

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

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Case No. 2020-CP-40-02098

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

Respondent,

v.

Pennsylvania National Mutual  
Casualty Insurance Company,

Appellant.

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(7) Order Granting Covil's Motion for Attorneys' Fees and Costs, dated May 11, 2023, filed  
May 12, 2023, and received by Appellant on May 12, 2023

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STATE OF SOUTH CAROLINA )  
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COUNTY OF RICHLAND )  
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Covil Corporation, by and through its duly )  
Appointed Receiver Peter D. Protopapas, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
Pennsylvania National Mutual Casualty )  
Insurance Company, *et. al*, )  
 )  
Defendants. )  
 )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

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

**ORDER GRANTING COVIL'S  
MOTION FOR ATTORNEYS'  
FEES AND COSTS**

**RECEIVED**

APR 23 2024

SC Court of Appeals

This matter is before the Court on Covil’s Motion for Attorneys’ Fees and Costs under Rules 26 and 37(a)(4) of the South Carolina Rules of Civil Procedure. The motion arises out of seven motions to compel filed between January 2021 and November 2022 on various discovery disputes between the Receiver for Covil Corporation (“Covil”) and Pennsylvania National Mutual Casualty Insurance Company (“Penn National”). The Court held a hearing on the motion on April 19, 2023. Present at the hearing were G. Murrell Smith, Jr., Jonathan M. Robinson, and W. Brad Nes on behalf of Covil and Brady A. Yntema and Kirby D. Shealy, III, on behalf of Penn National. The Court has considered the motion and briefing, including the supplemental declarations, extensive arguments of counsel, and an *in camera* review of the unredacted billing records. The Court **GRANTS** the motion and orders Penn National to pay attorneys’ fees in the amount of \$671,693.

**BACKGROUND**

This Court appointed Peter D. Protopapas in November 2018 as the Receiver for Covil, a defunct South Carolina corporate entity. Covil engaged in the business of installing, removing,

and sometimes selling insulation made with asbestos materials in the State of South Carolina and in other places in the Southeast for many years between the 1960s and the 1990s. Covil has been sued in many asbestos lawsuits before this Court, which was appointed to manage the asbestos docket at the direction of the Chief Justice of the Supreme Court of South Carolina. This Court therefore charged the Receiver with marshaling Covil's assets, including all occurrence-based liability insurance policies, that may respond to the asbestos suits pending against Covil.

Prior to the Receiver's appointment, this Court became aware of a regular pattern in which Covil Corporation would not respond to requests for information, necessitating orders compelling compliance with discovery obligations. Ultimately, after granting numerous motions to compel with no response, this Court struck Covil's pleadings in an underlying asbestos case as a sanction for its failure to respond to discovery.

This Court learned subsequently that, after letting its charter from the State of South Carolina lapse, Covil had been effectively managed by the attorneys for certain insurance companies that covered Covil.<sup>1</sup> The strategic litigation approach adopted on Covil's behalf by other insurers was not to participate in discovery. Rather, it was to accept the pleadings on Covil's behalf and then engage in a course of conduct of waiting until the last moment and then settling cases at a nuisance value. The other insurers appeared to want to be as minimally responsive as possible to avoid discovery of the occurrence-based general liability policies covering Covil.

When this Court learned of certain Covil insurers' conduct, it appointed a receiver to manage Covil's assets. Covil's only assets are the "legacy" occurrence-based general liability policies covering Covil that were issued during the time it was an active asbestos insulation company.

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<sup>1</sup> Penn National was not providing a defense in the underlying asbestos cases for Covil at that time.

Covil, under the guidance of the Receiver, has identified numerous insurance policies issued by several different insurance companies covering its defense and indemnity obligations for the asbestos suits. A court-approved Qualified Settlement Fund (“QSF”) has been created and funded by the proceeds of settlements with at least six insurers. Those companies engaged in a long process of disclosure and negotiation, resulting in approval by the Court of settlement proposals that initially funded the QSF.

Penn National is now the last known insurance company from which the Receiver seeks information and documents related to the “legacy” occurrence-based liability policies it issued covering Covil as a primary or additional insured. Penn National first came to this Court’s attention in connection with the *Finch* case, an asbestos personal injury case tried in federal court in North Carolina resulting in a \$32.7 million verdict against Covil in October 2018. Specifically, the Court became aware that two general liability policies issued by Penn National that covered Covil were located by Penn National in June 2018 in response to an asbestos claimant subpoena in *Finch*. The subpoena requested (1) the policies associated with two known policy numbers, and (2) all other insurance policies issued by Penn National that covered Covil. Penn National responded only with copies of the two policies with known policy numbers listed in the subpoena.<sup>2</sup>

Following his appointment in November 2018, the Receiver requested from Penn National copies of all the insurance policies it issued covering Covil. This effort as to Penn National began in November 2019, and continues to the present, as the Receiver continues to seek historical insurance records more than three years later. To carry out his court-appointed duty to locate and

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<sup>2</sup> In the hearing on the Receiver’s motion, counsel for Penn National represented that the *Finch* plaintiffs requested only the two policies for which the plaintiffs were aware of the policy numbers. The Court notes that this is incorrect.

marshal the assets of Covil, the Receiver has served a subpoena and five sets of written discovery on Penn National and has taken four depositions of Penn National employees.

Throughout this extensive discovery, Penn National has taken the position that it is unable to access any possible historic occurrence-based liability coverage for Covil or any other policyholder it may have insured in the past unless it is provided with an exact policy number. This is even despite that Penn National admitted in answers to interrogatories on May 10, 2021, that it may have issued relevant insurance coverage located in its files: “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.” This interrogatory response necessarily required the Receiver to make inquiries into the Covil coverage that Penn National admitted it may have in its historical files.

At each turn in discovery, Penn National pulled back a small portion of the curtain, revealing just enough information about the existence of historical records and its document maintenance system to raise more questions to which it would not respond, and forcing Covil to return to this Court with additional requests for discovery intervention.

The Receiver ultimately was forced to file six different motions to compel on this issue. After each of this Court’s many discovery orders, Penn National and its representatives consistently failed to engage in a search for the policies in question, showing instead their purposeful stonewalling of the discovery process. It is clear that this is not a case of an insurance company lacking any records. Instead, it is a case in which the insurer decided to store voluminous records in such a way that it would be expensive to search them to locate a policyholder’s insurance

policies in any way other than by policy number, and now the insurer seeks to avoid evaluating its own records.

Covil's six motions to compel related to Penn National's failure to participate in discovery related to historic insurance policies were as follows:

**January 15, 2021:** Motion to compel a policy search after claims handler Boyd Wright's deposition revealed that he spent merely a few "minutes" in preparation for his deposition, and that he was not aware that a search through the entire company records occurred.

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." The Court further warned Penn National against asking Covil "for something that's just as ridiculous as what you say they asked for from you. They are not going to know policyholder's numbers or policyholders."

**April 22, 2021:** Motion to compel complete responses to the subpoena Covil issued as a result of this Court's January 25 Order, and to which Penn National failed to respond meaningfully.<sup>3</sup>

In a related order dated July 1, 2021, this Court found, "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."

**August 20, 2021:** Motion to compel a thorough search of the Penn National records as required by this Court's July 1 Order, after a deposition of Penn National employee

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<sup>3</sup> The Court notes that Penn National did provide Covil with copies of three policies insuring Covil once a hearing date was set on the motion to compel. Even with the production of the three insurance policies, Penn National failed to fully respond to the subpoena.

Brent Reifsnyder made clear that even after this Court's order, he had spent less than five minutes searching for responsive documents, he did not take any steps to locate policy-related documents, he did not consult with anyone at Penn National or otherwise about how he might be able to search for documents other than by policy number, and he had never reviewed the Receiver's list of job sites that this Court had ordered Covil to prepare in January 2021. Mr. Reifsnyder further confirmed that Penn National itself designed the system of organizing its records by policy number.

**September 8, 2021:** Motion to compel a thorough search of the Penn National records as required by this Court's July 1 Order, after a deposition of Penn National employee Boyd Wright made clear that Penn National's electronic system was designed in such a way as to only allow searches of policy numbers, and a search of additional or supplemental insureds would require a manual search. Further, Mr. Wright did not speak with Mr. Reifsnyder about such a process or logistics for searching the paper archives.

On November 5, 2021, following a hearing on both the August 20 and September 8 Motions, this Court found: "This Court has ordered Penn National to meaningfully participate in discovery on multiple occasions. Penn National claims that it cannot search its documents unless Covil provides the policy numbers where Covil was designated as an additional insured. Despite this Court's orders, Penn National has yet to perform a manual search or to scan the documents so that they can be searched electronically." As a result, 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."

**February 24, 2022:** Motion to compel Penn National to produce documents related to its purge of historical insurance policy related documents, which purge was apparently revealed to the Receiver on November 19, 2021, and was made known to this Court on the Receiver's motion for evidentiary hearing on January 3, 2022. In a response to written discovery on the topic on January 18, 2022, Penn National admitted that it disposed of paper policy-related documents pursuant to its records purge policy in 2018, 2019, and 2020, and that it did not issue a litigation hold for Covil until December 2021. Further, Penn National admitted it did not review the documents it destroyed in the 2018 to 2020 period for references to Covil, and it could not identify the additional insureds or supplemental insureds listed on the documents it purged since 2018. Related discovery requests sought responsive documents and e-mail correspondence on the topic of the purge, which had not been produced in discovery.

**April 1, 2022:** Motion to compel Penn National to produce documents related to its purge of historical insurance policy related documents after a production of

documents included a single spreadsheet, document retention policies, and a legal hold procedure. This limited production did not include any documents to establish the parameters of the annual document purge, nor did it include any internal e-mail communications related to the purge process.

In an order dated May 5, 2022, following a hearing on both the February 24 and April 1 motions, this Court ordered Penn National to work with Covil's defense counsel in the underlying asbestos personal injury cases, Ellis & Winters, to image and review Penn National's microfiche cards on which its historical policy information is stored, and to make those records available to the Receiver; to produce all Covil underwriting information to the Receiver; and to bear the costs associated with the work performed to digitize the microfiche policy documents.

Penn National knew from the beginning of the Receiver's years-long discovery investigation that it had created a system of historical policy maintenance that would require a manual search of records should a policyholder be unable to provide a policy number. Rather than attempt a meaningful response to any of the Receiver's discovery, or otherwise offer and implement suggestions to make its system searchable, Penn National forced the Receiver and his lawyers to spend hundreds of hours over three years to reach the same conclusion. Still, after all these efforts, Covil waits for Penn National to complete the process of digitizing its historical policy records.

Penn National's stonewalling of Covil's discovery efforts extended beyond policy documents, to nearly every aspect of the litigation. Indeed, just one month prior to a scheduled trial in December 2022, Penn National had failed to produce its claim files related to fourteen asbestos claims requested by Covil, or to produce documents responsive to the Receiver's Fourth Requests for Production, until Covil filed a motion to compel. The Court granted Covil's motion to compel this discovery, which was directly relevant to the December trial date, on November 16, 2022.

### LEGAL STANDARD

Under Rule 37(a)(4) of the South Carolina Rules of Civil Procedure, when a trial court grants a motion to compel, “the court shall, after opportunity for hearing, require the party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorneys’ fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.”

The South Carolina Supreme Court in *Buist v. Buist*, 410 SC 569, 766 S.E.2d 381 (2014), held that when considering whether to award attorneys’ fees a court must apply the *Glasscock* or *EDM*<sup>4</sup> factors “to determine whether to award a fee, as well as the amount of the fee to award.” The six *Glasscock* factors enumerated by the South Carolina Supreme Court include: “(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services.” *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

### RULINGS AND ORDERS

After careful consideration of the motion and briefing, including the supplemental declarations, extensive arguments of counsel, and an *in camera* review of the unredacted billing records, this Court finds that Covil has demonstrated the requisite factors to allow this Court to

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<sup>4</sup> The *E.D.M.* factors, developed more narrowly for the context of a divorce proceeding, are less instructive in an insurance dispute, and therefore are not considered in the instant analysis, but are as follows: “(1) the party’s ability to pay his/her own attorney’s fee; (2) beneficial results obtained by the attorney; (3) the parties’ respective financial conditions; (4) effect of the attorney’s fee on each party’s standard of living.” *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992).

render an award of attorneys' fees in the full amount requested by the Receiver's attorneys.

**Award of Attorneys' Fees under Rule 37(a)(4)**

Penn National's discovery conduct necessitated the Receiver's filing of a total of seven motions to compel in this case. As detailed above, the Court finds that Penn National's conduct in discovery necessitated the filing of each successive motion.

Penn National's recalcitrance to meet its discovery obligations appears directly related to its litigation strategy in the instant insurance coverage action. South Carolina law recognizes that "the insured bears the burden of proving its claim falls within the policy's coverage." *Jericho State Capital Corp. of Florida v. Chicago Title Ins. Co.*, 431 S.C. 437, 445, 848 S.E. 2d 572, 576 (2020). Penn National therefore appears to have had little independent incentive to search for all policies potentially protective of Covil in its voluminous historical records. Instead of engaging in an adequate document search as requested by the Receiver and ordered by this Court on numerous occasions, Penn National wasted this Court's and the Receiver's time and resources in its gamesmanship.

The South Carolina Supreme Court has also held that the insurer bears the burden of establishing exclusions to coverage. *See Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005) ("Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability."). Therefore, if Penn National is presented with a policy number, as the *Finch* plaintiffs did in June 2018, Penn National easily can locate the policy. After all, locating the policy after the insured has proven its existence is critical to Penn National's ability to establish applicable exclusions to coverage. Without access to any Covil historical archive, then, the Receiver has faced an uphill battle against Penn National.

Penn National complains that it has been forced to “play a constant game of Whack-A-Mole in responding to the flow of motions filed by Covil.” The Court finds that the opposite is true. The Receiver’s behavior has been nothing but consistent: from the beginning of this litigation, the Receiver has asked Penn National to search its records for historical insurance policies protective of Covil. Penn National also has remained consistently recalcitrant, stating since the beginning of this litigation 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.” In each successive discovery response, Penn National has pointed Covil in a new direction, and allowed the slow trickle of information that merely required the Receiver to seek more discovery relief from this Court. The motions to compel and hearings before this Court have made clear that the Receiver has worked tirelessly for more than three years to recover Covil’s assets—its insurance policies—from Penn National, which Penn National admits it may have.

In this context, the Court finds that Penn National’s opposition to Covil’s motions to compel was not substantially justified. The information requested in discovery is integral to the instant litigation and accessible only by Penn National.

In addition to the discovery disputes related to the historical insurance policies, in November 2022, Penn National refused to timely respond to relevant discovery in advance of a December 2022 trial date. The discovery at issue, Covil’s claim files and Penn National’s document retention policies, was directly related to a declaratory judgment action. Despite Covil’s attempts to engage in routine discovery on these topics, and to meet and confer on this issue, Penn National refused to produce these relevant documents. The Court finds that given the relevance of

the documents and the clarity of the requests, Penn National's failure to participate in this discovery was not justified.

**Appropriateness of Fees Under *Glasscock***

The Court has carefully considered the *Glasscock* factors, as discussed fully herein and approves the full award of requested attorneys' fees.

*A. The nature, extent, and difficulty of the case*

This insurance coverage action against Penn National is a complex dispute arising out of an insured seeking to locate and litigate "legacy" occurrence-based liability policies Penn National issued to the insured during its existence. The litigation raises novel issues of insurance policy interpretation, and because of the discovery conduct of Penn National in this case, has required extensive and protracted litigation on the issues described in detail herein. Therefore, the first factor, the nature, extent, and difficulty of the case, weighs in favor of an attorney fee award.

*B. The time necessarily devoted to the case*

Second, considering time necessarily devoted to the case, over the course of the last three and a half years, and more specifically the last two years of intense litigation before this Court on these issues, the Receiver's counsel report that collectively, they have devoted over one thousand hours of time to this litigation against Penn National specifically. Hundreds of hours of attorney time were required to craft meaningful written discovery, to prepare for and execute four separate depositions of Penn National witnesses on these topics, to prepare written motions and proposed orders, to engage in attempts at negotiations with counsel for Penn National on these topics, and to appear for hearings before this court, among other necessary litigation practices. Additionally, the Receiver's counsel were forced to engage in defending against frivolous appeals of a discovery order on these issues. The Court has reviewed the billing records of each firm *in camera* and finds

that the time these firms devoted to this matter has been extensive and necessary. The Court finds that this factor weighs in favor of an attorney fee award.

*C. Professional standing of counsel*

Third, considering the professional standing of counsel, the Receiver engaged three law firms to assist with the instant litigation: Smith Robinson, John B. White, Jr. P.A., and Morgan Lewis. Each firm was selected for its specialty in practice and its understanding of the issues at hand. The attorneys from Smith Robinson and John B. White, Jr. P.A. are preeminent lawyers in this state who have undertaken to represent this Court's appointed receiver in contentious litigation. In addition, Morgan Lewis has particularized expertise in the handling of complex insurance coverage disputes. The Court finds that all three firms are of the utmost professional standing.

*D. Contingency of compensation*

Fourth, all three firms representing this Court-appointed receiver of a defunct South Carolina corporation are engaged in a contingent fee arrangement. At this time, none of the Receiver's lawyers have been compensated for their hundreds of hours of time devoted to this discovery dispute. The Court finds that this factor, too, weighs in favor of an attorney fee award.

*E. Beneficial results obtained*

On the issue of beneficial results obtained, the Receiver's counsel ultimately was successful in extracting the insurance policy documents from Penn National which allow the identification of additional legacy occurrence-based insurance policies covering Covil. Since his appointment in November 2018, the Receiver has been actively involved in complex and aggressive litigation on behalf of the defunct entity that has demanded the expenditure of extraordinary time and resources. The Receiver and his team of highly qualified law firms have

achieved beneficial results in obtaining insurance policies and other necessary documents in order to identify and marshal Covil's insurance assets. The Court notes that Covil had no liquid assets when the receivership began. However, over the past four and a half years, the Receiver has been highly successful in marshaling and liquidating Covil's insurance asserts to establish a qualified settlement fund for the defense and payment of asbestos bodily injury suits involving Covil. In order to obtain these beneficial results, it has been instrumental that the Receiver obtain information and documents from companies like Penn National. The Court therefore finds that the fifth factor weighs in favor of an attorney fee award.

*F. Customary legal fees for similar services*

Finally, this insurance coverage action and the discovery disputes involved highly complex and detailed issues of law and necessitated the association of highly qualified counsel within South Carolina and outside of South Carolina. The Court has reviewed the filed Declarations of Attorneys' Fees and redacted billing records as well as the detailed billing records of each firm submitted *in camera* and finds the legal fees charged are customary for similar services by local counsel and outside counsel. This factor weighs in favor of an attorney fee award.

Therefore, carefully considering each *Glasscock* factor in turn, the Court finds that the Receiver's counsel should be awarded the full amount they seek in attorneys' fees for their work associated with their discovery efforts against Penn National.

The Court therefore **GRANTS** the motion and orders Penn National to pay attorneys' fees in the amount of \$671,693. The Court further orders Penn National to provide written reports to the Court every two weeks as to the status of its compliance with the May 5, 2022 Order.

**IT IS SO ORDERED.**



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/Attorney Fees

So Ordered

Jean H. Toal