coverage to Covil starting in at least May 2018, and continuing throughout the current litigation. However, Penn National destroyed historic, occurrence-based general liability insurance policies on an annual basis between 2018

² Covil Trial Ex. 121, Attorneys' Fee Sanction Order against Penn National, at 1–7.

³ See generally Covil Trial Ex. 71, May 5, 2022 Discovery Order.

⁴ Covil Trial Ex. 121, Attorneys' Fee Sanction Order against Penn National, at 4.

⁵ On November 28, 2023, Penn National's corporate representative, Boyd Wright, testified at the evidentiary hearing that Penn National did not destroy microfiche. However, on cross examination, Penn National's corporate representative admitted that he never read the prior testimony of Penn National's corporate representative, Brent Reifsnyder, who had testified in deposition over a year earlier that Penn National had in fact destroyed microfiche.

and 2021, including historic comprehensive general liability insurance policies stored on microfiche, in violation of applicable law and its own Document Retention Policy. Penn National failed to issue the requisite litigation holds mandated by applicable law and its own Litigation Hold Procedure. Penn National failed to review any of the policies it destroyed for reference to Covil before destruction. Penn National failed to keep any records of what it was destroying. And Penn National issued one or more insurance policies protective of Covil that it can no longer produce, including at least one primary general liability insurance policy responsive to asbestos bodily injury lawsuits with a policy period of March 31, 1985 to March 31, 1986.⁶ The record demonstrates that Penn National destroyed material evidence that amounts to spoliation.

With respect to the non-jury trial, the Receiver asks this Court to declare the rights of the parties under two Penn National general liability insurance policies issued to Covil with policy periods of March 31, 1986 to March 31, 1987 and March 31, 1987 to March 31, 1988. Pursuant to Section 15-53-30 of the Uniform Declaratory Judgments Act, the Receiver is entitled to have this Court determine any question of construction or validity arising under the insurance contract and to obtain a declaration of rights.⁷ To that end, the Receiver has requested Penn National's

⁶ The additional Penn National insurance policies issued to Covil include general liability coverage issued for the policy period directly preceding the March 31, 1986 to March 31, 1987 and March 31, 1987 to March 31, 1988 policy periods, for which there are true and complete copies. Covil Trial Exs. 1 and 2. Specifically, the March 31, 1986 to March 31, 1987 Penn National Policy is a "renewal" policy. See Covil Trial Ex. 1 at 29 ("Amending policy to delete products form GL0031 (4/84), and Add GI2104 (7/66) Product hazard exclusion as it was *left off at renewal*." (emphasis added)). Penn National's entire reliance at trial on a "coverage chart" to avoid a spoliation ruling is nothing more than a red herring. It is not evidence of what Penn National did or did not issue to Covil, and it certainly is no defense for Penn National's destroying Covil's policy documents during the pendency of Covil litigation. Penn National fails to address much less confront the admission in the 1986–1987 Policy that it issued general liability coverage to Covil prior to 1986.

⁷ An insurance contract may be construed before a breach occurs. *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 595-96, 748 S.E.2d 781, 787 (2013). Here, despite Penn National's claim to the contrary, the Receiver does not seek an advisory opinion: he seeks judicial determination of how the Penn National insurance policies respond to fourteen previously settled asbestos lawsuits that

participation in indemnity payments for settlement of the asbestos bodily injury claims filed against Covil (the “Covil Asbestos Suits”). Litigation ensued related to Penn National’s failure to participate in one claim,⁸ but ultimately, Penn National participated in settlement negotiations for several other claims. On September 1, 2022, Boyd Wright, Penn National’s Senior Home Office Claim Examiner, wrote to the Receiver to announce that the total limits that Penn National was willing to pay for future indemnity payments were dwindling fast due to Penn National’s participation in the settlement of fourteen Covil asbestos claims and his reading of the “aggregate” limit in the Penn National insurance policies.⁹

The Receiver retained two expert witnesses for purposes of helping this Court determine whether the “aggregate” limit applied, among other reasons. The Receiver’s first expert witness, former asbestos defense counsel Sharla Frost, evaluated the case files for all fourteen asbestos claims.¹⁰ Penn National had access to these same case file materials, including complaints, discovery responses, deposition transcripts, job site lists, and other relevant materials,¹¹ in advance of its participation in the settlement of each claim. Ms. Frost analyzed the materials and has provided summaries of each claim relevant to an understanding of the types of exposures to asbestos from Covil’s ongoing work for which Penn National historically has deemed appropriate to indemnify Covil. The Receiver’s second expert witness, Charles Miller, testified as to the history, derivation, intent, and purpose of the general liability and products/completed operations provisions of comprehensive general liability policies and the distinctions between operations

Penn National has paid to date, and how that informs and impacts the construction and validity of Penn National’s insurance policies with respect to pending and future Covil asbestos claims.

⁸ *Covil Corp. v. Penn Nat’l Mut. Cas. Ins. Co.*, 436 S.C. 85, 870 S.E.2d 191 (2022).

⁹ Covil Trial Ex. 14, Letter from B. Wright to P. Protopapas, Sept. 1, 2022.

¹⁰ Covil Trial Ex. 103.

¹¹ Covil Trial Exs. 15–28.

hazard coverage and products/completed operations hazard coverage. Mr. Miller also testified regarding insurance industry standards for the timely and thorough search for insurance policies.¹²

Penn National has acknowledged its disagreement with Covil as to the existence, application and/or interpretation of certain insurance coverage afforded under its general liability policies. Covil continues to be sued in the asbestos litigation, implicating additional Penn National indemnity payments while Penn National asserts that its indemnity payments continue to erode the alleged liability limits of the policies. Penn National's stated coverage positions related to the application of its policies are contrary to the Receiver's positions. Rulings clarifying the interpretation of the Penn National insurance coverage, as applied to the fourteen exemplar claims in Boyd Wright's September 1, 2022 letter, will assist the parties in resolving questions related to when the Penn National policies respond to the Covil asbestos claims, the impairment of any limits of liability, and the portion of any Covil asbestos claim to be paid by Penn National.

Because the Receiver and Penn National maintain disputes regarding the existence, interpretation, meaning, and/or application of certain Penn National insurance policies, this Court finds that the Receiver's instant action for declaratory relief against Penn National is necessary. The Court carefully reviewed and considered all evidence, briefing, and oral argument submitted by the parties.

¹² Having heard their credible and persuasive testimony, and having independently reviewed the record, the Court adopts fully the expert witness opinions provided by Ms. Frost and Mr. Miller.

II. FACTUAL BACKGROUND

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

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

In 1948, Palmer Covil opened a small insulation contracting business in Greenville, South Carolina.¹³ The company was incorporated in 1954.¹⁴ Over the next thirty years, Covil grew to become a major regional insulation contractor, installing or removing asbestos-containing insulation in a variety of heavy industrial facilities across South Carolina.¹⁵ In 1991, Covil was administratively dissolved.¹⁶

2. **Covil was placed into receivership in November 2018.**

When Covil failed to respond to two asbestos personal injury claims in South Carolina state court in November of 2018, defaults were entered in both cases. *See* Order Granting Default Judgment against Covil Corporation, *Taylor v. Air & Liquid Sys. Corp.*, C.A. No. 2018-CP-40-04940 (S.C. Comm. Pl. Nov. 2, 2018); Order Granting Default Judgment against Covil

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

¹⁴ *See* Covil Trial Ex. 80, Certified Doc. from Secretary of State of South Carolina.

¹⁵ *See* Covil Trial Ex. 81 at COV_005788 (Covil promotional material, noting “Founded in 1947, we have for 32 years furnished the Southeast with insulation products from companies that set industry standards. As contractors our workmanship has proved to be of such high quality that we too, are setting standards throughout the Southeast.”); *id.* at COV_005785 (Resume of Work Performed by Covil Corporation); *id.* at COV_005787 (Resume of Work Performed by Covil Corporation).

¹⁶ Covil Trial Ex. 101, Certificate of Administrative Dissolution.

Corporation, *Hill v. Advance Auto Parts*, C.A. No. 2018-CP-4004680 (S.C. Comm. Pl. Nov. 2, 2018). In addition to requesting entry of defaults in both cases, plaintiffs moved to appoint a receiver over Covil Corporation. *See* Order Appointing a Receiver for Covil Corporation, *Taylor v. Air & Liquid Sys. Corp.*, C.A. No. 2018-CP-40-04940 (S.C. Comm. Pl. Nov. 2, 2018). On November 2, 2018, this Court appointed Peter Protopapas as the Receiver of Covil Corporation. *See id.* The Receiver was tasked with “the right and obligation to administer any insurance assets of Covil corporation as well as any claims related to the actions or failure to act of Covil’s insurance carriers.” *Id.* at 1.

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

Since the Receiver’s appointment, Covil has continued to be sued in the asbestos litigation for claims arising out of Covil’s historic operations, among other allegations, throughout the southeastern United States (the “Covil Asbestos Suits”). I find that Mr. Protopapas has done an exceptional job as Receiver in administering the insurance assets of Covil to resolve legitimate Covil Asbestos Suits.¹⁷

As established by the credible testimony of Sharla Frost,¹⁸ a litigator specializing in the defense of asbestos-related product liability cases, Covil faces potential verdict risks in the Covil

¹⁷ As this Court stated to Penn National at trial, “The luckiest day you ever had was when someone like Peter Protopapas got involved for your insured. Because there’s a guy who’s not trying to gouge you at all. He’s trying to talk fairly as a defendant and as a receiver for a defendant about what makes sense and whether claims have validity and so forth and so on.” Trial Tr. Day 1, Morning Session, at 31:2–9. Penn National agreed, stating: “The record is Mr. Protopapas has done an outstanding job in retaining and defending claims and resolving claims. There’s no dispute about that.” *Id.* at 31:10–14.

¹⁸ At trial, “[b]y reason of her education, training, and experience,” this Court qualified Ms. Frost “[a]s Plaintiff’s expert in the area of the history and evolution of asbestos litigation and evaluation of asbestos claims.” Trial Tr. Day 1, Afternoon Session, at 44:4–8. As reflected in her trial testimony and CV (Covil Trial Ex. 94), Ms. Frost has had a lengthy career defending a wide variety of defendants in various industries in asbestos litigation across numerous jurisdictions in the United States, including South Carolina.

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

As to the evaluation of verdict risk based on the plaintiff's disease/medical diagnosis, Ms.

Frost credibly testified as follows:

For the purposes specifically of these cases, I was looking really at whether they were mesothelioma. Mesothelioma, as you are well aware, is what's called a "signature disease" by the plaintiffs' experts. That means that it is a disease that is most commonly associated with exposure to asbestos. It is a type of lung cancer that occurs in the mesothelial lining of the lungs. It is exquisitely painful. It is invariably fatal. And it is associated with an extraordinarily high risk of an adverse verdict for a defendant, particularly in a living mesothelioma case, but also in the death cases.

...

Lung cancer can be caused by exposures other than asbestos. It is – has potential alternative causes which makes it a somewhat lower risk of verdict exposure, but it is still highly associated with asbestos exposure. And accordingly, if there is exposure documented in the record, it presents a significant risk of a verdict against a defendant in one of these cases.

Trial Tr., Day 1, Afternoon Session, at 60:21–61:17. Therefore, once a plaintiff's disease process is identified, an individual with experience in asbestos litigation immediately will become aware of the relative risk the case presents from a disease perspective, as well as potential defenses to begin to employ in the case of a lung cancer diagnosis, as compared with a mesothelioma diagnosis.

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

Q. So I want to talk to you about one of the other factors, in particular the other factor that you were looking at with regard to the cases against Covil, and that is the conditions of exposure. And what we have here are two types of exposure, direct exposure and bystander exposure. Could you, again, generally provide a description of each of those for the Court?

A. Well, direct exposure is pretty much what it sounds like. That's the person who is using the product and is directly exposed to asbestos from his work activity.

A bystander is someone who may not himself be working with the asbestos-containing product, for example, for Covil, it's the person who may not have been installing the insulation but he was in the area, and there was either cutting or some sort of manipulation of the product that releases friable asbestos and puts them in the zone where they have exposure in the breathing zone to those products even though they are not themselves hands-on with it.

Q. And do all of these activities that we have listed here, installing, removing, replacing, repairing, maintaining, are those all the types of activities that can release those fibers and cause exposure either directly to a worker or to a bystander?

A. The industrial hygiene literature and the medical literature related to asbestos all demonstrate that each of these types of activities have been proven to release friable asbestos that in turn presents a risk of exposure to those people who are in the vicinity.

...

Q. All right. So you talked a minute ago about job positions. Again, describe to the court what you're looking at when you're reviewing conditions of exposures, in particular job positions.

A. Well, you're looking to see what level of exposure they likely had.

So the insulators, as demonstrated by Selikoff and others, have an extremely high amount of exposure. But also the pipefitters who work around those products, whether they are in the vicinity at the time that the product is being installed or they're required to cut into the insulation later in order to access pipes, those are demonstrated types of exposure. Similarly, the welders who must repair pipes or repair other metal items around are demonstrated to have exposures.

Electricians who are working in an industrial setting where others are working with asbestos-containing products have exposure, depending on the product that they are using. An electrician may have direct exposure because many of the fire suppression items that were associated with electricity contained asbestos.

Carpenters, they built the frameworks that went around the pipes. They had exposure.

Q. Like the scaffolding?

A. The scaffolding, yes.

And the laborers or helpers who did the cleanup or did other sorts of tasks in the vicinity of any of these other positions also are demonstrated in the literature to have fairly significant exposure and are, therefore, at risk.

Id. at 61:22–65:1. Specifically as to Covil, Ms. Frost evaluated the complaints, discovery materials, dispositive motions and oppositions thereto, and pre-trial reports of Covil’s defense counsel, Ellis & Winters, to determine the verdict risk presented by each of the fourteen Covil Asbestos Cases for which Penn National participated in settlement. *Id.* at 65:2–66:21; Covil Trial Exs. 15–28. At trial, Ms. Frost provided credible and helpful analyses of five of the settled claims, *Ashworth, Jonas, Morgan, Moss, and Wannamaker*. *See id.* at 67:1–81:3. Ms. Frost’s Pre-Trial Declaration provided similar credible analyses of the remaining settled Covil asbestos claims to provide this Court with the background necessary to fully analyze the types of asbestos claims for which Penn National has previously indemnified Covil for purposes of context for the coverage determination. *See* Covil Trial Ex. 103, Declaration of S. Frost at 6–23.

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

1. Covil purchased insurance policies from Penn National.

During the company’s existence, Covil purchased a range of different insurance policies and policy renewals from Penn National, including but not limited to multiple years of comprehensive general liability, auto, and inland marine coverages.¹⁹ For example, Penn National admits in this lawsuit that it issued general liability coverage to Covil through Policy Number 515-50-28-53-7 for the period March 31, 1986 to March 31, 1987 (hereinafter “1986–1987 Policy”)

¹⁹ *See, e.g.*, Covil Trial Exs. 1, 2, 4, and 5.

and Policy Number 515-50-28-53-8 for the period March 31, 1987 to March 31, 1988 (hereinafter “1987–1988 Policy”) (collectively, “the Penn National Policies”),²⁰ and produced what it characterized as “true and accurate” copies of those specific policies.²¹ Penn National also issued auto coverage to Covil through Policy Number 130 03 87 00-6 for the period March 31, 1985 to March 31, 1986, Policy Number 130 03 87 00-7 for the period March 31, 1986 to March 31, 1987, and Policy Number 130 03 87 00-8 for the period March 31, 1987 to March 31, 1988 (hereinafter the “Auto Policies”).²² Further, Penn National issued inland marine coverage to Covil through Policy Number 900 0521 40-6 for the period March 31, 1985 to March 31, 1986, Policy Number 900 0521 40-7 for the period March 31, 1986 to March 31, 1987, and Policy Number 900 0521 40-8 for the period March 31, 1987 to March 31, 1988 (hereinafter the “Inland Marine Policies”).²³

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

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

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

Coverage A. **bodily injury**, or

Coverage B. **property damage**.

[to] which this insurance applies, caused by an **occurrence**, and the company shall [have] the right and duty to defend any suit against the **insured** seeking damages on

²⁰ Penn National Trial Ex. 2, Penn National’s Answer to Compl. ¶ 8. Penn National failed to produce “true and accurate” copies of any other comprehensive general liability coverage issued to, or otherwise protective of, Covil as a named insured or additional/supplemental insured. As explained in this Court, the Court also finds that Penn National issued a comprehensive general liability policy to Covil for the policy period of March 31, 1985 to March 31, 1986. *See* Covil Trial Ex. 1 at 29 (Change Endorsement establishes 1986-1987 Policy is a renewal policy).

²¹ Covil Trial Exs. 1–3.

²² Covil Trial Ex. 5.

²³ Covil Trial Ex. 4.

[account] of such **bodily injury** or **property damage**, even if any of the allegations of [the] suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.²⁴

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

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

Subject to the above provision respecting "each occurrence," the total liability of the company for all damages because of (1) all **bodily injury** included within the **completed operations hazard** and (2) all **bodily injury** included within the **product hazard** shall not exceed the limit of **bodily injury** liability stated in the declarations as "aggregate."²⁵

The "Limits of Liability" further provide:

Coverages A and B—For the purpose of determining the limit of the [company's] liability all **bodily injury** and **property damage** arising out of continuous or [repeated] exposure to substantially the same general conditions shall be considered as arising out of one **occurrence**.²⁶

The applicable "Definitions" section of the Penn National Policies contains these definitions:

- "**bodily injury**" means bodily injury, sickness, or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom;²⁷
- "**completed operations hazard**" includes bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs

²⁴ Covil Trial Ex. 1, 1986–1987 Policy at Penn National Policies 000002; Covil Trial Ex. 2, 1987–1988 Policy at Penn National Policies 000045.

²⁵ Covil Trial Ex. 1, 1986–1987 Policy at Penn National Policies 000004; Covil Trial Ex. 2, 1987–1988 Policy at Penn National Policies 000047.

²⁶ *Id.*

²⁷ Covil Trial Ex. 1, 1986 to 1987 Policy at Penn National Policies 000036; Covil Trial Ex. 2, 1987 to 1988 Policy at Penn National Policies 000081.

after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. ‘Operations’ include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

- (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed,
- (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or
- (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.²⁸

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed;²⁹

- “**occurrence**” means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured; and
- “**products hazard**” includes bodily injury . . . arising out of the named insured’s products . . . but only if the bodily injury . . . occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others.³⁰

There is no definition of the term “aggregate” in the “Definitions” section of the Penn National Policies.³¹

The Court notes that Penn National’s proffered insurance expert, Mr. Bernd Heinze, testified that the 1986–1987 Policy and the 1987–1988 Policy are unambiguous. Trial Testimony, Day 2 at 52–53.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

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

Penn National has paid more than \$600,000.00 to participate in the settlement of fourteen covered asbestos bodily injury claims against Covil under the Penn National Policies.³²

Considering the underlying defense file with regard to each of the fourteen Covil Asbestos Suits in which Penn National participated in settlement, Covil's expert witness, Sharla Frost, evaluated each suit to explain the potential verdict risk the cases presented from the perspective of the disease/medical diagnosis with which the plaintiff presented, the job/job duties of each particular plaintiff, the work site(s) where each particular plaintiff performed work during his working life, the time period(s) when the plaintiff worked at each such work site, and the overlap in terms of those time periods with periods when Covil insulation employees performed work operations at the same work site.³³

As credibly detailed in Ms. Frost's Declaration and trial testimony, the following asbestos suit settlements for which Penn National participated under its insurance policies—*Ashworth, Campbell, D'Amico, Garren, Jolly, Jonas, Knight, Morgan, Sims, Aspray, Wannamaker*, and *Moss*—alleged that Covil performed contracting work at the respective plaintiff's worksites at the same time that the plaintiff was working at those same jobsites, and that Covil's contracting work allegedly caused the plaintiff to be exposed to asbestos.³⁴ As Ms. Frost credibly explained, these cases each presented a high verdict risk, and therefore were appropriate for resolution before trial, because the "worker is working at the same site while the Covil work activities are still in progress. When a worker is directly involved in the installation, removal, replacement, repair, or

³² See Covil Trial Ex. 14, Letter from B. Wright to P. Protopapas, Sept. 1, 2022.

³³ See Covil Trial Ex. 103, S. Frost Decl. at 3–23.

³⁴ *Id.*

maintenance of asbestos containing thermal insulation there is, of course, a significant risk of exposure to asbestos. Likewise a worker whose job function is nearby on the jobsite where such insulation installation, removal, replacement, repair, or maintenance work is taking place, faces a significant risk of a high dose exposure because of the release of asbestos fibers into the air as a result of the insulation work being performed by the insulation contractor's—in this case, Covil's—employees, even if his personal job duties do not require the manipulation of the asbestos containing materials himself.”³⁵

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

1. Penn National's duty to preserve its historic insurance policies was independently triggered in 2018, 2019, 2020, and 2021.

Penn National was on notice in May 2018 that it should preserve its historic Covil insurance policies from automatic destruction or deletion when asbestos claimants in *Ann Finch v. Covil Corporation*, 1:16-cv-1077 (M.D.N.C.), served Penn National with a subpoena requesting “all liability insurance policies and endorsements issued to Covil between 1969 and 1995[.]”³⁶ At that time, Covil faced significant potential liability in the *Finch* asbestos personal injury case, which ultimately resulted in a \$32 million verdict against Covil.³⁷ Although Penn National was not involved in the defense of the *Finch* case, the underlying asbestos personal injury plaintiff's counsel, Dean Omar Branham & Shirley, LLP, served the subpoena on Penn National seeking policies for two known policy years (86/87 and 87/88) and also seeking documents related to any and all other policies protective of Covil. Penn National responded to the subpoena on June 15, 2018, but only searched for Covil policies by the exact policy numbers provided to it by the

³⁵ *Id.* at 4.

³⁶ Covil Trial Ex. 12, *Finch* Subpoena to Penn National, at 5.

³⁷ *Id.*

asbestos claimant's counsel for the two identified policy years.³⁸ In response to the subpoena, Penn National did not perform a search for any other policies covering or potentially covering Covil for any other years despite the request for same having been clearly made in the subpoena. Additionally, Penn National did not institute any form of internal litigation hold for Covil policies at this time.

Then, in October 2019, Penn National was named as a defendant in the Covil coverage litigation in the Middle District of North Carolina.³⁹ This put Penn National on notice that specific and identifiable litigation was filed against the company and that all evidence of Penn National's historic insurance policies covering Covil as a named insured or additional/supplemental insured would be relevant. Specifically, the Receiver immediately served discovery on Penn National, demanding that it identify "all insurance policies [Penn National] issued to Covil or which otherwise include Covil as an insured."⁴⁰ Penn National understood the Receiver's request to include policies covering Covil as a named insured or additional insured, claiming in response that it "*does not maintain its records in a way that would provide a reasonable method of searching for policies under which Covil is named as an additional insured or qualifies as an additional insured.*"⁴¹ Therefore, no later than October 2019, Penn National was on notice that the Receiver sought documents and information about both named insured as well as additional insured coverage for Covil in ongoing litigation.

³⁸ Covil Trial Ex. 13, Penn National Subpoena Resp., June 15, 2018.

³⁹ On October 2, 2019, another of Covil's historical insurers, Hartford, named Penn National as a third-party defendant in the first Covil insurance coverage action, filed in the Middle District of North Carolina. *See Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-cv-932 (M.D.N.C. Oct. 2, 2019), ECF 104. On November 20, 2019, Covil amended its Answer to include a third-party action against Penn National. *See id.*, ECF 131 at ¶¶ 118, 169, 174–176. Penn National moved to dismiss Covil's third-party complaint, but the motion was denied on February 24, 2020. *See id.*, ECF 227.

⁴⁰ Covil Trial Ex. 42, Dec. 18, 2019 Penn National Disc. Resp. at Interrog. No. 1.

⁴¹ *Id.*

At the same time, the Receiver requested that Penn National “describe [its] document retention policies, oral or written, that relate to insurance policies, underwriting information related to such policies, and/or form language used in such policies issued by [Penn National] during the 1950-1986 time period.”⁴² Penn National did not produce or describe those policies, nor did it assert that they were confidential or proprietary.⁴³ Once again, Penn National failed to issue any form of internal litigation hold at this time to prevent the destruction of any Covil-related documents.

In February 2020, the Receiver filed suit against Penn National in this Court.⁴⁴ The Receiver again served Penn National with discovery requesting any policy issued by Penn National that included Covil as an insured.⁴⁵ The Receiver also requested Penn National’s document retention policies from 1950 through 2018.⁴⁶ Penn National repeated its responses from the North Carolina case.⁴⁷ Penn National did not institute a litigation hold in response to this litigation.

In April 2020, the Receiver filed this case against Penn National. In his Complaint, the Receiver made clear that he was seeking “an order requiring that Penn National . . . provide to plaintiff complete and authentic copies of any general liability and excess liability insurance policies it issued to Covil together with all other documents and things relating to these policies, including (but not limited to) certificates of insurance, underwriting manuals and documents, and claims files[.]”⁴⁸ Subsequent discovery revealed that Penn National had not conducted a fulsome

⁴² *Id.* at Interrog. No. 9.

⁴³ *Id.*

⁴⁴ *Covil Corp. v. Pa. Nat’l Mut. Cas. Ins. Co.*, C.A. No. 2020-CP-40-01226 (Com. Pl. filed Feb. 28, 2020).

⁴⁵ Covil Trial Ex. 52, May 15, 2020 Penn National Disc. Resp. at RFP No. 2.

⁴⁶ *Id.* at RFP No. 11.

⁴⁷ *See id.* at RFP Nos. 2 and 11.

⁴⁸ Penn National Trial Ex. 1, Covil Comp. at 11(¶ B.).

search of its records for policies covering Covil as either a named insured or an additional insured. The Receiver continued to serve requests for coverage, and Penn National continued to stonewall.⁴⁹ Once again, Penn National did not institute a litigation hold in response to this litigation.

2. Penn National destroyed historic occurrence-based general liability insurance policies and policy-related documents as part of its annual document purges in 2018, 2019, 2020, and 2021 without issuing a litigation hold related to the Covil litigation.

On a November 19, 2021 call with the Receiver's counsel and Ellis & Winters, Penn National disclosed for the first time that it conducts an annual purge of archived general liability insurance policies as they age out of its retention period without any litigation hold in place related to the Covil litigation. This disclosure was confirmed a month later in Penn National's written discovery responses.⁵⁰ Based on Penn National's admission, it is clear that Penn National conducted annual document purges at the end of 2018, 2019, and 2020 (or the very beginning of 2019, 2020, and 2021), all of which were performed *after* it was on notice—as early as May 2018 with the *Finch* subpoena—of the need to preserve documents that potentially identify insurance coverage for Covil.⁵¹

⁴⁹ Ex. 57, May 10, 2021 Penn National Resp. to Receiver's Interrog. at Interrog. No. 1.

⁵⁰ Covil Trial Ex. 64, Dec. 20, 2021 Penn National Responses to Receiver's Second Req. for Produc. at RFP No. 1 ("Penn National has not issued any formal litigation hold notice at this time. . . . Pursuant to [Penn National's] retention policy, certain policy-related documents may be identified for purging throughout the course of the year."). Penn National finally issued a litigation hold on December 17, 2021. *See* Covil Trial Ex. 10, Dec. 17, 2021 email litigation hold from S. Maier to B. Reifsnyder.

⁵¹ *See* Covil Trial Ex. 84, B. Reifsnyder Dep. Tr., Nov. 11, 2022, at 41:23–42:8 ("Q. Do you recall when policies were purged in 2018? A. We purge policies—we—we pull them. Everything is then purged the beginning of the new year. Q. So if a purge was taking place in 2018, it would have been January or February 2018? A. If we were doing a purge in 2018, then everything that was pulled to be destroyed—to be purged in 2018 would have been purged early, meaning January, 2019."); *see also id.* at 53:14–22 ("Q. So the documents identified to be purged in 2019, did you review any of those policies to determine whether Covil was identified as an insured on any of

Specifically, Penn National has admitted that it (1) destroyed liability policies and policy-related documents in 2018, 2019, and 2020; (2) did not issue a litigation hold related to any litigation involving Covil until December 2021; (3) did not search the liability policies and policy-related documents it destroyed between 2018 and 2021 for references to Covil before purging them; and (4) can no longer identify each and every named insured, additional insured or supplemental insured listed in the now destroyed policy-related documents, as follows:

- Penn National admitted that it identified policy-related documents by policy number that were beyond the scope of its retention timeframe for possible disposal in 2018, 2019, 2020, and 2021.⁵²
- Penn National admitted that it disposed of policy-related documents pursuant to its standard record purge policy and practice in 2018, 2019, and 2020.⁵³
- Penn National admitted that it disposed of liability insurance policies in 2018, 2019, and 2020.⁵⁴
- Penn National admitted that it did not issue a litigation hold for any Covil litigation until December 2021.⁵⁵
- Penn National admitted that it did not review the policy-related documents for references to Covil before it disposed of the purged documents pursuant to its standard record purge policy and practice in 2018, 2019, and 2020.⁵⁶
- Penn National admitted that it did not review the liability insurance policies for any reference to Covil before it disposed of them in 2018, 2019, and 2020.⁵⁷
- Penn National admitted that it cannot identify each and every named insured, additional insured or supplemental insured listed in the paper and microfiche-

those policies before you destroyed them in 2020? A. From looking through them individually is the nature of the question? Q. Yes. A. The answer is no.”)

⁵² See, e.g., Covil Trial Ex. 68, Feb. 17, 2022 Penn National Resp. to Req. for Admis. at RFA No. 2.

⁵³ See *id.* at RFA Nos. 3, 5, 7.

⁵⁴ See *id.* at RFA Nos. 4, 6, 8.

⁵⁵ See *id.* at RFA No. 21.

⁵⁶ See *id.* at RFA Nos. 11, 13, 15.

⁵⁷ See *id.* at RFA Nos. 12, 14, 16.

policy-related documents it destroyed, purged, or otherwise disposed of since 2018.⁵⁸

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

Penn National has asserted that it is unable to locate any additional policies or policy-related documents indicating coverage protective of Covil, but Penn National has not produced “complete and authentic copies” of each of the Covil policies and policy renewals issued to Covil, including general liability policies that pre-date the 1986–1987 Policy.⁵⁹

Likewise, the policies and policy-related documents that Penn National has produced in this case also demonstrate that Penn National policies include endorsements in which other companies or individuals are covered that are not identified on the declarations page of the policy. The 1986–1987 Policy, for example, identifies the following entities and individuals as “Special Named Insureds”: Covil Corporation, Inc.; Covil Residential Insulation, Inc.; Covil Construction Co, Inc.; C&J Realty Co., Inc.; Industrial and Associated, Inc.; John Hamrick Link; James P. Covil; Yvonne Wells; and Charles McWhorter.⁶⁰ The 1987–1988 Policy includes a similar list on the “Special Named Insured” Endorsement.⁶¹ Given the list of insureds identified in these endorsements, it follows that Covil may have been identified as an insured on other Penn National policies that Penn National may have been able to locate had it not destroyed historical policies.

As Penn National admitted in its first set of discovery responses on December 18, 2019, and consistently stated in discovery thereafter, it now has no reliable way to search its own records

⁵⁸ See *id.* at RFA No. 23.

⁵⁹ See Covil Trial Ex. 1, 1986–1987 Policy at Penn National Policies 0000029 (Change Endorsement establishes 1986–1987 Policy is a *renewal*).

⁶⁰ Covil Trial Ex. 1, at 11.

⁶¹ Covil Trial Ex. 2, at 10.

for this information: “Penn National does not maintain its records in a way that would provide a reasonable method of searching for policies under which Covil is named as an additional insured or qualifies as an additional insured. Thus, Penn National has no reasonable method of identifying all documents *that may be responsive* to this interrogatory.”⁶²

4. Insurers, such as Penn National, have known about the need to preserve their legacy occurrence-based general liability policies once long-tail claims are asserted against their policyholder since at least 1986.

Insurance companies have been on notice regarding the need to preserve their legacy occurrence-based comprehensive general liability insurance policies once an asbestos lawsuit is filed against its insured for decades. As Sharla Frost explains, “The Manville Corporation filed for bankruptcy in 1982 and came out of . . . bankruptcy in 1986, starting the Manville Trust operations in 1988. Part of the controversy with the Manville bankruptcy initially had to do with the handling of the insurance proceeds that were contributed to the bankruptcy estate for use by the Manville Trust. That was done very early in the litigation. And from that point onward it was very obvious that one was going to have a long-tail litigation and there were going to be implications for the insurance proceeds.”⁶³

The U.S. Supreme Court, recounting the history of the Johns Manville Trust creation in *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 141 (2009), similarly explained, “[i]n a settlement described as the ‘cornerstone’ of the Manville reorganization, the insurers agreed to provide most of the initial corpus of the Trust, with a payment of \$770 million to the bankruptcy estate, \$80 million of it from Travelers.” *Citing MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 90 (2d.

⁶² Covil Trial Ex. 50, Penn National’s Answers to Covil’s First Set of Interrog. and Resp. to Covil’s First Set of Req. for Admis. at Interrog. No. 1 (emphasis added).

⁶³ Covil Trial Ex. 96, Sharla Frost Dep. at 12:15–13:5.

Cir. 1988); Bkrcty. Ct. Op. 134(a); *In re Johns-Manville Corp.*, 68 B.R. 618, 621 (Bkrcty. S.D.N.Y. 1986). Not only was this information reported in the legal cases, but also newspapers published stories regarding the Manville Trust plan at the time it was negotiated.⁶⁴

Penn National has no excuse for failing to suspend its systemic document destruction or purge policy and failing to ensure that it preserves all Covil policy-related documents with a litigation hold during the pendency of the litigation relating to Covil.⁶⁵

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

Penn National's delayed revelation of its policy document purge is directly related to its failure to meet its basic obligations to fully respond to written discovery and to produce witnesses prepared to testify as to key issues in this case. Penn National's stonewalling activity required Covil to file six motions to compel against Penn National between January 15, 2021 and April 11, 2022, and thereby required this Court to enter six separate orders over the course of two years to discover basic information from the insurance company related to its issuance of insurance coverage to Covil, and its maintenance of historical policy documents. Despite Covil's efforts, and this Court's demands, Penn National still has yet to fully comply with its discovery obligations in this case.

⁶⁴ See, e.g., Covil Trial Ex. 102, Tamar Lewin, A New Set of Hurdles for Manville, N.Y. TIMES (Feb. 17, 1986) <https://timesmachine.nytimes.com/timesmachine/1986/02/17/591186.html> ("Under the plan, Manville would establish a trust to pay present and future claimants. The trust would be funded with \$615 million of insurance money, \$200 million in cash, notes and receivables, and up to 80 percent of Manville's stock.").

⁶⁵ Penn National presented testimony from its expert witness, Bernd Heinze, in an effort to suggest that destruction of documents, including insurance policy information, was reasonable around the time of the creation of the Manville Trust and thereafter to the extent policies covered companies other than asbestos manufacturers, such as Covil. The Court does not find Mr. Heinze's generalized testimony to be credible or persuasive on this point. Indeed, Mr. Heinze acknowledged that in the 1980's and 1990's when he was a practicing lawyer that he was "aware of asbestos and other kinds of long-tail bodily injury claims in litigation that companies and their insurers were facing." Trial Tr., Day 2, Morning Session at 23:1-10.

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

Penn National's prolonged discovery intransigence focused on the premise that it could not access any possible historic occurrence-based liability coverage from its archives for Covil or for any other policyholder unless provided with a policy number.⁶⁶ As more fully detailed below, this was despite the fact that Penn National itself, Covil, and later Covil's asbestos personal injury defense lawyers, Ellis & Winters, acknowledged that it was possible to engage a vendor to scan the historical policy documents in Penn National's remaining collection of paper and microfiche records to create a more searchable set of information. A solution clearly existed, but Penn National consciously elected to waste this Court's and the Receiver's resources in prolonged discovery fights.

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

This Court has now lost all confidence in Penn National's willingness and ability to independently participate in discovery. The Court finds that Penn National's conduct with respect to its searches for historic Covil insurance policies . . . amounts to a total and complete refusal to comply with its discovery obligations. It could well have done exactly what Ellis & Winters has proposed here. Penn National could have selected a vendor, processed the information on its microfiche cards, and conducted a review. It did not. Instead, Penn National took the defiant stance that it could not search for historic policies on its microfiche cards without being provided a policy number. That position turns out not to be so. This Court is left with no choice but to allow the Receiver to examine the records.⁶⁷

The stonewalling position extended beyond policy documents, to nearly every aspect of the litigation. Following the Court's May 5 discovery order, Penn National refused to produce its claim files related to fourteen asbestos claims until Covil filed a motion to compel; and it also refused to

⁶⁶ Covil Trial Ex. 71, May 5, 2022 Order, at 4.

⁶⁷ *Id.* at 8.

produce documents responsive to the Receiver's Fourth Request for Production. The Court granted Covil's motion to compel on November 16, 2022.

2. Penn National's additional discovery misconduct.

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

More than a year after first filing a case against Penn National, on January 7, 2021, Covil had its first opportunity to depose a Penn National corporate representative, Penn National's claims adjuster, Boyd Wright. In his deposition, Mr. Wright testified that he merely spent a few "minutes" in preparation for the deposition asking the Penn National clerical staff what they had done to perform a search for Covil policies—he could not specify the actual searches Penn National performed.⁶⁸ Mr. Wright was aware that the clerical personnel searched an electronic system, which he could only identify as "version 6 or version 7," and which he does not personally use because "it requires coding that [he] can't ever get straight."⁶⁹ He also confirmed that the clerical employees did not search for—and Penn National does not maintain—an index of insurance policies that include information identifying "additional insureds" covered by Penn National policies.⁷⁰ Finally, Mr. Wright confirmed that he was "not aware that a search . . . through the entire company records occurred."⁷¹

In a hearing on January 25, 2021 related to the policy search deficiencies Mr. Wright's deposition uncovered, this Court ordered Covil to "develop a more complete list of job sites and possible agents that might have been involved in procuring this coverage from Penn National," and "[gave] Penn National 15 days to respond to it."⁷² The Court warned Penn National against

⁶⁸ See Covil Trial Ex. 76, B. Wright Dep., Jan. 7, 2021, at 9:5–12, 43:14–44:18.

⁶⁹ *Id.* at 39:7–16, 39:21–25.

⁷⁰ *Id.* at 45:14–25.

⁷¹ *Id.* at 67:4–6.

⁷² Covil Trial Ex. 100, Hearing Tr. at 141:14–24.

asking Covil “for something that’s just as ridiculous as what you say they asked for from you. They are not going to know policyholder’s numbers, or policyholders.”⁷³

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

Fifteen days after the hearing, on February 8, 2021, Covil re-issued its subpoena to Penn National, this time listing relevant contractors and job sites as the Court requested.⁷⁴ Despite this Court’s warning against doing so, Penn National’s first reaction to the subpoena included requesting the Receiver to provide “a policy number for any policy that may relate to Covil or the Contractors listed.”⁷⁵ Ultimately, Penn National responded to the subpoena request, objecting on many grounds over the course of two pages, including that the subpoena did not provide “any policy number.”⁷⁶ Following its objections, Penn National asserted that it spent an “immense amount of time” conducting a search and exercised reasonable diligence in searching its files.”⁷⁷ However, the actual substance of the subpoena response was limited to a single two-page e-mail chain in which several policies issued to contractors from Covil’s list were identified, but Penn National determined they were “not relevant to this action because such policies do not provide coverage to Covil Corporation.”⁷⁸

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

⁷³ *Id.* at 143:17–21.

⁷⁴ Covil Trial Ex. 53, Letter and Subpoena to Penn National, Feb. 8, 2021.

⁷⁵ Covil Trial Ex. 54, Letter from D. Harris to M. Shisko, Feb. 12, 2021.

⁷⁶ Covil Trial Ex. 55, Penn National’s Subpoena Resp., Feb. 22, 2021.

⁷⁷ Covil Trial Ex. 56, Penn National’s Suppl. Subpoena Resp., Mar. 9, 2021, at 5.

⁷⁸ *Id.* at 7.

protective of Covil in its discovery responses in another case.⁷⁹ In its July 1 order following the hearing, the Court found:

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

Moreover, although Penn National asserts it has ‘exercised reasonable diligence in searching its files,’ Penn National’s response to the Receiver’s subpoena did not provide a sufficiently detailed description of its search efforts and the Receiver is not simply required to take Penn National at its word. . . .

This Court finds that Penn National has a duty to fully, completely, and thoroughly search both its electronic records and its hard copy paper records for the information and documents sought by the Receiver, and the Court is not satisfied that Penn National has fully complied with its instructions at the January 25 hearing. Additionally, the Court is not satisfied that Penn National is only able to search its paper records by policy number. In any event, without more detailed information from Penn National, the Receiver and this Court are unable to evaluate Penn National’s efforts to search for coverage.⁸⁰

The Court therefore ordered Penn National to “provide the Receiver with a detailed description of how Penn National maintains its paper records” by July 9, 2021, and to thoroughly search its paper records by July 23, 2021.⁸¹

⁷⁹ Covil Trial Ex. 62, Order granting Covil’s motions to compel, July 1, 2021 (*Finch and Covil v. USF&G*, No. 2019-CP-40-03003 (S.C. Comm. Pl.) at 4.

⁸⁰ *Id.* at 5–6.

⁸¹ *Id.* at 6.

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

Penn National relied on its Director of Administrative Services, Brent Reifsnyder, to provide the court-ordered detailed description of how it maintains its paper records.⁸² In his July 9 Affidavit, Mr. Reifsnyder explained that non-electronic archives were stored on microfilm and in paper form.⁸³ The Affidavit outlined the storage and search procedures for both archive forms. Importantly, Reifsnyder attested, “[p]olicy documents that are stored on microfilm or paper are only searchable by policy number given that Penn National has historically organized such documents by using the terminal digit system” that marks each file with the last two digits of a policy number.⁸⁴

In a second Affidavit dated July 23—the date by which Penn National was to thoroughly search its paper records—Reifsnyder did not attest to having performed a thorough search.⁸⁵ Instead, he stated he “considered other alternative means of searching Penn National’s non-electronically-stored paper documents[.]”⁸⁶ He asserted, “the only alternative means of searching such [non-electronic] documents is by way of a manual search of each of the policy documents contained on microfilm at Penn National and in paper form This would entail a manual search of all non-electronically stored paper policy documents for policies that Penn National may have issued to any of the 240 contractors and 650 facilities listed by the Receiver that may or may not identify Covil Corporation as an additional insured.”⁸⁷

⁸² See Covil Trial Ex. 73, Aff. of B. Reifsnyder, July 9, 2021.

⁸³ *Id.* ¶ 6.

⁸⁴ *Id.* ¶¶ 8, 16.

⁸⁵ See Covil Trial Ex. 74, Aff. of B. Reifsnyder, July 23, 2021.

⁸⁶ *Id.* ¶ 6.

⁸⁷ *Id.* ¶ 7.

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

- he spent *less than five minutes* trying to locate documents responsive to the Court's Order.⁸⁸
- he did not take any steps to search for policy-related documents based on the contractor or job site lists provided by Covil.⁸⁹
- he did not consult with anyone at Penn National or outside Penn National about how he might be able to search for documents other than by policy number.⁹⁰
- until preparing for his deposition, he had never reviewed the list of job sites the Receiver provided to Penn National to facilitate Penn National's searches.⁹¹
- Penn National itself designed the system of organizing its records by policy number.⁹²
- he only considered, but did not pursue, one alternative means of searching: "[S]omebody would need to coordinate having somebody physically pull up and look through every conceivable record from microfilm and paper storage."⁹³
- he never consulted with anyone how a manual search could be conducted, never determined how long such a search would take, never determined how many individuals it would take to conduct such a search, never discussed procuring additional staff or resources for a search, and never determined how much the search would cost, whether conducted internally or by an outside vendor.⁹⁴

Shortly thereafter, Covil deposed Penn National's 30(b)(6) deponent, Boyd Wright, who was in charge of Penn National's electronic document search. Like Mr. Reifsnyder's complete refusal to search Penn National's paper or microfiche files, Mr. Wright doubled down on Penn National's assertion that "[y]ou'd have to have a policy number" to search electronically for an

⁸⁸ Covil Trial Ex. 77, Aug. 3, 2021 B. Reifsnyder Dep. at 65:3–11.

⁸⁹ *Id.* at 49:20–50:1.

⁹⁰ *Id.* at 50:2–9.

⁹¹ *Id.* at 47:10–24.

⁹² *Id.* at 43:11–16.

⁹³ *Id.* at 50:20–51:3.

⁹⁴ *Id.* at 52:7–24, 55:23–56:5, 57:2–12, 59:8–13, 59:14–60:10, 62:17–63:3.

“additional insured,” such as Covil, as well.⁹⁵ Without a policy number, Mr. Wright admitted, Penn National would “have to look in the policy documents to see if there was any supplemental insureds.”⁹⁶ But Mr. Wright testified that he did not even speak with Mr. Reifsnyder about the process or logistics for manually searching the paper archives for documents responsive to the Subpoena, let alone begin that task.⁹⁷

In short, Penn National’s flagrant defiance of this Court’s orders continued.

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

Given this background, on November 5, 2021, the Court entered an order requiring Penn National “to open its repository of insurance policies and to facilitate a review supervised and performed by Covil’s insurer-appointed defense counsel, Ellis & Winters, LLP.”⁹⁸ The Order required interim reports, with the first to be made on December 7, 2021.⁹⁹

In so ordering, the Court reasoned: “This Court has ordered Penn National to meaningfully participate in discovery on multiple occasions. Penn National claims that it cannot search its documents unless Covil provides the policy numbers where Covil was designated as an additional

⁹⁵ Covil Trial Ex. 78, Aug. 26, 2021 B. Wright Dep. at 23:22–24.

⁹⁶ *Id.* at 23:22–24:1.

⁹⁷ *Id.* at 36:6–11. The Court notes that to the extent Penn National’s expert, Mr. Heinze, was presented in an effort to vouch for the appropriateness of Penn National’s document retention system or the adequacy of its policy search efforts related to Covil, his testimony is rejected. While Mr. Heinze made a visit to Penn National’s headquarters in November 2022, during which time he observed boxes containing microfiche and reviewed a few randomly selected microfiche slides, he acknowledged that he (i) never spoke with Mr. Reifsnyder or Mr. Wright about their search efforts, (ii) is unaware of who at Penn National was involved in any document searches related to Covil or how much time was spent conducting those searches, (iii) does not know what documents were reviewed during any such search, and (iv) is not aware of and never asked if any index exists linking policy numbers to insured name or policy issue date. Trial Tr., Day 2 Morning Session at 43–49, 57–58.

⁹⁸ Covil Trial Ex. 63, Nov. 5, 2021 Order, at 1.

⁹⁹ *Id.* at 2.

insured. Despite this Court's orders, Penn National has yet to perform a manual search or to scan the documents so that they can be searched electronically."¹⁰⁰

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

No longer protected by its position that it would not perform a manual search of its policy records on its own, after the November 5, 2021 Order, it was quickly revealed that (a) Penn National purposefully downgraded its ability to perform policy searches in 2010, despite knowing the potential for claims from policyholders with long-tail liability in the asbestos litigation; (b) Penn National routinely purged its policy documents, including microfiche; and (c) there was no litigation hold for Covil until December 2021 despite the existence of several different litigations.

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

It is notable that Penn National's corporate representative testified in a 1991 deposition that *it was possible* at that time to search its policy index by policyholder name.¹⁰¹ In this case, however, Brent Reifsnyder testified that the only way to search for historic policies is by policyholder *number* using the system he created in 2010.¹⁰² In fact, Mr. Reifsnyder admitted that Penn National designed the 2010 electronic system of organizing its records by policy number only.¹⁰³ Specifically, Mr. Reifsnyder himself designed the computer system, 2k10, in 2010 to

¹⁰⁰ *Id.* at 1.

¹⁰¹ See Covil Trial Ex. 83, E. Rice Dep. at 16:16–22 (“In order to find if there were policies issued to General Gasket, we went back and went through our indexing system by name as well as by the policy number that was—or the alleged policy number that was provided on the documents that you furnished.”); *see also* Covil Trial Ex. 99, Nov. 30 2022 B. Wright Dep. at 57:4–58:8 (confirming that he had seen the deposition previously, and “Q. But you have no reason to believe that this was not his 30(b)(6) deposition testimony on behalf of Penn National; correct? A. The document is what it is, and I accept it at face value.”).

¹⁰² See Covil Trial Ex. 84, Nov. 10, 2022 B. Reifsnyder Dep. at 112: 10–17.

¹⁰³ Covil Trial Ex. 77, Aug. 3, 2021 B. Reifsnyder Dep. at 43:11–16.

provide only three pieces of information about Penn National's policies: (1) the policy number, (2) the date of policy cancellation or nonrenewal, and (3) the date the policy should be destroyed under Penn National's twenty-five-year document retention policy for insurance policies.¹⁰⁴

The 2k10 System was designed with a specific purpose in mind: to determine what documents record clerks could destroy under the Penn National document retention policy. As Mr. Reifsnyder testified, the Penn National document retention policy specifies that policy documents can be destroyed 25 years after the date of the policy cancellation or nonrenewal.¹⁰⁵ The policy does not, however, provide details for how the document destruction process should take place.¹⁰⁶ As a result, Mr. Reifsnyder was left with preparing his own system, and he did: the 2k10 System.¹⁰⁷

Mr. Reifsnyder explained that in 2010, Penn National hired clerks to perform the task of inputting policy numbers into the computer system, and the company paid the clerks so little that they did not want the low-paid employees to do a complex analysis that a policyholder name entry would require.¹⁰⁸ Mr. Reifsnyder described the policyholder name as "extraneous information."¹⁰⁹ Penn National produced a spreadsheet of the output of the 2k10 System in this case, which shows

¹⁰⁴ Covil Trial Ex. 84, Nov. 10, 2022 B. Reifsnyder Dep. at 91:1–24.

¹⁰⁵ *Id.* at 127:17–21; Covil Trial Ex. 8, Penn National Doc. Retention Policy.

¹⁰⁶ Covil Trial Ex. 84, Nov. 10, 2022 B. Reifsnyder Dep. at 68: 5–12 ("Q. The process that you have described here today for identifying policies in a calendar year and destroying them in January of the next year, is that policy written anywhere? A. Not that I'm aware of. Our – our records retention policy offers that once they hit that destruction date, then they're eligible to be purged.").

¹⁰⁷ *Id.* at 59:17–60:22.

¹⁰⁸ *Id.* at 92:24–93:25 ("Q. When you were going through this 2k10 database exercise and pulling the policyholder number, at that period, you could have pulled the policyholder name as well, correct? A. We could have, however – however, the people doing that job would have no idea to know whether that was the policyholder name without looking at each form. They were not underwriting people. They were clerks. No experience in underwriting, no experience in dealing with policies. They were just basic clerks. . . . It was a manual [] task. We assigned the appropriate level staff from a dollar perspective to that task.").

¹⁰⁹ *Id.* at 91:25–92:23.

that the oldest policy subject to the destruction program as of the time the spreadsheet was printed was a 1982 policy.¹¹⁰

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

Since the 2k10 System has been in place, on an annual basis, Mr. Reifsnyder prints out a list of all Penn National policies subject to destruction within the calendar year, which he places outside his office door.¹¹¹ His team of five document clerks locates all copies of the policy documents, in both paper and microfiche form, writing “done” next to each policy number on the printed list as the policies are collected.¹¹² No copies of those lists were maintained.¹¹³ In January of the calendar year after the documents are collected, the full set of policies to be destroyed, both in paper form and in microfiche form, are collected and sent to Iron Mountain for destruction.¹¹⁴

Penn National is unable to recreate or identify who the policyholders were for the policies that were destroyed in previous years.¹¹⁵ As Mr. Reifsnyder explained when asked about the policies that were destroyed in 2019, for instance, “[s]o everything is only by policy number.

¹¹⁰ Covil Trial Ex. 11, Microfiche Destruction Spreadsheet; *see also* Covil Trial Ex. 84, Nov. 10, 2022 B. Reifsnyder Dep. at 626–8.

¹¹¹ Covil Trial Ex. 84, Nov. 10, 2022 B. Reifsnyder Dep. at 103:9–22.

¹¹² *Id.* at 104:2–17 (“Q. Would they return that part of the list to you to QC or verify that they have done that section of the list? A. They would write done on it. That way we knew that that section . . . Done, D-O-N-E, on the sheet. As they worked through the sheet, they would check off each file so that they weren’t looking for something that they had already found. At the end of doing the list, they would just—we would know when they—the whole series was done because everything was marked off.”).

¹¹³ *Id.* at 104:19–105:2 (“Q. And this was all done by hand? A. Yes, sir. Q. Do you have a copy of that list from 2018? A. No. Do you have the list from 2019? A. No. Do you have that list from 2020? A. Not that I’m aware of.”).

¹¹⁴ *Id.* at 46:6–47:5; *see also id.* at 53:6–8 (“What was purged for 2019 would have been pulled 2018, 2019 in preparation for their eventual purge early the following year.”).

¹¹⁵ *Id.* at 44:2–17.

Everything that was in—pulled was by policy number. I would have no idea out of all the records who was Covil, who was not.”¹¹⁶

Mr. Reifsnyder acknowledged that the document destruction process is not without errors. He explained that one of the most problematic pieces of the destruction process is that sometimes the microfiche stick together, which means that a document clerk may pull more sheets of microfilm than should be destroyed.¹¹⁷ No one performs an independent quality control or spot checking of the documents to be destroyed.¹¹⁸ Further, there is no list of destroyed policies for anyone to review over the course of the project of pulling the policies.¹¹⁹

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

On November 19, 2021, the parties held a telephone conference to discuss Penn National’s policy search efforts.¹²⁰ During that call, Penn National’s records custodian, Brent Reifsnyder, admitted when questioned that Penn National regularly destroyed or otherwise purged historic policy-related documents—and continued to do so *even after* the Court’s November 5, 2021 Order. This routine purge included destroying files in its repository of microfiche and paper policy documents without reviewing any of those documents to determine whether Covil was listed as an

¹¹⁶ *Id.*; *see also id.* at 67:4–22 (“I understand what you’re saying. There’s nothing that’s additional to say we destroyed them.”).

¹¹⁷ *Id.* at 78:6–9.

¹¹⁸ *Id.* at 81:4–8 (“I do not look at a quality control at all. They pull the files. They prep them, meaning pull them out and—and date them, and we go to—they’re sorted and put in boxes. I do not go through the files.”).

¹¹⁹ *Id.* at 77:25–78:5.

¹²⁰ *See* Covil Trial Ex. 66, Order on Mot. for Protection, Feb. 11, 2022, at 1–2; *see also* Covil Trial Ex. 93, Penn National’s Interim R. to the Ct., Dec. 7, 2021, at 1.

additional insured on those policies or whether the information was otherwise responsive to the sampling and review ordered by the Court.

Immediately upon the conclusion of the Parties' November 19, 2021, conference call, the Receiver prepared and served on Penn National a set of document requests seeking the litigation hold notices, if any, that Penn National issued related to the Covil litigation as well as all correspondence regarding such litigation holds. On December 20, 2021, in its response to the Receiver's discovery requests, Penn National admitted that it did not issue any litigation hold notices related to the Covil litigation until December 17, 2021, and the litigation hold it did issue on December 17 was only issued to a single person—Mr. Reifsnyder.¹²¹

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

On February 11, 2022, this Court entered an order requiring Penn National: "to preserve all historic insurance policies and policy-related information unless and until this Court orders otherwise. This Order includes not only historic insurance policies, but also policy-related information existing in electronic form, hard copy, handwritten notes, or any other format. As examples only, this Order includes insurance policies, certificates of insurance, underwriting files, claims files, and any other documentation, regardless of format, evidencing the terms and conditions of historic insurance coverage. Because some of this relevant material is likely stored in electronic forms, all auto-delete or other routine destruction policies for historic insurance policies and policy-related information must be suspended until further notice."¹²²

¹²¹ Covil Trial Ex. 64, Dec. 20, 2021 Penn National's Resp. to Pl.'s Second Set of Req. for Produc., at RFP No. 1.

¹²² See Covil Trial Ex. 66, Order on Mot. for Protection, Feb. 11, 2022, at 3.

In so holding, this Court found, “[i]t is clear to this Court Penn National only put a litigation hold in place on December 17, 2021, in response to the Receiver’s legitimate concerns regarding document preservation. Moreover, the Court is not persuaded that the current litigation hold, that was recently distributed to a single Penn National employee, is sufficient to preserve all relevant documents.”¹²³

This Court’s concern over the efficacy of the litigation hold was well founded: not even Penn National was aware of its litigation hold procedure, and confusion remains as to who received a litigation hold from whom, and when. Scott Maier, an in-house lawyer for Penn National, was presented by Penn National as a corporate representative for deposition on November 21, 2022. During his deposition, Mr. Maier confirmed that he issued the litigation hold to Mr. Reifsnyder in December 2021 pursuant to the Penn National Legal Department’s litigation hold policy.¹²⁴ Mr. Maier further testified that the Penn National Claims Department has its own litigation hold policy which is distinct from the Legal Department’s litigation hold policy under which Maier issued the hold to Mr. Reifsnyder.¹²⁵ At no time—not when he issued the December 2021 litigation hold to Mr. Reifsnyder and not when he was preparing to testify as a corporate representative—has Mr. Maier ever confirmed with the Claims Department whether it ever issued a litigation hold notice related to Covil documents.¹²⁶

¹²³ *Id.* at 2–3.

¹²⁴ Covil Trial Ex. 10, Dec. 17, 2021 Litigation Hold Email.

¹²⁵ Covil Trial Ex. 97, Nov. 21, 2022 Scott Maier Dep., at 45:3–6 (“Q. Do you know if the Claims Department has a separate litigation hold policy or procedure? . . . A. I’ve been advised they do.”).

¹²⁶ *Id.* at 56:15–57:1 (“Q. Did Mr. Parson confirm to you that a Litigation Hold Notice had been issued by the Claims Department in connection with any of the Covil litigation? A. He did not confirm a notice went out, no. Q. As the corporate representative for Penn National, can you tell me whether the Claims Department ever issued a litigation hold notice under its policies or procedures related to any of the Covil litigation as that term is defined in the 30(b)(6) notice? A. I cannot.”).

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

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

A. When Scott presented this, yeah.

...

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

A. Yes, Scott Maier, corporate counsel.

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

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

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

A. Yes.

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

A. No.¹²⁷

When asked again specifically whether he received a litigation hold from the Claims Department related to the Covil litigation, Mr. Wright testified, "not from anyone in the claims division, but when Scott Maier's litigation hold comes out, we accept it for what it is and don't do anything to violate it until he tells us otherwise."¹²⁸ When asked whether Mr. Parsons received the litigation hold, Mr. Wright testified, "Oh, I'm sure he did. I mean, as far as I know or can remember or

¹²⁷ Covil Trial Ex. 99, Nov. 30, 2022 Boyd Wright Dep. Tr. at 41:9–42:3. The Court notes that Mr. Wright's testimony that he received a litigation hold from Mr. Maier is in direct conflict with Mr. Maier's testimony that he only sent a litigation hold to one person—Mr. Reifsnnyder.

¹²⁸ *Id.* at 44:9–15.

understand, it would be very common for every division within the company to be notified and Adam certainly would have been notified if there was a litigation hold. I mean, *if he wasn't, that's appalling.*"¹²⁹

III. CONCLUSIONS OF LAW

A. Legal Standard for Interpreting Penn National's Policies Under South Carolina Law.

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

¹²⁹ *Id.* at 54:4–11 (emphasis added). The Court notes that the testimony presented by Penn National's expert, Mr. Heinze, on the issue of the litigation hold was inconsistent and unpersuasive. To begin with, while he disclaimed having any opinion on the Penn National litigation hold issue during his November 2022 deposition, he nevertheless sought to offer an opinion at trial suggesting that the issuance of the first and only litigation hold by Penn National in December 2021 was appropriate based on industry custom and practice. Trial Tr. Day 2, Morning Session, at 25:2–16, 29:9–30:3. However, on cross examination, the flaws in Mr. Heinze's new opinion were revealed. For example, he testified on direct examination that the reason the December 2021 litigation hold was issued because (i) "there had been coverage litigation in which Penn National was involved" regarding policies issued to Covil and (ii) there was "another case in which Penn National is not a party [and] Covil had requested policy information." Trial Tr., Day 2, Morning Session, at 27:7–20. Yet, these two events occurred well before December 2021. He also acknowledged that Penn National received the *Finch* subpoena in May 2018, and was aware of the current litigation being filed in April 2020, yet offered no explanation for why it would be appropriate to wait until December 2021, to issue a litigation hold. Further, he claimed to be unaware of Penn National being named in a coverage action in October 2019 and thus offered no explanation for why a litigation hold would not have been appropriate at that time. Trial Tr. Day 2 Morning Session, at 35:5–36:23.

insurance, and their language must be given its plain, ordinary and popular meaning.” *Id.* (quoting *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008)).

“Where the contract’s language is clear and unambiguous, the language alone determines the contract’s force and effect.” *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628m (quoting *McGill*, 381 S.C. at 185, 672 S.E.2d at 574). Whether the language of a contract is ambiguous is a question of law for the court. *Id.* “An insurance contract is read as a whole document so that ‘one may not, by pointing out a single sentence or clause, create an ambiguity.’” *Beauford Cty. Sch. Dist. v. United Nat’l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) (quoting *Yarborough v. Phx Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976)). However, this Court must construe “[a]mbiguous or conflicting terms in an insurance policy . . . liberally in favor of the insured and strictly against the insurer.” *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628 (quoting *Clegg*, 377 S.C. at 655, 661 S.E.2d at 797). “Interpretation of an unambiguous insurance policy, or a policy with a patent ambiguity, is for the court.” *Auto-Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 144, 718 S.E.2d 137 (Ct. App. 2015) (citing *Beauford Cty.*, 392 S.C. at 526, 709 S.E.2d at 95-96). “A patent ambiguity is one that arises upon the words of a . . . contract.” *Id.*¹³⁰

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

¹³⁰ As a general matter, “where a contract is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties.” *Penton v. J.F. Cleckley & Co.*, 326 S.C. 275, 280, 486 S.E.2d 742, 745 (1997) (citing *Klutts Resorts Realty, Inc. v. Down’Round Devp. Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977); *Skinner v. Elrod*, 308 S.C. 239, 417 S.E.2d 599 (Ct. App. 1992)).

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

1. The distinction between operations hazard, completed operations hazard, and products hazard.

It has been long established that the risk insured by the “products hazard” and the “completed operations hazard” is “the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than the product or completed work itself.”¹³¹ By contrast, “[w]here an insured begins an operation and the evidence shows it is still in progress” when an injury or damage occurs, the applicable hazard is “premises-operations” and not “completed operations.”¹³²

The “Dean Henderson article” is the seminal academic exploration of the “products hazard” and the “completed operations hazard” in liability insurance policies. A Westlaw search reveals that courts have readily accepted Henderson’s formulation, citing it more than 150 times. For example, in *Boyer Metal Fab, Inc. v. Md. Cas. Co.*, 750 P.2d 1195, 1197 n.2 (Or. Ct. App. 1988), the Oregon Court of Appeals cited Dean Henderson’s article for the proposition that “the purpose of the product hazard and completed operations hazard coverage is to insure against the risk that the product or work, if defective, *will cause bodily injury or damage to property of others*

¹³¹ Covil Trial Ex. 30, Roger C. Henderson, *Insurance Protection For Products Liability And Completed Operations—What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971).

¹³² *Id.* at 434–35; *see also, e.g., Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of Am.*, 419 F.3d 181, 184 (2d Cir. 2005) (“*Gerling*”) (“Operations” coverage “protected [the insured] from claims for asbestos-related injuries resulting from asbestos exposure on [the insured’s] premises or during its business operations, for example, injuries occurring during the installation or removal of asbestos products”); *Travelers Cas. & Sur. Co. v. Emps. Ins. of Wausau*, 130 Cal. App. 4th 99, 114 n.6 (2005) (“Examples of injuries covered under the premises-operations coverage include injuries suffered by a shipyard worker while installing insulation at the insured’s facility and injuries caused by a subcontractor’s negligent construction of a wall that fell on a worker while the job was in progress.”).

after it leaves the insured's hands." (emphasis added); see also *W. Emp'rs Ins. Co. v. Arciero & Sons, Inc.*, 146 Cal. App. 3d 1027, 1031 (Ct. App. 1983) (quoting Henderson directly).

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

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

Id. at 1215 n.5 (emphases added). It is not surprising, then, that other courts have noted that the "products hazard" applies only when the injury *is caused by a defective product placed into the stream of commerce*, or when injury or damage is *caused by the insured's completed work*. See *B & R Farm Servs., Inc. v. Farm Bureau Mut. Ins. Co.*, 483 N.E.2d 1076, 1077 (Ind. 1985); see also *CPS Chem. Co. v. Cont'l Ins. Co.*, 489 A.2d 1265, 1270 (N.J. Super. Ct. Law Div. 1984), *rev'd on other grounds* by 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985) ("Commentators are in *complete agreement* that [the completed operations hazard] refers to accidents *caused by defective workmanship which arise after completion of work* by the insured on construction or service contracts." (emphases added)).¹³³

¹³³ The case law and commentary is clear that the "products hazard" applies *only* when injury is caused by a "completed" product placed into the stream of commerce, e.g., *B & R Farm Servs., Inc.*, 483 N.E.2d at 1077; *Szczeklik v. Markel Int'l. Ins. Co., Ltd.*, 942 F. Supp. 2d 1254, 1265 (M.D. Fla. 2013), or by a product previously installed at a job site *and* the injury occurs *after* the insured "has relinquished control of [the] jobsite." See, e.g., *Friestad*, 393 A.2d at 1215 n.5. Injuries caused by "un-completed" products, injuries caused by "component" products, or injuries caused by products installed as part of a continuing installation or construction project are *not*

2. The clear and unambiguous policy language.

The Penn National Policies contain an “aggregate” on the declarations page for “Bodily Injury and Property Damage Liability Combined Single Limit.”¹³⁴ The term “aggregate” is not defined in the Penn National Policies.¹³⁵ Therefore, to understand the parties’ intent with respect to the total limit of liability, the Penn National Policies must be read as a whole.¹³⁶ Penn National concedes that the “\$1 million per occurrence/aggregate policy limit” is “*subject to the terms, conditions and endorsements that compose the entire policy.*”¹³⁷

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

III. LIMITS OF LIABILITY

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

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

within the “products hazard.” It is only *after* the insured “has relinquished control of a jobsite that the products hazard or completed operations hazard exclusions will operate to deny coverage.” *Id.*
¹³⁴ Covil Trial Ex. 1, 1986–1987 Policy at Penn National Policies 000028; Covil Trial Ex. 2, 1987–1988 Policy at Penn National Policies 000071.

¹³⁵ Covil Trial Ex. 1 at Penn National Policies 000036; Covil Trial Ex. 2 at Penn National Policies 000081.

¹³⁶ Covil Trial Ex. 99, Nov. 30, 2022 B. Wright Dep. Tr. at 12:1–8.

¹³⁷ Covil Trial Ex. 14, B. Wright letter to P. Protopoulos, Sept. 1, 2022 (emphasis added).

Subject to the above provision respecting “each occurrence”, the total liability of the company for all damages because of (1) all bodily injury included within the **completed operations hazard** and (2) all bodily injury included within the **products hazard** shall not exceed the limit of bodily injury liability stated in the declarations as “aggregate”.¹³⁸

The policy declarations page specifies an aggregate limit of liability for bodily injury of \$1,000,000 for each occurrence, and \$1,000,000 in the aggregate.¹³⁹

Reading these contract provisions together (i.e., the declarations page and Section III of the Insuring Agreement), as is required under South Carolina law, the clear and unambiguous language of the Penn National Policies contain an aggregate or total limit of one million dollars for damages because of bodily injury included within the completed operations hazard and the products hazard only. The Penn National Policies contain no aggregate or total limit of liability for damages because of purely “operations” bodily injury claims. Accordingly, the operations coverage part for each of the Penn National Policies at issue in this case responds repeatedly to each and every “occurrence” without a total “cap” on Penn National’s liability to pay, subject only to a “per occurrence” limit of liability.¹⁴⁰

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

Covil’s expert witness on insurance industry customs and practices, Charles Miller,¹⁴¹ credibly and convincingly testified at trial that aggregate limits were not the norm for general

¹³⁸ Covil Trial Ex. 1 at Penn National Policies 000004 (emphasis in original; highlighting added).

¹³⁹ Covil Trial Ex. 1 at Penn National Policies 000001.

¹⁴⁰ While the language of the Penn National policy is clear and unambiguous, this Court must construe any ambiguity in the Penn National Policies “liberally in favor of the insured and strictly against the insurer.” *Whitlock*, 399 S.C. at 615.

¹⁴¹ At trial, this Court qualified Mr. Miller as an expert witness in the area of insurance industry standards, customs, and practices related to his areas of trial testimony. Mr. Miller was employed by Fireman’s Fund Insurance Company for 18 years in insurance claims, holding various positions including senior adjustor, branch office general adjustor, and claims manager. He handled a wide

liability claims in the 1973 Insurance Services Office (“ISO”)¹⁴² standard comprehensive general liability (“CGL”) policy form, and the Penn National Policies are identical to the 1973 ISO standard CGL policy form language.¹⁴³ Many, if not most, insurers at that time included an aggregate limit for claims arising from “products” or “completed operations” hazards (*e.g.*, sale or distribution of a product or the failings of a completed project causing injury at a later date), but had no aggregate limit for general liability claims that arose out of a policyholder’s ongoing operations.¹⁴⁴ Insurers were wrote CGL coverage without aggregate limits for certain hazards, primarily premises-operations hazards, because they were expected to have low loss frequency.¹⁴⁵

Mr. Miller also credibility testified at trial that “the operations coverage in the Penn National policies in effect from 1986 to 1988 is not limited by an aggregate limit, it only has an occurrence limit.”¹⁴⁶

range of claims dealing with commercial lines, including liability claims and asbestos litigation, and worked with a range of forms, including the standard comprehensive general liability forms at issue in this litigation. Mr. Miller is also familiar with the change in policy forms over time, including changes to standard comprehensive general liability forms promulgated by the Insurance Services Office in 1973 and 1986. Mr. Miller also has a law degree, practiced insurance law, and in 2004 founded a sole proprietorship called the Insurance Law Center where he works as an insurance claims practice and coverage expert.

¹⁴² ISO is an organization that developed standard policy forms used in the insurance industry.

¹⁴³ See Covil Trial Ex. 98, Covil’s Expert Witness Charles Miller Dep. at 55:2–15. Penn National presented James A. Robertson as its counter-expert to Mr. Miller’s testimony. At trial, the Court found that Mr. Robertson was qualified as an expert based on his training, education and experience. See Trial Tr. Day 2, Morning Session, at 67. However, the Court found his testimony wholly unpersuasive on this and other insurance industry custom and practice topics.

¹⁴⁴ Covil Trial Ex. 134, Charles Miller Op. Outline, at MILLER 01376.

¹⁴⁵ *Id.*

¹⁴⁶ Miller Trial Tr. at 17:19–18:01; see also Miller Trial Tr. at 21:21–22:12 (Q: What is the basis of your opinion that the aggregate limit in the Penn National policies do not apply to operations claims? A: Well, the basis is multiple. First of all, the basis is the insurance policy language itself which is applied based on its own terms, as is done commonly in the insurance industry by claims handlers. The other basis is my own experience and knowledge with exactly the same policy form and the language while I was in the industry and my continuing education on its course—on its application and the understanding of how it is applied in the industry. Which leads to the other bases which is my research into the history and development of this—of aggregate limits on

The Court finds, consistent with the plain terms of the policies and South Carolina law, that the one million dollar “aggregate” or “total limit” of liability in the Penn National Policies applies to “completed operations” and “products” bodily injury claims only; the “aggregate” does not apply to “operations” bodily injury claims.

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

a. The clear and unambiguous policy language.

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

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

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

operations coverage and what—and how that developed and the scope of that aggregate as it is understood and applied in the industry.”).

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

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

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

There is nothing in either the structure or the language of the Penn National Policies that suggests a claim for bodily injury is within the “completed operations hazard” if a long-term injury process begins while the operations are ongoing *and* continues until they were completed. The “completed operations hazard” applies “only if *the* bodily injury. . . occurs after such operations have been completed.”¹⁴⁷ Thus, if *any* bodily injury occurs *before* the operations are completed, then “*the*” bodily injury could not have occurred *after* the operations were completed.

Under this scenario, some of “*the*” injury occurred before the operations were completed, while some of “*the*” injury occurred after the operations were completed. The use of the definite article “the” before “bodily injury” in the provision suggests that *all* of the bodily injury must occur *after* the operations are completed for the “completed operations hazard” to apply. If “the” injury—all of it—happens after the operations are completed, the claim is within the “completed

¹⁴⁷ See Covil Trial Ex. 1 at Penn National Policies 000036.

operations hazard.” If not, then the claim is not within the “completed operations hazard.” It is instead within the “premises-operations hazard.” By requiring the injury to occur *entirely* after the operations were completed for a resulting claim to fall within the “completed operations hazard,” the policies therefore foreclosed the possibility that “completed operations” claims could result from either exposures or accidents that happened during ongoing operations.

b. The underwriting intent.

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

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

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

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

So, even for new business, the underwriter must be more alert than ever. More potential losses may be inherited from the past. A harmful waste disposal practice unknown to the underwriter because it has since been corrected, or which the applicant promises to correct, may still produce serious losses during your period

of coverage. This has always been true for products, but with gradual injury or damage being covered, the potential is a lot worse.¹⁴⁸

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

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

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

Stempel at 370 (quoting Richard H. Elliott, “The New Comprehensive General Liability Policy,” in *Liability Insurance Disputes*, 12-3, 12-5 (Sol Schreiber & Stuart J. Motelson eds., PLI 1968)).

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

¹⁴⁸ Covil Trial Ex. 29, Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 Conn. Ins. L.J. 349, 368–69 (2005/2006) (quoting Gilbert L. Bean (Liberty Mutual Insurance Company), “Address at the Mutual Insurance Technical Conference on New Comprehensive General and Automobile Program: The Effect on Manufacturing Risks” (Nov. 15–16, 1965)).

Penn National addressed this particular problem as respects potentially inherited *product liability exposures* by placing an aggregate limit of liability on their policies for losses within the “products hazard.” Had Penn National wanted the aggregate limit of liability to apply to bodily injury resulting from “operations” exposures that happened before the inception date of their policies to limit their liability for Covil’s losses they “inherited from the past,” they could have easily included language such as this in their policies:

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

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

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

under the premises-operations coverage include injuries suffered by a shipyard worker while installing insulation at the insured's facility and injuries caused by a subcontractor's negligent construction of a wall that fell on a worker while the job was in progress.").

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

For example, a standard risk management and insurance textbook sketched the scope of the two hazards succinctly: the "completed operations hazard" applies when "the liability arises from the unsatisfactory *outcome* of the work, not from the actual *performance* of the work, as with operations liability."¹⁴⁹

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

¹⁴⁹ Covil Trial Ex. 31, James L. Athearn, S. Travis Pritchett & Joan T. Schmit, *Risk and Insurance*, at 510 (6th ed. 1989) (emphases added); *see also* Covil Trial Ex. 32, Mark S. Dorfman, *Introduction to Risk Management and Insurance*, at 397 (7th ed. 2001) ("Completed operations insurance. This type of policy covers claims from injuries arising after a service is rendered and the property's control is returned to the owner. This coverage would help Leaky Louis, the plumber, whose negligence caused a water heater to explode."); Covil Trial Ex. 35, Fire Casualty & Surety Bulletin, June 1985 (the "completed operations hazard. . . is the insured's potential liability for bodily injury or property damage that arises out of the insured's completed work"). The Fire Casualty & Surety Bulletin is "used by insurance agents and brokers to interpret standard insurance policy provisions." *Md. Cas. Co. v. Reeder*, 221 Cal. App. 3d 961, 972 (1990). It is frequently cited by courts when interpreting disputed insurance policy provisions. *See, e.g., Ind. Ins. Cos. v. Granite State Ins. Co.*, 689 F. Supp. 1549, 1555 (S.D. Ind. 1988) (citing the June 1985 Fire Casualty & Surety Bulletin for the proposition that "[c]ompleted operations coverage is designed to protect the insured from liability arising from the insured's completed work"); *see also Prudential-LMI Comm. Ins. Co. v. Reliance Ins. Co.*, 22 Cal. App. 4th 1508, 1513 (1994) (Fire Casualty & Surety Bulletin admissible to determine whether insured's policy interpretation was reasonable).

The ACE Construction Company remodels one of the Case Company branch offices. ACE is the named insured, *after ACE has completed the job* a portion of the ceiling falls, injuring a customer.¹⁵⁰

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

During delivery of some ice machines to National Inns, a child is injured when one of the machines falls off the delivery truck.¹⁵¹

The ISO workbook later defined “Completed Operations Insurance” as “[a] form of insurance issued particularly to various types of contractors. It covers a contractor’s liability for accidents arising out of jobs or operations that he has completed.”¹⁵² In sum, the ISO thus explained that “completed operations” coverage applies to injuries that happen after a job is completed, while “operations” coverage applies to injuries that happen during the performance of a job. The two coverages do not overlap.

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

[o]ne of the categories of hazards ordinarily insured by a general liability policy. Composed of those exposures to loss that fall outside the defined ‘products-completed operations hazard,’ it includes liability for injury or damage arising out of the insured’s premises or out of the insured’s business operations while such operations are in progress.¹⁵³

Legal and academic commentators have concluded similarly that the “premises-operations hazard” covers liability resulting from the insured’s ongoing work, while the “completed operations hazard” covers liability resulting from the insured’s completed work. Whether the

¹⁵⁰ Covil Trial Ex. 33, Insurance Services Office, *General Liability Coverage*, at 26 (1985) (emphasis added).

¹⁵¹ *Id.* at 28 (emphasis added).

¹⁵² *Id.* at 106.

¹⁵³ Covil Trial Ex. 34, IRMI, Premises-Operations Definition, <http://www.irmi.com/online/insurance-glossary/terms/p/premises-operations.aspx>, (last visited Nov. 29, 2022).

operations resulting in injury happened during the policy period is immaterial under policies that cover “injury” during the policy period as opposed to “operations” during the policy period.

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

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

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

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

Academic commentary is in accord:

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

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

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

For injuries that begin after that time, the aggregate limits of the CGL policy applicable to products or completed operations claims set forth the insurer's

maximum liability for third-party claims that arise because of failings of the building or project that cause injury. By contrast, injuries that begin during operations are properly classified as general liability injuries.

Id. at 387.

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

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

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

Finally, Mr. Miller also credibility testified at trial that "the operations coverage [under the Penn National Policies], once it applies does not change to completed operations after expiration of the applicable policy."¹⁵⁴

¹⁵⁴ Miller Trial Tr. at 33:09–33:14.

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

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

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

Consequently, as to any individual asbestos lawsuit, it is Penn National’s burden to prove that the suit seeks the recovery of damages that are subject to the aggregate limits of liability, if any, applicable to the “completed operations” provisions in its policies, where such aggregate

limits have been proven by Penn National as to each specific policy or policy period. By definition, aggregate limits restrict coverage. Accordingly, Penn National bears the burden of demonstrating that aggregate limits in its policies, if any, apply to any particular asbestos suit.

6. The *Ashworth, Campbell, D'Amico, Garren, Jolly, Jonas, Knight, Morgan, Sims, Aspray, Wannamaker, and Moss* claims are not subject to the Penn National Policies' aggregate limit of liability.

The settlement amounts that Penn National contributed to resolve the *Ashworth, Campbell, D'Amico, Garren, Jolly, Jonas, Knight, Morgan, Sims, Aspray, Wannamaker, and Moss* claims, as identified in Penn National's September 1, 2022 letter to the Receiver,¹⁵⁵ do not meet the definition of "completed operations hazard" or "product hazard" claims and therefore are not subject to the aggregate limit of liability in the Penn National Policies and do not impair the total limits of liability. Penn National has not carried, and cannot carry, its burden to prove otherwise. Rather, the evidence adduced in each of these cases reveals exposure to asbestos from Covil's *ongoing work operations* at a jobsite, and thus are subject only to the "per occurrence" limits of the policies.

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

7. Coverage should be allocated on an all sums basis.

The Court must next determine how Covil's liability should be allocated. Courts take two different approaches to allocation. Some courts allocate liability on proportionate basis, an

¹⁵⁵ See Covil Trial Ex. 14, Letter from B. Wright to P. Protopapas, Sept. 1, 2022.

approach generally referred to as “pro-rata allocation.” Other courts allow an insured to allocate liability on a joint and several basis to a single triggered insurance policy, an approach generally referred to as “all-sums allocation.”

Which approach to allocation should be adopted here—like the initial coverage determination—is governed by the terms of the insurance policy. “Insurance policies are subject to general rules of contract construction.” *Standard Fire Co. v. Marine Cont. & Towing Co.*, 301 S.C. 418, 421, 392 S.E.2d 460, 461 (1990). The Court “must give policy language its plain, ordinary and popular meaning.” *Id.* This is a fundamental precept of insurance law in South Carolina that has been embraced repeatedly by the South Carolina Supreme Court.¹⁵⁶ It requires an insurer to fulfill the promise of coverage actually made to a policyholder under the terms of the insurance policy.

Adhering to this principle, the South Carolina Supreme Court has held that liability for progressive property damage spanning multiple policy periods must be allocated on a pro-rata basis to all triggered policies. *Crossmann Cmty. of N. C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011). The Court reached this determination “rel[ying] heavily” on

¹⁵⁶ See e.g., *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994) (“The Supreme Court must enforce, not write, contracts of insurance and we must give policy language its plain, ordinary, and popular meaning. We should not torture the meaning of policy language to extend or defeat coverage that was never intended by the parties.”); *Sullivan Mgmt., LLC v. Fireman's Fund Ins. Co.*, 437 S.C. 587, 591, 879 S.E.2d 742, 744 (2022), *reh'g denied* (Nov. 17, 2022) (holding that policy terms “must be interpreted under their common meaning”); *B.L.G. Enterprises, Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (holding the “[c]ourt must give policy language its plain, ordinary, and popular meaning. . . . The court’s duty is limited to the interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness, or failure [of the parties] to guard their interests carefully.”) (quotation and citations omitted); *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008) (“An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law”).

Boston Gas Co. v. Century Indemnity Co., 454 Mass. 337, 357-59, 910 N.E.2d 290, 305, 306-07 (2009), which the Court explained “provides the reading of the relevant policy language that we believe is correct.” *Id.* at 61–62, 600. In *Boston Gas*, the Massachusetts Supreme Judicial Court interpreted an Insuring Agreement that obligated the insurer to pay for “property damage . . . to which this insurance applies,” and a “Policy Period, Territory” provision that stated “[t]his policy applies to . . . property damage . . . which occurs anywhere during the policy period.” 454 Mass. at 343, 910 N.E.2d at 296. Essentially the same Insuring Agreement was before the Court in *Crossmann*, and the policies at issue expressly provided that “the insurance applied ‘only if . . . bodily injury or property damage occur[red] during the policy period.’” *Crossmann*, 395 S.C. at 53, 717 S.E.2d at 595. The Court held that the limitation placed on property damage to which “the insurance applied” limited the insurer’s promise to pay to property damage that occurred during the policy period. *Id.* at 62, 600.¹⁵⁷

The South Carolina Supreme Court has not been presented with the question of whether the same rule applies in progressive bodily injury cases. As was the case in *Crossmann*, the terms of the Penn National policies govern that question. Here, the policy terms that govern Covil’s progressive bodily injury claim are distinct from the policy terms at issue in *Crossmann* and notably do not limit the bodily damage to which “the insurance applies” to bodily damage that occurs during the policy period. To the contrary, the policy provisions define Penn National’s obligation to insure Covil for bodily injury in broad terms that encompass all consequences of bodily injury, without regard to when they occur. In this case, an all sums approach to allocation is most consistent with the Penn National policy language. All sums allocation also best serves

¹⁵⁷ The Court further held that pro-rata allocation of liability in a progressive property damage case was consistent with the reasonable expectations of the contracting parties and public policy goals. *Id.* at 63–64, 601.

the contracting parties' reasonable expectations of bodily injury coverage and policy goals for bodily injury coverage.

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

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

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

by a number of exclusions.” *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 197, 684 S.E.2d 541, 546 (2009).

The Insuring Agreement sets two preconditions on coverage and the imposition of this broad insuring obligation on Penn National: (1) Covil’s legal liability must be because of “bodily injury . . . to which this insurance applies,” and (2) the bodily injury must be “caused by an occurrence.” The provision that establishes the “bodily injury . . . to which the insurance applies,” and the “bodily injury” and “occurrence” definitions determine whether those preconditions are met. Each of these policy terms reinforces that Penn National’s insuring obligation extends to all consequences that flow from “bodily injury,” and is not limited to injury that occurs during the policy period.

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

policies that establishes the “bodily injury . . . to which this insurance applies” establishes that it is only necessary that the bodily injury “occur within the policy territory.”

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

as temporally truncating the “bodily injury” covered by the policy. Such a limitation is inimical to the meaning of the term “any,” which modifies the word “time.” “Any” is commonly understood to mean “unmeasured or unlimited in amount, number or extent” and “appreciably large or extended.”¹⁵⁸

The inclusion of the phrase “during the policy period” in the definition of “bodily injury” does not support a contrary interpretation. When a court interprets an insurance policy, it must give meaning to all words used in the policy. *Crossmann*, 395 S.C. at 62, 717 S.E.2d at 600–01. Application of this principle to the “bodily injury” definition requires the Court give meaning to each part of the definition, and the significance of the phrase “during the policy period” must be harmonized with the phrase “at any time.” Interpreting “during the policy period” as importing a temporal limitation into the “bodily injury” definition puts one part of the “bodily injury” definition in conflict with another part. What harmonizes all elements of the definition is interpreting the phrase “during the policy period” as establishing a trigger of coverage. That is, through the use of the phrase “during the policy period,” the definition of “bodily injury” requires that some of part of the bodily injury must occur during the policy period to trigger the policy.¹⁵⁹ Once a policy is triggered, the “bodily injury” encompassed by the policy includes the injury and consequences flowing from the injury up to and including death “at any time.”

The “occurrence” definition also reflects an intention to impose on the insurer a broad obligation to insure bodily injury that is not subject to a temporal limitation. The policy anticipates that “bodily injury” might result from “continuous or repeated exposure to conditions.” The

¹⁵⁸ *Any*, MERRIAM-WEBSTER DICTIONARY (online edition) (available at <https://www.merriam-webster.com/dictionary/any>) (accessed January 11, 2024).

¹⁵⁹ South Carolina has adopted a modified continuous trigger of coverage. *Crossmann*, 395 S.C. at 55, 717 S.E.2d at 596. Coverage is triggered at the time of an injury-in-fact and continuously thereafter through progressive damage.

definition does not limit an occurrence to “bodily injury” that results from conditions that take place during the policy period. Rather, the definition uses expansive language to provide that an occurrence will encompass “bodily injury” that results from “continuous” conditions. The use of the word “continuous,” which is commonly understood to mean “marked by uninterrupted extension in space, time, or sequence,” reflects an intention that conditions that result in bodily injury should not be temporally limited.¹⁶⁰

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

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

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

Cannon Elec., 2017 WL 10992340, at *26. Prorating the insurer’s liability would require the Court to disregard policy terms and rewrite the agreement between Penn National and Covil, which would be contrary to South Carolina law. *B.L.G. Enterprises.*, 334 S.C. at 535, 514 S.E.2d at 330

¹⁶⁰ *Continuous*, MERRIAM-WEBSTER DICTIONARY (online edition) (available at <https://www.merriam-webster.com/dictionary/continuous>) (accessed January 11, 2024).

(“The court’s duty is ‘limited to the interpretation of the contract made by the parties themselves[.]’”) (citations omitted)).

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

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

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

Accordingly, the Court holds that each Penn National Policy is required to pay or reimburse “all sums” that Covil, as the insured, becomes legally obligated or reasonably required to pay as damages by reason of Covil Asbestos Suits.

8. Covil is entitled to multiple “per occurrence” limits of liability to resolve each of the asbestos suits.

The Court must next determine whether multiple asbestos claims should be treated as a single occurrence or multiple occurrences under the Penn National insurance policies at issue. Penn National raises this issue for the first time at trial, asserting multiple asbestos claims should be treated as a single occurrence.¹⁶¹ The Court rejects Penn National’s request as inconsistent with the plain terms of the policies.

The policies at issue provide coverage for legal liabilities resulting from an “occurrence.” An “occurrence” is defined in the policies as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.”¹⁶² Covil faces allegations in numerous lawsuits that multiple asbestos injury and wrongful death “occurrences” have resulted from its asbestos “operations.” Covil is therefore entitled to multiple “per occurrence” limits of liability to resolve each of the asbestos suits.

¹⁶¹ Penn National’s proffered expert witness, James Robertson, provided generalized testimony that “it’s possible that [all underlying asbestos claims] may be considered a single occurrence even though there are separate claims. . . .” Trial Tr., Day 2, Morning Session, at 91:14–22. The Court does not find Mr. Robertson’s generalized testimony to be credible or persuasive on this point or consistent with the language of the Penn National insurance policies at issue here.

¹⁶² Covil Trial Ex. 1 at 36.

The asbestos insulation operations suits against Covil are not repetitive products liability suits alleging exposure to asbestos from the same defective product. Instead, these suits allege that Covil's operations exposed workers and other bystanders to asbestos.¹⁶³

Courts have held that the type of asbestos operations claims against Covil resulted from multiple "occurrences" under the standard definition of "occurrence" used during the time of Penn National's policies. *See, e.g., Gerling*, 419 F.3d 184 ("[I]f claims arising from multiple occurrences triggered [operations] coverage, then [the insurer] was exposed to unlimited liability; each occurrence was subject to a \$1 million limit on liability, but there was no cap on total liability. Regardless of how much [the insurer] had paid for previous non-products occurrences under a single policy, each additional non-products occurrence under that policy subjected [the insurer] to liability anew."); *see, e.g., Com. Union Ins. Co. v. Porter Hayden Co.*, 698 A.2d 1167, 1211 (Md. Ct. Spec. App. 1997) ("The event causing damage in the asbestos-related bodily injury cases is exposure to asbestos fibers Since each individual claimant has a unique work history, each claimant's exposure must be viewed as a separate occurrence."); *In re Prudential Lines Inc.*, 158 F.3d 65, 83 (2d Cir. 1998) (holding that each asbestos claim arose from a separate occurrence); *Babcock & Wilcox Co. v. Arkwright-Boston Mfg. Mut. Ins. Co.*, 53 F.3d 762, 767-68 (6th Cir. 1995) (same); *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 765 A.2d 891, 908 (Conn. 2001) ("we are not persuaded that thousands of exposures to asbestos, occurring at different times and places, constitute one occurrence"); *Cincinnati Ins. Co. v. ACE INA Holdings, Inc.*, 886 N.E.2d 876, 887 (Ohio Ct. App. 2007) (holding that "each individual exposure to asbestos, and the resulting injury, constituted a separate accident or occurrence").¹⁶⁴

¹⁶³ *See* Covil Exs. 15-29.

¹⁶⁴ *See also Exxon Corp. v. St. Paul Fire & Marine Co.*, No. CIV. A 94-2111, 1996 WL 665751 (E.D. La. Nov. 15, 1996) (separate encounters with hazardous material by different men working

9. Continuous trigger of coverage applies to Covil Asbestos Suits.

The term “trigger of coverage” describes the necessary events for a liability policy to respond to a suit seeking damage because of bodily injury. The Court rules that the policies at issue respond to suits when bodily injury takes place during the policy period, regardless of when the event causing the injury took place and regardless of when the injury becomes known or knowable. All of an insured’s policies in effect from a person’s first exposure to asbestos through manifestation of an asbestos disease and, ultimately, to death cover the asbestos cases unless coverage is otherwise excluded. This approach is called a “continuous trigger of coverage” or an “injury in fact trigger of coverage” inasmuch as medical science established long ago that asbestos injuries begin upon first inhalation of asbestos fibers and continue progressively thereafter. As respects asbestos injury and death suits, the “continuous trigger of coverage” and the “injury in fact trigger of coverage” yield the same result that the Court need not choose between these conceptually similar approaches.¹⁶⁵

In its policies, Penn National promised to cover any claim arising out of an “occurrence” so long as “bodily injury” happened during the policy period, even if the claim is made years after the policy expires. *See* Penn National Policies 000002, 36, 45, 81. Insurers developed this type of “occurrence” policy “to make clear that gradually occurring losses would be covered so long as they were not intentional.” *Cont’l Cas. Co. v. Rapid-Am. Corp.*, 80 N.Y.2d 640, 648 (1993). Thus,

around oil field constitutes separate occurrences); *CSX Transp., Inc. v. Continental Ins. Co.*, 680 A.2d 1082 (Md. 1996) (each claimant’s allegation of noise induced hearing loss is a separate occurrence); *Worcester Ins. Co. v. Fells Acres Day Sch., Inc.*, 558 N.E.2d 958, 973–74 (Mass. 1990) (discrete acts of child abuse at different locations in school are separate occurrences).

¹⁶⁵ *See Armstrong World Indus. Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 45 (1996) (“We find no error in the trial court’s use of an injury-in-fact analysis to apply a continuous trigger.”).

latent injury claims, such as the underlying asbestos claims asserted against Covil, are precisely the type of claims for which the Penn National Policies were designed.

As discussed below, based on the relevant policy language, existing South Carolina law, the drafting history of the relevant policies, other equitable considerations, and Penn National's course of performance, the continuous trigger theory governs the issue whether any Covil Asbestos Suit "give[s] rise to a duty on the part of Penn National to defend and/or indemnify Covil," *i.e.*, "triggers" the Penn National Policies.

a. The plain language of the Penn National Policies encompasses coverage for subclinical injury and subclinical disease that happened during the policy period.

The policy language is the starting point for insurance policy interpretation. As used in the Penn National Policies, the term "bodily injury" plainly encompasses subclinical injury and subclinical disease. Any argument that a clinical disease is required to trigger coverage, or that only the initial asbestos exposure itself triggers coverage, is contrary to both the language of the Penn National Policies and South Carolina law.

The Penn National Policies provide, in relevant part: "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury or . . . property damage to which this insurance policy applies, caused by an occurrence"¹⁶⁶ Under the Policies, "bodily injury" means "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom."¹⁶⁷ And "occurrence" means "an accident including continuous or repeated

¹⁶⁶ Covil Trial Ex. 1, at Penn National Policies 000002; Covil Trial Ex. 2, at Penn National Policies 0000045.

¹⁶⁷ Covil Trial Ex. 1, at Penn National Policies 000036; Covil Trial Ex. 2, at Penn National Policies 0000081.

exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.”

Relevant principles of insurance policy interpretation under South Carolina law are well established. First, “[i]f the contract’s language is clear and unambiguous, the language alone determines the contract’s force and effect. When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense.” *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). In accord with this principle, “[c]ourts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.” *Sloan Const. Co. v. Central Nat. Ins. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977). Second, “[w]here the words of a policy are capable of two reasonable interpretations, that construction will be adopted which is most favorable to the insured.” *McPherson By and Through McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993). Third, “an interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.” *Stevens Aviation, Inc. v. DynCorp Int’l LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153.

The Penn National Policies’ definition of “bodily injury” is clear and unambiguous and includes subclinical injuries other than disease and sickness. “Bodily injury” is defined in relevant part as “bodily injury, sickness or disease sustained by any person.”¹⁶⁸ On its face, this language states that the Penn National Policies are triggered if any one of multiple events happens during a Penn National policy period. “Disease” is one such event. “Bodily injury” is another such event.

¹⁶⁸ Covil Trial Ex. 1, at Penn National Policies 000036; Covil Trial Ex. 2, at Penn National Policies 0000081.

Thus, the Penn National Policies are triggered not only by “disease,” but also by “bodily injury” (as well as other events) that happen during the policy period. Limiting coverage to periods in which there is clinically diagnosable disease only effectively reads out of the policies the express grant of coverage for “bodily injury” that happens during the policy period. That interpretation, which would render the coverage grant for “bodily injury” superfluous, should be avoided. *See Stevens Aviation*, 407 S.C. at 417, 756 S.E.2d at 153.

Inherent in the definition of “bodily injury” for which the Penn National Policies promise to provide coverage are subclinical injuries at the cellular or molecular level that happen during the policy period and eventually progress into a clinical injury or disease.¹⁶⁹ This is common sense. A person who experiences an unknown, subclinical injury that later progresses into a clinical injury is plainly worse off on the day he or she experienced the subclinical injury than he or she was the day before. The natural meaning of “bodily injury” encompasses such subclinical injury because the person’s body has been hurt or damaged at the cellular or molecular level. *See Injury*, MERRIAM-WEBSTER DICTIONARY (online edition) (available at <https://www.merriam-webster.com/dictionary/injury>) (last accessed Jan. 11, 2024) (injury means “hurt, damage, or loss sustained”). Absent language limiting “bodily injury” to injury that is known or diagnosed during the policy period, there is no basis for this Court to impose such a limitation. *Stevens Aviation, Inc.*, 407 S.C. at 417, 756 S.E.2d at 153.¹⁷⁰

¹⁶⁹ Whether “bodily injury” under the Penn National Policies extends to subclinical injuries from exposures to asbestos but do not eventually result in a diagnosed disease is not at issue here because Covil is not seeking coverage for such cases.

¹⁷⁰ *See also American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760, 756-66 (2d. Cir. 1984) (refusing to impose a requirement that injury be “diagnosable” or “compensable”); *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, 45 Cal. App. 4th 1, 46 (1996) (“The trial court’s continuous trigger decision, then, is based upon factual findings that for asbestos claimants an injury-in-fact took place during each triggered policy period, even though the injury was not diagnosable or compensable during the policy period.”); *Associated Aviation*

There is no merit to any argument that the coverage grant for “bodily injury” during the policy period under the Penn National Policies is limited to *clinical* disease. Indeed, in prior similar litigation, “the medical evidence regarding the carcinogenic mechanisms of asbestos sufficiently establishes an insidious disease process involving billions of cellular mutations that constitute injuries.” *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1198 (2d Cir. 1995). Similarly, the medical evidence regarding non-cancer asbestos-related diseases in other litigation shows that “there is a period of time prior to the point at which asbestosis and pleural plaques are clinically diagnosable when the condition is evolving cumulatively or incrementally. . . . [And] [t]he disease process . . . begins within days of initial exposure to asbestos and continues for decades.” *Id.* Reading the coverage grant for “bodily injury” to include subclinical cellular mutations and lung tissue scarring is consistent with South Carolina principles of insurance-contract interpretation, which require that coverage grants be interpreted broadly and in favor of coverage. *See McPherson* 310 S.C. at 319, 426 S.E.2d at 771 (“rules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed.”). Accordingly, the unmodified term “bodily injury” in the Penn National Policies includes subclinical injuries and disease.

Also unfounded is the argument that the coverage grant for “bodily injury” during the policy period is limited to the initial exposure to asbestos. Such an argument would require the Court to “interpret ‘bodily injury’ to mean *only* the exposure to a toxic substance and the cellular damage resulting therefrom.” *Associated Aviation Underwriters v. Wood*, 209 Ariz. 137, 166, 98 P.3d 572, 601 (Ct. App. 2004) (emphasis in original). This would either require the Court to give

Underwriters v. Wood, 209 Ariz. 137, 166, 98 P.3d 572, 601 (Ct. App. 2004) (“Based on its plain and ordinary meaning, the term, “bodily injury,” in this context is not limited to a fully manifested, diagnosable condition.”) (internal citations omitted).

the same meaning to both “bodily injury” and “disease” or render the coverage grant for “disease” superfluous. “Neither result is supportable.” *Id.*

Even though these arguments lack merit, insurers have consistently sought to avoid or limit coverage by adopting a “manifestation” or “exposure” position. *See, e.g., Stonewall*, 73 F.3d at 1192–93. Under the “manifestation” position, coverage is only triggered under the policy in effect “at the point in time when the asbestos-related diseases were either manifested or became fully developed,” thereby limiting coverage to a single policy period. *Id.* Under the “exposure” position, coverage is triggered only under policies “in effect during the period of a claimant’s exposure to asbestos,” thereby limiting coverage to the policy or policies in effect when asbestos was inhaled. *Id.* Both rules would preclude coverage under those policies in effect during the post-exposure latency period, in which “the progressive [and subclinical] asbestos injury process is developing.” *Id.*

Considering the principles of insurance contract interpretation in South Carolina and the plain language of the Penn National Policies, this Court adopts the “continuous trigger” theory “to establish that occurrences have taken place at any or all points from exposure to manifestation, on the ground that identifiable injuries have been proved to have occurred at each point to a reasonable degree of medical certainty.” *American Home*, 565 F. Supp. 1485, 1498 (S.D.N.Y. 1983). This interpretation is consistent with decades of court interpretations of this policy language.¹⁷¹

¹⁷¹ *See, e.g., Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034, 1047 (D.C. Cir. 1981) (holding that insurance coverage in the context of asbestos-related diseases is triggered by exposure, exposure in residence, and manifestation); *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1197 (2d Cir. 1995) (where the medical evidence establishes that successive injuries are recurring, all policies in effect at any time during the period between exposure and date of claim or death are triggered); *AC & S, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968 (3d Cir. 1985) (the time of exposure through manifestation constituted “bodily injury” within the meaning of the contracts); *Alcan Aluminum Corp. v. Prudential Ins. Co. Ltd.*, 173 F.3d 859 (9th Cir. 2000) (under the continuous trigger theory, an insurer may allocate costs to the policyholder for

b. Applying the continuous trigger theory is consistent with existing South Carolina law established by *Joe Harden*.

The South Carolina Supreme Court adopted the continuous trigger of coverage in the context of a construction defect claim in *Joe Harden Builders, Inc. v. Aetna Casualty & Surety Co.*, 326 S.C. 231, 486 S.E.2d 89 (1997). The case involved a defect in a brick wall, where the brick mason knew that the brick wall was defective, but the defect did not manifest itself for some time after the construction because the damage was progressive in nature, and the homeowner did not become aware of the defect until the brick wall failed. *Id.* Considering a certified question on the issue, the Court held, “coverage is triggered at the time of an injury-in-fact and continuously

uninsured periods); *Associated Aviation Underwriters v. Wood*, 209 Ariz. 137, 98 P.3d 572, 602 (2005) (rejecting the exposure and manifestation theories and finding the continuous trigger theory to be appropriate in the context of personal injury damages resulting from exposure to a toxic substance); *Montrose Chemical Corp. of California v. Admiral Ins. Co.*, 10 Cal. 4th 645, 689, 42 Cal. Rptr. 2d 324, 913 P.2d 878 (Cal. 1995) (holding that the continuous injury trigger of coverage should be applied to third party claims of continuous or progressively deteriorating bodily injury or property damage); *R.T. Vanderbilt Co., Inc. v. Hartford Accident & Indem. Co.*, 171 Conn. App. 61, 156 A.3d 539 (2017), *aff’d*, 330 Conn. 343 (2019) (adopting the continuous trigger theory as a matter of law for asbestos bodily injury claims); *Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.*, 264 Conn. 688, 826 A.2d 107 (2003) (discussing with approval the trial court's finding of a continuous trigger approach); *In re Viking Pump, Inc.*, 148 A.3d 633 (Del. 2016) (“bodily injury first occurs, for policy purposes, upon cellular and molecular damage caused by asbestos inhalation, and such cellular and molecular damage occurs during each and every period of an asbestos claimant's significant exposure to asbestos and continues thereafter”); *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467 (Ind. 1985) (holding that contracts in effect from date of ingestion of drug through date of manifestation were triggered); *Graphic Arts Mutual Ins. Co. v. D.N. Lukens, Inc.*, 2013 WL 2384333 (D. Mass. May 29, 2013) (applying the continuous trigger theory); *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 478–79, 650 A.2d 974 (N.J. 1994) (adopting the continuous-trigger theory for activating insurers’ obligation to respond in the context of progressive indivisible injury resulting from exposure to asbestos products); *Owens-Corning Fiberglass Corp. v. Am. Centennial Ins. Co.*, 74 Ohio Misc. 2d 183, 660 N.E.2d 770 (C.P. Lucas County 1995) (finding that all contracts in effect from initial exposure to diagnosis or death are triggered); *J.H. France Refractories Co. v. Allstate Ins. Co.*, PMA, 534 Pa. 29, 626 A.2d 502 (Pa. 1993) (holding that all stages of asbestosis disease process were “bodily injury” triggering insurers’ obligation to indemnify).

thereafter to allow coverage under all policies in effect from the time of injury-in-fact during the progressive damage.” *Id.* at 236, 486 S.E.2d at 91.

Although *Joe Harden* considered a property damage claim, the South Carolina Supreme Court “framed its subject broadly, as ‘coverage under an occurrence policy when there is progressive damage that is not apparent at the time of the underlying injury-causing event,’ . . . and it cited approvingly a case involving a policy covering bodily injury from asbestos, rather than merely property damage.” *Pharmacists Mut. Ins. Co. v. Scyster*, 232 F. App’x 217, 226 (4th Cir. 2007) (citing *Joe Harden*, 326 S.C. at 233, 236, 486 S.E.2d at 90–91).

In adopting the continuous trigger theory, the South Carolina Supreme Court specifically rejected the exposure trigger theory because it “conflicts with the plain language of the policy.” *Joe Harden*, 326 S.C. at 234, 486 S.E.2d at 90. As the Court explained, the policy “provides coverage for an occurrence that causes property damage ‘*which occurs during the policy period.*’” *Id.* (emphasis in original). The Court found that such policy language “clearly focuses on the time the *damage* occurs and not on the time of the underlying event that eventually caused the damage.” *Id.* (emphasis in original). Indeed, the Court observed that “[a]n overwhelming majority of jurisdictions have rejected the argument that coverage is triggered at the time of the injury-causing event because such an interpretation conflicts with this provision of a standard occurrence policy.” *Id.* This is true whether the claim is for property damage or bodily injury because both are implicated in the same provision.

The *Joe Harden* Court also rejected the manifestation trigger theory because “nothing in the standard occurrence policy requires that the property damage actually be manifested or discovered during the policy period.” *Id.* at 235, 486 S.E.2d at 90–91. And again, this is true for both property damage and bodily injury.

In the construction defect context, the *Joe Harden* Court adopted the continuous trigger theory and modified it to require an injury-in-fact during each policy period. *Crossmann*, 395 S.C. 40, 55–56, 717 S.E.2d 589, 597 (2011) (discussing *Joe Harden*’s holding). The Court reasoned that the continuous trigger theory “gives effect to the policy provision regarding a continuous or repeated exposure” but suffers from the problem that “it triggers coverage from the time of the injury-causing event even if no damage has yet occurred.” *Joe Harden*, 326 S.C. at 236, 486 S.E.2d at 91.

Adopting the continuous trigger theory without any modification in the context of progressive bodily injury from asbestos is consistent with *Joe Harden*’s ruling. The science is settled that injuries to body tissue from asbestos start almost immediately, within days to weeks, from the initial inhalation of asbestos fibers and continue until manifestation. *Owens-Illinois*, 650 A.2d at 983; *see also R.T. Vanderbilt Co., Inc. v. Hartford & Acc. & Indemn. Co.*, 156 A.3d 539, 567 (Conn. App. 2017) (“To the extent that a background understanding of the nature of asbestos related diseases is helpful in selecting among trigger of coverage theories, both courts and commentators have recognized that expert testimony is not required in this context because the relevant medical facts . . . are now so widely understood and incontrovertible that many courts simply assume their truth when resolving the trigger of coverage question.”).¹⁷²

¹⁷² Expert testimony proffered by insurers in other litigations where selection of coverage trigger theories was at issue consistently shows that injuries to body tissues, including inflammation and direct DNA damage or mutation, happen within days to weeks after inhalation of asbestos fibers. *See, e.g., Cannon Elec. Inc. v. Ace Property & Cas. Co.*, 2017 WL 10992340 at *16 (Cal. Super. Aug. 17, 2017) (“Dr. Weitzman agreed that inflammation and direct DNA cellular injury happened within hours or days after inhalation of asbestos fibers”); *R.T. Vanderbilt*, 159 A.3d at 569 (“Kratzke acknowledged that, under the prevailing medical model, the lungs begin to exhibit an inflammatory response within hours or days of exposure to asbestos fibers.”); *J.H. France*, 626 A.2d at 506 (“The process of macrophage accumulation, tissue scarring, and functional impairment of the lungs begins to occur within a month of exposure.”).

Notably, “[t]he overwhelming weight of authority elsewhere acknowledges the progressive nature of asbestos-induced disease[] and affirms that bodily injury occurs when asbestos is inhaled and retained in the lungs.” *Id.* (internal quotation marks omitted); *see, e.g., Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Porter Hayden Co.*, 331 B.R. 652, 664 (D. Md. 2005) (“The undisputed medical evidence in this case establishes that exposure to and inhalation of asbestos fibers begins a cumulative process in which the body suffers virtually continuous injuries.”); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 507 (Pa. 1993) (“The medical evidence in this case unequivocally establishes that injuries occur during the development of asbestosis immediately upon exposure, and that the injuries continue to occur even after exposure ends during the progression of the disease right up until the time that increasing incapacitation results in manifestation as a recognizable disease.”).

Thus, in this context, this Court need not modify the continuous trigger theory because the concern that coverage will be triggered “from the time of the injury-causing event even if no damage has yet occurred” does not exist.

c. The drafting history of the relevant policies supports applying the continuous trigger theory.

“In 1966, the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Board, the predecessor organizations to the Insurance Services Office (ISO), changed the standard form policy from an ‘accident-based’ to an ‘occurrence-based’ format.” *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 891 (Cal. 1995), *as modified on denial of reh’g* (Aug. 31, 1995). “By 1966, the insurance industry was also demonstrating its awareness of potential coverage issues involving continuous or progressively deteriorating bodily injury and property damage.” *Id.* at 892 (citing comments by Richard H. Elliott, then secretary of the National Bureau of Casualty

Underwriters). It is therefore “reasonable to infer that the insurance industry knew precisely what the change entailed.” *Id.* at 891.

The drafting history does not support the exposure trigger theory. “The reference to ‘injurious exposure to conditions [resulting in] . . . bodily injury [or property damage]’ eliminates any requirement that the injury result from a sudden event. Although it is most common that an injury takes place simultaneously with the exposure, there are many instances of injuries taking place over an extended period of time before they become evident[.]” *Id.* at 892.

Nor does the drafting history support the manifestation trigger theory. Applying a manifestation trigger theory to an occurrence-based CGL policy would unduly transform it into a “claims made” policy. *Id.* at 903. As the *Montrose* court explained:

The insurance industry’s introduction of “claims made” policies into the area of comprehensive liability insurance itself attests to the industry’s understanding that the standard occurrence-based CGL policy provides coverage for injury or damage that may not be discovered or manifested until after expiration of the policy period. That understanding is clearly reflected in the higher premiums that must be paid for occurrence-based coverage to offset the increased exposure.

Id.

d. Equitable considerations warrant applying the continuous trigger theory.

The continuous trigger theory provides certainty to policyholders and insurers. “[W]hen exposure is not discoverable until many years after the fact, the exposure [theory] will not provide a feasible method for insurers to monitor risks and charge appropriate premiums.” *Owens-Illinois*, 650 A.2d at 980. “[A] manifestation [theory] would reduce coverage: insurers would refuse to write new insurance for the insured when it became apparent that the period of manifestations, and hence a flood of claims, was approaching. The insured would be left without coverage for victims whose diseases were not yet manifested.” *Id.* at 981.

“Because [the continuous trigger theory] avoids the dangers of the manifestation rule, and because it encourages all insurers to monitor risks and charge appropriate premiums, the continuous trigger rule appears to be the most efficient doctrine” *Id.* at 981. In other words, “[d]efining ‘bodily injury’ as any stage of the disease process guarantees all possible injured victims will receive compensation and, in cases involving multiple insurance policies, spreads the risk to the largest possible group of policyholders or claimants.” *Associated Aviation Underwriters*, 98 P.3d at 602.

Importantly, the insurance industry itself on record has favored adoption of a continuous injury trigger of coverage in the third party liability insurance context, considering the uncertainties in other trigger theories: “the difficulty of applying [the manifestation] limitations or requirements in cases of continuing damage or injury over the course of successive policy periods, the uncertainty of who would bear the burden of a discovery requirement (i.e., the insured or third party claimants), the arbitrariness, from the carrier’s perspective, of telescoping all damage in a continuing injury case into a single policy period, and the fear that policyholders could be disadvantaged by such an approach.” *Montrose Chem. Corp.*, 913 P.2d at 903.

e. Penn National applied the continuous trigger theory when approving settlements for Covil Asbestos Suits.

The Court declares that the continuous trigger theory applies to the Penn National Policies at issue because Penn National itself applied the continuous trigger theory when approving settlements for Covil Asbestos Suits.

Penn National approved its indemnification of Covil’s settlements in fourteen Covil Asbestos Suits.¹⁷³ Nine out of the fourteen settlements approved by Penn National only involve

¹⁷³ See Covil Trial Ex. 14, Letter from B. Wright to P. Protopapas, Sept. 1, 2022.

evidence of asbestos exposure that occurred before 1986, when the Penn National Policies at issue became effective. For example, in one of the Covil Asbestos Suits, *Campbell v. Armstrong International, Inc.*, C/A No. 2021-CP-40-02286, Mr. Campbell worked for Duke Power Company at various of its locations, including Oconee Nuclear Plant, between 1969 and 1991.¹⁷⁴ Covil insulators were at the Oconee Nuclear Plant from 1969 to 1973 when Mr. Campbell was working there.¹⁷⁵ That is, any of Mr. Campbell's potential asbestos exposure due to Covil's operation could have only occurred from 1969 to 1973, *i.e.*, before 1986. Thus, Penn National itself applied the continuous trigger theory when approving the Campbell settlement and the other similar settlements.

Accordingly, the Court hereby finds that the continuous trigger theory applies to the Penn National Policies at issue. *See* S.C. Code Ann. § 36-1-303 (“A course of performance . . . between the parties . . . is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.”); *Fed. Ins. Co. v. Americas Ins. Co.*, 258 A.D.2d 39, 44, 691 N.Y.S.2d 508, 512 (1999) (noting that “the parties’ course of performance under the contract is considered to be the ‘most persuasive evidence of the agreed intention of the parties’”); *Gen. Refractories Co. v. First State Ins. Co.*, 94 F. Supp. 3d 649, 663 (E.D. Pa. 2015) (quoting the Restatement (Second) of Contracts § 202(4)) (“Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.”).

¹⁷⁴ *See* Covil Trial Ex. 18(c).

¹⁷⁵ *See* Covil Trial Ex. 18(l), 26:6–17; Ex. 18(m), 25:6–26:3.

Accordingly, the Court holds that the continuous trigger theory applies to the Covil Asbestos Suits.

C. Penn National Spoliated Evidence.

1. Legal Standard for Spoliation.

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

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

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

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

2. Penn National admits that it spoliated historic occurrence-based liability insurance policies and policy-related documents during the pendency of the Covil litigation.

Penn National admits that it (1) issued multiple insurance policies to Covil, which included renewal policies;¹⁷⁶ (2) no longer has full, original copies of the policies or policy-related documents it issued to Covil;¹⁷⁷ (3) was first put on notice to search for “all liability policies” issued to Covil with a subpoena in the *Finch* asbestos lawsuit in 2018 and received subsequent discovery requests as a defendant in insurance coverage litigations to identify and search for “all policies” issued to Covil throughout 2019, 2020, and 2021;¹⁷⁸ (4) did not issue a single litigation hold to stop the destruction of Covil policies or policy-related documents *until over three years later* on December 17, 2021,¹⁷⁹ and only *after* this Court was forced to issue a November 5, 2021 Order for Covil’s underlying asbestos defense counsel, Ellis & Winters, to conduct an independent review of Penn National’s document repositories;¹⁸⁰ (5) destroyed historic liability policies that were contained on microfiche on an annual basis in 2018, 2019, and 2020;¹⁸¹ (6) did not search for Covil in the documents it destroyed in 2018, 2019, and 2020; and (7) has no record of the historic general liability insurance policies and policy-related documents it destroyed in 2018, 2019, and 2020. Penn National’s admissions warrant a finding of spoliation.

¹⁷⁶ See Covil Trial Exs. 1, 2, 3, 4, 5.

¹⁷⁷ See Covil Trial Ex. 99, Nov. 30, 2022 B. Wright Dep. Tr. at 13:1-14:17.

¹⁷⁸ See Covil Trial Ex. 13, Penn National Subpoena Resp., June 15, 2018; Covil Trial Ex. 50, Penn National’s Answers to Covil’s First Set of Interrog. and Resp. to Covil’s First Set of Req. for Admis.; Penn National Trial Ex. 1, Compl.

¹⁷⁹ See Covil Trial Ex. 97, Nov. 21, 2022 Scott Maier Dep. at 83:3-8.

¹⁸⁰ *Id.* at 169:1-22.

¹⁸¹ See Covil Trial Ex. 68, Penn National Resp. to RFA Nos. 2-7; Covil Trial Ex. 84, Nov. 2, 2022 B. Reifsnyder Dep. at 97:13-98:11.

a. Penn National had a duty to preserve Covil's insurance policy related documents at the time it was destroying historic, occurrence-based general liability policies.

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

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

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

annual basis between 2018 and 2021, despite the fact that Penn National faced subpoenas and active litigation in which it was a named party regarding the historic occurrence-based insurance policies it issued to Covil. The existence of active requests for policy information both in the form of subpoenas and in the form of Penn National's being named as a party to litigation involving the Covil asbestos cases and associated insurance established a clear and unequivocal duty on the part of Penn National to preserve its insurance policies.

The Court finds that Penn National was on notice starting in May 2018 that it should preserve any and all insurance policies issued to Covil.¹⁸² Specifically, in May 2018, Branham & Shirley, LLP ("Dean Omar"), the law firm representing Ann Finch in an asbestos case against Covil in the Middle District of North Carolina, served Penn National with a subpoena requesting Covil's insurance information (the "*Finch* subpoena"). The subpoena sought "[c]opies of all liability insurance policies and endorsements issued to Covil between 1969 and 1995, including without limitation, commercial general liability, umbrella, or other liability policies."¹⁸³ Dean Omar also provided Penn National with two specific policy numbers in the subpoena, but had no further information regarding the Covil's overall coverage program with Penn National.¹⁸⁴

In response to the *Finch* subpoena, Penn National located two historic, occurrence-based general liability policies potentially providing insurance coverage for asbestos bodily injury suits that it issued to Covil—the same two policies Dean Omar identified by policy number. Once Penn National received the *Finch* subpoena, there can be no genuine dispute that Penn National knew or should have known that the subpoena was not a one-off discovery issue to be ignored. Moreover, Penn National should have issued a litigation hold. Given the nature of asbestos litigation, Penn National, having issued historic, occurrence-based general liability insurance policies potentially responsive to asbestos bodily injury suits, should have reasonably expected to receive similar

¹⁸² Covil Trial Ex. 12.

¹⁸³ *Id.* at Ex. A.

¹⁸⁴ *Id.* at Ex. C.

discovery requests going forward. Penn National therefore had a duty to preserve any and all liability insurance policies in its possession, custody, or control potentially responsive to Covil's asbestos bodily injury lawsuits.¹⁸⁵

Continuously between 2018 and 2021, parties to litigation repeatedly requested all insurance policies issued to or covering Covil in discovery from Penn National, in the form of document requests, interrogatories, and third-party subpoenas. For example, the Receiver first tendered a Covil asbestos claim to Penn National in August 2019. In the Receiver's tender letter, the Receiver asked Penn National for coverage under the two known policies *and any other policies issued to Covil*.

(1) Penn National destroyed microfiche containing commercial line insurance policies issued prior to 1992.

At the November 2023 evidentiary hearing on spoliation, Penn National failed to present a corporate representative who was prepared to testify competently regarding Penn National's document retention policy and/or its destruction of historic insurance policy documents on microfiche during the relevant timeframe of May 2018 to December 2021. Instead, Penn National presented Boyd Wright, who provided testimony directly contrary to facts known to this Court in this litigation.

A year before the hearing, on November 10, 2022, Penn National employee Brent Reifsnnyder testified at the deposition as Penn National's corporate representative on document

¹⁸⁵ Penn National contends that because the subpoena identified two Penn National policy numbers specifically, and Penn National located and produced those two policies to the Dean Omar firm, Penn National was not required to search for and/or preserve any other Covil policies. This argument is without merit. Exhibit A to the Subpoena demands production of "all liability insurance policies and endorsements," not simply the policies identified in Exhibit C. The fact that Penn National chose to create a document indexing system that only lists policies by policy number and not by the name of its insured did not relieve Penn National of its discovery obligations, including but not limited to preserving material evidence.

retention and destruction issues. During his deposition, he conceded (i) that Penn National knowingly destroyed microfiche containing historic insurance policies issued prior to 1992,¹⁸⁶ (ii) that Penn National did in fact destroy such historic insurance policies without searching for any reference to Covil whatsoever before destroying the policies, and (iii) that Penn National failed to keep any records of which insurance policy documents were destroyed:

Q. To your recollection, microfiche cards were destroyed as part of the 2018 purge, correct?

A. Correct.¹⁸⁷

* * *

Q. And microfiche cards were destroyed as part of the purge in 2019?

A. I believe so, correct.¹⁸⁸

* * *

Q. As part of the pulling process in 2019, was any microfiche destroyed?

A. Yes.¹⁸⁹

* * *

Q. Are policies -- how are policies destroyed?

A. So paper is shredded. That is done at Iron Mountain. Microfiche is also shredded by Iron Mountain.¹⁹⁰

* * *

Q. Have you purged any microfiche with policies with a nonrenewal date prior to 1992?

¹⁸⁶ Penn National admits in its responses to interrogatories that “[a]ll commercial line policy-related documents that pre-dated 1992 were stored on microfiche and kept at Penn National’s headquarters in Harrisburg, Pennsylvania.” Covil Trial Ex. 69 at 2.

¹⁸⁷ Covil Trial Ex. 84, Rule 30(b)(6) Dep. Tr. at 97:13–18.

¹⁸⁸ *Id.* at 97:19–21.

¹⁸⁹ *Id.* at 45:10–12.

¹⁹⁰ *Id.* at 47:2–5.

A. So the answer is yes, we would have destroyed them.¹⁹¹

* * *

Q. Do you know of any policy at Penn National that would prohibit you from destroying policies that are on microfiche cards?

A. No. Subject to litigation hold, that's the only time I would pause.¹⁹²

* * *

Based on the admissions in Mr. Reifsnyder's corporate testimony on behalf of Penn National in November 2022, including but not limited to the above-referenced excerpts, this Court finds that Penn National destroyed historic insurance policies issued prior to 1992 on an annual basis from 2018 through 2021.¹⁹³ This Court also finds that Penn National failed to issue a timely litigation hold.

Notwithstanding Mr. Reifsnyder's deposition testimony that Penn National deliberately destroyed historic insurance policies issued to policyholders prior to 1992 that were stored on microfiche throughout the pendency of the Covil litigation, Penn National's corporate representative at the November 2023 evidentiary hearing voluntarily provided misleading and uninformed testimony when questioned by the Court: "From my experience, as much as they

¹⁹¹ *Id.* at 68:13–22.

¹⁹² *Id.* at 71:17–21.

¹⁹³ This Court notes that Penn National failed to produce any evidence at the hearing that the litigation hold issued in December 2021 was issued before Mr. Reifsnyder and his team at Penn National conducted their annual purge and destruction of microfiche for the year 2021–2022. For example, Penn National failed to provide the specific list of policy documents that Penn National used to collect insurance policies throughout 2021, which were scheduled for annual destruction at the beginning of the calendar year for 2022. Nor did Penn National provide any evidence that the insurance policies on that list or the policies that were "set aside" throughout 2022 were still in existence. What is clear is that Penn National keeps no records of what has been destroyed. Moreover, even though Mr. Reifsnyder was listed as a witness on Penn National's own witness list and testified repeatedly via affidavit and deposition testimony in this case, Penn National refused to make Mr. Reifsnyder available for cross-examination questioning at the hearing, either in person or remotely, or for direct questioning by this Court. Penn National offered no explanation for his absence from the proceedings.

would like to say that they were removing microfiche, I don't think they ever did it. I really don't."¹⁹⁴ Penn National's corporate representative went on to testify inaccurately that Penn National does not destroy microfiche.¹⁹⁵ This testimony mirrors Penn National's false interrogatory responses. Both are in direct conflict with Mr. Reifsnyder's unequivocal deposition testimony as Penn National's corporate representative on November 10, 2022.¹⁹⁶ Penn National's refusal to disclose or admit timely in written discovery that it was destroying microfiche containing Penn National's historic, pre-1992 commercial line policies, including occurrence-based general liability policies potentially responsive to ongoing asbestos litigation, is an independent and material discovery violation.

This Court also has serious concerns with the manner in which Penn National identified insurance policies contained on microfiche for destruction, failing to maintain any records of which documents were destroyed and failing to conduct any quality control over the process. This is particularly troubling considering Mr. Reifsnyder's admission that quality control issues arise during the process (*e.g.*, microfiche cards sticking together, inadvertently leading to the wrong microfiche cards being collected for destruction). Moreover, this Court does not find Mr.

¹⁹⁴ Trial Tr. at 112:9–11.

¹⁹⁵ Trial Tr. Day 2, Morning Session, at 112:12–16 (Court: "You think [the microfiche] just stayed there in those storage facilities? Answer: "Yeah. What we have to understand is what Mr. Reifsnyder does is every year he purges documents. He does not destroy what he's purged."). Penn National's corporate representative at the hearing, however, admitted on cross-examination that he had not even bothered to read Mr. Reifsnyder's corporate representative testimony on these issues before offering such demonstrably incorrect testimony. *Id.* at 114:25–115:3.

¹⁹⁶ *See, e.g.*, Covil Trial Ex. 68, Feb. 17, 2022 Penn National Resp. to Req. for Admis. at RFA No. 5 ("With respect to microfiche, it is denied that any commercial line policy-related records that had a cancellation or non-renewal date that pre-dated 1992 were disposed of in 2019."); Covil Trial Ex. 69 at 4 ("With respect to Covil related policies, any Covil related policy documents would have pre-dated 1992, and therefore, were stored on microfiche, and would not have been purged or destroyed between 2018 to present date."). These discovery responses are demonstrably false and were never corrected by Penn National after Mr. Reifsnyder unambiguously corrected the record in November 2022.

Reifsnnyder's testimony that Penn National has a true quality control process in place credible. Mr. Reifsnnyder testified that he delegated responsibility for conducting the "quality control" review to the individual administrative personnel who conducted the search in the first place. In other words, these administrative employees were tasked with selecting the correct microfiche cards and then tasked with grading their own papers. That is not quality control. Perhaps most disturbing, Penn National delegated the crucial responsibility of making the decisions as to which historic CGL policies were destroyed, decisions with potentially billions of dollars in policyholder assets at stake, to unsupervised administrative staff. It is hard to envision a more reckless system.

Penn National offers no viable defense for its failure to issue a basic litigation hold at any point between May 2018 and December 2021.¹⁹⁷ Nor does it offer any viable defense for its failure to supervise and implement quality control procedures.

(2) Penn National destroyed at least one comprehensive general liability policy issued to Covil for the 1985-1986 policy period, which was "renewed" for the 1986-1987 and 1987-1988 policy periods.

The Court next turns to the issue of whether there is evidence that Penn National issued insurance policies to Covil that it has been unable to produce to the Receiver in discovery, potentially because of the above-referenced deficiencies. The answer is unequivocally, yes.

The 1986–1987 Policy contains a Change Endorsement establishing that the 1986–1987 Policy was not the original general liability policy issued to Covil. Rather, it was a "renewal" policy. The plain language of the Change Endorsement is clear and unambiguous that there were two errors on the declarations page of the 1986-1987 Policy—(1) the Completed Operations

¹⁹⁷ As established by the credible testimony of the Receiver's insurance industry expert witness, Charles Miller, Penn National failed to issue a timely litigation hold in accordance with insurance industry standards. Miller Trial Tr. 39:23–42:7.

Hazard and Products Hazard Exclusion was inadvertently left off and (2) the exclusion was left off *at renewal*. The term “renewal” has a specific meaning in an insurance contract.¹⁹⁸

One need look no further than the very next comprehensive general liability policy that Penn National issued to Covil—the 1987–1988 Policy. This was also a “renewal” policy, containing the same terms, conditions, and limits of the prior 1986–1987 Policy.¹⁹⁹

In response, Penn National raises two meritless arguments. First, Penn National claims that the term “renewal” in the Change Endorsement is actually just a “comment” that this Court should simply ignore. However, binding South Carolina law prohibits this Court from taking such a cavalier approach to contractual interpretation. This Court must give meaning to each and every term in the insurance contract. *See Stevens Aviation, Inc. v. DynCorp Int’l LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014).

¹⁹⁸ For a missing policy that has been renewed, the policyholder can use the subsequent renewal policy to prove the terms of the lost preceding policy. *See, e.g., Century Indem. Co. v. Aero-Motive Co.*, 254 F. Supp. 2d 670, 692–93 (W.D. Mich. 2003); *Ne. Utilities v. Century Indem. Co.*, No. X03CV 980495496S, 1999 WL 476274, at *7 (Conn. Super. Ct. June 21, 1999). It is well-settled that the renewal policy is presumed to adopt the same terms, conditions, and limits of liability of the existing or expiring policy absent of an agreement to the contrary. *See Ne. Utilities*, 1999 WL 476274, at *4 (citing cases from various jurisdictions); *Aero-Motive*, 254 F. Supp. 2d at 695 (“giving effect to the presumption that a renewal policy is on the same terms, conditions, and amounts as the original policy, Aero has established the material terms of coverage under [the missing policy]”); *Patel v. Northfield Ins. Co.*, 940 F. Supp. 995, 1000 (N.D. Tex. 1996) (“In the absence of an agreement to the contrary, the presumption is that renewals are on the same terms, conditions, and amounts as provided in the original policy.”); § 29:40. Continuation of original terms, 2 Couch on Ins. § 29:40 (“Except where there is a special agreement for different terms, the renewal of a policy continues the original stipulations, and the only change is in the time of its expiration.”). Here, the Receiver has presented sufficient evidence of the terms of the 1985–86 Policy through the terms of the 1986–87 Policy. Given that the Court concludes that 1986–87 Policy is a renewal policy (see Covil Trial Ex. 1), the 1985–86 Policy is presumed to have the same terms, conditions, and limits of liability as those of the 1986–87 Policy. Penn National failed to provide any evidence of agreement to the contrary to rebut the presumption. Thus, the Court finds that the 1985–86 Policy has the same terms, conditions, and limits of liability as those of the 1986–87 Policy.

¹⁹⁹ As established by the credible testimony of Charles Miller, the fact that an insurance policy references a prior policy is evidence that a prior policy was issued. Miller Trial Tr. 38:25–39:10.

Second, Penn National asserts that the declarations page lists the 1986–1987 Policy as a “New” policy and therefore it cannot be a “renewal” policy. But, again, this argument is wholly inconsistent with the plain terms of the Change Endorsement. The declarations page does not list a Product/Completed Operations Hazard Exclusion (GL2104) in the numerous endorsements listed on the declarations page either.²⁰⁰ But that was a mistake. Penn National not only acknowledges that was a mistake but also actively informed both underlying asbestos plaintiffs’ counsel and the Receiver and his counsel of this mistake in numerous instances of written correspondence.²⁰¹

The Court cannot fairly read the Completed Operations Hazard and Products Hazard Exclusion (GL 2104) into the 1986–1987 Policy through the Change Endorsement, but ignore the language in the Change Endorsement indicating that the error occurred at “renewal.” The Court finds that the plain and unambiguous language of the Change Endorsement supports the argument that the reference to a “New” policy was an inadvertent error at the time of renewal per the terms

²⁰⁰ See Covil Trial Ex. 1, at Penn National Policies 000001.

²⁰¹ Covil Exs. 13, 37, 45. To overcome this mistake, Penn National makes the meritless argument that a 2019 draft of an insurance coverage chart prepared by the Receiver’s outside counsel early in the investigatory stages of the case to support its position that it did not issue a 1985–1986 CGL policy. In addition to the fact that the 1986–1987 Penn National policy speaks for itself with the “renewal” language, this Court finds that a coverage chart created by outside counsel is not evidence of insurance coverage. See Trial Tr. Day 1, Morning Session at 134:20–135:3, 164:2–12. Penn National fails to direct this Court to any authority stating otherwise. In fact, the authority for which Penn National directed this Court for purposes of reconstruction of missing or lost policies makes plain that such evidence is wholly irrelevant and that it is Penn National’s burden to prove the existence and terms of the alleged policy. See Penn National’s Proposed Conclusions of Fact and Law, filed Dec. 5, 2022, at 17–19. Further, the insurer listed on the 2019 draft coverage chart, Hartford, disputed its coverage when the coverage chart was created and when Hartford entered into a settlement agreement with the Receiver. See Trial Tr. Day 1, Morning Session at 135:4–136:1; 168:21–169:11; 171:11–22. Additionally, the Receiver’s insurance industry expert witness Charles Miller testified credibly that, in his opinion, it is possible for a policyholder to have overlapping primary coverage for the same policy period. Mr. Miller, as an expert witness on this subject, testified that he had seen this happen in other matters. See Covil Trial Ex. 98, Covil’s Expert Witness Charles Miller Dep. at 122:17–123:22.

of the Change Endorsement.²⁰² The 1986–1987 Policy should have indicated that it was a “renewal” policy on the declarations page.

In light of the plain and undisputed meaning of the term “renewal” in the 1986–1987 Policy, and the complete and identical terms, conditions, and limits of the subsequent renewal policies for the policy periods of March 31, 1986 to March 31, 1987 and March 31, 1987 to March 31, 1988 contained in the record,²⁰³ this Court finds there is no genuine dispute of material fact in this action regarding the existence of a Penn National comprehensive general liability policy issued to Covil for the policy period of March 31, 1985 to March 31, 1986. Moreover, the Court finds there is no genuine dispute of material fact regarding the terms, conditions, and limits of the 1985–1986 CGL Policy, which were identical to the 1986–1987 and 1987–1988 CGL Policies.

This Court believes there is overwhelming evidence, taken in totality, that Penn National’s litigation misconduct in this case severely harmed the Receiver’s ability to marshal Covil’s insurance coverage programing, including locating a full and complete copy of the 1985–1986 CGL Policy. The Court finds that Penn National acted with gross negligence when it destroyed this material evidence.

For these reasons, the Court finds that Penn National issued a comprehensive general liability insurance policy to Covil for the policy period of March 31, 1985 to March 31, 1986.

²⁰² Tellingly, even Penn National’s own proffered expert witness, Bernd Heinze, admitted on cross-examination that there are no ambiguities in the 1986–1987 insurance policy. Trial Tr., Day 2, Morning Session, at 52:19–53:10.

²⁰³ Additionally, the evidence shows that Covil purchased liability policies from Penn National responsive to auto claims for the March 31, 1985 to March 31, 1988 policy periods (the Auto Policies) as well as liability policies issued to Covil responsive to inland marine claims for the for the March 31, 1985 to March 31, 1988 policy periods (the Inland Marine Policies). Covil Trial Exs. 4–6.

(3) Insurance policies that provide Covil with coverage as an additional, supplemental, or special named insured may also have been destroyed.

The 1986–1987 CGL Policy provides evidence that Covil Corporation was identified not only as a Named Insured on the declarations page of Penn National policies but also on a list of persons and organizations named in the “Special Named Insured Endorsement.”²⁰⁴ Penn National, however, did nothing to search the historic, occurrence-based liability policies it destroyed for identification of Covil prior to destruction. This is especially concerning in light of Penn National’s often repeated discovery response that such policies may in fact exist. For example, Interrogatory Number 1 requested Penn National to “[i]dentify all insurance policies that YOU issued to Covil or which otherwise include Covil as an insured.” In response, Penn National stated that it “does not maintain its records in a way that would provide a reasonable method of searching for policies under which Covil is named as an additional insured or qualifies as an additional insured. Thus, Penn National has no reasonable method of identifying all documents that *may be responsive to this Interrogatory*.”²⁰⁵ Given that Penn National admitted that there may have been responsive discovery in its microfiche archive, it should not have destroyed such microfiche without analyzing such policies for references to Covil.

b. Penn National destroyed historic, occurrence-based general liability policies with a culpable state of mind.

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

²⁰⁴ Covil Trial Ex. 1 at 11.

²⁰⁵ Covil Trial Ex. 42 at 6–7 (emphasis added).

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

Here, the evidence before the Court shows that Penn National’s conduct of destroying relevant documents satisfies the required level of culpability needed for spoliation sanctions to be imposed. Because culpability encompasses everything from ordinary negligence to willful conduct, the culpable standard merely requires Penn National to have some degree of fault, which is the case in this matter.

Penn National knew or should have known that it should not have been destroying insurance policies on microfiche between May 2018 and December 2021 without reviewing those policies for mentions of Covil and in the absence of a litigation hold. Penn National’s Document Retention Policy advises:

It is imperative to remember that if the records retention schedule calls for the destruction of records and we have not destroyed some or all of them, without a compelling reason, courts may view this as “selective retention.” And, if selected records are destroyed as part of a retention program or destroyed outside the program, the courts may view this as “selective destruction.” **Either selective retention or selective destruction can subject the company to substantial fines, penalties, and the loss of rights.**²⁰⁶

Penn National also has Litigation Hold Procedure. The Litigation Hold Procedure directs:

Penn National Insurance is committed to fully complying with its discovery obligations. To do so, the Company and its employees will preserve and secure all information that may be potentially discoverable in relation to future litigation. If an employee receives a Litigation Hold notice from the Legal Department, then the employee should follow the procedures described below in the gathering and retention of such information. **A Litigation Hold shall override any other company policy**

²⁰⁶ Covil Trial Ex. 8 at 2 (emphasis added).

or procedure that would normally require the information be purged or destroyed. A Litigation Hold can only be terminated by the Legal Department.²⁰⁷

Therefore, Penn National had a Document Retention Policy that advised its employees not to destroy the historic, occurrence-based CGL policies contained on microfiche. Penn National did not comply with its own Policy. Penn National also had a Litigation Hold Procedure that advised that the Company was “committed” to complying with its discovery obligations and that “the Company and its employees will preserve and secure all information that may be potentially discoverable in relation to future litigation.” Penn National did not comply with its own Procedure. It waited until December 2021 to issue a basic litigation hold. On December 17, 2021, Scott Maier, Penn National’s in-house counsel, sent an email to Brent Reifsnyder, with specific directions to preserve, and not purge, any and all microfiche:

Penn National Insurance must now take immediate steps to preserve, and not purge, any and all paper policy related documents and microfiche stored by Penn National Insurance, and . . . microfiche that may be in your possession, custody, or area of control, or that may be maintained under your direction and supervision. . . .²⁰⁸

Penn National’s failure to issue the above-quoted Litigation Hold at any point between May 2018 and December 2021 resulted in Penn National’s continued, annual purge of microfiche containing historic, pre-1992 commercial line policies for over three and a half years.

In addition to Penn National’s violations of its own written policies and procedures, this Court has been forced to invest significant time and judicial resources to issue a series of escalating discovery and sanction orders against Penn National based on its litigation conduct in this case.²⁰⁹

Throughout the course of the Covil litigation, Penn National also sent a series of letters to Covil’s asbestos defense counsel in June 2018, the Receiver in August 2019, and the Receiver’s coverage counsel in November 2019 in which Penn National made the same material misstatement with respect to the number of CGL insurance policies issued by Penn National to Covil, claiming

²⁰⁷ Covil Trial Ex. 9 at 1 (emphasis added).

²⁰⁸ Covil Trial Ex.10 at 1 (emphases added).

²⁰⁹ Covil Trial Exs. 62, 63, 66, 71, 82, 121.

incorrectly that there was only one renewal policy when there were in fact two renewal policies.²¹⁰ Penn National also made a material omission regarding the specific terms and conditions of the Change Endorsement in the 1986–1987 Policy. Specifically, in its coverage letters, Penn National explained why the Completed Operations Hazard and Products Hazard Exclusion (GL 21 04) applied to bar coverage, despite the fact that GL 21 04 was not listed as an applicable exclusion on the declarations page: “As the attached records reflect, after the policy was effective on March 31, 1986, it was discovered endorsement GL 21 04 (07/66), Exclusion (Completed Operations Hazard and Products Hazard), was inadvertently **left off the policy.**”²¹¹

The Change Endorsement, however, has materially different language:

POLICY CHANGES

Amending policy to delete products form GL0031 (4/84), and Add GL2104(7/66) Products hazard exclusion as it was **left off at renewal.**²¹²

The Court finds it significant that Penn National altered the material terms of the policy from the exclusion being “left off *at renewal*” to “left off *the policy.*” The later alteration of the policy language deliberately or recklessly fails to disclose to the reader that the 1986-1987 Policy was in fact a “renewal” policy and that there was not “one” renewal policy potentially triggered by asbestos lawsuits against Covil but “two” renewal policies.

Finally, the Court notes that Penn National’s misconduct toward South Carolina policyholders is not limited to Covil. On March 23, 2020, following a non-jury trial in *Portrait Homes v. Pennsylvania National Mutual Casualty Insurance Company*, Case No. 2014-CP-08-2757 (County

²¹⁰ Covil Trial Exs. 13, 37, 45.

²¹¹ Covil Trial Ex. 37 (emphasis added); *see also* Covil Trial Ex.13 (“As the records reflect, after the policy was issued for coverage effective March 31, 1986, it was discovered endorsement GL 21 04 (07/66) Exclusion (Completed Operations Hazard and Products Hazard), was inadvertently **left off the policy.**”); Covil Trial Ex. 45 (“The records reflect that after the policy was effective on March 31, 1986, it was discovered endorsement GL 21 04 (07/66) Exclusion (Completed Operations Hazard and Products Hazard), was inadvertently **left off the policy.**”) (emphasis added).

²¹² Covil Trial Ex. 1 at 29 (emphasis added).

of Berkeley), Judge Roger M. Young issued a Post-Trial Motions and Punitive Damages Order against Penn National. In his order, Judge Young explained Penn National's misconduct as follows:

The Court also finds that Penn National failed to perform a reasonable investigation of this claim and knowingly misrepresented coverages under the policies and failed to disclose important information that it had in its possession to Mr. Castillo. The evidence is clear and convincing that the conduct of Penn National was willful, wanton, and in reckless disregard of JJA's rights causing harm.²¹³

The South Carolina Court of Appeals affirmed Judge Young's order.²¹⁴ Judge Young's description of Penn National's conduct is similar to the circumstances that this court has faced here.

In sum, Penn National's institutional failures are significant. Penn National (1) never issued a timely litigation hold, (2) never suspended its annual purge process, (3) never reviewed its insurance policies for "Covil" prior to destruction, (4) never conducted quality control of the purge process, and (5) destroyed historic CGL policies on microfiche. Moreover, Penn National (1) violated its Document Retention Policy, (2) violated its Litigation Hold Procedure, (3) violated applicable law on retaining documents in anticipation of litigation, and (4) violated its discovery obligations by refusing to preserve and search for responsive insurance policies. This Court is convinced that Penn National had a culpable state of mind throughout these failures.

c. The destroyed historic, occurrence-based general liability policies were relevant to the Receiver's charge by this Court to marshall Covil's Insurance Assets.

The last of the three independent elements, relevance to the party's claims, is also clearly present on these facts. Under Rule 401 of the South Carolina Rules of Evidence, "relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." "Evidence is relevant if it tends to establish or make more or less probable some matter at issue upon which it directly or indirectly bears." *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

²¹³ Covil Trial Ex. 122 at 57 (emphasis added).

²¹⁴ See *Portrait Homes v. Pa. Nat'l Mutual Casualty Ins. Co.*, Op. No. 6038 (S.C. Ct. App. filed Sept. 13, 2023).

Thus, any evidence which assists a fact finder at arriving at the truth of an issue is relevant. The determination of the relevancy of evidence is largely within the trial judge's discretion. *Strickland v. Coastal Design Assocs., Inc.*, 294 S.C. 421, 425, 365 S.E.2d 226, 228 (Ct. App. 1987).

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

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

When a party destroys evidence, an inference may be drawn that the destroyed evidence would have been adverse to that party. *Gathers ex rel. Hutchinson v. S.C. Elec. & Gas Co.*, 311 S.C. 81, 83, 427 S.E.2d 687, 689 (Ct. App. 1993) (citing *Kershaw Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990)). Over the years, courts have found numerous sanctions to be appropriate for the spoliation of evidence. Courts have allowed adverse inferences to be drawn from the loss or destruction of relevant evidence, dismissed cases or stricken pleadings, issued fines plus attorneys' fees and applied almost every other sanction available for the failure to provide discovery.

Among the tools that judges may use to combat spoliation is the adverse inference presumption. Giving the finder of fact the ability to decide what weight to place on the spoliation is the preferred practice in South Carolina. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997). The presumption does not arise from the failure to present the evidence, but

rather from the role that the spoliating party had in preventing it from being reviewed by the court. When a party destroys evidence, an inference may be drawn that the destroyed evidence would have been adverse to that party. *Gathers*, 311 S.C. at 83, 427 S.E.2d at 689 (citing *Kershaw Cty. Bd. of Educ.*, 302 S.C. at 395, 396 S.E.2d at 372).

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

D. This Court Awards Attorneys' Fees To Covil.

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

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

“There is no material difference in the legal effect between an outright refusal to defend and in undertaking the defense under a reservation of rights until a declaratory judgment is prosecuted to resolve the question of coverage.” *Id.* Accordingly, the South Carolina Supreme Court reasoned fees that are expended because of a declaratory judgment are themselves fees expended in defense of a claim. *See id.* And thus, said fees are recoverable. *See id.* “The legal fees incurred by [an insured], in successfully asserting [its] rights against [an insurer]’s attempt in

the declaratory judgment action to avoid its obligation to defend, were damages arising directly as a result of the breach of the contract[ual]" obligation to defend. *Id.* at 550-51, 243 S.E.2d at 244 (citing *Cohen v. Am. Home Assur. Co.*, 255 Md. 334, 258 A.2d 225 (1969)).

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

These holdings have been reaffirmed and remain foundational jurisprudence in South Carolina. *See, e.g., First Fin. Ins. Co. v. Sea Island Sport Fishing Soc., Inc.*, 327 S.C. 12, 17, 490 S.E.2d 257, 259 (1997) ("We decline to overrule *Hegler*..."); *Portrait Homes - S.C., LLC v. Pa. Nat'l Mut. Cas. Ins. Co.*, No. 2020-000735, 2023 WL 8610277, at *33 (S.C. Ct. App. Dec. 13, 2023) (citing *Hegler*) (affirming attorneys' fees award in a declaratory judgment action brought by the insured against Penn National); *Jessco, Inc. v. Builders Mut. Ins. Co.*, No. 2:08-CV-1759-PMD, 2012 WL 1570015, at *2 (D.S.C. May 3, 2012) (citing *Hegler* and *Gordon-Gallup*) ("South Carolina courts have unanimously found that an insured may be entitled to reasonable attorney fees and costs for defending the underlying action brought against it as well for bringing a declaratory judgment action against the insurer.").

Any differences between this case and *Hegler* or *Gordon-Gallup* are not material. Penn National argues that "*Hegler* has no applicability here" because, unlike the insured in *Hegler*, Penn National has defended the underlying cases at issue. Nov. 28, 2023 Afternoon Tr. at 67:25–68:19. However, Penn National did not deny that it defended the underlying cases under a reservation of rights. As expressly discussed in *Hegler*, "[t]here is no material difference in the legal effect

between an outright refusal to defend and in undertaking the defense under a reservation of rights until a declaratory judgment is prosecuted to resolve the question of coverage.” *Hegler*, 270 S.C. at 550–51, 243 S.E.2d at 444.

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

The selection of a sanction for discovery violations is within the trial court's discretion. *Kershaw Cty. Bd. of Educ.*, 302 S.C. 390, 396 S.E.2d 369 (1990). Sanctions can range up to default or dismissal, and “[i]n determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice.” *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999) (citing *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974)). The sanction should be aimed at the specific conduct of the party sanctioned. *Id.* at 198, 511 S.E.2d at 719 (citing *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990)).

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

Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999) (trial court awarded attorneys' fees for failure to comply with discovery order).

IV. ORDERING PARAGRAPHS

With respect to the Receiver's declaratory judgment claims, the Court enters judgment in favor of Plaintiff Peter D. Protopapas, as the Receiver for Covil Corporation, and declares as follows:

1. The aggregate limit of liability for bodily injury damage in the Penn National Policies does not apply to operations claims, but applies to completed operations and products claims only;
2. The aggregate limit of liability in the Penn National Policies does not apply to Covil Asbestos Suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos while Covil was performing work at a particular jobsite;
3. Penn National bears the burden of proving any exclusion or limitation of coverage, including the application of the aggregate limit of liability to particular Covil Asbestos Suits and the exhaustion of the aggregate limit of liability in its policies;
4. Penn National has not met its burden of proving that the bodily injury alleged in the covered Asbestos Suits in which Penn National contributed to settlement payments—*Ashworth*, *Campbell*, *D'Amico*, *Garren*, *Jolly*, *Jonas*, *Knight*, *Morgan*, *Sims*, *Aspray*, *Wannamaker*, and *Moss*—are subject to and impair the Penn National Policies' aggregate limit of liability;

5. The Penn National Policies are required to pay or reimburse “all sums” that Covil, as the insured, becomes legally obligated or reasonably required to pay as damages by reason of Covil Asbestos Suits;
6. The “continuous trigger of coverage” applies to the Covil Asbestos Suits, such that the policies at issue respond to suits when bodily injury takes place during the policy period, regardless of when the event causing the injury took place and regardless of when the injury becomes known or knowable;
7. Covil is entitled to multiple ‘per occurrence’ limits of liability to resolve each of the Covil Asbestos Suits;
8. Based on the plain and unambiguous terms of the 1986–1987 Policy, Penn National issued a previous comprehensive general liability insurance policy with a policy period of March 31, 1985 to March 31, 1986 (“the 1985–1986 Policy”); and
9. The 1985–1986 Policy contains the same terms, conditions, and limits of liability as its successive, renewal policies issued with policy periods of March 31, 1986 to March 31, 1987 (the 1986–1987 Policy) and March 31, 1987 to March 31, 1988 (the 1987–1988 Policy).

With respect to the Receiver’s request for a spoliation ruling, this Court finds that Penn National culpably spoliated historic occurrence-based liability insurance policies and policy-related documents stored on microfiche during the pendency of the Covil litigation. This Court holds that spoliation is an appropriate, alternative basis for issuing a declaration regarding the existence, terms, and conditions of the 1985–1986 Policy, which is likely a missing policy as a result of Penn National’s destruction of material evidence. The Court finds as follows:

1. Penn National issued one or more insurance policies protective of Covil that it can no longer produce, including at least one primary general liability insurance policy responsive to asbestos bodily injury lawsuits with a policy period of March 31, 1985 to March 31, 1986 (the 1985–86 Policy); and
2. The 1985–1986 Policy contains the same terms, conditions, and limits of liability as its successive, renewal policies issued with policy periods of March 31, 1986 to March 31, 1987 (the 1986–1987 Policy) and March 31, 1987 to March 31, 1988 (the 1987–1988).

This Court further finds that the Receiver is entitled to his reasonable attorneys' fees and costs as the prevailing party on his declaratory judgment claim. Independently, this Court finds that the Receiver is entitled to his reasonable attorneys' fees and costs as a sanction against Penn National for Penn National's spoliation of relevant, material evidence in this case. The Receiver is ordered to produce within thirty (30) days from this order evidence of its reasonable attorneys' fees and costs for this Court's *in camera* review.

This Court further orders that Penn National shall complete the digitization of the microfiche cards described in its most recent February 27, 2024 Interim Report and provide a Final Report to the Court within seven (7) days of this Order.

Finally, this Court directs the Receiver to provide a copy of this Order to the Attorney General of the State of South Carolina as well as the Insurance Commissioners for the State of South Carolina and for the Commonwealth of Pennsylvania for their consideration and further action, as they may deem appropriate.²¹⁵

²¹⁵ To the extent that an alleged fact, opinion, or legal argument raised by Penn National is in conflict with this Court's findings but not specifically addressed in this Order, the assertion is hereby rejected.

IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

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

So Ordered

Jean H. Toal