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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Circuit Court Judge

Case No. 2020-CP-40-02098

Appellate Case No. 2024-000674

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

v.

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

Of which Pennsylvania National Mutual Casualty Insurance Company is the Appellant.

RECORD ON APPEAL
VOLUME 4

Kirby D. Shealy III (S.C. Bar No. 11556)
ADAMS AND REESE LLP
1221 Main Street, Suite 1200
Columbia, SC 29201
P: 803-254-4190
kirby.shealy@arlaw.com

David Grant Harris, II (S.C. Bar No. 101951)
Alexander Erwin Davis (S.C. Bar No. 100061)
Brady A. Yntema, admitted pro hac vice
(N.C. Bar No. 25771)
David L. Brown, admitted pro hac vice (N.C. Bar
No. 18942)
GOLDBERG SEGALLA LLP

701 Green Valley Road, Suite 310
Greensboro, NC 27408

dharris@goldbergsegalla.com

aedavis@goldbergsegalla.com

byntema@goldbergsegalla.com

dbrown@goldbergsegalla.com

*Attorneys for Appellant Pennsylvania National
Mutual Casualty Insurance Company*

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1 2022?

2 A. Yes.

3 MS. PATTERSON: Again, Sharla, I'm not
4 sure your answer was audible. I think you got cut
5 off.

6 THE WITNESS: Okay. I did see the
7 working draft on the screen as we worked through it
8 to clarify the areas of my testimony.

9 BY MR. YNTEMA:

10 Q. The next portion of that sentence says:
11 The standard for analysis and
12 management of asbestos litigation in the historical
13 context of the litigation.

14 I think that is somewhat similar to
15 your initial disclosure; would you agree?

16 A. I don't have the initial one in front
17 of me. I think the documents speak for themselves.
18 I don't think it's significantly different, but it
19 may differ slightly. I would have to do a
20 word-for-word comparison to tell you if there are
21 any specific differences there.

22 Q. I understand, and I'm certainly not
23 going to put you to the test on that one. Just
24 moving on to the next one, it says -- and this I do
25 have some question, if you can give me some

1 explanation. It says:

2 The knowledge of asbestos defendants
3 and potential asbestos defendants.

4 Could you explain that topic for me?

5 A. Absolutely. As the litigation began --
6 in fact, if you'll look back at that Manville
7 opinion, one of the reasons I found it so helpful
8 is it provides a very good overview of the
9 beginnings of the asbestos litigation going back to
10 the Tomplait cases in the late 1960s.

11 Borel in 1973 was sort of the watershed
12 change in the litigation case. It's a 1973
13 personal injury case out of the 5th Circuit that
14 established the concept that one could have strict
15 liability responsibility for a product under a risk
16 utility analysis simply because of a lack of
17 warning. And that was really a game changer for
18 products liability litigation, not just in the
19 asbestos context but also in a more general sense
20 for tort cases.

21 And from that point onward it became
22 clear that if one made an unreasonably dangerous
23 product, even if the utility of the product could
24 outweigh its risk, it needed to have and have had a
25 warning on it.

1 So that was a red flag for defendants
2 who were current defendants and anyone who had not
3 yet been sued but had similar kinds of products.
4 And that was borne out as you look through the
5 history. As the litigation moved forward more and
6 more product defendants got sued, but along with
7 that you had more and more sort of subsidiary
8 products, products and defendants that were sued.
9 It went -- if you are familiar with Dr. Arnold
10 Brody, by any chance, who is the pathologist who
11 testifies in this litigation a lot --

12 Q. Yes.

13 A. -- he talks about the first, second and
14 third wave of the development of medical problems
15 related to asbestos litigation.

16 There is actually a fascinating
17 historical review on the Kazan website, if you are
18 familiar with Steve Kazan who tried some of the
19 early cases, where Kazan likens the asbestos
20 litigation to the medical situation with asbestos
21 in that there was a first, second and third wave.

22 So starting with the Borel case and
23 then as you start to get into the bankruptcy
24 situations and so on so that there were a -- it's
25 obvious there was going to be a larger view in the

1 corporate world of what -- who might be liable for
2 the kinds of exposures that plaintiffs were
3 complaining of, you either knew you were going to
4 be a defendant, you should have had a good idea you
5 were going to be a defendant. It was reasonable to
6 expect that that litigation was not going to be
7 over soon and that the scope of it was going to
8 broaden.

9 Q. In approximately what year would that
10 expectation have occurred to companies?

11 A. I think it's reasonable to assume that
12 it would have happened, if not by 1973, when Borel
13 was issued. If you'll recall, the Selikoff
14 conference was in 1965, and that -- late '64, and
15 then his seminal article on the risk of insulators
16 and asbestos exposure was published in 1965.

17 So it would be appropriate to have
18 raised that issue with the Selikoff article in '65
19 because industry was on notice at that point. If
20 you were a little late to the game, 1973 with
21 Borel. And if you were really late to the game
22 when Manville filed for bankruptcy in 1982, and
23 that was front-page news all across the country and
24 certainly a topic in the business press, you either
25 knew or should have known. If you were a producer,

1 a user, insurer, it doesn't really matter. I think
2 '65 is probably the right year, but I would not
3 argue with someone who said they didn't have a
4 dawning appreciation until either '73 or '82, but
5 anything beyond that, it was pretty broadly known
6 knowledge.

7 Q. Thank you. I'm just reading here. And
8 I think you've already testified to the next
9 portion of that sentence. It says:

10 As well as their insurers and other
11 indemnitors.

12 And I think you've already spoken to
13 that. Yes? Is that --

14 A. That would be a yes, once the Manville
15 bankruptcy and the structure for that was public
16 knowledge. And it was very public because it was
17 very controversial given that the insurers were
18 going to donate the policy limit proceeds to the
19 qualified settlement trust in return for receipt of
20 a litigation bar of the same type that Manville was
21 getting. And that was very creative, it was very
22 new, it was highly controversial and it was part of
23 the insurance knowledge, not just the man-on-the
24 street knowledge.

25 Q. I'm just reading this disclosure,

1 ma'am. The next sentence says:

2 With regard to the scope of the
3 litigation and the requirement to maintain
4 historical records for policyholders.

5 That sentence in particular, does that
6 apply to insurers and other indemnitors?

7 A. Yes. And that relates back to the
8 concept that once the insurance industry was aware
9 of the creative use of insurance proceeds for
10 purposes of the Manville Trust use and the public
11 information about the long-tail risk of litigation
12 that prompted Manville, yes, that is exactly what
13 that covers.

14 Q. But to be clear, in your background
15 you've never consulted with or advised insurance
16 carriers with respect to the scope of the
17 litigation and the requirement to maintain
18 historical records for policyholders; is that
19 correct?

20 A. I have to think about that. I have
21 never been the direct counsel for an insurer who
22 was making a decision concerning retention of
23 records and handling of the records and
24 policyholders.

25 In my role as defense counsel in those

1 states in which there is joint representation of
2 the underlying insured and the insurer, it is my
3 recollection that I had some discussions with at
4 least some of those teams about the necessity of
5 responding to discovery, which would have included
6 the potentiality of such documents.

7 So I don't think that in the way you
8 phrased the question I had that responsibility, but
9 the phrasing of the question doesn't really cover
10 the breadth of what my experience was in that
11 space.

12 Q. So essentially, if an insurance
13 company -- I'm sorry for the background noise.

14 So essentially, if an insurance carrier
15 was part of a team that you were advising, as part
16 of the team that you were advising that also
17 included a company that had asbestos liability
18 exposure, then that carrier may have been part of
19 the team that you consulted with?

20 A. That is correct, may have been part of
21 the team that I consulted with concerning the
22 necessity to have documents to respond to discovery
23 and maintain those documents for purposes of
24 litigation.

25 Q. But you never had any direct

1 consultation or provided advice directly to an
2 insurer outside of any team-oriented environment;
3 correct?

4 A. I think that's a fair statement. I do
5 not recall having done so.

6 Q. And as you've stated earlier on in this
7 deposition that you are -- you've never been an
8 insurance coverage expert; is that true?

9 A. That was correct then and remains
10 correct now. I am not a coverage expert.

11 Q. Thank you for that. Moving on to the
12 next portion of that sentence:

13 The importance of maintenance of
14 historical records for a defendant in asbestos
15 personal injury litigation.

16 Is that the same as the prior portion
17 of that sentence as far as an insurer's -- I'll
18 just leave it at that. Is that -- let me rephrase
19 it. I apologize.

20 The portion of the sentence that I just
21 read, is that the same as the preceding portion
22 that we just discussed?

23 A. It's very similar, but the nuance is
24 that to the extent that there are documents beyond
25 just the sort of working-day files, there's still

1 that historical requirement to keep those to the
2 extent that they were late to asbestos or the
3 defense of the asbestos litigation cases.

4 Q. And does that also pertain -- does that
5 obligation also pertain to corporate asbestos
6 defendants or corporations that are exposed to
7 asbestos liabilities?

8 MS. PATTERSON: Objection; form.

9 THE WITNESS: Can you ask that again?
10 I'm not sure that I followed the question.

11 BY MR. YNTEMA:

12 Q. In essence, the importance of
13 maintenance of historical records for a defendant
14 in asbestos personal injury litigation, would that
15 obligation also apply to companies like Covil?

16 MS. PATTERSON: Objection; form.

17 THE WITNESS: For any --

18 MS. PATTERSON: Go ahead. Sorry.

19 THE WITNESS: Yeah. For any company
20 that faces or faced asbestos litigation, it is very
21 important for them to maintain -- what I call
22 collect and protect the documents that relate to
23 their business and to their use of
24 asbestos-containing products. They need that for a
25 variety of different purposes, and it's very

1 important to both collect those and maintain them.

2 BY MR. YNTEMA:

3 Q. And as far as with respect to the
4 corporate defendants or corporations that are
5 exposed to asbestos liability, does that also apply
6 to their insurance policy-related documents?

7 A. Whatever documents that company has
8 that relate to asbestos or to their potential
9 asbestos liabilities I believe they should collect
10 and maintain. That is my opinion.

11 Q. And that obligation, at a very minimum,
12 started -- in your opinion, started in 1982 when
13 the Johns-Manville case was published.

14 A. When they filed for bankruptcy. Not
15 that the case was published, but when Manville
16 filed for bankruptcy.

17 Q. In 1982; correct?

18 A. Correct.

19 Q. Thank you, ma'am. I'm just reading
20 this disclosure. And then just reading the last
21 portion of that sentence, ma'am, I think you have
22 that handy there with you.

23 A. Yes.

24 Q. It says:

25 And an evaluation of the asbestos

1 personal injury claims against Covil for which Penn
2 National contributed to settlements.

3 Do you see where it says that?

4 A. I do see that.

5 Q. And do you expect to testify on that
6 topic?

7 A. I do.

8 Q. And that's a change from the initial
9 disclosure that we just reviewed; correct?

10 A. That is an expansion of what I was
11 asked to do in connection with the evaluation of
12 materials in this case.

13 Q. I appreciate that. And, ma'am, with
14 respect to that topic, do you have any opinions as
15 to that topic that you can testify to today?

16 MS. PATTERSON: Objection; form.

17 THE WITNESS: Yes. I went through all
18 eight notebooks and the information on all 14 of
19 the cases identified in the letter from Penn
20 National to the receiver, Peter Protopapas. I
21 believe it's dated September 1st, 2022.

22 But yes, I've gone through those cases
23 and looked at them to evaluate what I thought about
24 verdict risk and the propriety of resolving those
25 cases.

1 BY MR. YNTEMA:

2 Q. I'm just writing that down, ma'am.
3 Verdict risk and the propriety of resolving those
4 cases. Okay. Thank you.

5 Other than the topics that are listed
6 here on this disclosure, do you expect to testify
7 as an expert as to any other topics in this case?

8 A. I have not been asked to so far. In
9 the event that I am asked to do so I presume that
10 that would be disclosed by counsel.

11 Q. Thank you, ma'am. Do you know a
12 Mr. Charles Miller of the Insurance Law Center?

13 A. I know the name. I do not know him.

14 Q. And how do you know Mr. Miller's name?

15 A. I don't know. I recognize the name. I
16 know that he is one of the other experts who's
17 designated in this case. However, he is not
18 someone with whom I am personally acquainted. I
19 don't know that I've ever even met him.

20 Q. I appreciate that. Do you know if
21 you've ever been designated as a witness -- as an
22 expert witness -- I apologize -- in another case in
23 which he was also designated as an expert witness?

24 A. It's possible, but I don't have a
25 recollection as I sit here.

1 Q. Thank you, ma'am. I think I can move
2 off of that exhibit.

3 A. Okay.

4 Q. And again, this deposition is going to
5 be somewhat document intensive. That's not to
6 scare you and think that you're going to be here
7 with me all day.

8 A. Ah, come on.

9 Q. I'll be referring to some other
10 documents throughout. In preparing for today's
11 deposition did you review any documents?

12 A. I reviewed the notebooks that were sent
13 to me by Morgan Lewis. That includes the eight
14 notebooks that comprise the underlying case files
15 for the 14 cases that are referred to in the letter
16 from Penn National to Peter Protopapas.

17 I reviewed the spreadsheet that was
18 provided to me by Lauren Semlinger, which is a
19 summary of those cases, and I annotated that,
20 scanned it, and you should have been provided with
21 a copy of that as it is part of my file.

22 In addition to that I reviewed a 31-tab
23 notebook from Morgan Lewis that's titled Sharla
24 Frost Prep Materials which I received sometime in
25 late October. And I did go back and do some

1 cursory review of that in connection with the
2 deposition for today. I also had a prep call with
3 counsel.

4 Q. Okay. The Sharla Frost prep materials
5 that you just referenced, can you give me a general
6 description of what those materials were or the
7 documents -- or the information that they contain?

8 A. They are Bates numbers 2020.07.24. I
9 can give you sort of an overview. It's my
10 understanding that you were sent the Bates numbers
11 for those materials. I didn't see the production,
12 so I don't know.

13 But it's the pretrial report, the Covil
14 versus Pennsylvania opinion, 30(b)(6) depositions
15 of Mr. Wright and Mr. Brent Reifsnyder, if I'm
16 pronouncing that correctly, and some of the
17 supplemental responses to requests for production
18 and motions to compel by Penn National. So they're
19 things of that nature.

20 Q. I see you're looking at something there
21 to your left.

22 A. I have -- I have the notebook with me.
23 I'm trying to decide what's the easiest way to give
24 you the list of materials that are in the notebook.

25 Q. Maybe the easiest way --

1 A. I received it in hard copy. I didn't
2 receive it digitally. I'm old school. I like to
3 have paper to look at. So they printed them out
4 and sent it to me. I don't have a digital copy, so
5 I can't send you that as part of my file.

6 MS. PATTERSON: And, Brady, I'm fine if
7 you want her to just read to you each tab, what it
8 is. You have it all. It's either pleadings or,
9 you know, opinions or depositions. Do you want her
10 to go through and just tell you what is in each
11 tab?

12 MR. YNTEMA: Yes. Ms. Peterson --
13 Patterson. I apologize. I think that that is
14 something we can do.

15 MS. PATTERSON: Yes.

16 MR. YNTEMA: Ms. Frost also said that
17 there were Bates stamp numbers. So if there are
18 Bates stamp numbers, if you could just -- if
19 they're -- if the Bates stamp numbers run, you
20 know, numerically from beginning to end so you can
21 just give me the complete range that's contained in
22 that binder, that might be the quickest way.

23 MS. PATTERSON: Well, yeah, I'll let --
24 I don't have --

25 THE WITNESS: Yeah.

1 MS. PATTERSON: Yeah, go ahead.

2 THE WITNESS: And I'm looking here.

3 And I told you those were Bates stamp numbers.

4 They may just -- those may be date numbers, looking

5 at it. Because I'm looking here to see if there

6 are actually Bates stamp numbers on here and I

7 don't think there are. There are only 34 of them.

8 So why don't I either read these to you or I could

9 scan it real fast and send it to you.

10 MS. PATTERSON: Why don't you just read
11 it to him real quick. That way --

12 THE WITNESS: Okay. All right. No. 1
13 is the Covil Archer pretrial report. No. 2 is
14 Covil versus Pennsylvania opinion. No. 3, Boyd
15 Wright, dash, Penn National 30(b)(6). No. 4, Penn
16 answer. No. 5, affidavit of Boyd Wright. No. 6,
17 Penn National's supplemental answers to Covil's
18 interrogatories. No. 7, Penn National's
19 supplemental responses to requests for production.
20 8, letter to Shisko regarding the affidavit of
21 Brent Reifsnyder. 9 is a letter attaching the
22 Reifsnyder affidavit. 10, Covil's motion to
23 compel. 11, Covil Boyd Wright national -- Penn
24 National 30(b)(6) deposition. 12, Covil Brent
25 Reifsnyder Penn National deposition. 13, Covil's

1 second supplemental motion to compel. 14,
2 affidavit of Boyd G. Wright in opposition to
3 Covil's motion for summary judgment with exhibits.
4 15, discovery order granting Covil Corporation's
5 motion to compel Penn National. 16, Covil receiver
6 versus Penn National letter to Brad Nes. 17,
7 motion for evidentiary hearing. 18, proposed order
8 on receiver for Covil's motion for protective
9 order. 19, receiver for Covil's notion -- notice
10 of motion to compel. 20, receiver's motion to
11 compel Penn National with exhibits. 21, Penn
12 National's supplemental responses to Covil's third
13 request for production. That may be request for
14 disclosure. It's RPD. 22, Penn National's
15 supplemental responses to Covil's third RPD. 23,
16 letter to B, and I assume this is pronounced
17 Yntema. It's Y-N-T-E-M-A and D. Harris re Penn
18 National document production deficiencies. 24,
19 filed notice of filing report regarding Penn
20 National documents. 25, filed receiver for Covil's
21 supplemental notice of motion and motion to compel.
22 26, letter to Jay Spitz forwarding PN's second
23 supplemental response to discover. 27, Penn's
24 response to receiver's supplemental motion to
25 compel. 28, filed clocked summons and complaint.

1 29, order on discovery motions. 30, notice of
2 deposition Penn 30(b)(6) regarding document purge
3 and coverage. 31, Penn National letter re
4 remaining policy limits. 32, filed clocked Covil's
5 status report. 33, receiver for Covil's fact and
6 expert disclosures. 34, scheduling and pretrial
7 order. And that's the contents of the notebook.

8 BY MR. YNTEMA:

9 Q. And just from my recollection you may
10 have testified to this, but if you have the
11 patience to answer it again, when did you receive
12 those documents?

13 A. I'd have to look at the emails. It's
14 sometime in October.

15 Q. Okay. That gives me a good
16 understanding. That's all I need.

17 A. Okay.

18 Q. Thank you. And my last name is Brady
19 [sic] and it's the most difficult last name I think
20 a lot of people run into. I always tell people I
21 was fortunate enough to meet a woman who was
22 actually willing to take that last name. So she
23 has to live with it on a daily basis too, but you
24 did a fine job in pronouncing it. I appreciate
25 that.

1 A. Thank you.

2 Q. So we've been going at this for an hour
3 now. Do you want to take a break, or are you fine
4 to continue?

5 A. I'm fine to continue for a bit if you
6 would like.

7 Q. Sure.

8 A. If you, however, need to take a break
9 I'm perfectly fine to take a five-minute break.
10 Whatever works for you guys. And for the court
11 reporter.

12 MR. YNTEMA: That's my next question.
13 Miss -- Madam Court Reporter, are we okay to
14 proceed?

15 THE REPORTER: Yes, sir. Thank you.

16 MR. YNTEMA: Thank you. So I'm going
17 to turn to the -- some of the exhibits that were
18 included in the production to our firm of your
19 file. The next one will be what we've marked as
20 Frost Exhibit 3.

21 (EXHIBIT 3, Email to Ms. Frost from
22 Mr. Nes dated 11-6-22, with Attached Stipulated
23 Confidentiality Agreement, marked for
24 identification.)

25 THE WITNESS: Okay.

1 BY MR. YNTEMA:

2 Q. And that is -- while we call it up I'll
3 just represent to you before it's called up on the
4 screen it says Stipulated Confidentiality
5 Agreement.

6 A. Yes.

7 Q. And it's got a cover email to it which
8 I'll show to you once it comes up on the screen.
9 Ma'am, what we have on the screen now is just a --
10 it's like a cover email. It looks like it's
11 attaching the stipulated confidentiality agreement.

12 A. Yes.

13 Q. And what we'll do is we'll go -- we'll
14 move down to the next page. I'll stop there.
15 Ma'am, do you recall seeing this document?

16 A. Yes. As you can see from the cover
17 note I received that on November 6th from Mr. Nes.

18 Q. And do you know why this was provided
19 to you?

20 MS. PATTERSON: Objection; form.

21 THE WITNESS: Not particularly, but it
22 is relatively common that I would anticipate a
23 confidentiality limitation on discussion of the
24 types that we are having in this case.

25 BY MR. YNTEMA:

1 Q. Did you read through this document in
2 detail?

3 A. I did.

4 Q. Is it important -- was this document of
5 any -- is this document of any importance to you in
6 forming your expert opinions in this case?

7 A. It was not, but I certainly am
8 cognizant of the importance of maintaining
9 confidentiality both for my client and for the
10 litigation.

11 MR. YNTEMA: If we could scroll down
12 this document to the signature page.

13 BY MR. YNTEMA:

14 Q. So you see a couple signature blocks
15 there, right, ma'am?

16 A. I do.

17 Q. One is a signature block for what's
18 Penn National's counsel. Do you see that?

19 A. I do.

20 Q. And we see a signature block for
21 Mr. Murrell Smith who you understand is receiver's
22 counsel?

23 A. Yes.

24 Q. You didn't have any -- you didn't
25 put -- you didn't put any assistance in drafting

1 this document, did you?

2 A. No.

3 Q. And your signature isn't on this
4 document.

5 A. It is not.

6 Q. Okay.

7 MR. YNTEMA: Move on to the next
8 exhibit. Just a moment, ma'am, while I collect my
9 thoughts on this one. Are we calling that up?

10 MS. BOUPLON: Yes.

11 MR. YNTEMA: Okay.

12 (EXHIBIT 4, Email to Mr. Nes from
13 Ms. Frost dated 2-7-22, with Attached Expert
14 Witness Retainer Agreement, marked for
15 identification.)

16 (EXHIBIT 5, Email to Ms. Frost from
17 Mr. Nes dated 2-11-22, with Attached Expert Witness
18 Retained Agreement, marked for identification.)

19 BY MR. YNTEMA:

20 Q. Okay, ma'am. This was a document,
21 actually, that has a cover letter email, it shows,
22 from you to a Mr. Brad Nes at Morgan Lewis. Do you
23 see that?

24 A. I do.

25 Q. Okay. And you see the date on that is

1 February 7th, 2022?

2 A. That is correct.

3 MR. YNTEMA: If we could scroll down to
4 the next page.

5 BY MR. YNTEMA:

6 Q. Looking at this first page here it
7 says -- it appears to be that this is your retainer
8 agreement for the Covil versus Penn National
9 matter?

10 A. Correct.

11 Q. And that's the retainer agreement with
12 Morgan Lewis; would that be correct?

13 A. It is correct.

14 MR. YNTEMA: Move back up.

15 BY MR. YNTEMA:

16 Q. And that's dated also February 7th,
17 2022; correct?

18 A. Yes.

19 Q. Ma'am, before sending this retainer
20 agreement to Mr. Nes at Morgan Lewis had you ever
21 been retained as a consultant in this case by
22 Morgan Lewis?

23 A. In this case? No, I had not.

24 Q. Okay. And you understand why I'm
25 trying to distinguish the two. I want to know if

1 you were hired prior to this as -- just as a
2 consultant to the firm rather than as an expert,
3 and your answer to that question is no with respect
4 to the Covil versus Penn National case; correct?

5 A. As it relates to Covil versus Penn
6 National, no. This was my first contact with
7 Mr. Nes, and the agreement came as a result of his
8 call and our discussion.

9 Q. Okay. Thank you.

10 MR. YNTEMA: Just moving down the page.

11 BY MR. YNTEMA:

12 Q. While it's scrolling down I'll just
13 state to you that I'm looking at the fees and
14 expenses portion of the retainer agreement, and it
15 says that you are charged at a rate of \$650 per
16 hour; is that correct?

17 A. That is correct.

18 Q. Has that rate changed as of today?

19 A. It has not.

20 Q. And do you expect that rate to change
21 at any point in the future prior to trial of this
22 matter?

23 A. Not prior to trial. That would be kind
24 of mean.

25 Q. As an attorney, I guess I would agree.

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1 A. Yeah. Kind of bad -- bad form to go up
2 in the middle of a proceeding. So no. It will
3 remain at 650.

4 Q. Sure. And some experts do have a
5 different rate for trial testimony. Do you have a
6 different rate for trial testimony?

7 A. I do not.

8 Q. Thank you.

9 MR. YNTEMA: If you'd go to page 2 of
10 that document, ma'am. Well, page -- I'm sorry.
11 It's page 2 of the letter. I apologize. If you
12 scroll down to the confidentiality provision. Stop
13 right there.

14 BY MR. YNTEMA:

15 Q. Ma'am, I'm sure you're familiar with
16 this document since it's your retainer agreement,
17 but there is a confidentiality provision. I know
18 that there have been several pages of documents
19 that have been provided to our firm in advance of
20 your deposition today. However, my question is a
21 general question.

22 Of the -- of the documents that you
23 provided to Morgan Lewis as part of your file to be
24 produced to our firm, did you withhold any
25 documents based on grounds of confidentiality?

1 A. I did not.

2 Q. Thank you. You were retained in
3 February of -- 7th of 2022. Do you recall the
4 first time that you received any documents from
5 Morgan Lewis to review with respect to this matter?

6 A. It would be reflected in the email
7 traffic. They attempted to send me some things by
8 electronic file transfer at one point, and I spend
9 a lot of my time on my cattle ranch, which is where
10 I am today, and have problems with the internet.
11 So I never actually received those.

12 The first documents I actually received
13 are reflected in the individual attachments on some
14 of the emails and then the hard copy documents, the
15 notebook that we just went through the index on and
16 the eight notebooks that contain the individual
17 file information for the 14 cases referred to in
18 the September correspondence from Penn to
19 Mr. Protopapas.

20 Q. Thank you for that. So based on what
21 has been provided to our firm, your activity with
22 respect to this case in reviewing documents would
23 have started sometime after the 1st of August of
24 this year; correct?

25 A. I believe that's correct.

1 Q. So between the time period of February,
2 this proposed retainer agreement, and the 1st of
3 August, do you recall having any activity in this
4 case?

5 A. I may have had a random phone call or a
6 short email, but in terms of reviewing documents or
7 doing anything substantive, that would have been
8 either very late July or early August.

9 Q. Okay. Thank you. As far as your
10 invoicing to Morgan Lewis's -- Morgan Lewis for
11 your services rendered, have you invoiced Morgan
12 Lewis yet for your services rendered?

13 A. I have not. If I were still at a law
14 firm they would beat me for not sending one out
15 every 30 days even if it didn't have anything on
16 it. I did go through and do a quick analysis, and
17 I've got about 25 hours in the file to date. So
18 prior to today the time spent has been mainly
19 reviewing these enormous notebooks that I've
20 received over the last month.

21 Q. And when you do invoice Morgan Lewis,
22 does that invoice become part of your expert file?

23 A. I don't typically keep it that way. I
24 wouldn't have any objection to doing so if the
25 court preferred it that way.

1 Q. As far as your invoicing, do you
2 invoice on a task-by-task basis, if you understand
3 me?

4 A. I do, and I use the ABA codes to do
5 that even though as an expert I'm probably not
6 obligated to. I find that that is a more standard
7 process, so that's what I do.

8 Q. Meaning the L&A codes?

9 A. Yes, sir.

10 Q. God bless you. I feel your pain.

11 A. I hate those things, yeah.

12 Q. Okay. But you would have no objection
13 to producing that, those invoice statements. And
14 do you deem those -- let me ask you this. I
15 apologize. Do you deem those invoice statements to
16 be confidential?

17 A. I don't. Whether Morgan Lewis does or
18 not, I -- that's an answer that you would have to
19 ask them.

20 Q. I'm just going through my outline here.
21 Okay. I'm going to go to Frost Exhibit 6.

22 (EXHIBIT 6, Email Chain to Ms. Frost
23 from Mr. Nes dated 10-24-22, marked for
24 identification.)

25 BY MR. YNTEMA:

1 Q. Okay. Do you see that on the screen,
2 ma'am?

3 A. I do.

4 Q. Okay. And that appears to be an
5 October 24th email from Mr. Brad Nes to you;
6 correct?

7 A. Correct.

8 Q. And the text of it says:

9 Sharla, Please find attached the cert
10 petition and Supreme Court order denying the cert
11 petition.

12 Is that part of the documents that we
13 discussed earlier that are contained in some of the
14 documents that you provided for production in this
15 case?

16 A. Yes, because the production materials
17 include all the emails along with their
18 attachments. So this should be included in the
19 materials that you received because I do consider
20 all of those the corpus of my file.

21 Q. Thank you. With respect to the cert
22 petition and the Supreme Court order, do you intend
23 to rely on any portion of the cert petition or the
24 Supreme Court order in providing testimony, expert
25 testimony in this case?

1 A. I will answer whatever questions are
2 posed to me at the time. Those materials were
3 referred to in the text of some of the orders that
4 were in the notebook that was sent to me but were
5 not included along with it. So I had asked for a
6 copy of that to make sure that I understood the
7 context of some of the dispute.

8 I have not been asked at this point to
9 render an opinion related to the controversy that
10 was reflected in the cert petition. So to the
11 extent that that answers your question, that's kind
12 of background, in my view.

13 Q. I appreciate that.

14 MR. YNTEMA: If we could scroll down a
15 little further in that email. Stop there, please.
16 Thank you.

17 BY MR. YNTEMA:

18 Q. Just briefly, it says -- this appears
19 to be an email from you just to folks at Morgan
20 Lewis. Am I right?

21 A. That is correct.

22 Q. And it does say:

23 I have completed my reading of the
24 materials in the notebook I received on October
25 7th.

1 Do you remember the notebook? And if
2 you could give me a general description of what was
3 contained in the notebook you might have received
4 on October 7th.

5 A. That's the notebook with the 34 entries
6 that we previously walked through. I was wrong
7 about the date, but this refreshes my recollection.
8 That notebook arrived on October 7th. And if
9 you'll scroll up just a little bit I can tell you
10 when I finally finished reading it. Yeah. My
11 father died on the 10th, so...

12 Q. I understand. Thank you so much. Are
13 you ready to proceed, or would you like to take a
14 break?

15 A. Let's take a break.

16 MR. YNTEMA: Yeah, I thought that would
17 be appropriate at this time.

18 THE WITNESS: Yeah.

19 MR. YNTEMA: So we'll take --

20 THE VIDEOGRAPHER: We're off the record
21 at 11:20 AM.

22 (A recess transpired from 11:20 until
23 11:32.)

24 THE VIDEOGRAPHER: We are back on the
25 record at 11:32 AM.

1 BY MR. YNTEMA:

2 Q. Ms. Frost, good morning again. Thank
3 you for allowing us to take that break. Back on
4 the record, and I just have just a -- like one or
5 maybe two questions left on Exhibit 6 here.

6 A. Sure.

7 Q. If you can see, there's a sentence here
8 that I need to read slowly for the court reporter,
9 but it's the second sentence of that message. It
10 says:

11 In the text of the status report of the
12 receiver (filed September 6, 2022), the Supreme
13 Court chronology lists both a petition for writ of
14 cert and an associated order, period.

15 So I assume that the text of the status
16 report of the receiver is a status report that was
17 filed with the court at the -- on September 6,
18 2022; is that correct?

19 A. Yes. That is the one referred to at
20 tab 32 in the notebook and was the 32nd item that I
21 read into the record.

22 Q. Thank you so much.

23 MR. YNTEMA: So now we'll go to Exhibit
24 7.

25 (EXHIBIT 7, Email Chain to Mr. Nes from

1 Ms. Frost dated 9-27-22, marked for
2 identification.)

3 BY MR. YNTEMA:

4 Q. Okay, ma'am. Looking at this message,
5 this is dated September 27th, 2022, and it seems
6 to -- as we scroll down it's kind of an email
7 exchange that you had with Mr. Nes.

8 A. Correct.

9 Q. And before we scroll down I'll allow it
10 to kind of proceed up, but you'll see this is from
11 you to Mr. Nes. It says:

12 Why don't you send the documents to me
13 in hard copy.

14 As you previously testified, you prefer
15 hard copy rather than electronic. So that was
16 being addressed there, but my interest is below
17 that is a communication from Mr. Nes to you.

18 MR. YNTEMA: If we could scroll down.
19 Kind of put the body of that there.

20 BY MR. YNTEMA:

21 Q. Okay. I see this email in kind of two
22 parts, and I may stand corrected, but the first
23 paragraph there says:

24 Thanks again for your recent call.

25 This is from you to Mr. Nes. From

1 Mr. Nes to you. I apologize. And it says I --
2 Brad Nes says:

3 I tried to send you a zip file with
4 certain documents for your review. Unfortunately,
5 I got a bounce back in light of the size of the
6 attachment.

7 So he's referring to the fact that
8 he -- I'm interpreting this -- that he emailed you
9 a zip file that was -- that got bounced back and
10 then you requested that he send it to you by way of
11 hard copy; correct?

12 A. That is correct.

13 Q. And is that referencing -- that
14 paragraph and your email back to him, is that kind
15 of referencing the binder that you finally received
16 from Morgan Lewis that you've already testified to
17 as far as the topics?

18 A. Yes, that is correct. The notebook
19 that I received on October 7th was the -- what I
20 assume was the complete hard copy of the zip file
21 that did not come through.

22 As I previously testified to, I have
23 sometimes internet issues here at the ranch, and we
24 could not get any of those materials to come
25 through electronically. So it is my understanding

1 that the notebook we have been discussing is the
2 printed-out version of the documents that he wanted
3 me to review.

4 Q. Sure.

5 A. And I wasn't able to get to them
6 electronically.

7 Q. Certainly. Thank you for that. And
8 the next part to this email that I see is -- says:

9 We have also requested certain
10 additional files from underlying defense counsel,
11 Ellis & Winters. As soon as we receive those, I
12 will forward them to you for review as well.

13 Do you recall getting certain
14 additional files from underlying defense counsel,
15 Ellis & Winters?

16 A. The eight notebooks that I described
17 earlier that were sent to me concerning the 14
18 cases in which Penn National agreed to make
19 settlements included some materials from Ellis &
20 Winters.

21 And as I understand it, the reference
22 in this email is to those materials that were then
23 later included in that next set of notebooks. I
24 have not received Ellis & Winters' file materials
25 other than those that are included in the eight

1 notebooks.

2 Q. Okay. I appreciate that. And you just
3 answered my next question. So that -- they were
4 received, meaning Ellis & Winters' documents were
5 received in eight notebooks by you; correct?

6 A. They were among the materials contained
7 in the eight notebooks. Whether the totality of
8 the materials in those files came from Ellis &
9 Winters I can't testify to. I'm not sure the
10 source of all of them, but they are underlying case
11 files and they have Ellis & Winters' materials
12 amongst the materials in the files.

13 Q. All right. And did the -- just in
14 general form, did those files contain -- I'll
15 reword this. I apologize.

16 Were those -- did those appear to be --
17 did those -- I've got to get this straight. Sorry.

18 Did those files appear to be asbestos
19 defense files only?

20 A. They are the underlying litigation
21 files for the 14 cases to which Penn National
22 contributed settlement funds.

23 Q. Okay. And those -- okay. I --
24 we'll -- thank you for that.

25 MR. YNTEMA: Okay. Moving on to

1 Exhibit 8.

2 (EXHIBIT 8, Email to Mr. Nes from
3 Ms. Frost dated 11-7-22, with Attached Court
4 Opinion, marked for identification.)

5 BY MR. YNTEMA:

6 Q. Okay. Just to -- briefly on this
7 exhibit, it says:

8 As we discussed, my Covil/Penn
9 National -- I'm sorry. This is an email dated
10 November 7th, 2022 from you to Mr. Nes, and it
11 reads:

12 As we discussed, my Covil/Penn National
13 file consists of the emails we had exchanged, along
14 with attachments.

15 I think your testimony is -- and if you
16 could confirm that now. Have you -- did you
17 provide Morgan & Lewis with all of your emails with
18 them to be produced in this case?

19 A. Morgan Lewis has the originals of all
20 of those emails along with my responses, and it's
21 my understanding that all of those were produced.

22 Q. Thank you. And then it references, if
23 you see there, the nine notebooks that you sent.
24 Are those nine notebooks referencing, one, the
25 eight notebooks that were the Ellis & Winters files

1 and then the ninth notebook meaning -- being the
2 notebook that you've testified to earlier today?

3 A. That is correct.

4 MR. YNTEMA: Okay. We can move off
5 that exhibit. Well, I apologize. Is that
6 exhibit -- has the Johns-Manville case to it?

7 MS. BOUPLON: No. Hold on. I'll pull
8 it back up. I believe it does. I'll share it
9 again.

10 MR. YNTEMA: Sure. I apologize. I
11 didn't realize that this exhibit had the
12 Johns-Manville case attached.

13 MS. BOUPLON: Yes.

14 BY MR. YNTEMA:

15 Q. Okay, ma'am. I know that you have
16 referenced this -- the Johns-Manville case in
17 your -- previously in your deposition testimony,
18 and I had read through it as well. I'm not going
19 to summarize what my reading of the case is, but
20 the first question is: Are you going to rely on
21 the Johns-Manville case in providing expert
22 testimony in this case?

23 MS. PATTERSON: Objection; form.

24 THE WITNESS: Not in terms of the legal
25 holding. I use this case as a refresher on the

1 dates involved and I made sure that I had the
2 proper sequence.

3 So you know, my very first asbestos
4 client was the Johns-Manville Settlement Trust, and
5 so in 19 -- late 1989 I began to do litigation work
6 for the Johns-Manville Personal Injury Settlement
7 Trust which had to be referred to as the
8 Johns-Manville Personal Injury Settlement Fund in
9 trial, which made it very popular with the
10 plaintiffs' lawyers and not so much with the
11 defendants.

12 But there had been a -- enough time had
13 passed between when I dealt with those on a
14 day-to-day basis and now that I wanted to refresh
15 myself on some of the finer details of the trust
16 and the organizational structure.

17 I found this particular opinion, and it
18 contains a very good historical overview of the
19 proceeding itself and points out that 30 years
20 later the Manville bankruptcy is still an ongoing
21 piece of litigation.

22 But in terms of the court's holding,
23 the standing issues and those types of legal
24 conclusions, I do not anticipate that they will
25 play a part in the opinions that I express in this

1 case. Did that answer your question? You look a
2 little puzzled.

3 BY MR. YNTEMA:

4 Q. No. It did answer my question to a
5 degree. Thank you for that.

6 Are you aware that in this case that
7 there is a qualified settlement fund already
8 established by the receiver in this matter?

9 A. When you say in this matter are you
10 referring to the Penn -- Covil versus Penn National
11 matter?

12 Q. I'm sorry. For --

13 MS. PATTERSON: And you beat me to my
14 objection to the form.

15 BY MR. YNTEMA:

16 Q. For Covil. The receiver has been
17 appointed the receiver for Covil. So I would ask
18 that -- do you have any knowledge that there is a
19 QSF that has been established for Covil
20 liabilities?

21 MS. PATTERSON: Objection; form.

22 THE WITNESS: I saw reference -- I'm
23 sorry. Were you objecting, Nancy?

24 MS. PATTERSON: Yeah. Objection; form,
25 but you can certainly go ahead and answer.

1 THE WITNESS: I saw reference to that
2 in one of the documents contained in the original
3 notebook, but beyond that I do not have any further
4 information and I certainly do not have any
5 opinions related to the qualified settlement fund
6 as may be related to Covil and have not been asked
7 to express any.

8 BY MR. YNTEMA:

9 Q. I appreciate that, and you anticipated
10 my next question. Thank you.

11 A. And is this Exhibit 9 or 8? 8. Okay.

12 Q. This is Exhibit 8.

13 MR. YNTEMA: Okay. We'll move forward
14 to Exhibit 9, ma'am.

15 (EXHIBIT 9, Email to Mr. Nes from
16 Ms. Frost dated 11-7-22, with Attached Spreadsheet,
17 marked for identification.)

18 BY MR. YNTEMA:

19 Q. And this, while it's being called up,
20 is the spreadsheet, I believe, that you've been
21 testifying to. Okay. Ma'am, do you see that cover
22 email?

23 A. I do.

24 Q. And you see it's dated -- it's an email
25 exchange dated Monday, November 7th from you to

1 Mr. Nes?

2 A. Right.

3 Q. And it's providing an annotated case
4 chart that is attached, and we'll scroll down to
5 that. So, ma'am, there are several case names on
6 this annotated chart, case names that you will see
7 a column there, and I assume that case name is
8 referring to the plaintiff in each case; correct?

9 A. That is correct.

10 Q. And I count 15 cases that are contained
11 on this chart. Would that be accurate?

12 A. I thought there were 14, but let me
13 recount.

14 Q. On my recount, you're correct. 14
15 cases.

16 A. 14 cases.

17 Q. And these are all underlying asbestos
18 cases in which Ellis & Winters is involved in the
19 defense.

20 A. That is my understanding. I would
21 characterize them slightly differently. I would
22 say that these 14 cases are underlying
23 asbestos-related personal injury cases in which
24 Covil has been named as a defendant and which were
25 listed by Penn National as cases in which the

1 company was contributing to settlement.

2 Q. To your understanding, are each of
3 these 14 cases -- have each of these 14 cases been
4 settled?

5 A. That is my understanding.

6 Q. And those 14 cases have been settled
7 with a contribution to the settlement by Penn
8 National under its policies of insurance for Covil;
9 correct?

10 A. That is what is reflected on the
11 September 1, 2022 letter from -- let's see who this
12 is from -- from Boyd Wright at Penn National at tab
13 31 of the original notebook that we discussed. And
14 it lists each of these cases with an amount that
15 was contributed by Penn National for a total of
16 payments of an amount of \$613,672.50.

17 Q. Thank you. Do you have any knowledge
18 of when Penn National first -- was first tendered a
19 Covil asbestos case for defense and indemnity?

20 A. No. I believe I saw some reference to
21 that in one of the 30(b)(6) depositions, but I
22 don't have any independent recollection of that as
23 I sit here, and I don't recall having been given
24 any specific information on that in the context of
25 my analysis of these cases.

1 Q. So is it fair to say that the first
2 tender date of any asbestos claim against Covil to
3 Penn National is of no consequence to your expert
4 opinions in this case?

5 MS. PATTERSON: Objection; form.

6 THE WITNESS: I have not been asked to
7 form any opinions that relate to the timeliness or
8 dating of tendering of cases. So to the extent
9 that that's your question, no, that doesn't form
10 part of my opinions.

11 BY MR. YNTEMA:

12 Q. Are you aware that Penn National has
13 defended Covil for all asbestos defense matters
14 tendered to Covil -- tendered to Penn National
15 after the first tendered case -- after the first
16 case that was tendered to Penn National, if you
17 understand the question.

18 MS. PATTERSON: Object to the form.
19 Object to the form.

20 THE WITNESS: I have no information
21 concerning that. And to the extent that that
22 implicates a question of applicability of coverage
23 and what might be characterized as a coverage
24 opinion, that's outside the area of my expertise.

25 BY MR. YNTEMA:

1 Q. Outside of the 14 cases listed on this
2 spreadsheet, are there any other asbestos
3 Covil-related cases that you have analyzed?

4 A. As relates to Penn National, not that
5 I'm aware of. I was retained as an expert in
6 Covil's litigation against USF&G roughly a year,
7 maybe a little bit longer than that ago.

8 In the context of that litigation I did
9 review some cases that related to Covil and
10 allegations underlying exposure. I did not review
11 those cases again in the context of my preparation
12 for this matter.

13 Q. Thank you. Now turning to this
14 spreadsheet, mainly the -- namely the Archer case
15 at the very top.

16 A. Yes, sir.

17 Q. And I'm just using this because this is
18 your annotated spreadsheet, so I thought that would
19 be the best for you to testify from.

20 A. Yes.

21 Q. So with respect to Jerry Archer you'll
22 see there you have annotated M dash W death. If
23 you could explain that annotation to me.

24 A. Of course. That means mesothelioma.
25 That is the type of disease that was being alleged,

1 and this is a wrongful death case. So Mr. Archer
2 was no longer living at the time the case was
3 filed.

4 Q. And on my copy there's some faint
5 highlighting there. Do you see any faint
6 highlighting there in the evidence of exposure
7 column?

8 A. I do.

9 Q. And you see where it's highlighted, it
10 says:

11 These exposures did not coincide with
12 Mr. Archer's alleged exposures.

13 A. Yes.

14 Q. If you could explain why you
15 highlighted that. I assume that's your
16 highlighting; correct?

17 A. It is my highlighting, and I
18 highlighted that because it didn't make sense to me
19 in light of the preceding language in that box.

20 Mr. Archer was a pipefitter, as it's
21 noted here, and the records show that Covil had
22 installed insulation at Kimberly-Clark Beech
23 facility while Mr. -- while Daniel was a
24 construction contractor, and then that Mr. Archer
25 was performing work at that location later.

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1 So those two things just didn't make
2 sense to me in connection with analyzing whether
3 Mr. Archer potentially had exposure to either
4 products or workers that were related to Covil. It
5 appeared that the explanatory information above
6 indicated that in fact he did. So I highlighted
7 that not because it was significant to me but
8 because it didn't make any sense to me.

9 Q. Are you aware of the effective dates of
10 Penn National's policies for Covil?

11 A. I have seen that in the materials.
12 Because I am not a coverage expert, I don't know
13 the significance of the coverage types during that
14 time period.

15 So other than being aware that
16 apparently there are policies that date, I believe,
17 '86 through '88, I don't know the significance of
18 that and have no opinions concerning that.

19 Q. Okay. When you say you don't know the
20 significance of the dates '86 through '88, are you
21 analyzing evidence of exposure in relation to Penn
22 National's coverage for Covil during '86 through
23 '88?

24 MS. PATTERSON: Objection; form.

25 THE WITNESS: I was analyzing these

1 cases to determine whether the allegations
2 regarding exposure to Covil in either Covil
3 employees' installation or Covil products was
4 supported by the information in the files.

5 I did not make a determination whether
6 that would have implicated a particular coverage
7 year because that's not what I was asked to do.

8 BY MR. YNTEMA:

9 Q. Thank you. And so correct me if I'm
10 wrong -- and I hope you do -- is that your analysis
11 of the evidence of the exposure as to each of these
12 cases on the spreadsheet is as to whether the -- as
13 to whether there was exposure to asbestos products
14 to the plaintiff.

15 MS. PATTERSON: Objection; form.

16 THE WITNESS: That's not entirely
17 correct. It -- my analysis was to determine
18 whether there was a verdict risk to Covil related
19 to the described work conditions, exposures and
20 work conditions for the individual plaintiffs in
21 these cases.

22 BY MR. YNTEMA:

23 Q. So if I could put that short, whether
24 Covil had any exposure with respect to -- liability
25 exposure with respect to these particular cases;

1 correct?

2 MS. PATTERSON: Objection; form.

3 THE WITNESS: A little bit broader than
4 that, but that, in its essence, is correct. I was
5 looking to see whether there was any potential
6 verdict risk, whether that was an ultimate
7 liability or not. Because my experience is that
8 there is some overlap to verdict risk and actual
9 liability, but they are not necessarily the same
10 issue.

11 BY MR. YNTEMA:

12 Q. Okay.

13 A. You can take a bad verdict where you
14 don't actually end up having liability. So I was
15 looking at verdict risk on these cases that for
16 many of these is subsumed into liability, but in
17 terms of whether there was actual liability or not
18 at the end of the day, that is a little bit further
19 than my analysis.

20 Q. Thank you. And based on verdict risk
21 with each of these cases, do you -- did you assess
22 a particular settlement value for each case?

23 A. No, because I was not provided with
24 information about damages, potential lost wages,
25 any sort of the household services, medical cost

1 expenses or any of the hard damages that would go
2 into calculating the potential verdict number.

3 Q. So is it fair to say that your analysis
4 of the evidence of exposure in these cases was only
5 as to the verdict risk?

6 MS. PATTERSON: Objection; form.

7 THE WITNESS: The verdict risk, and
8 implicit in that is the propriety of resolving
9 them. So if you've got a verdict risk, does it
10 make sense to go ahead and settle it. So yes as to
11 verdict risk, but it's not just verdict risk, which
12 we can talk about a little bit on the individual
13 cases if you'd like. But it's verdict risk plus
14 the question of propriety of resolving the cases.

15 BY MR. YNTEMA:

16 Q. Okay. All right. Well, let's look at,
17 for example, Mr. Archer's case.

18 A. Yes.

19 Q. I know you've explained that the
20 highlighted portion there, these exposures did not
21 coincide with Mr. Archer's later exposures as being
22 conflicting of the prior narrative within that
23 evidence of exposure description; correct?

24 A. That is correct. It appears -- if you
25 look up a couple of sentences before, Covil's

1 defense counsel in its pretrial report lists a
2 series of Bates documents to establish that Covil
3 was at the site in 1968 and again in 1971 and that
4 that included pipe insulation and asbestos cement.

5 Mr. Archer was working as a pipefitter
6 at that facility. So if the materials were in
7 place when he arrived at the facility, pipefitters,
8 based on my experience in litigation, would have
9 needed to access the pipes -- consequently, the
10 name -- and that ordinarily required them to
11 infiltrate in-place product.

12 So if Covil had in fact installed
13 asbestos-containing thermal insulation and he was
14 required to intrude on that as part of his work as
15 a pipefitter, then that would have been an exposure
16 that I think would have coincided with his work at
17 the facility.

18 Given that the records show that Covil
19 was there in 1968 and again in 1971, if they were
20 providing insulation materials, those would have,
21 by definition, been asbestos containing because it
22 was prior to the elimination of asbestos in thermal
23 insulation products.

24 Q. Okay. And that would have been
25 important to your verdict risk analysis?

1 A. Yes, because I think that the case
2 would not have been -- would not have qualified for
3 a successful motion for summary judgment on that
4 basis.

5 As a result, since it would not have
6 been dismissed on motion for summary judgment under
7 South Carolina law, it, by definition, presents a
8 verdict risk.

9 His description of what was being done,
10 working as a pipefitter, and the Covil documents
11 combined indicate an exposure that is more than a
12 scintilla of evidence for purposes of a verdict.

13 So I would anticipate that this is a
14 case that presents a verdict risk for the company
15 and, consequently, was one that was appropriate for
16 resolution.

17 Q. And company, you mean Covil.

18 A. Correct.

19 Q. I'm sorry. Correct?

20 A. Correct.

21 Q. Yeah. I'm sorry. You're --

22 A. Am I cutting out? Yes. Sorry about
23 that. (Witness moves head up and down.)

24 Q. And so your testimony is not as to any
25 specific obligation any insurer should have with

1 respect to any verdict risk that you've assessed in
2 this case; correct?

3 A. I was --

4 MS. PATTERSON: Objection; form.

5 THE WITNESS: I was not asked to form
6 or express an opinion on that issue.

7 BY MR. YNTEMA:

8 Q. All right. Let's move to Mr. Robert
9 Ashworth --

10 A. Yes, sir.

11 Q. -- who's the next case name. As you've
12 noted there underneath it says LC dash WD. I can
13 assume what that might mean, but I'd like you to
14 testify if you can tell us what that means.

15 A. Yes. That is a wrongful death lung
16 cancer case. Mr. Ashworth was a laborer,
17 pipefitter, welder and carpenter from '68 to 2006,
18 including the Bowater paper mill, which we know
19 from looking at this whole collection of cases, is
20 a location where Covil was providing services. And
21 it appears that they were also providing thermal
22 insulation products, depending on the time period.
23 So that he was working at places that Covil was
24 located.

25 Mr. Ashworth had already passed away,

1 so his stepson, I believe it is -- yes, stepson,
2 Mr. Rollins, was the primary product identification
3 witness, and he provided testimony that -- connect
4 between Mr. Ashworth and Covil at various work
5 sites.

6 THE REPORTER: I'm sorry. You cut out
7 a little bit in that.

8 THE WITNESS: Okay.

9 THE REPORTER: He provided testimony
10 that?

11 THE WITNESS: That connects
12 Mr. Ashworth and Covil at work sites. And if you
13 look in the second column on that particular one
14 you'll note that I have some additional notes that
15 says Rollins deposition, quote, Corval, closed
16 quote.

17 When you read the Rollins deposition he
18 talks about the identity of the insulation
19 companies that were on site and doing work. And
20 when you pair that with the materials that are
21 referenced in the Cornwell deposition, which is
22 another coworker, then it is clear that one can
23 make the connection between Mr. Ashworth and Covil.

24 So this is a case, again, that I do not
25 believe would be successful in obtaining a motion

1 for summary judgment under South Carolina law.

2 Mr. Ashworth was working from 1968
3 onward on a variety of work assignments that would
4 have involved asbestos exposure. I particularly
5 noted that he was a carpenter. And in my
6 experience from prior cases I know that carpenters
7 in these sorts of industrial work sites often were
8 the ones who constructed the -- you know, what do
9 they call it? The scaffolding that was used by the
10 other types of job classifications, particularly
11 the insulators.

12 So it -- his exposure is of a type that
13 would be consistent with exposure to thermal
14 insulation products. And the other materials
15 provide a connection between Covil and its work on
16 site and production presentation of
17 asbestos-containing products.

18 So when you combine the two of those
19 sorts of categories, this obviously presents a
20 verdict risk for Covil and was appropriate for
21 resolution.

22 BY MR. YNTEMA:

23 Q. And indeed, both with Mr. Archer and
24 Mr. Ashworth's cases, those were both settled, to
25 your knowledge.

1 A. They were settled, and the amount
2 contributed by Penn National is reflected on that
3 September 1, 2022 letter to Mr. Protopapas.

4 Q. Thank you. And we'll get to that
5 letter. On to Mr. Aspray, Robert Aspray, it just
6 has M on it. If you could explain to me what you
7 mean by M dash.

8 A. That's a living mesothelioma plaintiff.
9 So at the time that his case was filed he was still
10 living. He was an electrician between 1953 and
11 1997. And as you see here, he had a variety of
12 jobsites, including the DuPont site where he
13 testified that he was in contact with DuPont and
14 that his coworker said that the electricians did
15 work that included overlap with the maintenance
16 team.

17 But more importantly on that one,
18 Mr. Robert Glenn, who is the corporate
19 representative for Covil, testified that there was
20 an overlap of work being done on the jobsite for at
21 least one of Mr. Aspray's confirmed places of work.
22 So that, again, couldn't have qualified for motion
23 for summary judgment, or at least not successful
24 motion for summary judgment.

25 The product identification and work

1 description is sufficient to be plausible in light
2 of the type of work he was doing.

3 And since he was working prior to 1972,
4 he would have been anticipated to have had exposure
5 to asbestos-containing thermal insulation products
6 as opposed to anything that was asbestos-free since
7 those didn't come on the market until after OSHA at
8 the end of '72.

9 Q. Okay. Thank you. The fact that
10 Mr. Aspray -- Aspray was a living meso, is that of
11 any consequence to you compared to a potential --
12 like a wrongful death plaintiff?

13 A. Well, it's significant in that you get
14 the description of the work directly from the
15 plaintiff in a deposition.

16 From a verdict size standpoint, living
17 mesothelioma cases at trial ordinarily command
18 larger verdicts than do wrongful death cases.
19 That's my experience in litigation.

20 So that's a consideration in
21 determining whether it's appropriate to resolve the
22 case or not. But those are always more complicated
23 cases simply by the nature of the exposure, and
24 they are ordinarily very compelling plaintiffs.

25 Q. I appreciate that. This is more a

1 general question as to all of these cases.

2 A. Yes.

3 Q. Do you know if all these cases were
4 South Carolina state court trial court cases, or
5 were any of them federal court cases?

6 A. I'd have to go back and look. I didn't
7 notate that in my spreadsheet here. That makes
8 some difference. It doesn't make a tremendous
9 amount of difference because the application of
10 South Carolina state law would still be appropriate
11 even if it were in a federal court venue.

12 I've tried cases in both state and
13 federal court, not in South Carolina, but state and
14 federal court. And while there is some difference
15 in the outcome of those verdicts for asbestos cases
16 I do not find that it is typically significant.

17 Q. And to your knowledge, out of these --
18 I believe there are 14 cases that are listed on the
19 spreadsheet, to your knowledge, are all of these
20 South Carolina cases?

21 A. I believe so, but I would have to go
22 back and double-check. Like I said, I don't have
23 that annotated on my spreadsheet. There may be a
24 couple that are not.

25 Q. Would that be a factor in your analysis

1 of any of these cases if one may be a North
2 Carolina case?

3 A. Not really, because the quality of the
4 descriptions of the work being done and the types
5 of exposures that are presented don't make a
6 significant difference one as to the other.

7 There are slight differences in local
8 procedure, but I didn't find that any of these
9 cases would be likely to obtain a motion for
10 summary judgment really anywhere unless plaintiff
11 had filed them in the state of Texas, and the Texas
12 standard is a little bit more stringent than
13 everywhere else. But none of these would have
14 qualified for filing there, so that really is not a
15 consideration.

16 Q. Do you know if Covil has ever obtained
17 a favorable summary -- had it ever obtained summary
18 judgment in its favor on an asbestos liability case
19 in South Carolina?

20 A. I suspect that would depend on the time
21 period, but as I sit here today, I do not have any
22 particular information regarding that issue.

23 Q. And when you say time period, why would
24 time period be important to you?

25 A. The law has changed somewhat, and

1 Justice Toal is the master asbestos judge and has
2 been a little bit more exacting in her analysis to
3 the factual situations than was the case when the
4 underlying cases were scattered amongst different
5 courts. So there is more consistency in the
6 rulings.

7 And so the time period of when a motion
8 for summary judgment was filed would make a
9 difference. If it was filed in, let's say, 1995
10 versus today, I don't think that that's informative
11 of whether there is a verdict risk for one of these
12 cases currently pending in South Carolina.

13 Q. Do you know if Covil has ever -- has
14 received a summary judgment order in its favor
15 since Judge Toal has taken the -- has presided over
16 the asbestos docket in South Carolina?

17 A. I don't know the answer to that one way
18 or the other. I do know that as it relates to the
19 14 cases that we're looking at which were settled
20 that there were motions for summary judgment filed
21 in some of those, but the files that I reviewed do
22 not reflect that there was a ruling in favor of
23 Covil in any of those.

24 Q. Okay. Thank you for that, ma'am. I'll
25 go back to these case-specific analyses. We

1 stopped with Mr. Aspray. I think we can move on to
2 Mr. Campbell.

3 A. Yes.

4 Q. It appears to me that you've annotated
5 Mr. Campbell was a living meso at the time that
6 this spreadsheet was generated; is that correct?

7 A. That is what my note says.

8 Q. And is there anything about the -- I
9 don't see any highlighting there in the evidence of
10 exposure, but is there anything in the evidence of
11 exposure that is meaningful to you in analysis of
12 his case?

13 A. Yeah. Actually, basically everything
14 that's in that box. He was working for Duke Power
15 as a carpenter between '69 and '79, and as a civil
16 maintenance technician between '79 and '91. That,
17 according to this, comes from his interrogatories
18 and is consistent with materials that I reviewed.

19 While he was working in maintenance he
20 was around Covil insulators, quote, the entire time
21 that he was there. And why that is important to me
22 is that it is my experience that the maintenance
23 workers who did cleanup cleaned up behind the
24 insulators.

25 So if Covil insulators were there the

1 entire time between '69 and '79, that time period
2 between '69 and late '72 would, by definition, have
3 included asbestos-containing thermal insulation
4 products. And as a maintenance worker I would have
5 anticipated that he would have been doing cleanup
6 of that. So that gives the validation to the tie
7 between Mr. Campbell and his claims against Covil.

8 Q. Thank you. And to be clear -- I'll
9 routinely ask you this. To be clear, to your
10 knowledge, the Jerry Campbell case was eventually
11 settled with a contribution to the settlement by
12 Penn National; correct?

13 A. That is what is reflected on the
14 September 1, 2022 correspondence, yes.

15 Q. Thank you. Moving on to Mr. D'Amico,
16 it appears that you do have a M slash wrongful
17 death notated below his name. Again, remind me of
18 what you mean by M slash wrong -- WD.

19 A. Mesothelioma wrongful death. And you
20 will note in the second column I have -- to the
21 extent you can read my scribbly handwriting, it
22 says prior Baron & Budd pleural.

23 Mr. D'Amico is interesting for a
24 variety of reasons. He was an engineer, supervisor
25 and manager for Duke Power between '51 and '89,

1 according to these materials. He was a frequent
2 testifier as a product identification witness.

3 He had his own early case as a Baron &
4 Budd plaintiff. Baron & Budd, as you know, was
5 the -- one of the original asbestos plaintiff firms
6 out of Dallas. And in his original case which I
7 believe was in the 1990s -- I'd have to go back and
8 pull the deposition -- he presented as having
9 pleural plaques which -- for which he received a
10 very minimal settlement.

11 Pleural plaques are a marker of
12 asbestos exposure. They are not ordinarily
13 debilitating. The problem with them is that what
14 we have learned through both the litigation and my
15 understanding from medical experts is that given
16 enough time, pleural cases very often develop into
17 mesothelioma, which is what happened here.

18 So we have an extensive amount of
19 information on Mr. D'Amico, and his description of
20 all of the work that was being done is very
21 consistent. He was around the insulators, he was
22 around the various products. And given the time
23 periods, they would have been asbestos-containing.

24 But the -- probably the most
25 significant thing here if you look at the bracketed

1 part, additionally the notes made by Covil during
2 the deposition reflect its presence at a number of
3 the Duke Power facilities while Mr. D'Amico worked
4 at the same site.

5 So that is a case that I think would
6 present significant verdict risk for the company
7 and, in fact, is one of the cases that's indicated
8 on the September 1, 2022 letter as having been one
9 where Penn contributed to the resolution, which, by
10 the way, I think was a really good idea. That
11 would have been a very difficult case to have tried
12 successfully.

13 Q. And going back in more general to all
14 of these 14 cases just to get this question out of
15 the way, are you aware of any other insurer that
16 would have contributed with Penn National to any of
17 these cases?

18 A. I do not have any information
19 concerning that.

20 Q. So if there was an insurer group,
21 quote/unquote, contributing to these cases, you do
22 not know that?

23 A. I was not provided with information
24 from which I could derive that and have not been
25 asked to express any opinions on it.

1 Q. Thank you. Just stepping forward on to
2 Mr. Garren's case.

3 A. Yes, sir.

4 Q. If you could explain that in the same
5 nature that you've explained the other cases.

6 A. Of course. Mr. Garren was a living
7 lung cancer at the time that he filed his case. He
8 showed that -- in his interrogatory shows employed
9 as a welder between '77 and 2008 at the Duke Power
10 generating facilities in North and South Carolina.

11 He testified that he generally recalled
12 Covil insulators who worked at the Duke Power
13 plant. He, more importantly, testified he was also
14 at Catawba, which is significant to me, because
15 when you look at these cases as a group sort of
16 holistically, Catawba comes up over and over. It's
17 what in my prior life I would have called a
18 historic worksite because there does not seem to be
19 any real dispute that Covil was there and providing
20 products there.

21 But Mr. Garren testified that Covil
22 removed old installation -- insulation and
23 installed new insulation. So he was seeing them do
24 both sides of that.

25 And old insulation, by definition,

1 considering the time period here, would most likely
2 have been asbestos-containing. The new insulation
3 may or may not have been, depending on the time.
4 But -- looking down here to see if there's anything
5 else.

6 Sort of at the very end, kind of like
7 the Aspray description, I noted that it says that
8 he didn't have a specific recollection of a
9 specific time that he worked around a Covil
10 insulator, but considering the totality of his
11 testimony about having seen them on the job and
12 observing what they were doing and working around
13 them, I think that that was sufficient
14 identification. It is certainly unlikely that they
15 would have been able to have obtained a motion for
16 summary judgment on that.

17 And he did have lung cancer which the
18 medical experts associate with asbestos exposure if
19 there is asbestos exposure in the work history.

20 Q. Certainly. Thank you. Okay. Moving
21 on to the next one, is Jolly, Mr. Beverly Jolly.

22 A. Yes, sir.

23 Q. I'll go ahead and let you go forward
24 and explain your annotations and then what was
25 important to you. I --

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1 MR. YNTEMA: Strike all that. I
2 apologize.

3 BY MR. YNTEMA:

4 Q. So with respect to Mr. Garren's case,
5 you thought that that was a case that should be
6 resolved.

7 A. I did. The fact that he was working
8 around Covil as they removed old insulation, and it
9 appears that Covil had possibly installed that
10 insulation prior to the elimination of asbestos,
11 that is certainly a case that would be appropriate
12 for resolution rather than for trial.

13 Q. Okay. Thank you. Now we can move on
14 to Mr. Jolly, and again, I'll let you describe your
15 annotations there and your analysis of Mr. Jolly's
16 case.

17 A. Sure. Mr. Jolly was a mesothelioma
18 wrongful death case. His case is particularly
19 complicated because his father worked as an
20 insulator for Duke from '46 to '84. So Mr. Jolly,
21 the plaintiff, had household exposure from a very
22 young age.

23 And Jolly testified that he remembered
24 his father working in the Duke plants, including
25 Duke Catawba. And Catawba is significant for me

1 because you see it again and again in this list of
2 14 cases and is a facility where Covil had an
3 extensive presence, and it appears that their
4 presence was both selling insulation and then
5 installing the insulation.

6 But in terms of the exposure for
7 Mr. Jolly, the plaintiff, he was a pipefitter for
8 Duke between '79 and 2003. And the Ellis &
9 Winters' analysis says that Covil performed
10 contract insulation work at Belew in the '70s and
11 '80s and that Covil contracted with Duke for both
12 labor and materials for all insulation needs on
13 units 1 and 2 for an extended period of time.

14 That being said, this case presents
15 household exposure, personal work exposure. They
16 are able to provide some tie to Covil and its work
17 practices and products both before and after
18 installation of asbestos-containing thermal
19 insulation products.

20 I would have not thought this case was
21 appropriate for granting of a motion for summary
22 judgment and was certainly appropriate for
23 resolution.

24 Q. Okay. And indeed, Mr. Jolly's case was
25 resolved and settled; correct?

1 A. It was. It too is noted on the
2 September 1, 2022 letter from Penn National to
3 Mr. Protopapas as one of the cases in which Penn
4 National, quote, was called to participate in the
5 settlement.

6 Q. Thank you. Moving forward to Mr. -- I
7 believe his last name is pronounced Jonas, his case
8 and evaluation bridges into page 1030.

9 A. Yes.

10 Q. And again, he was a living meso; is
11 that correct?

12 A. That is correct. He was a welder and
13 welder's pipefitter at the Catawba nuclear plant
14 between '77 and '84.

15 Q. Right.

16 A. He --

17 Q. I'm sorry to interrupt you, ma'am.

18 A. That's okay.

19 Q. I'm trying to follow you. He was a
20 pipefitter -- let me see. Yes, I see that now. I
21 apologize.

22 A. That's okay. The type is very small.
23 So yes.

24 Q. Thank you. I'll let you continue,
25 ma'am.

1 A. Okay. If you flip over to the next
2 page it says that he continued to work at Duke
3 Power in various capacities through 2003.

4 There was testimony from a coworker
5 about the Duke Power Catawba plant, and you will
6 see at the top I had annotated Garren, comma, too.
7 Because this testimony is consistent with the
8 testimony from the Garren case about Covil's
9 presence at the facility and that Duke hired Covil
10 to both insulate equipment and provide products
11 during the construction of Catawba.

12 So even though the potential exposure
13 for Mr. Jonas was after the cessation of use of
14 asbestos in thermal insulation products, the
15 materials that were in place from having been
16 constructed would still have been
17 asbestos-containing.

18 And the fact that they were called --
19 going down further, that Covil was the only
20 insulation contractor at Duke Power's nuclear
21 plants, it makes the connection between Covil and
22 the claimed exposures for the plaintiff viable.

23 And again, this is a case that I
24 wouldn't anticipate would qualify for a successful
25 motion for summary judgment, which in turn means

1 that it is a verdict risk and, therefore,
2 appropriate for resolution and is -- not to
3 anticipate, but that case is listed on the
4 September 1, 2022 letter from Penn National to
5 Mr. Protopapas.

6 Q. Thank you. Feel free to anticipate my
7 next question. It doesn't -- I take no offense to
8 that. Thank you.

9 A. Okay.

10 Q. So let's go ahead and start --
11 continuing to move on through these cases. And I
12 appreciate your analysis for each one, and I think
13 it's necessary for you to describe your annotations
14 and any of your thoughts as to the evidence of
15 exposure. We'll move to the -- Mr. Teddy Knight
16 and I'll let you explain your annotations, your
17 highlights and then your analysis.

18 A. Okay. Mr. Knight was a meso wrongful
19 death case. He had worked as a pipefitter and
20 welder between 1966 and 1973.

21 Pipefitters and welders were not
22 necessarily interchangeable, but people doing work
23 on pipes often did in fact do the welding, and that
24 required them to access pipes that were probably
25 previously insulated.

1 And I say probably, because unless it
2 was a new construction, it is my experience and
3 understanding from the testimony in the long
4 litigation that those pipes would have been
5 insulated. Therefore, in order for the pipefitter
6 or welder to access the item that they're working
7 on they have to do an incursion into the
8 insulation, which is the way that those individuals
9 received exposure.

10 There was testimony from a Mr. Robert
11 Cassidy that he had testified -- testified. Let me
12 start that again.

13 There was testimony from Mr. Robert
14 Cassidy, who's a coworker, that he recalled
15 Mr. Knight being on locations where there were
16 Covil insulation workers on sites.

17 And the plaintiff's younger brother,
18 Randy, had worked with him in Ethyl -- at Ethyl in
19 the mid to late '70s and remembers working at the
20 plant. And he testified that Covil supplied the
21 insulation and he recalled the trucks unloading the
22 insulation.

23 The type of exposure that is described
24 for Mr. Knight is the type that you typically see
25 in this litigation where there is exposure to

1 insulation products. Here they have identified not
2 just insulation but also workers on site. So that
3 is significant in that it corroborates the
4 potential of exposure.

5 This is a case that I would not
6 anticipate being appropriate for a successful
7 motion for summary judgment, and I would say that
8 was true whether we're talking about South Carolina
9 or really just about anywhere else other than I'll
10 except Texas because of BorgWarner opinion.

11 It would certainly be appropriate to
12 resolve this case. And in fact, this case was
13 resolved and is listed as one of the cases on the
14 September 1, 2022 letter from Penn National to
15 Peter Protopapas regarding cases in which Penn
16 National has been called upon to participate in the
17 settlement. Do you have any other questions about
18 Mr. Knight?

19 Q. No. We can move on to Mr. Morgan. I'm
20 starting to get the sense that you anticipate my
21 questions, which are appreciated, and it's making
22 this deposition much more efficient as to this. So
23 I'll let you go ahead and explain Mr. Morgan and
24 your annotations and highlights and your analysis.

25 A. Mr. Morgan was a living lung cancer

1 case, and his wife was an asbestosis plaintiff.
2 The allegation here was that he had developed lung
3 cancer from exposure to asbestos-containing
4 products in the course of his work, and he had
5 brought fibers home on his clothing to which his
6 wife was exposed, and as a result, she developed
7 asbestosis.

8 He worked as an electrician alongside
9 Daniel Construction from '64 to '67. That time
10 period is prior to the elimination of asbestos from
11 thermal insulation products. Among his work sites
12 was the Champion paper mill in Clinton, North
13 Carolina. He was the top helper for the electrical
14 work at that site and worked next to the insulators
15 who were using both insulation and
16 asbestos-containing cement.

17 We haven't really talked about
18 asbestos-containing cement today, but
19 asbestos-containing cement was a highly friable
20 product and had to be mixed and then applied over
21 the thermal installation [sic]. So that typically
22 involved, from an industrial hygiene perspective, a
23 significant exposure, depending on what the work
24 practices were. We don't know that here. We don't
25 know what those work practices were. But given the

1 description, one can assume that there was some
2 exposure there.

3 The Covil plant records indicate that
4 the Champion paper mill in Canton, North Carolina
5 was among Covil's largest early industrial
6 insulation jobs which Covil completed in 1965.

7 The Covil records certainly corroborate
8 the concept that there would have been
9 asbestos-containing insulation provided by Covil
10 either directly or as a supplier, a third party,
11 given the time period, because it's prior to 1972.
12 And the records indicate an overlap with Mr. Morgan
13 at that facility in North Carolina.

14 There were also other sites where he
15 worked, and Mr. Cornwell talks about the Rock Hill
16 and Celanese plants and says that Covil was on
17 those facilities, which I understand to be South
18 Carolina facilities, during the entire time that he
19 was there from the '70s through 1985.

20 Again, this is a case I would not
21 expect to be appropriate for a successful motion
22 for summary judgment. Consequently, it would be
23 one that was appropriate to settle because of the
24 verdict risk when you combine the fact that this
25 gentleman had lung cancer and his wife had

1 asbestosis would be significant.

2 Q. Okay. Stepping back just generally if
3 you don't mind me interrupting the flow, but it's
4 your understanding that Ellis & Winters prepared
5 these spreadsheets that you eventually redacted and
6 highlighted.

7 A. I don't know if these came from Ellis &
8 Winter or if they came from Morgan Lewis.

9 Q. Okay. So you don't know which firm
10 they -- that would have -- would have generated
11 these spreadsheets.

12 A. No. I can tell you that after I got
13 the spreadsheet I did coordinate the spreadsheet
14 with the eight notebooks to confirm that the
15 information reflected in the spreadsheet was in
16 fact consistent with what is in the underlying
17 materials.

18 As to who prepared those, I don't know,
19 but I'm confident of the information in them based
20 on my separate review of the underlying documents.
21 It saved me a whole lot of work.

22 Q. I understand. And do you have any
23 knowledge as to whether these spreadsheets were
24 ever provided to Penn National?

25 A. I do not know the answer to that.

1 Q. Okay. Thank you. And you may have
2 answered this question, but I just want to make
3 sure it is answered. With respect to Mr. Morgan,
4 that case was resolved with a contribution by Penn
5 National?

6 A. The Morgan case is reflected on the
7 list of cases to which Penn National was called
8 upon to participate in resolution according to the
9 September 1st, 2022 correspondence from Penn
10 National to Peter Protopapas.

11 Q. Okay. Moving on to Mr. Moss's case, I
12 will let you provide us with the same analysis of
13 the annotations, the highlighting and your analysis
14 of the exposure.

15 A. Okay. Mr. Moss was a mesothelioma
16 wrongful death case. He had worked as a welding
17 inspector at the Catawba nuclear plant from 1981 to
18 1985.

19 And he testified that he was around a
20 lot of grinding and that sort of work that was
21 dusty. Significant documentary and deposition
22 evidence shows that Covil supplied the insulation
23 and materials for the construction of that plant
24 and was there at least in the 1980s.

25 The Catawba plant, as we have

1 previously discussed, is one that is referenced in
2 a number of the cases. And if you look at the
3 materials holistically as opposed to just
4 singularly, it is a reasonable conclusion that
5 those materials at Catawba came from a time period
6 when there was asbestos-containing thermal
7 insulation. And it's clear that Duke -- those Duke
8 plants involved a significant amount of Covil work.

9 There are invoices and purchase orders
10 that show that Covil was on the facility until at
11 least 1983. So they certainly were there and
12 continuing to work.

13 Because this is a mesothelioma case and
14 there are links in the invoices and purchase
15 orders, I would not expect that this would be a
16 case that was appropriate for a successful motion
17 for summary judgment. Therefore, it presents a
18 verdict risk. Because it presents a verdict risk,
19 it was appropriate to resolve the case. It is one
20 that resolved, and in fact, the Moss case is listed
21 in the letter from Penn National to Mr. Protopapas
22 in September of 2022.

23 Q. Let me step you back just in general.
24 As far as verdict risk, you've kind of attributed a
25 verdict risk to each of the cases we've evaluated

1 thus far, and I think if there's a -- and I think
2 you had a verdict risk as to each of the cases that
3 we'll talk about, the remaining three, I think.

4 Is there a -- is there a graduation to
5 your verdict risk? Meaning, is there a -- I mean,
6 if you can rank a verdict risk from 1 to 10, 10
7 being the worst, I mean, do you have a range of
8 verdict risk that you would attribute to any case,
9 or when you say there's a verdict risk, is that it?

10 A. If you mean by that do I have a
11 numerical verdict in mind for each of the
12 individual cases, I would have to see the
13 underlying damage model to understand what the
14 specific losses were for an individual case. So I
15 would need to know what the medical expenses were
16 to the extent there were lost wages, household
17 service predictions and so on.

18 But for many of these cases,
19 particularly for the mesothelioma cases, it is not
20 uncommon that it is what I would call the soft
21 damages that are the most significant component of
22 verdicts. And the plaintiffs that we have been
23 talking about are all long-term, solid citizens.
24 They -- particularly the cases like Mr. Morgan
25 where you've got both him and his wife, those

1 present significant dollar damage verdicts.

2 So in my analysis I am looking both at
3 the risk of a jury finding a liability which then
4 predicates a damage award, but I haven't seen any
5 of these that I think would be an insignificant
6 dollar amount.

7 The verdict numbers for asbestos cases
8 around the country has tended upwards fairly
9 significantly over the last 20 years, and that's
10 publicly available information. I did not compile
11 that as part of my preparation for opinions in this
12 case.

13 I think probably all the participants
14 are familiar with how those numbers have tended
15 upwards over time, and they are multimillion-dollar
16 verdicts. So even a small verdict in an asbestos
17 case with the types of exposures we're talking
18 about is probably multiple millions of dollars.

19 Q. Thank you for that. I was thinking
20 about -- I'll let you -- we can move on to the next
21 case which is, I believe, the -- I may have lost my
22 way here -- Murphy case, Nicholas Murphy. I'll let
23 you provide the same type testimony with respect to
24 Mr. Murphy's case.

25 A. Mr. Murphy was a living mesothelioma

1 case. He worked for Daniel Construction as a
2 welder at the Bowater plant in Catawba, getting
3 back to the Catawba connection.

4 This particular box starts with a
5 description of him as Mr. Moss, but when you look
6 at the underlying documents and the remainder of
7 the box here, it is in fact Mr. Murphy that we're
8 talking about.

9 He worked at the Catawba plant as a
10 welder between '74 and '78. And Ellis & Winters'
11 review of the Covil documents and the testimony
12 shows that Covil supplied both insulation and
13 contracting services to the mill prior to
14 Mr. Murphy's arrival.

15 So he -- they were providing services
16 and materials prior to 1974 we know from Dwaine
17 Waters' testimony, which is actually referred to
18 down in the Sims discussion. But Mr. Waters gave
19 stipulated testimony in one of the prior Covil
20 trials that Covil was providing asbestos-containing
21 thermal insulation products through to at least
22 '73, possibly '74.

23 So the information in this case would
24 indicate to me that this is a case that would be
25 unlikely to obtain a motion for summary judgment.

1 There is sufficient product identification and
2 company identification to support a verdict
3 finding. That means there is a verdict risk to
4 this case, which makes it appropriate for
5 resolution. And it is, in fact, one of the cases
6 listed as a resolved case for which Penn was asked
7 to participate in the September 1, 2022 letter from
8 Penn National to Mr. Protopapas.

9 Q. Okay. Thank you for that. Let's
10 continue on to Mr. Sims's case which follows, if
11 you don't mind.

12 A. Yes. Mr. Sims is a lung cancer
13 wrongful death case. And you'll notice in the
14 second column that I annotated that he is a
15 lifelong nonsmoker and that Dr. Roggli found no
16 plaques.

17 That is significant on the medical
18 side, because as a lifelong nonsmoker but with
19 asbestos exposure, many, if not most -- certainly
20 all of the plaintiff experts would reach the
21 opinion that his lung cancer was associated with
22 asbestos exposure. There's no alternative cause
23 here because he was a nonsmoker.

24 Dr. Roggli would not have attributed it
25 because he didn't find pleural plaques, but those

1 aren't necessarily determinative. They're
2 certainly not determinative to a jury.

3 Mr. Sims worked as a coal handler and
4 helper. That's actually a job classification I am
5 not as familiar with. You don't typically see
6 that.

7 However, his coworker testified that
8 the coal yard workers were in fact required to work
9 in maintenance in plant during shutdown. So that
10 would explain why he was in the plant and having
11 asbestos exposure.

12 And the coworker also testified that he
13 remembered him and Mr. Sims, the other coworkers,
14 working around those who were removing insulation
15 from equipment. That was corroborated by an
16 additional coworker named Leslie Holiday.

17 The information from the documents --
18 and this is material and labor invoices. So I
19 assume these are documents that came from the
20 worksite itself -- show that Covil was there during
21 the '70s, '80s and '90s.

22 Mr. Sims also worked as a thread
23 machine operator in Anderson, South Carolina
24 between '73 and '78. And the Covil records show
25 that their employees were on site doing maintenance

1 and other projects from '67 to '82. Because that
2 straddles the time period when they would have been
3 providing asbestos-containing thermal insulation
4 products, that certainly makes the testimony
5 concerning exposure corroborated.

6 And further, Mr. Waters, in his
7 stipulated testimony, said that they didn't provide
8 asbestos-free boxes until 1974, but the implication
9 is that prior to 1974 those were -- would not have
10 been asbestos-free, and that would be consistent
11 with his stipulated testimony in the prior trial.

12 So I would consider this to be a case
13 that would not get a successful grant of motion for
14 summary judgment, presenting, therefore, a risk of
15 an adverse verdict, making it appropriate to reach
16 resolution. And in fact, it was resolved, and the
17 Sims case is listed as one of the cases to which
18 Penn National participated in the September 1, 2022
19 letter from Penn National to Peter Protopapas.

20 Q. Okay. I appreciate that. And on
21 Mr. -- on the next cases, Mr. Wannamaker's --
22 you'll get to this, but I don't want to interrupt
23 you when you do. So before you start to give us
24 your analysis you do have circled here 1964 and
25 2014. When you get to that, if you could give me

1 an explanation as to why you circled those years.

2 A. Sure. That's an exceptionally long
3 time period. Mr. Wannamaker, if I remember from
4 his deposition and discovery answers, went to work
5 as a very, very young man. So he had a very
6 lengthy exposure.

7 But from 1964 through late 1972,
8 whatever he would have been doing as a pipefitter,
9 steamfitter, insulator, or welder would have
10 exposed him to asbestos-containing thermal
11 insulation products. But that's the reason I
12 circled that. 1964 is a particularly early time
13 for one of the plaintiffs in this particular group
14 to have begun to have exposure.

15 He was a living mesothelioma plaintiff.
16 And based on his job descriptions, he certainly
17 would have had job duties that exposed him to
18 insulation products.

19 He worked as a welder between '77 and
20 '79. The Ellis & Winters initial report which is
21 included in those eight notebooks provided
22 material -- said that Covil provided materials and
23 performed insulation work at the Winyah, if I'm
24 pronouncing that correct, power plants during the
25 late '70s and early '80s.

1 This, again, is a case that there is
2 sufficient connection to Covil to make it unlikely
3 to be successful in obtaining a motion for summary
4 judgment. Given that it couldn't get a motion for
5 summary judgment, a mesothelioma case of this type
6 for someone with that length of exposures presents
7 a significant verdict risk, making it appropriate
8 for resolution and, in fact, is one of the cases --
9 in fact, it's the final case listed on the list of
10 cases to which Penn was asked to participate and
11 reflected in the letter dated September 1, 2022
12 from Penn National to Peter Protopapas.

13 Q. Thank you, Ms. Frost. We have a couple
14 ancillary-type questions with respect to Covil. To
15 your knowledge, was Covil an insulator of
16 insulation products?

17 A. It is my understanding --

18 Q. I'm sorry. Installer of insulation
19 products. I apologize.

20 A. It is my understanding, based on the
21 description, that they were an insulation company.
22 So they sold insulation products, they installed
23 insulation products, and they maintained insulation
24 products.

25 Q. Yes, and I appreciate that. I was

1 going to go through each step individually, but
2 you've answered the question. They were an
3 installer, they manufactured insulation products,
4 and they maintained insulation products. What is
5 your interpretation -- what is your -- what is the
6 meaning of --

7 A. Hold on a second. Hold on a second. I
8 don't know that they manufactured insulation
9 products. I know that they sold insulation
10 products that were manufactured by others, because
11 I have seen reference in various of the deposition
12 testimony that they provided Kaylo and some other
13 products. Kaylo was a name brand -- and it's
14 K-A-Y-L-O for the court reporter.

15 That was a name-brand thermal
16 insulation product that was manufactured first by
17 Owens-Illinois in the '50s and then later by Owens
18 Corning fiberglass.

19 I don't know whether Covil itself
20 manufactured thermal insulation materials. They
21 may have, but they certainly provided thermal
22 insulation products manufactured by other companies
23 as part of the services that they provided to their
24 clients in providing insulation and maintenance
25 services.

1 Q. Thank you. And when you say that Covil
2 maintained insulation, what do you mean? What do
3 you mean by maintaining it?

4 A. Well, it's clear from the description
5 of some of the plaintiffs and from some of the
6 descriptions you've seen above here, Covil had not
7 just contracts to come in and install insulation.
8 They did routine maintenance and other services for
9 their clients on an ongoing basis.

10 Duke, in fact -- let me see if I can
11 find it here. They were hired by Duke to do their
12 labor and materials. So they did -- that's
13 installation and materials.

14 But I was looking here. One of
15 these -- if you look at the box on the chart that
16 describes Mr. Murphy, it says that the Covil
17 documents and testimony establish that Covil
18 supplied both insulation and contracting services
19 to the mill.

20 And there was at least one other that
21 described that Covil had workers in and out of the
22 plants on an ongoing basis. So it does not appear
23 to me that they only did initial installation.
24 They were also doing ongoing work on those
25 facilities.

1 And I would describe -- I would
2 characterize that as maintenance. Not in terms of
3 doing sweeping and that sort of thing, but they
4 clearly had an ongoing requirement related to the
5 insulation products and materials that they were
6 providing.

7 Q. Okay. And the products and materials
8 that Covil was either providing or installing, how
9 long would those products or materials contained
10 asbestos? Meaning when in the approximate year
11 would those products have ceased containing
12 asbestos?

13 MS. PATTERSON: Objection; form.

14 THE WITNESS: Typically those products
15 stopped containing asbestos sometime in the early
16 '70s. It really depends on the manufacturer
17 involved.

18 And as you will note from that
19 reference to the Waters testimony, sometime in 1974
20 they started providing boxes that said
21 asbestos-free.

22 There is a significant history in the
23 asbestos litigation of the plaintiffs' bar taking
24 the position that manufacturers continued to
25 provide asbestos-containing thermal insulation

1 products after the institution of the OSHA
2 regulations in late 1972.

3 Some of the companies apparently had
4 inventory, and there has always been an ongoing
5 argument that that inventory was used rather than
6 destroyed. That would be a
7 manufacturer-by-manufacturer analysis to determine
8 the exact dates on which they stopped providing
9 third parties with asbestos-containing thermal
10 insulation and converted to asbestos-free.

11 That's a long way of saying sometime in
12 the '70s, but I cannot give you a specific date
13 because that does vary from manufacturer to
14 manufacturer.

15 THE VIDEOGRAPHER: Counsel, I've got
16 about five minutes until I need to go off the
17 video.

18 MR. YNTEMA: Okay. Thank you. Do you
19 want to go off video now and then come back on? I
20 probably have maybe 15 to 30 more minutes.

21 THE VIDEOGRAPHER: That works for me if
22 it works for you.

23 MR. YNTEMA: Okay. Let's take a break
24 and we'll go off the record.

25 THE VIDEOGRAPHER: We're off the record

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1 at 12:57 PM.

2 (A recess transpired from 12:57 until
3 1:06.)

4 THE VIDEOGRAPHER: We are back on the
5 record at 1:06 PM.

6 BY MR. YNTEMA:

7 Q. Thank you, Ms. Frost, for your
8 testimony as to Exhibit 9. Thank you for going
9 through each one of those cases with me. I do
10 appreciate that. We probably have maybe 15, maybe
11 20 minutes left of our deposition. I've only got
12 mainly two more exhibits to ask you about, and one
13 of them is your CV, so you kind of see me tapering
14 down here.

15 The next exhibit I'm going to ask you
16 about is Exhibit -- what we marked as Frost Exhibit
17 10.

18 (EXHIBIT 10, Letter to Mr. Protopapas
19 from Mr. Wright dated 9-1-22, marked for
20 identification.)

21 BY MR. YNTEMA:

22 Q. That is the -- what I term the
23 impairment letter sent from Boyd Wright of Penn
24 National to Mr. Protopapas that you've recently
25 testified to that's dated September 1st, 2022.

1 We're going to bring that up for you to look at.
2 So is this indeed the letter -- oops. I'm trying
3 to navigate through it.

4 MR. YNTEMA: I'll let you scroll
5 through it slowly and show that to Ms. Frost. I
6 think we can stop there.

7 BY MR. YNTEMA:

8 Q. I know there's a second page there, but
9 is that indeed the impairment letter that you
10 recall referencing when -- while looking at the
11 spreadsheet to form your analysis in this case?

12 A. That is the correspondence from Penn
13 National to Peter Protopapas dated September 1,
14 2022, to which I have referred in connection with
15 my analysis of the cases on the spreadsheet that is
16 Exhibit 9.

17 Q. Okay. And all the cases that are
18 listed there are cases that were listed on the
19 spreadsheet; correct?

20 A. That is correct.

21 Q. And the amounts there that are listed
22 beside each of the cases, those are amounts that
23 were contributed to [sic] Penn National. Is that
24 your understanding?

25 A. That is my understanding based on the

1 context of the letter. I don't have any
2 independent knowledge one way or the other.

3 Q. Okay. And again, just to shore
4 everything up there, all the cases that are listed
5 in this letter and all the cases that are listed on
6 your spreadsheet, to your knowledge, have been
7 resolved and settled.

8 A. That is my understanding, yes.

9 Q. Okay. Now in that paragraph under the
10 case list, and it says:

11 As a result of the above-referenced
12 settlement payments, this letter serves to advise
13 you as Covil's court appointed receiver that the
14 global aggregate policy limits applicable under the
15 two policies issued to Covil are impaired by
16 \$613,672.50.

17 Do you see that?

18 A. I do see that.

19 Q. Do you take issue with that calculation
20 at all?

21 MS. PATTERSON: Objection; form.

22 THE WITNESS: I have no opinion. I
23 would have to take out a calculator. I assume that
24 that amount corresponds to the total of the numbers
25 associated with the 14 cases above, particularly

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1 given that the paragraph above says that the
2 settlements are made with payments totaling that
3 same total number. But again, I have no
4 independent information but from what is reflected
5 here on the letter.

6 BY MR. YNTEMA:

7 Q. Thank you. And with respect to the
8 amounts contributed to a settlement by Penn
9 National, do you take issue with the amounts that
10 Penn National contributed to each one of those
11 settlements?

12 MS. PATTERSON: Objection; form.

13 THE WITNESS: I have no opinion one --
14 I'm sorry.

15 MS. PATTERSON: Go ahead.

16 THE WITNESS: I have no opinion.

17 BY MR. YNTEMA:

18 Q. You have no opinion as to whether those
19 amounts were too little or too much or in between.

20 A. Correct.

21 MS. PATTERSON: Objection; form.

22 THE WITNESS: I have no opinion on the
23 propriety of the settlement contribution.

24 BY MR. YNTEMA:

25 Q. And also, sitting here today, you don't

1 have any reason to dispute the amounts --

2 MR. YNTEMA: If we could go to the
3 second page.

4 BY MR. YNTEMA:

5 Q. I apologize, Ms. Frost. I thought we
6 had that second page pulled up. On the second page
7 it shows the policy periods with the amount that
8 Penn National has stated as being the limits of
9 those policies. You have no reason to dispute that
10 statement, do you?

11 MS. PATTERSON: Objection; form.

12 THE WITNESS: I do not have any
13 coverage opinions. So I would have no opinion
14 whether that is correct or incorrect and have not
15 been asked to develop any opinions on that.

16 BY MR. YNTEMA:

17 Q. Okay. That would be the same for the
18 impairment amount of \$1,386,327.50 that's listed in
19 that same sentence; correct?

20 A. I consider that to be a coverage issue,
21 and that is outside the area of my expertise and
22 outside the area of my designation.

23 Q. All right. Thank you, ma'am. And as a
24 lawyer I'm sure you understand that sometimes
25 there's just a need to ask the question even though

1 you know the answer.

2 A. I do.

3 Q. Ma'am, I think I know the answer to
4 this question, but I just needed your answer. Have
5 you reviewed any of Penn National's document
6 retention policies?

7 A. To the extent that the 30(b)(6)
8 depositions constitute part of the document
9 retention policies, yes, I have reviewed those. If
10 by that question you mean the specific written
11 document, unless it is contained within the
12 exhibits for the 30(b)(6) witness, then I have not.
13 But -- and I don't remember as I sit here if those
14 are attached to the deposition transcripts or not.
15 There certainly was discussion of them in the
16 context of those depositions.

17 Q. Do you intend to rely on Penn
18 National's document retention policy in providing
19 expert testimony in this case?

20 A. Let me think about that one for a
21 second. To the extent that it is my opinion that
22 from a historical perspective the defendants and
23 their associated insureds knew or should have known
24 that they should retain materials at least as early
25 as 1982 when Manville filed for bankruptcy, yes,

1 that would, in part, form a basis for my opinion
2 because I believe that there was an obligation to
3 maintain those policies.

4 To the extent that you're asking about
5 the phraseology of the particular retention policy,
6 that's something I haven't specifically been asked
7 to opine on.

8 Q. Do you have an opinion as to whether an
9 insurer should retain insurance policy-related
10 documents for an insured that it has no knowledge
11 has -- that it has no knowledge -- either has --
12 that the insured has exposure to liability asbestos
13 claims or lawsuits?

14 MS. PATTERSON: Objection; form.

15 THE WITNESS: It has no knowledge. If
16 they knew or should have known that the insured had
17 such liability -- and Covil is a perfect example.
18 Covil was an insulation company.

19 To the extent that a company was in the
20 business of writing coverage for a company that was
21 in that business, it is my opinion that at least as
22 of 1982 they either knew or should have known that
23 there was a potential for liability against those
24 types of insureds, and it would certainly have been
25 wise policy to make sure that those materials were

1 collected and protected.

2 BY MR. YNTEMA:

3 Q. Do you mean it would have been Covil's
4 obligation to collect and protect insurance
5 records?

6 MS. PATTERSON: Objection; form.

7 THE WITNESS: It is my opinion that it
8 was a joint obligation of anyone who had those
9 policies. If one was an insurer -- for example,
10 Penn National -- of companies that it knew to be in
11 the insulation business, considering the lay press
12 information, setting aside all of the legal
13 information about Manville and others, it would
14 certainly have been appropriate and I think
15 something that was reasonable for them to expect
16 that the companies that they were insuring in that
17 industry could be subject to liability and,
18 therefore, those materials should have been
19 maintained.

20 BY MR. YNTEMA:

21 Q. And do you have opinion as to how long
22 those materials should have been maintained by
23 insurers that may have insured companies like Covil
24 that installed or distributed asbestos-containing
25 insulation?

1 A. Well, according to the breakout panel I
2 heard at the DRI asbestos seminar last week which
3 was on alternatives to bankruptcy and how both
4 insureds and insurers were evaluating long-tail
5 exposures in asbestos litigation, that panel
6 predicted that there would be litigation through
7 2062 and runoff liabilities through 2072. So I
8 think that the obligation to maintain those
9 materials probably exceeds the life expectancy of
10 any of those of us who are still on this
11 deposition.

12 Q. I'm knocking on wood, but I will move
13 forward.

14 A. It was a scintillating panel, by the
15 way.

16 Q. So sitting here today, you have no idea
17 as to how long Penn National's document retention
18 policy was with respect to commercial general
19 liability policies.

20 MS. PATTERSON: Objection; form.

21 THE WITNESS: I believe that was
22 discussed in at least one of the 30(b)(6)
23 depositions. As I sit here today, I don't recall.
24 I do -- it is my general understanding that it was
25 not nearly as long as referenced by that panel at

1 DRI.

2 BY MR. YNTEMA:

3 Q. Prior to that panel at DRI had you
4 heard any other opinions as to how long an
5 insurance carrier should keep their insurance
6 policies as they may relate to an insured such as
7 Covil?

8 MS. PATTERSON: Objection; form.

9 THE WITNESS: The RAND analyses over
10 the last several years have posited that asbestos
11 litigation will continue through at least 2049,
12 which was, frankly, consistent with some of the
13 medical discussion in San Diego last week, but that
14 was not a new number to me.

15 The predictions about the length of the
16 asbestos litigation have been quite long. And in
17 fact, if you look back in that Manville opinion
18 that we talked about early in the deposition, if I
19 recall correctly they point out that in 1982, when
20 the bankruptcy was filed, the expectation was that
21 the litigation would last for at least 20 to 30
22 years from that point which would have brought us
23 roughly to now.

24 So it is certainly reasonable to expect
25 that a company or an insurer would have maintained

1 such records at least through current time. But if
2 you look at the current analyses of the long tail
3 of this litigation, whether it's correct that it
4 goes through 2049 or 2072, that still would be a
5 significant hold time that would be remaining for
6 those types of documents.

7 BY MR. YNTEMA:

8 Q. And that significant hold time would be
9 kind of a best practice for retaining insurance
10 documents with respect to companies like Covil;
11 correct?

12 MS. PATTERSON: Objection; form.

13 BY MR. YNTEMA:

14 Q. Is that your opinion?

15 MS. PATTERSON: Objection; form.

16 THE WITNESS: That comes awfully close
17 to a coverage opinion. I would say in a more
18 general sense that whether you're talking about an
19 insurer or an underlying insured that it would be
20 prudent to maintain those materials until such time
21 that there is either a bankruptcy, an alternative
22 to bankruptcy or some other conclusion of this
23 ongoing litigation.

24 BY MR. YNTEMA:

25 Q. Okay. And when you say underlying

1 insured with respect to Covil, would Covil be an
2 underlying insured in this case?

3 A. Yes, they would. They are the insured
4 in this case, as I understand it.

5 Q. The answer's yes?

6 A. Yes.

7 Q. Thank you. Okay, ma'am. In this case
8 have you reviewed any of Penn National's litigation
9 hold policies?

10 A. Unless they were discussed as part of
11 the 30(b)(6) materials, I don't remember anything
12 that was specifically described as a litigation
13 hold policy. If it is part of the discussion in
14 the 30(b)(6) deposition testimony, then I reviewed
15 the materials that were associated with those.

16 Q. Do you intend to provide any testimony
17 as an expert in this case as to Penn National's
18 litigation hold as to any of Covil -- Covil's
19 insurance policy-related documents?

20 A. My opinion would be the same that I
21 just described as it relates to general documents.
22 To the extent that there is litigation or a
23 reasonable expectation of litigation, then it would
24 be appropriate to collect and protect those
25 documents until such time as they are no longer

1 necessary.

2 Q. Is it your opinion that all insurers
3 should have had a reasonable expectation since at
4 least 1982 that if they insured a insulation
5 installer or distributor of such products that they
6 should have kept the insurance policy-related
7 materials?

8 A. I believe they were on notice as of the
9 time of the Manville filing. The Manville
10 confirmation in 1986 engendered a significant
11 discussion, both broadly and in litigation circles
12 and in insurance circles, of the implications for
13 insurers related to asbestos litigation.

14 So whether you put that obligation and
15 knowledge starting in '82 at the filing or '86 with
16 the confirmation, there was significant discussion
17 in the public press about the insurance
18 implications of asbestos and asbestos bankruptcies.

19 Q. Okay. And that obligation is also as
20 to underlying insureds as well; correct?

21 A. If they were at risk for asbestos
22 litigation, I think that companies should have kept
23 their documents. And that's not always possible.
24 I've had clients who had fires, I had clients who
25 had floods. There have been a lot of moving parts

1 depending on the particular circumstances of
2 particular companies. But as a general rule, it is
3 important to collect and protect those documents,
4 and companies began to do that fairly early on.

5 Q. And in this case are you aware that
6 Penn National actually has produced two insurance
7 policies for Covil?

8 A. That, I think, is a reasonable
9 conclusion based on the materials that I have read.
10 I have not seen those policies, nor have I been
11 asked to review them or derive any opinions because
12 that's outside the area of my designation.

13 Q. I understand. And you're not at this
14 point intending to testify as to the propriety of
15 Penn National's document retention program;
16 correct?

17 MS. PATTERSON: Objection; form.

18 THE WITNESS: I believe I've already
19 answered that. I think that they were under an
20 obligation to either -- they either knew or should
21 have known that they were in a position where those
22 policies were going to be called upon at some point
23 given that they were insuring a company that was in
24 the insulation business.

25 BY MR. YNTEMA:

1 Q. And that opinion is based on the
2 Johns-Manville case, bankruptcy case and the
3 confirmation in that case and also --

4 A. No, no, no.

5 MS. PATTERSON: Objection; form.

6 THE WITNESS: Yeah. That's just a good
7 illustration. That opinion is based on my more
8 than 30 years of experience in dealing with
9 asbestos litigation, my review of documents here,
10 my review of the relevant case law and what I know
11 about the ongoing litigation. So that opinion is
12 just one of many examples of the history that
13 relates to this litigation.

14 BY MR. YNTEMA:

15 Q. Okay. The RAND analysis that you
16 previously testified to, could you tell me the date
17 of that analysis?

18 A. RAND has done a series of reports over
19 probably the last 20 years. And I have always made
20 a practice of reviewing those when they came out.
21 I did not go back to those and review them in
22 preparation for either my opinions in this case or
23 my deposition testimony today.

24 It is something that I am generally
25 familiar with, and I am aware that they have done

1 projections for quite some time about the
2 anticipated length of the litigation. Those should
3 be available in the public domain.

4 Q. Okay. I'm going to try to be brief on
5 this. I think it is my final topic. I've gone
6 through your CV, but I'm not going to walk you
7 through that today. I just want to know, have you
8 ever been admitted to testify as an expert in
9 court?

10 A. I was present and ready to testify in
11 Judge Toal's court in connection with the USF&G
12 case. I do not recall whether I had been tendered
13 as an expert in advance or not, but I have not yet
14 given trial testimony as an expert in either the
15 Covil-related cases or any other case.

16 Q. So is it correct in saying that you
17 haven't been admitted in court as an expert on any
18 topic?

19 A. What I'm saying is I don't know,
20 because I don't know what the procedure was on that
21 prior case in Judge Toal's court. If I was not
22 admitted in that case in advance, then the answer
23 to your question would be you are correct, I have
24 not been previously admitted as an expert to give
25 opinions in trial.

1 Q. I appreciate that, ma'am.

2 MR. YNTEMA: I think that is all the
3 questions I have. There may be -- Ms. Patterson
4 may have questions on her end, but I appreciate
5 your time today. If I don't have any more
6 questions after Ms. Patterson, thank you for your
7 time and I appreciate your testimony today.

8 MS. PATTERSON: And we have nothing for
9 today. The receiver will reserve all questions for
10 this witness until the time of trial.

11 THE VIDEOGRAPHER: All right. This
12 concludes the deposition. We are off the record at
13 1:28 PM.

14 (Off the record.)

15 THE REPORTER: And, Ms. Patterson, did
16 you want to order a copy of the transcript with
17 exhibits?

18 MS. PATTERSON: Yes, ma'am, I would.
19 And what is your normal turnaround time?

20 THE REPORTER: We have been asked to
21 expedite this in five days, delivered on the 16th,
22 I believe.

23 MS. PATTERSON: Perfect. I would like
24 it that day. That would be perfect.

25 (EXHIBIT 11, Email to Ms. McCulloch

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1 from Ms. Frost, with Attached Curriculum Vitae,
2 marked for identification.)

3 (The right to read and sign this
4 transcript was not waived.)

5 (The deposition was concluded at
6 1:28 PM.)

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CERTIFICATE OF REPORTER

I, Sandra K. Bjerke, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript was transcribed to the best of my ability using the Zoom technology platform, including, but not limited to, its inherent shortcomings of garbled speech, overmodulation, and voice-overlap cancellation;

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 14th day of November, 2022 at Charleston, Charleston County, South Carolina.



Sandra K. Bjerke, RDR, CRR, CBC

My Commission Expires

May 6, 2030

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22
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1 Nancy Patterson

2 nancy.patterson@morganlewis.com

3 November 14, 2022

4 RE: Covil Corporation v. Pennsylvania National Mutual Casualty
Insurance Co.

5 11/9/2022, Sharla J. Frost (#5564159)

6 The above-referenced transcript is available for
7 review.

8 Within the applicable timeframe, the witness should
9 read the testimony to verify its accuracy. If there are
10 any changes, the witness should note those with the
11 reason, on the attached Errata Sheet.

12 The witness should sign the Acknowledgment of
13 Deponent and Errata and return to the deposing attorney.
14 Copies should be sent to all counsel, and to Veritext at
15 cs-carolinas@veritext.com.

16
17 Return completed errata within 30 days from
18 receipt of testimony.

19 If the witness fails to do so within the time
20 allotted, the transcript may be used as if signed.

21
22 Yours,
23 Veritext Legal Solutions
24
25

Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Co.

Sharla J. Frost (#5564159)

E R R A T A S H E E T

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Sharla J. Frost

Date

Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Co.

Sharla J. Frost (#5564159)

ACKNOWLEDGEMENT OF DEPONENT

I, Sharla J. Frost, do hereby declare that I have read the foregoing transcript, I have made any corrections, additions, or changes I deemed necessary as noted above to be appended hereto, and that the same is a true, correct and complete transcript of the testimony given by me.

Sharla J. Frost

Date

*If notary is required

SUBSCRIBED AND SWORN TO BEFORE ME THIS
_____ DAY OF _____, 20____.

NOTARY PUBLIC

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South Carolina Rules of Civil Procedure

Part V. Depositions and Discovery

Court Rule 30

(e) Submission to Witness; Changes; Signing.

When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds

that the reasons given for the refusal to sign
require rejection of the deposition in whole or in
part.

DISCLAIMER: THE FOREGOING CIVIL PROCEDURE RULES
ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.
THE ABOVE RULES ARE CURRENT AS OF APRIL 1,
2019. PLEASE REFER TO THE APPLICABLE STATE RULES
OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

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,

**DEFENDANT PENN NATIONAL'S
MOTION *IN LIMINE* TO EXCLUDE
TESTIMONY OF
CHARLES M. MILLER AND
RELATED EVIDENCE**

v.

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

Defendants.

Defendant Pennsylvania National Mutual Casualty Insurance Company ("Penn National"), by and through undersigned counsel, hereby presents this motion *in limine*, to exclude portions of the testimony of Charles M. Miller, Esq., and related evidence at the upcoming "trial" set for December 12, 2022, in the above-referenced matter. In support of this motion, Penn National states as follows:

INTRODUCTION AND LEGAL STANDARD

Plaintiff Covil Corporation, by and through its Receiver Peter Protopapas (the "Receiver"), has put forward Charles M. Miller, Esq. as an expert in insurance industry standards and practices in this matter.¹ Although Mr. Miller previously worked for Fireman's Fund Insurance Company in claims, he has not been employed by any insurance company since 1990. Since that time, Mr. Miller has practiced insurance law and/or served as an as an expert on insurance coverage and claims handling.² The Receiver's Amended Fact and Expert Witness Disclosures indicate that

¹ The Receiver's Amended Fact and Expert Disclosure is attached hereto as **Exhibit 1**.

² The Curriculum Vitae for Mr. Miller is attached hereto as **Exhibit 2**.

Mr. Miller will testify regarding the history, derivation, intent, and purpose of the general liability and products/completed operations provisions of commercial general liability (“CGL”) policies and distinctions between general liability coverage and products/completed operations coverage. Additionally, the Receiver’s disclosure indicates that Mr. Miller will also testify regarding insurance industry standards for the timely and thorough search for insurance policies.

However, during his deposition and as reflected in the “Opinion Outline” produced by the Receiver prior to Mr. Miller’s deposition,³ the opinions that the Receiver intends to solicit from Mr. Miller go well beyond the opinions identified in the Receiver’s Amended Fact and Expert Witness Disclosures and include inadmissible opinion testimony. (Ex. 3, Opinion Outline; Ex. 4, Miller Deposition, p. 9:4–9:19. Mr. Miller should be precluded from offering his opinions and related testimony as to the following:

1. The one million dollar aggregate on declarations pages of the Covil policies issued by Penn National does not apply to premises/operations coverage. (Ex. 3, Opinion Outline, pp. 1–3)
2. Coverage for operations/premises claims do not convert to completed operations claims following expiration of policy during which operations claim arose. *Id.* at 3–4.
3. Penn National’s search for policies it issued to Covil did not accord with insurance industry standards. *Id.* at 4–5.

³ The “Opinion Outline” prepared by Mr. Miller is attached hereto as **Exhibit 3**. The “Rough Draft” of the transcript of the deposition of Mr. Miller conducted on November 28, 2022, is attached hereto as **Exhibit 4**, which was available as of the deadline for filing motions *in limine* under the Scheduling Order in this matter. Penn National will supplement the record to include the final transcript of Mr. Miller’s deposition upon receipt.

4. Insurance companies began to create data bases for insurance policy retention in the late 1970's and early 1980's, which provided for policy searches by at least policy number and named insured. *Id.* at 5–6.
5. Penn National failed to timely issue a policy hold. *Id.* at 6–7.

These opinions and related testimony from Mr. Miller should be excluded. As to the first two opinions and related testimony, such opinion testimony embodies legal conclusions, and therefore, intrudes upon the role of the Court and are not admissible under South Carolina law. As to the remaining opinions, Mr. Miller lacks the experience with regard to document retention and searches by insurance companies and litigation hold procedures. Mr. Miller has only been employed by a single insurance company, which employment ended over thirty (30) years ago and involved claims handling positions only, which would not have involved management of an insurer's document retention program. (Ex. 1, Miller CV; Ex. 4, pp. 20:6–20:12) Because the Receiver cannot satisfy his burden of demonstrating the admissibility of the above-referenced topics of anticipated testimony in accordance with Rule 702, Penn National respectfully requests that the Court issue an order precluding Mr. Miller's testimony on these topics.⁴

LEGAL ARGUMENT

Expert testimony is appropriate when “the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.” *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Where expertise is needed to aid the fact-finder, the witness must possess the requisite “knowledge, skill, experience, training, or education” in a particular field to qualify as an expert and ensure that the opinion is reliable. *See* Rule 702,

⁴ Penn National reserves the right to object to any and all additional testimony of Mr. Miller and does not intend to waive any such objections by not including them in this motion

SCRE; *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 374, 635 S.E.2d 97, 104 (2006). The trial court has a gatekeeping function with regards to expert testimony—in addition to satisfying itself that the proposed expert evidence meets the above criteria, a court must then consider whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice or other Rule 403, SCRE considerations. *State v. Warner*, 430 S.C. 76, 85, 842 S.E.2d 361, 365 (Ct. App. 2020), reh’g denied (May 28, 2020); *see also State v. Slocumb*, 336 S.C. 619, 628, 521 S.E.2d 507, 512 (Ct. App. 1999) (holding that under Rule 403, SCRE, expert testimony “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”) (internal quotations omitted). “All expert testimony must meet the requirements of Rule 702, regardless of whether it is scientific, technical, or otherwise.” *Graves v. CAS Med. Sys.*, 401 S.C. 63, 73–74, 735 S.E.2d 650, 655 (2012).

Based on his deposition testimony and the “Opinion Outline” provided by the Receiver, Mr. Miller intends to testify as to five topics as outlined above that should be excluded.

I. Mr. Miller’s Opinions Impermissibly Embody Legal Conclusions.

It is apparent from Mr. Miller’s deposition testimony and “Opinion Outline” that he intends to offer legal conclusions and to testify as to the coverage afforded by the Penn National policies at issue in this coverage action. Such testimony, if permitted, would impermissibly intrude upon the role of the Court, and is not admissible under the South Carolina Rules of Evidence. It is hornbook law that experts may not opine on the law. *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003) (“In general, expert testimony on issues of law is inadmissible.”); *see also Brown v. Dennis*, No. 3:15-3334-JMC-PJG, 2016 WL 4618892, at *2 (D.S.C. Sept. 6,

2016) (excluding “impermissible legal conclusions”); *see also Carter v. Bryant*, 429 S.C. 298, 313, 838 S.E.2d 523, 531 (Ct. App. 2020), reh’g denied (Feb. 20, 2020), cert. denied (Oct. 19, 2020); *see also Newkirk v. Enzor*, No. 2:13-cv-1634-RMG, 2017 WL 823553, at *5 (D.S.C. Mar. 2, 2017) (excluding legal opinions of an attorney); *see also Cont’l Cas. Co. v. Amerisure Ins. Co.*, 886 F.3d 366, 370 n.3 (4th Cir. 2018) (excluding expert testimony in insurance coverage dispute which was “nothing other than [the expert’s] interpretation of the [insurance policy] exclusion” and other relevant policy provisions); *America Online, Inc. v. St. Paul Merc. Inc. Co.*, 207 F.Supp.2d 459, 466 n.1 (E.D. Va. 2002), aff’d 347 F.3d 89 (4th Cir. 2003) (holding that it is typically improper for a court to rely on expert testimony for purposes of interpreting the terms and clauses of a contract”); *Am. Home Assurance Co. v. Federal Ins. Co.*, 06-3237-CV-W-FJG, 2007 WL 1459816 (W.D.Mo. 2007) (excluding as an expert the dean of a law school and teacher of insurance law and torts who offered an opinion as to the obligations of parties under a settlement agreement despite being proffered as “industry custom and practice” because the substance of the opinions was made up of “assertions of legal conclusions which are reserved for this Court to determine”); *McCabe v. Macaulay*, 2007 U.S. Dist. LEXIS 124210 at *8 (N.D. Iowa 2007) (prohibiting lawyers, professors, and other experts from interpreting the law for the court or from advising the court about how the law should apply to the facts of a particular case); *Saunders v. Farmers Insurance Exchange*, No. 97-1104-CV-W-FJG, 2005 WL 8169104 (W.D.Mo. 2005) (excluding the declaration of a witness that was proffered to “assist the Court in understanding Missouri insurance practices and standards” because the prohibition on testimony on legal standards and conclusions applied to fact and expert witnesses alike, and rejecting the argument that the witness’s declaration concerning insurance law and regulations would be helpful to the court or the jury).

“The interpretation of an insurance policy is a legal issue.” *Bankers Standard Ins. Co. v. Chalmers*, No. 9:19-cv-0248-DCN, 2020 U.S. Dist. LEXIS 43164, at *9 (D.S.C. Mar. 12, 2020); *see also City of Hartsville v. S.C. Mun. Ins. & Risk Financing Fund*, 382 S.C. 535, 677 S.E.2d 574, 578 (S.C. 2009). As set forth above, Mr. Miller’s anticipated testimony includes the interpretation of the terms of the Penn National policies. For example, as stated in his Opinion Outline, Mr. Miller seeks to opine that “[t]he one million dollar aggregate on declarations pages of the Covil policies issued by Penn National does not apply to premises/operations coverage” and “Penn National Policies provide that aggregate on declarations’ pages only applies to property damage and not bodily injury.” (Ex. 3, Opinion Outline, pp. 1–3) Similarly, Mr. Miller opines that “[c]overage for operations/premises claims do not convert to completed operations claims following expiration of policy during which operations claim arose.” *Id.* at 3–4. These opinions rely upon Mr. Miller’s attempts to interpret the terms of the Penn National policies—a legal issue to be addressed by the Court.

In fact, Mr. Miller testified that he had never addressed the legal issues on which he is opining in this case in any publications or as a practicing attorney. (Ex. 4, Miller Deposition, pp. 17:23–18:14, 22:3–22:21) Furthermore, Mr. Miller was unable to identify any case or treatise to support his coverage analysis. *Id.* at 93:3–94:6. Instead, Mr. Miller relies on his interpretation of the policy terms and conditions—which are legal questions for the Court. *Id.*

Mr. Miller’s opinions regarding the scope of coverage afforded under the policies issued by Penn National do not meet SCRE 702’s requirements, and are unhelpful, inappropriate, and inadmissible. Any such opinion testimony regarding the scope of coverage afforded under the Penn National policies would encroach upon the role of the Court, and therefore, must be excluded.

II. Mr. Miller Is Not Qualified to Offer Opinions Regarding Document Retention and Litigation Hold Procedures for Insurance Companies.

Courts routinely exclude expert testimony from attorneys who do not have the experience in the insurance industry to qualify as experts on insurance standards and practices. For example, in *Modern Auto. Network, LLC v. E. Alliance Ins. Co.*, 416 F. Supp. 3d 529 (M.D.N.C. 2019), *aff'd* *Modern Auto. Network, LLC v. Eastern Alliance Ins. Co.*, 842 Fed. Appx. 847 (4th Cir. 2021), the court addressed the admissibility of expert testimony concerning “many of the nuances of claims handling” offered by an attorney with more than forty-five years of experience in the practice of law. *Modern Auto. Network, LLC v. E. Alliance Ins. Co.*, 416 F. Supp. 3d 529, 537 (M.D.N.C. 2019). The case concerned insurance claims settlement for a worker’s compensation claim, and the attorney-expert, William Senter, primarily practiced in workers’ compensation, personal injury, mediations, and arbitration,” and ““mediated in excess of 5,000 cases as a plaintiff’s attorney or a mediator,” with a majority of those cases being workers’ compensation cases.” *Id.* at 538. The court excluded the report and testimony because it was “unclear ‘how [Mr. Senter’s] experience le[d] to [certain] conclusion[s] reached’ in light of his lack of experience in insurance claim handling.” *Id.* at 538.

In *Nature’s Way Marine, LLC, v. Everclear of Ohio, LTD*, the court also considered the admissibility of expert testimony by two attorneys under Rule 702’s three part analysis of qualifications, reliability, and helpfulness. *Nature’s Way Marine*, No. 12-316-CG-M. 2014 U.S. Dist. LEXIS 158568 (S.D.AL. November 10, 2014). The court found that the proffered witness, a lawyer working in admiralty and maritime law failed the qualifications criteria to testify as an expert about a charter agreement because he had “no experience ... performing any of the actual work called for in the charter agreement,” and his legal training and experience made him no more qualified “to testify about a charter agreement breach than a layperson who has heard

the evidence... and is provided jury instructions.” *Id.* at *8. Similarly, in *Estate of Arroyo v. Infinity Indem. Ins. Co.*, 2016 U.S. Dist. LEXIS 115669, *6-7, 2016 WL 4506991 (S.D.Fla. 2016), the court excluded testimony by an insurance attorney despite his experience advising insurers about claims handling because he had no experience personally handling claims.

Here, although Mr. Miller worked in various claim roles for a single insurer over thirty (30) years ago and since that time has either practiced insurance law or served as an expert, he now seeks to offer opinion testimony concerning industry standards for insurance companies in relation to document retention and the issuance of litigation holds. For example, in opining that Penn National’s search for policies that it issued to Covil did not comply with industry standards, Mr. Miller states that “insurance companies begun [sic] to create data bases for insurance policy retention in the late 1970’s and early 1980’s” and “these data bases provided for policy searches by at least policy number and named insured.” (Ex. 3, Opinion Outline, pp. 5–6) Mr. Miller also seeks to opine that “Penn National failed to timely issue a policy hold.” *Id.* at 6. Similar to the cases discussed above, this opinion testimony that Mr. Miller offer should be excluded because Mr. Miller is not qualified to offer opinion testimony regarding the standards or best practices for insurance companies in maintaining and retaining documents.

Although Mr. Miller was employed by a single insurance company (Fireman’s Fund) more than 30 years ago in a claims role and has since that time been an attorney practicing in insurance law, he does not have any direct experience related to document retention by insurance companies or the issuance of litigation holds.⁵ For example, when questioned about the document retention program for Fireman’s Fund, Mr. Miller could not describe the program or

⁵ In fact, Mr. Miller emailed counsel for the Receiver and stated that he would be interested in knowing what the Receiver’s document retention expert thought about Penn National and its document retention policy. (Ex. 4, Miller Deposition, pp. 32:17–34:10, Ex. 4)

even provide basic information regarding its document retention programs, such as how long Fireman's Fund maintained historical liability policies or how documents were stored, either stating that he did not know the "specifics" or qualifying almost every response to such questions with "I think" or "I assume". (Ex. 4, Miller Deposition, pp. 40:10–43:8) Mr. Miller also testified that he was not able to provide information regarding document retention as to the industry as a whole. *Id.* at 96:15-97:7. In fact, Mr. Miller was not aware of an industry standard for the length of time that an insurance company should retain liability policies or offer any authority to support his opinion that a 25-year document retention period for liability policies was too short or somehow violated any industry standard. *Id.* at 126:20–127:9, 129:12-129:20. Mr. Miller could not recall offering an opinion as to the proper retention period for insurance policies before. *Id.* at 129:21-130:4.

As such, Mr. Miller does not have the requisite experience to allow him to acquire specialized knowledge with respect to standards or best practices in the insurance industry for maintaining or retaining insurance documents. Mr. Miller's curriculum vitae contains no mention of any experience with insurance industry standards or practices in relation to document retention. As a result, Mr. Miller is not qualified as an expert in insurance industry standards and practices for document retention or litigation holds.

Therefore, this Court should exclude Mr. Miller's opinion testimony regarding whether Penn National's search for policies it issued to Covil complied with insurance industry standards, whether Penn National should have had a database for insurance policy retention which provided for policy searches by policy number and named insured, or whether Penn National issued a timely litigation hold.

Respectfully submitted, this the 30th day of November, 2022.

GOLDBERG SEGALLA LLP

/s/ David G. Harris II

David G. Harris II

S.C. State Bar # 101951

Email: dharris@goldbergsegalla.com

Brady A. Yntema (admitted *pro hac vice*)

N.C. State Bar #: 25771

Email: byntema@goldbergsegalla.com

Alexander E. Davis

S.C. Bar # 100061

Email: aedavis@goldbergsegalla.com

701 Green Valley Road, Suite 310

Greensboro, NC 27408

Phone: 336.419.4900

Fax: 336.419.4950

Attorneys for Defendant Penn National

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

Case Number: 2020-CP-40-02098

Vs.

**RECEIVER FOR COVIL
CORPORATION'S AMENDED FACT
AND EXPERT DISCLOSURES**

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

Defendants.

TO: PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE CO., THROUGH
ITS COUNSEL OF RECORD

COMES NOW Peter Protopapas, as Court Appointed Receiver for Covil Corporation (the
“Receiver”), by and through his counsel of record, and serves his initial fact and expert witness
designations pursuant to the South Carolina Master Discovery/Scheduling Order for the
Coordinated Asbestos Litigation Docket and hereby supplements his November 12, 2021 response
to Penn National’s Interrogatory Number 7.

The Receiver hereby incorporates into this listing, as if fully reproduced herein, any and
all expert and/or lay witnesses who may be listed by any other party. The Receiver further reserves
the right to supplement this witness list and to call any witness necessary to authenticate documents
or exhibits and/or for rebuttal. The Receiver further reserves the right to use any depositions
noticed in this case in accordance with the provisions governing the use of depositions contained
in the South Carolina Rules of Civil Procedure and the applicable rules of evidence. The Receiver
reserves the right to call as a witness any person deposed in the above-captioned case. The Receiver

reserves the right to name additional witnesses, based upon further evaluation of the information gathered through the discovery process.

FACT WITNESSES:

1. **Peter D. Protopapas, Receiver for Covil Corporation**
Rikard & Protopapas, LLC
2110 N. Beltline Blvd.
Columbia, SC 29204

Peter D. Protopapas is the Court-appointed receiver of Covil Corporation and can testify as to Penn National's handling of claims for coverage asserted by Covil. Covil is in possession of an affidavit from Mr. Protopapas. Mr. Protopapas's deposition was taken in *Zurich v. Covil* (Case Number 1-18-cv-932), in the USDC Middle District, North Carolina, and in *Finch et al. v. USFG et al.* (Case Number 2019-CP-42-3003), in Richland County, South Carolina.

2. **Brian Flatley**
Ellis & Winters LLP
4131 Parklake Avenue, Suite 400
Raleigh, NC 27612

Brian Flatley is Litigation Support Manager at Ellis & Winters. He consults with firm attorneys and clients on the proper methods of data preservation, collection, processing, production, and review. Mr. Flatley can testify as to Ellis & Winters' court-ordered investigation into the existence and storage of Penn National's legacy liability policy documents and the options provided to the court for additional document review.

Upon information and belief, no written or recorded statements have been taken from this witness to date.

3. **Brett Reifsnyder**
Penn National

Brett Reifsnyder, Penn National's Director of Administrative Services, can testify as to the search of Penn National's records for insurance policies that were issued to or that otherwise cover Covil, the Company's document retention policy and application thereof, and Penn National's destruction of legacy insurance policies.

Mr. Reifsnyder has given testimony in the instant matter.

**4. Boyd Wright
Penn National**

Boyd Wright, Penn National's Senior Home Office Claim Examiner, can testify as to the search of Penn National's records for insurance policies that were issued to or that otherwise cover Covil, Penn National's handling of claims for coverage asserted by Covil, and Penn National's interpretation of the insurance policies it issued to or that otherwise cover Covil.

Mr. Wright has given testimony in the instant matter.

**5. Scott Maier
Penn National**

Scott Maier, Penn National's Senior Corporate Counsel, can testify as to Penn National's litigation hold policies and his issuance of a litigation hold related to Covil Corporation in December 2021.

Upon information and belief, no written or recorded statements have been taken from this witness to date.

EXPERT WITNESSES:

**1. Sharla Frost
Sharla J. Frost
6336 Rutgers Avenue
Houston, TX 77005**

Sharla Frost is a seasoned asbestos trial lawyer, with over three decades of trial practice. In the asbestos context, she has successfully defended a succession of manufacturers of asbestos containing products in numerous cases since 1989, including having obtained nine defense verdicts in asbestos personal injury cases in Texas, Kentucky, Georgia and California between 2001 and 2017, including three cases involving living mesothelioma claimants. Her clients have ranged from insulation manufacturing defendants such as Johns-Manville and Turner & Newell to small property owners such as a Ford dealership in Washington State. She has extensive experience in all aspects of asbestos case management, including verdict analysis, case strategy, settlement negotiations, trial strategy, trial presentation, post-trial analysis, and docket oversight. She has served as National Coordinating Counsel for a major defendant in asbestos litigation; has participated as a member of the National Trial Team for several defendants; and has evaluated both trial prospects and verdict risks for asbestos lawsuits on behalf of defendants in venues throughout the United States.

Ms. Frost will testify as to the development and evolution of the asbestos litigation over the course of its history; the standard for analysis and management of asbestos litigation in

the historical context of the litigation; the knowledge of asbestos defendants and potential asbestos defendants, as well as their insurers and other indemnitors, with regard to the scope of the litigation and the requirement to maintain historical records for policyholders; the importance of maintenance of historical records for a defendant in asbestos personal injury litigation; and an evaluation of the asbestos personal injury claims against Covil for which Penn National contributed to settlements.

**2. Charles Miller
Insurance Law Center
1442A Walnut St. #55
Berkeley, CA 94709**

Charles Miller, an expert in insurance industry standards and practices, was employed by Fireman's Fund Insurance Company for eighteen years in insurance claims. Mr. Miller has held several insurance claims positions, including senior adjuster, branch office general adjuster and claims manager. Mr. Miller also managed an asbestos claims facility and a nationwide major claims unit. Mr. Miller has practiced insurance law since 1990. He has extensive experience with the interpretation and application of third party insurance policy forms. Mr. Miller will testify regarding insurance industry claims practices and standards and insurance industry standards for the interpretation and application of insurance policies. Mr. Miller will testify regarding the history, derivation, intent, and purpose of the general liability and products/completed operations provisions of commercial general liability policies and the distinctions between general liability coverage and products/completed operations coverage. Mr. Miller will also testify regarding insurance industry standards for the timely and thorough search for insurance policies.

In addition, the Receiver for Covil Corporation reserves the right to call any of the following individuals and/or entities:

- 1. Penn National through its corporate representative(s) in this matter.**
- 2. Penn National through its corporate representative(s) in prior deposition testimony offered in other matters.**
- 3. All witnesses listed by Penn National.**
- 4. All witnesses listed in the Receiver's Answers to Interrogatories and any and all supplements or amendments thereto.**
- 5. All witnesses deposed in this case.**
- 6. All witnesses identified in any deposition taken in this case.**

7. Any and all records custodians, or other witnesses necessary to authenticate any document the Receiver seeks to admit at trial, live or by deposition upon written questions.

8. Any witness necessary for rebuttal.

Dated: November 7, 2022

Respectfully submitted,

s/ Jescelyn T. Spitz
Jescelyn T. Spitz
Rikard & Protopapas, LLC
2110 N. Beltline Blvd.
Columbia, SC 29204
803.978.6111
bb@rplegalgroup.com

AND

G. Murrell Smith, Jr. (S.C. Bar No. 66263)
Jonathan M. Robinson (S.C. Bar No. 68285)
Smith Robinson
2530 Devine Street, 3rd Floor
Columbia, SC 29205
Phone: (803) 254-5445

Counsel for the Receiver

CV

Charles M. Miller, Esq.
INSURANCE LAW CENTER
1442A Walnut St. #55
Berkeley, CA 94709
Phone: (510) 549-9736
Fax: (510) 549-9726
Cell Phone: (510) 701-2963
E-Mail: cmiller.ilc@earthlink.net
EIN: 94-3335685

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The Insurance Law Center

The Insurance Law Center provides an exclusive combination of resources on insurance claims practices. These include:

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- Experience in testifying on insurance policy interpretation based on insurance industry publications.
- An extensive and unique library on insurance industry claims practices and policy interpretations that provide a sound basis for expert opinions.
- A one of its kind data base of well over one million pages of insurance company documents, depositions, manuals and policies and procedures that can be used in discovery as well as the basis for expert opinions.
- See attached for complete list of Insurance Law Center Services.

Experience:

Mr. Miller was employed by Fireman's Fund Insurance Company for eighteen years in insurance claims. Mr. Miller has held several insurance claims positions, including senior adjuster, branch office general adjuster, and claims manager. Mr. Miller also managed an asbestos claims facility and a nationwide major claims unit. Mr. Miller has practiced insurance law since 1990. Mr. Miller has extensive experience with the interpretation and application of first- and third-party insurance policy forms.

Since 1997, Mr. Miller has been retained in over 200 cases in at least fifteen states and territories (federal and state courts) as an expert on insurance coverage and claims handling, including cases concerning construction defects, first-party fire and water losses, disability claims, automobile liability including underinsured and uninsured motorist claims, professional liability claims, claims under various automobile insurance policies, comprehensive commercial liability policies, and excess and umbrella policies. Mr. Miller has been retained in both federal and state courts, including those in Arizona, California, Idaho, Nevada, New Mexico, South Carolina, Pennsylvania, Florida, the U.S. Virgin Islands, Washington, Oregon, Utah, Arkansas, Missouri, Mississippi, South Carolina, Louisiana, Massachusetts, West Virginia, and Toronto, Ontario, Canada. Mr. Miller has been qualified as an expert on insurance industry claims handling standards and practices in Arizona, Nevada, Arkansas, Idaho, Florida, Colorado, Hawaii, New Mexico, Ohio, Missouri, Louisiana, Washington, Kansas, Texas, South Carolina, West Virginia, and California.

Insurance Industry Experience:

1972-1980

- Held several positions at Fireman's Fund Insurance Company, including Senior and Branch Office General Adjuster.
- Experienced in the handling of first-party claims, including claims arising out of collision losses, theft losses, residential fires, and burglaries from commercial establishments.
- Experienced in handling a wide variety of commercial and personal liability claims, including construction and auto accidents, underinsured and uninsured motorist claims, environmental claims, construction defects, and personal injury claims.
- Responsible for the management and supervision of litigation.

1980-1986

- Managed insurance company asbestosis claims facility. Responsible for the supervision of litigation, investigation, and evaluation of over 600 claims for asbestosis-related injuries.
- Continued responsibility for the handling, investigation, and resolution of both third- and first-party claims as Branch Office General Adjuster.

1986-1990

- Managed insurance company major claims unit.
- Responsible for nationwide management of a variety of specialized claims, including construction defect, investment advisors professional liability, and sexual discrimination and harassment.
- Responsibilities included interpretation of insurance policy provisions and management of insurance coverage declaratory relief actions brought by either the policyholder or the company.

Legal Practice:

2004-Present	Insurance Law Center, Berkeley, California
2000-2004	Special Counsel, Wendel Rosen Black & Dean, Oakland, California.
1998-2000	Law Office of Charles M. Miller, San Francisco, California
1995-1998	Associate, Gray Cary Ware & Freidenrich. Practice in Insurance Litigation
1992-1995	Associate, Pettit & Martin
1990-1992	Associate, Heller, Ehrman, White & McAuliff

Education:

University of San Francisco	1990 J.D. (Magna Cum Laude) Law Review
Western Washington University	1970-1971 Masters Studies Political Science
Western Washington University	1970 B.A. Political Science (President's List)

Insurance Training:

Insurance Institute of America, Associate in Claims

Attendance at seminars, conventions, and other programs put on by insurance industry organizations covering a variety of topics related to insurance claims handling and insurance policy interpretation and application.

Teaching and Presentations:

"Insurance Issues and COVID-19 Part III," Trial Guides Webinar, July 31, 2020.

"Post Loss Duties," AAJ Annual Meeting, July 14, 2020.

"Insurance Issues and COVID-19," Trial Guides Webinar, May 27, 2020.

"Corona Virus And Insurance Coverage," New Mexico TLA Webinar, May 8, 2020

"COVID-19 and Insurance Business Interruption Claims," Colorado TLA Webinar, April 27, 2020.

"Insurance Issues and COVID-19," Trial Guides Webinar, April 1, 2020.

First Party Claims Conference, FPCC, "Handling The Insurance Claim Prior to Litigation," October 2019, Providence, RI.

First Party Claims Conference, FPCC, "Addressing Policyholders Claims in an Ethical Manner with Insureds and Insurance Companies when Experts are Involved," March, 27, 2019, Marina De Rey, CA.

Back to School in Insurance Law Seminar, NM TLA, "Insurance Industry Practices in Handling First Party Claims," and "Use of Experts in Support of Claim Denials," Feb. 22, 2019, Albuquerque, NM.

Oct. 2018, "Insurer's Use of Experts in First Party Claims," First Party Claim Conference, Providence, RI.

March 2017, "Developing the UM/UIM Claim," New Mexico TLA Annual Insurance Law Seminar

August 2016, "Discovery in Bad Faith Cases," and "Institutional Bad Faith," Montana TLA, Missoula, Mt.

August 2016, "Institutional Bad Faith," AAJ Convention, Los Angeles.

First Party Claims Conference, FPCC , March 2016, "Anatomy of a Bad Faith Case."

February 2016, "Discovery in Bad Faith Cases," and "Institutional Bad Faith," New Mexico TLA Annual Insurance Law Seminar.

January 2016, "Institutional Bad Faith," Washington State AJ annual insurance law seminars, Seattle and Spokane, WA.

June 10, 2014, Farmers Organization and Claims Operation, Farmers Annual Agent's Association Meeting, Las Vegas, NV.

October 2013, "Use of Experts in Insurance Bad Faith Cases," First Party Claim Conference, Providence, RI.

April 2013, "Use of Experts in Insurance Bad Faith Cases," North Carolina Bar Association program, "Why Do We Call It 'Bad Faith'?", Charlotte, NC.

March 2013, NAPIA/CAPIA Conference, "The Wear and Tear and Similar Exclusions in Wind and Water Damage Claims."

April 2012, "Bad Faith Issues In Business Interruption Claims," ABA Property Insurance Law Section, Los Angeles, CA.

September 2012, "Use of Experts in Insurance Bad Faith Cases," UTAH TLA, Salt Lake City, UT.

August 2011, "Developments In Insurance Claims Practices," AAJ, New York, NY.

August 2009, "Insurance Bad Faith and Settlement Institute," Advocacy Institute, Las Vegas, NV.

December 2009, "Insurance Coverage for Chinese Drywall Claims," Testimony before the NAIC Catastrophe Insurance Working Group, San Francisco, CA.

May 2009, "Presenting the Coherent Case," Claims Practices Seminar, Miami, FL.

October 2008, "Issues in Insurance Claims Practices," Claims Practices Seminar, Reno, NV.

September 2008, Presentations on Ethics and Claims Adjusting, Western Regional PLRB Convention, Sacramento, CA.

May 2008, Presentations on Ethics and Claims Adjusting, Eastern Regional PLRB Convention, Tampa, FL.

November 2007, "Issues in Insurance Claims Practices," Claims Practices Seminar, Reno, NV.

October 2006, "Issues in Insurance Claims Practices," Claims Practices Seminar, Deadwood, SD.

June 2006, "Discovery in Insurance Bad Faith Cases and Related Issues," Mississippi TLA, Memphis, TN.

April 2006, "Insurance Industry Claims Practices," Claims Practices Seminar, Reno NV.

April 2006, "Institutional Bad Faith Issues and Pay for Performance in the Insurance Industry," Ontario TLA, Toronto, Ontario, Canada.

May 2005, "Discovery in Insurance Bad Faith Cases and Related Issues," North Dakota TLA, Fargo, ND.

November 2004, "Insurance Industry Claims Practices," Claims Practices Seminar, Reno, NV.

September 2004, "Discovery in Insurance Bad Faith Cases and Related Issues," Utah TLA, Salt Lake City, UT.

September 2004, "Institutional Bad Faith Issues and Pay for Performance in the Insurance Industry," New Mexico TLA, Albuquerque, NM.

July 2004, "Incentive Pay's Effect on Claim Practices," Claims Practices Seminar, Reno, NV.

May 2004, "Recognizing Improper Claim Practices," Claims Practices Seminar, Deadwood, SD.

April 2004, "Discovery in Insurance Bad Faith Cases and Related Issues," Arkansas TLA, Little Rock, AR.

February 2004, "Incentive-Driven Claim Practices," Claims Practices Workshop, Reno, NV.

December 2003, "Non-Rate Action Plans," Claims Practices Workshop, Reno, NV.

June 2003, "Claim Practices Cases – Looking Ahead," Claims Practices Workshop, Reno, NV.

March 2003, "Claim Practices in Non-Rate Marketing Actions," Claim Practices Workshop, Reno, NV.

January 2003, "Farmers Ins. Group Corporate Organization and Operations," WTLA, Seattle, WA.

November 2002, "The Effects of Performance-Based Pay for Adjusters," Claim Practices Workshop, Reno, NV.

May 2002, "SFXOL – Settle for X or Less," Property-Casualty Claim Practices Workshop, Reno, NV.

December 2001, "A de novo Review of Claim Practices," Property-Casualty Claim Practices Workshop, Reno, NV.

1993-1996, Presented updates on Environmental Insurance Law at Santa Clara County Annual Environmental Law Update Conferences.

1992-1995, Presentations on environmental and insurance law issues at Federal Publications Seminars in Los Angeles, Phoenix, San Francisco, and Sacramento.

1972-1990, During employment in the insurance industry, responsible for the presentation of several courses and lectures on various aspects of insurance claims handling.

Organizations:

California Bar Association

American Bar Association

San Francisco Bar Association

American Association for Justice

Consumer Attorneys of California

Alameda Bar Association

San Francisco Trial Lawyers Association

Publications:

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Bruce D. Bell, et al. v. Dietz-Crane Builders LLC, et al., Maricopa Cty., AZ, June 12, 2008

Recommendations:

Provided upon request.

From: Charles Miller <cmiller.ilc@earthlink.net>
Sent: Saturday, November 26, 2022, 3:16 PM
To: "Nes, W. Brad" <brad.nes@morganlewis.com>
Subject: OPINION OUTLINE.docx
Attachments: Insurance Industry Standards Regarding Locating Old or Lost Policies.docx; LOOK FOR
COVERAGE.docx; INVESTIGATION STANDARDS.doc; OPINION OUTLINE.docxII.docx

[EXTERNAL EMAIL]

This should do it.

Charles M. Miller, Esq.
Insurance law Center
1442A Walnut St. #55
Berkeley, CA 94709
(510) 549-9736
Fax: (510) 549-9726
Cell (510) 701-2963

"Most Unhappiness comes from not being able to sit quietly in a room." Pascal

Insurance Industry Standards Regarding Locating Old or Lost Policies.

It is critically important that an insurer commence a timely and thorough investigation of any asbestos claim where there is a lost policy (or policies). This is because such claims frequently span many years (referred to as long-tail claims) and can expose an insured to substantial damages. This is certainly the case with asbestos claims. Until the mid-1980's, there was no asbestos exclusion on the standard Insurance Services Office ("ISO") Comprehensive General Liability ("CGL") policy. Accordingly, pre-mid-1980's primary CGL policies are more likely to provide coverage for asbestos claims for an insured.

Reconstruction of older policies thus becomes an important if not critical objective where an insured faces claims arising from asbestos exposure over several years. Often, this reconstruction is done through the use of secondary evidence. Indeed, one insurance industry source offers that "greater weight might be accorded to secondary documents in the following order:

- (1) Insurer documents
- (2) broker document, or other third-party documents, and
- (3) policyholder documents.

(Talley, Douglas, "Proving the Existence of Past Policies with Secondary Evidence," IRMI, January 2011, p. 3)¹

¹ The International Risk Management Institute ("IRMI") publishes several volumes on various types of insurance policies, such as professional liability, commercial liability, commercial property, and personal property policies, including this volume on insurance claims handling. These volumes are also used widely in the insurance industry to assist claims personnel in the interpretation and application of insurance policies. According to the IRMI "Personal Risk Management & Insurance" publication, the publication "was designed, researched, and written by the staff of IRMI, with the assistance of technical advisers. . . . It is designed to be used by those with a working knowledge of

The foregoing order of importance is understandable, given that an insurance company commonly has the greater resources to keep and maintain policy records of many kinds for many years.

In terms of specific types of documents, the same author notes that certificates of insurance “will certainly be of **great probative value**, since such certificates by industry custom and practice are designed to evidence the existence and certain material terms of a policyholder’s insurance coverage” (Id., p. 4; emphasis added).

Other types of recognized secondary evidence that an insurer can seek include:

Records produced by insurance brokers, including ledgers or schedules of insurance.

Premium invoices.

Loss prevention surveys conducted by insurers.^[2]

Specimen or sample policies used by the insurer during the policy period in question.

Loss history cards

Broker “placing slips.”

Broker and underwriter correspondence.

Testimony of an insured’s employee.

Testimony of an insurer’s employee.

(Id., pp. 4–5)³

insurance—insurance . . . adjusters—to give them detailed and practical information about specific topics on which they questions. . . . The research for the [publication] involved a thorough review of insurance literature, legal research, and interviews with many underwriters, agents, attorneys, and adjusters. Virtually all of the text was written by IRMI staff and has been extensively reviewed by insurance professionals not affiliated with the firm. In addition, each section written by us was carefully reviewed internally and revised as necessary” (1st reprint, September 2004, Preface).

² In this regard, underwriting files also become an important source of secondary evidence.

Another insurance industry source also provided the following potential sources of information that the insurer could access by “interviewing and obtaining documents from:

1. The risk manager or person responsible for the insurance program.
2. The broker
3. The insurer
4. Records retention personnel
5. Additional insureds
6. Outside counsel
7. Former employees.

(“Insurance Archaeology,” Practical Risk Management/Risk Management Activities – Topic A-24, IRMI, p. 4)

It is particularly important to note that “[o]btaining information from the state’s insurance regulatory body can be helpful as well. These government agencies require insurers admitted to conduct business in the state to file policy forms as a prerequisite to obtaining approval. . . . [S]tate regulatory bodies may be a valuable source of information” (Id.).

An insurer can also investigate various business records which can be a source of secondary evidence. The “[p]rimary method to prove the existence of a lost

³ Elsewhere, Talley points out that the “the majority rule appears to be that the burden of proof required to establish the issuance and terms of a lost policy is a ‘preponderance of the evidence’” (Talley, Douglas, “Judicial Reconstruction of Missing Insurance Policies,” IRMI, September 2010, p. 5; and see “Coverage for Pollution Claims Under Lost Policies,” IRMI, p. 3, “Most courts hold that policyholders are required to prove the existence and terms of lost insurance policies only to a preponderance of the evidence”). Any claims handler responsible for searching for lost policies must keep this standard in mind at all times in order to be able to objectively determine when he/she has sufficient evidence that likely will meet the standard.

insurance policy is to use ordinary business records that mention or pertain to the insurance provided there under,” such as,

- Accounting ledger sheets
- Canceled premium checks
- States of premium accounts
- Credit invoices
- Loss runs
- Settlement agreement
- Certificates of insurance
- Binders
- Correspondence
- Proofs of loss
- Premium audit records
- Premium refunds/dividends
- Minutes of board of directors meetings.

(Id., pp. 3–4)

In addition, the insured’s accountant may have records on the premiums paid to insurers for a particular period of time, if not also documents supporting the issuance of the lost policies.

“Another common means of proving the existence of a lost primary policy is to show that it was referenced on the schedule of underlying insurance in a contemporaneous umbrella or excess policy. Since the existence of primary coverage is so important to the operation of excess coverage, courts feel safe in presuming that, if the umbrella or excess insurer acknowledged them, the primary policies must have existed” (Id., p. 4).

“Another way to prove that lost insurance policies exist is to introduce the testimony of an eyewitness who was involved in the purchase of the insurance” (Id., p. 5).

As for the terms of a policy, it has been recognized that “the terms of a lost policy [can be determined] by introducing specimen copies of standard insurance forms commonly used in the industry and by showing that the insurer used such forms” (Id., p. 6).

In addition, claim files can also be a valuable source for information on lost policies, if not the lost policies themselves. It is not unknown in the insurance industry for claims handlers to copy and insert sections of an insured’s policy(ies) in a claim file involving a claim presented against an insured. Absent actual copies, claim files commonly contain information on the application policy(ies) such as the policy number, policy type, policy period and policy limits.

It is also important to consider reinsurance insurers as a source of policy information. Reinsurance is widely used in the insurance market place to provide additional underwriting capacity to many national insurance companies. “**Reinsurance** is the transfer of insurance risk from one insurer to another through a contractual agreement under which one insurer (**the reinsurer**)⁴ agrees, in return for a **reinsurance premium**, to indemnify another insurer (**the primary insurer**)⁵ for some

⁴ The reinsurer is defined as “[t]he insurer that accepts all or a portion of the liabilities of the ceding company.” (“Basic Reinsurance Terminology,” IRMI, p. 1).

or all of the financial consequences of certain loss exposures covered by the primary insurer's policies. Reinsurance is commonly referred to as "insurance for insurers." (Reinsurance Principles and Practices, Harrison, Connor M., ed. (The Institutes, 1st ed. 2004) §1.3 (Hereinafter, "Harrison")(emphasis in original). Because the reinsurer has assumed a certain amount of the risk of loss, the reinsurer will become involved in the underwriting and claims handling. In other words, to the extent the reinsurer has assumed a risk of loss, the reinsurer frequently acts as if it were the primary insurer.⁶

The reinsurer and primary insurer enter into a contract, not unlike an insurance policy, which shifts some of the risk of loss from the primary insurer to the reinsurer. There are two basic types of reinsurance contracts. The first is treaty reinsurance which "refers to arrangements in which groups of risks that fall within the terms of the agreement are normally insured automatically." ("Types of Reinsurance Contracts," International Risk Management Institute ("IRMI"), p. 1). Under treaty reinsurance the reinsurer is required to reinsure all risks that fall within that reinsured category.⁷ Therefore, the reinsurer may agree to reinsure all commercial property exposures in

⁵ The primary insurer is also referred to as the ceding company, which is "[t]he direct or primary insurer that contracts with a reinsurer to share all or a portion of its losses under insurance contracts it has issued to its insured in return for a stated premium." (Id.)

⁶ The "reinsurance market is of critical importance to the affordability and availability of all forms of insurance." ("Reinsurance," IRMI, p. 1). Indeed, primary insurers may not be able to underwrite certain lines of risk without access to reinsurance. For example, reinsurers paid "more than 60 percent of the total insured losses from hurricanes Katrina, Rita and Wilma in 2005." (Id.).

⁷ The two types of reinsurance contracts are also each divided into proportional and nonproportional reinsurance agreements. A discussion of these categories is not necessary for the purposes of this declaration. Nonetheless, it should be noted that each of these types of reinsurance policies provide that at some point, either measured by dollar amount or other factors, the reinsurer accepts a certain amount of the risk of loss.

excess of \$10 million per location. The second type of reinsurance contract is the facultative contract, in which “risk[s] are individually accepted or rejected according to specific terms that are unique to a given reinsurance transaction.” (Id.). Here, the reinsurer has the right to accept or reject any risk offered to it. Accordingly, the reinsurer may conduct extensive underwriting of the risk to determine whether to reinsure the risk.

The most important feature of reinsurance is that it reduces the risk of loss for the primary insurer. Accordingly, the primary insurer is highly motivated, regardless of the form of the reinsurance contract, to make sure that the reinsurer is provided with all material information to underwrite the risk as well as evaluate claims. (See “Reinsurance Principles,” FC&S, January 2007, p. 3, “[T]he reinsured must disclose to the reinsurer all material facts which may affect the subject risk,” and see *Infra* for discussion of specific reinsurance contracts). If this is not done the primary insurer is at risk of not being able to enforce the reinsurance contract, which would mean the primary insurer may have to pay the entire amount of the loss.

In order to accurately determine the obligations of both the primary insurer and the reinsurer it is necessary to obtain and examine the reinsurance contract; otherwise, any evaluation of the contract will be, for the most part, speculation.⁸

Primary insurers will conduct some degree of underwriting, in conjunction with the reinsurer, whether the reinsurance agreement is facultative or treaty. For example, with

⁸ There are some common provisions in reinsurance contracts, and these include notice of loss and retention and limits clauses.(See *infra* for discussion of other reinsurance policy provisions). These provisions may, however, vary slightly in their language from one reinsurance contract to another.

facultative reinsurance, “the reinsurer underwrites every loss exposure individually upon its submission from a ceding company [primary insurer]. The ceding company is normally required to furnish detailed information on each exposure.” (“Types of Reinsurance Contracts,” IRMI, p. 3, and see “Reinsurance Principles,” FC&S, January 2007, p. 12, “The underwriter examines the ceding company’s financial statements, management, and underwriting philosophy...[and] the qualifications of the personnel and the territories where the insurer does business.”). Accordingly, the reinsurer will review, sometimes in detail, the nature of the risk to be reinsured. (Id., “Each reinsurance submission involves extensive exchanges of information and negotiations between the ceding company and one or more reinsurers.”). In a first party policy, where the risk to be insured is a structure or building, the reinsurer’s underwriting file may contain detailed information on the risk, such as its size, construction, age, and similar information regarding the condition of the property. This information can be critical in evaluating the risk that both the primary insurer and reinsurer agreed to insure. For example, the primary insurer and reinsurer may have agreed to insure the property in the condition it was in at the time the insurance policy was written and not require that the insured perform any work, modification or improvements to the property. This fact will weigh heavily if a loss later occurs where the primary insurer (and/or reinsurer) decides to deny all or part of the claim because of some condition of the property that they originally agreed to insure.

Primary insurers commonly provide a reinsurer with several types of important documents concerning the handling of an individual claim. These can include the primary insurer’s written evaluations of liability, coverage and damages, reports from

counsel or other consultants, and documentary evidence concerning the nature and scope of the claim.

In addition, reinsurers will often conduct audits of the primary insurer's claims operations. (See *Infra* for discussion of specific reinsurance contracts). A number of issues are addressed in such audits, including the following:

- (1) The confirmation that coverage exists both under the reinsurance agreement as well as the underlying insurance policy;
 - (2) An evaluation of the claims data and information, including the completeness of the data and the adequacy of the investigation;
 - (3) Review of all paid losses to ensure adequate information and analysis were conducted;
 - (4) Review of defense counsel evaluations...; and
 - (5) The reserving practices of the insuring company.
- ("Claims Audits," IRMI, p. 1).

INVESTIGATION STANDARDS

“An investigation must often be undertaken to fully develop the facts needed to determine coverage. Good faith claim practices require that this investigation be objective, thorough, and timely.” Markham, James J. et al, ed., The Claims Environment (1st ed. 1993) Insurance Institute of America,, p. 29,

Jones, James R., Liability Claim Practices, (IIC, First ed., 2001) Section 1.14 (insurers have good faith duty to perform investigations promptly and thoroughly)(hereinafter “Jones”),

Rokes, Willis Park, Aggressive Good Faith and Successful Claims Handling (IIC, 1st ed., 1987) p. 114 (hereinafter “Rokes”)(insurers have duty to conduct prompt investigations).)

“[s]tatements are written or recorded accounts of the facts and circumstances involved in a claim; they are the principal investigative tool of the claim representative. The basic purpose of a statement is to gather information in a logical and orderly fashion so that claim representatives can make decisions necessary for the disposition of the claims.” (Markham, p. 46)

Another insurance industry text points out: “The adjuster must conduct a thorough investigation and do it promptly. Since property insurance policies are first party in nature, the law will require the insurer to deal fairly with its insureds once a loss occurs. Unjustified delays are not tolerated.” (Loss Adjustment And Subrogation, (AEI, 2006, 6th ed.) p. 52).

LOOK FOR COVERAGE

An insurer must look for coverage and not just ways to deny coverage (See Markham, p. 13, “[T]he claims representative’s chief task is to seek and find coverage, not to seek and find coverage controversies or to deny or dispute claims”; and p. 9, “[C]laim representatives must investigate the facts of each claim because policyholders do not know exactly what is covered, under exactly what circumstances it is covered, or exactly what amount should be paid”).

OPINION OUTLINE
COVIL V. PENN. NATIONAL

I. The one million dollar aggregate on declarations pages of the Covil policies issued by Penn National does not apply to premises/operations coverage.

1. Aggregate limits were generally not made applicable to operations/premises coverage prior to 1986

However, aggregate limits were not the norm for general liability claims until the 1986 ISO revision of the standard CGL policy form. Prior to this point, many if not most insurers included an aggregate limit for claims arising from a “products” or “completed operations” hazard (discussed in more detail in Section V, *infra*) but had no aggregate limit for general liability claims that arose out of a policyholder’s ongoing operations rather than from sale or distribution of a product or the failings of a completed project causing injury at a later date. (Stempel 12 Conn. Ins. L.J. 349, *376).

The premises and operations hazard encompasses liability for accidental bodily injury or property damage that results from either a condition on the insured’s premises or the insured’s operation in progress, whether on or away from the insured’s premises.” (Public Liability B-3, FC&S Bulletins) Under the existing policy form [1973], the only limit that applies to some parts of the coverage is a per-occurrence limit, so the insurer’s liability for injury that occurs during the policy period increases with the number of “occurrences” held to have produced the injury....Both new policy forms [1986]-“claims made” and “occurrence”—put aggregate limits on all coverages to specify at the outset of the policy term the total amount available for indemnification’ (Commercial General Liability (ISO 3rd ed. 1986, and see “Understanding aggregate limits,” Independent Agent, Oct. 1988)). [NOTE: See also 1966 policy form]

At one time, insurers were willing to write coverage without aggregate limits for certain hazards—primarily premises/operations—that were expected to have low loss frequency.” (“Commercial General Liability Insurance,” (ISO 1986).

Under the former general liability policy provisions, no aggregate applies to bodily injury claims (other than for products-completed operations). ("Dealing with Aggregate limits under the new liability provisions," Malecki Donald, Rough Notes, Dec. 1986).

"[C]laims based exposure to asbestos released during insulation contracting operations, or exposure occurring on premises that the defendant, owned, rented, or controlled, are not subject to aggregate limits under pre-1986 policies, but instead are subject only to per occurrence limits. "Eleven Years after Frontier and Foret Hayden, Insurers Still Wrongfully Refuse to provide Premises-Operations Coverage: An Analysis of the Keasbey Decision," 18 Coverage 27 (July/Aug. 2006), and see "Products/Completed Operations Coverage 1997: Still Learning Professor Henderson's Lesson 25 Years Later," 7 Coverage 33 (ABA Nov/Dec. 1997). P. 11.

Insurers have acknowledged the foregoing. (Id. at pp. 5-6)

2. Penn National Policies provide that aggregate on declarations' pages only applies to property damage and not bodily injury.

1973 ISO Policy jacket provided that aggregates applied to completed operations and products and to general liability for property damage only.

The Penn National policies are identical to the 1973 policy. There is no aggregate for bodily injury arising from premises/operations (until 1986). NOTE: The Amendment-Limits of Liability Endorsements are the same.

Despite the fact that ISO issued new policy form in 1986 that applied aggregates to all covered hazards, including premises/operations bodily injury and property damage Penn National continued to use pre-1986 forms and endorsements I issuing its 1986 and 1987 policies to Covil.

See Amendment-Limits of Liability Endorsement, GL 99 17 03 81, Ed 03 81.

3. Plaintiffs who brought actions against Covil are bringing claims, for the most part, for injury arising from Covil's operations and therefore the claims are covered under the general bodily injury coverage which has no aggregate.

See New Appelman on Insurance law Library edition, Thomas, Jeffrey, et al. ed. (Sept. 2019). P. 16-28)

The Reference Handbook on the Commercial General Liability Policy, Rutkin, Alan S. et al., (ABA 2014), p. 45) "if the operation was still ongoing at the time the injury or damaged occurred, coverage for completed operations liability is no triggered."

See Frost deposition, pp. 78-112

See original complaints and related documents of underlying plaintiffs.

4. To the extent that Penn National claims that claims brought against Covil are completed operations/products claims that is contradicted by fact that Penn National has contributed toward settlements of those claims based on argument that there is only one \$1M aggregate in each of the two policies issued by Penn National.

II. Coverage for operations/premises claims do not convert to completed operations claims following expiration of policy during which operations claim arose.

- a. Scope of coverage involves two step process which includes (1) determining the source of the injury and then the time of the injury.

But although the time of injury to the third-party claimant is critical to the question of trigger, the time of injury does not have any bearing on the [*368] classification of the coverage. The source of the injury determines whether the loss is within coverage, is appropriately regarded as a general premise-operations liability matter or a products/completed operations hazard matter, or is subject to an exclusion. (Stempel, 12 Conn. Ins. L.J. 349, *367).

See also, "Products-Completed Operations Hazard," (IRMI, 2012) p. 2, "Products-Completed Operations Liability Coverage," (IRMI, 2011) p. VI.T.3).

- b. The source of the injury, once determined, does not change once it is established.

See CGL Policy Handbook, Weimer, Britton D. et al. (3rd ed. Wolters Kluwer, 2020) p. 4-46)

"The CGL policy definition of "bodily injury" makes clear that a death sustained at a later time caused by an injury occurring in an earlier period will be covered by the policy in effect at the time injury was sustained." ("Bodily Injury," IRMI, p. 1).

III. Penn National's search for policies it issued to Covil did not accord with insurance industry standards.

- a. Insurance industry standards for lost policy search

See attached

Industry standards for thorough and timely investigation

Standards applicable for lost policy searches

Obligation that insurer look for coverage

ARMA Generally accepted Recordkeeping Principles

Principle of Availability: An organization shall maintain its information assets in a manner that ensures their timely, efficient, and accurate retrieval.

Operational – An organization must determine how long information assets are needed to satisfy business needs. In some cases, the organization's actuarial or analytical needs for the information may be longer than the legal retention period. **Such needs are determined by interviewing those most knowledgeable about**

the operational value and risks associated with each information type.

("Implementing the Generally Accepted Recordkeeping principles," ARMA; emphasis added)

- b. Penn National did not comply with these standards.
- c. Penn National's search for lost Covil policies was seriously hampered if not prevented by Penn National's policy of only being able to search for policies by policy number between 1974 and 1991 and 1995.
 - 1. In my experience insurance companies begun to create data bases for insurance policy retention in the late 1970's and early 1980's
 - i. In my experience this practice initiated because of appearance of asbestos and other long tail claims in 1970s and 1980s.

However, by the mid or late-1970s, insurers logically should have seen a good deal of this coming because of coverage battles such as Forty-Eight Insulations v. INA and Keene Corporation v. Aetna being waged at the trial court level. By 1980, these coverage clashes had resulted in prominent appellate court opinions adopting broad trigger rules that were the talk of the industry. (Stempel 12 Conn. Ins. L.J. 349, *464).

"An organization's policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with the preservation obligation related to actual and reasonable anticipated litigation, government investigation or audit. ("Formulating a Records Retention Policy," Jones, Thomas M. et al., *For The Defense*, Jan. 2008, p. 43).

Insurers should take into account statutes of limitation and discovery rule in setting any destruction dates. (Id.)

NOTE: Penn National set a 50 year
destruction date on workers comp policies.

Frost depo, pp. 12-13, 1982 Manville BK

- ii. In my experience these data bases provided for policy searches by at least policy number and named insured.
 - iii. Penn National provided for searches for prior policies by name and for policies stored in 1991 and 1995 but stopped that practice in between. (See Rice deposition, pp. 16-17).
- d. Penn National failed to timely issue a policy hold

Standards on spoliation

Insurers are advised that they “might be found liable if evidence is intentionally or negligently lost or destroyed. This is often referred to as spoliation of evidence” (Popow, Donna J. [Ed.], Property Claim Practices [The Institutes, 1st ed., 2011], §3.29, and see §6.18, and see “Litigation Hold,” IRMI 4/2014).

See Illinois Record Retention Manual, p. 4, “The destruction of ANY and ALL records, whether paper or electronic, must stop immediately when a company receives notice of pending or imminent litigation, government investigation or audit, even when destruction is otherwise permitted under this schedule”

Covil Litigation hold policy...where litigation is reasonable foreseeable “then the employee should immediately notify the legal department”

6/20/2018 Request for production of policies in Finch

10/2019 Covil named defendant in coverage litigation

Continued destruction until litigation hold (Receiver's Motion, pp. 1 & 4-5)

Did not look for Covil (Reifsnyder depo. P. 53)

No paper record of what was destroyed (Id. at 56 & 67)

12/17/2021 First litigation hold

CHARLES MILLER - ROUGH DRAFT - CONFIDENTIAL - 11/28/22

1 REPORTER'S NOTE: Since this deposition
2 has been realtimed and you may be in
3 possession of a rough draft form, please be
4 aware that there may be a discrepancy
5 regarding page and line numbers when
6 comparing the real-time screen, the rough
7 draft, rough ASCII, and the final
8 transcript. Also please be aware that the
9 real-time screen and the unedited,
10 uncertified rough draft transcript may
11 contain untranslated steno, an occasional
12 REPORTER'S NOTE, a misspelled proper name,
13 and/or nonsensical English word
14 combinations. All such entries are
15 corrected on the final certified transcript.
16 If the deposition has been videotaped, the
17 real-time draft, if any, will be compared
18 against the audio of the videotape in order
19 to assure complete accuracy on the final
20 transcript.

21 *****

22 I, the party working with realtime,
23 understand that if I choose to use the real-time

24 rough draft screen or printout that I am doing so
25 with the understanding that the rough draft is an

2

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1 uncertified copy. The real-time rough draft may be
2 used in place of or in addition to my notes taken
3 during testimony. Specifically, if I choose to
4 cross-examine or prepare a witness by using a rough
5 draft, I am doing so with full knowledge that the
6 rough draft is uncertified and that I am doing so
7 at my own risk. I further agree not to share,
8 give, copy, scan, fax, or in way any distribute the
9 real-time rough draft in any form (written or
10 computerized) to any party. However, my own
11 experts, co-counsel, and staff may have limited
12 internal use of same with the understanding that I
13 agree to destroy all real-time rough draft and/or
14 computerized forms, if any, and replace same with
15 the final transcript and/or final computerized form
16 upon its completion.

17 By accepting a rough draft transcript
18 or a rough ASCII diskette, I am hereby agreeing to
19 the above-mentioned terms, and I further agree to
20 pay for these reporting services that have been
21 provided.

22

23

24

25

3

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1

THE VIDEOGRAPHER: Good afternoon,

2

we're now on the record. The time on the

3

monitor is 1:26 p.m. Eastern Standard time

4

today's date is November 28th, 2022. This

5

is the video recorded deposition of

6

Mr. Charles M. Miller in the matter of Covil

7

Corporation versus Pennsylvania National

8

Mutual Insurance, et al. This deposition is

9

being held remotely via Zoom.

10

Counsel, please introduce yourselves

11

after which our court reporter Susan will

12

swear in Mr. Miller.

13

MR. BROWN: Good morning, this is David

14

Brown for Defendant Pennsylvania National

15

mutual casualty company and I'll be at least

16

initially taking the deposition.

17

MR. NES: Brad Nes of Morgan Lewis for

18

the receiver for Covil Corporation.

19

MS. PEAKE: And Shanon Peake from Smith

20 Robinson also for the receiver for Covil
21 Corporation.

22 THE COURT REPORTER: The attorneys
23 participating in this deposition acknowledge
24 that I am not physically present in the
25 deposition room and that I will be reporting

4

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1 this deposition remotely.

2 They further acknowledge that in
3 lieu of an oath administered in person, I
4 will administer the oath remotely.

5 The parties further agree that if
6 the witness is testifying from a state where
7 I am not a Notary that the witness may be
8 sworn in by an out-of-state Notary.

9 If any party has an objection to
10 this manner of reporting, please state it
11 now.

12 [NO RESPONSE]

13 THE COURT REPORTER: Hearing none,
14 I will proceed.

15 WITNESS

16 being first duly sworn, testified as follows:

17 EXAMINATION

18 BY MR. BROWN:

19 Q. Good morning Mr. Miller, good
20 afternoon, here on the East Coast but good morning
21 to you on the West Coast. Could you please state
22 your full name for the record?

23 A. Charles Murray Miller, the middle name
24 is M-u-r-r-a-y.

25 Q. Mr. Miller, my name is David Brown. We

5

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1 met just briefly off the record before we started
2 to day. I represent Pennsylvania National Mutual
3 Casualty Insurance Company in a matter pending in
4 Richland County, South Carolina in which you've
5 been designated as a potential expert witness for
6 the Plaintiff.

7 Do you understand that's what brings us
8 here today?

9 A. Yes.

10 Q. Okay. I understand that you have given
11 deposition testimony previously is that a fair
12 assumption?

13 A. Yes.

14 Q. On how many occasions have you given
15 deposition testimony approximately?

16 A. Probably north of something like 200,
17 but what it is beyond that I couldn't tell you.

18 Q. And have all of those depositions been
19 as an expert witness or have some of them also been
20 as a fact witness?

21 A. I think a couple of them have been with
22 regard to my handling claims at Fireman's Fund
23 Insurance Company but other than that they've all
24 been as an expert witness.

25 Q. Okay. So you're well familiar with the

6

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1 process but let me just say a couple of brief
2 things up front.

3 If at any time you don't understand my
4 question or would like me to repeat it or clarify
5 something, just let me know and I'll be happy to do
6 that. I may also from time to time ask you to
7 repeat or clarify an answer I do that similarly to
8 make sure that we are understanding one another and
9 the record will be clear as to the questions and
10 the answers is that fair enough?

11 A. Sure.

12 Q. If you where are to take a break at any
13 time, that's fine, just let me know. If there's a

14 question pending I would like you to answer the
15 question, but otherwise we can take as many breaks
16 as you or counsel want to take this afternoon. I
17 don't think we'll be a long time, but to the extent
18 we need to take some breaks, just let me know and
19 we'll do that.

20 A. Thank you.

21 Q. Have you forwarded opinions in
22 connection with the Covil Corporation through its
23 receiver versus Penn National case in Richland
24 County South Carolina about what you expect to give
25 testimony in the trial in this matter?

7

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1 A. Yes.

2 Q. And what are those opinions?

3 A. Well, they're set forth in my outline.

4 Q. I don't have a copy of an outline?

5 A. Oh? Well, I don't know quite what to
6 tell you, then.

7 MR. NES: David, we produced some
8 supplemental documents this morning.

9 Mr. Miller transmitted his outline to me
10 over the weekend and we sent that to you.

11 MR. BROWN: Okay. Do you know if that

12 was sent to Brady or to me as well and do
13 you know what time.

14 MR. NES: Yes, that would have been
15 sent to Brady and David and whomever. My
16 paralegal usually just takes who is on the
17 docket.

18 MR. BROWN: Sure that's fine.

19 MR. NES: Hold on one second I can pull
20 it up. This was sent at 7:25 a.m. I guess
21 my time, 8:25 East Coast. Yeah, it looks
22 like Brady and David and maybe one of the
23 secretary or paralegals. I ask forward this
24 through secure file transfer to you.

25 MR. BROWN: Yeah, if you can forward

8

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1 that to me, that would be great.

2 MR. NES: What's your e-mail address
3 David.

4 MR. BROWN: It's D brown at.com.^ C

5 BY MR. BROWN:

6 Q. So Mr. Miller when did you reach these
7 conclusions?

8 A. Oh, over the last week and a half as
9 I've been working on this project. I think it's

10 been about a week and a half, actually.

11 MR. BROWN: Okay, let's go off the
12 record.

13 (A brief recess was held.)

14 THE VIDEOGRAPHER: The time on the
15 monitor is 1:33 p.m. We're going off the
16 record.

17 (A brief recess was held.)

18 THE VIDEOGRAPHER: The time on the
19 monitor is 1:38 p.m. and we're back on the
20 record.

21 BY MR. BROWN:

22 Q. Okay, Mr. Miller I understand that you
23 prepared a document that was circulated this
24 morning. I don't have access to it yet. Hopefully
25 I will get access during the course of this

9

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1 deposition but what opinions have you reached in
2 this matter? If you need to read the document to
3 me, you can?

4 A. Sure. My opinions are the following.

5 Number 1, the 1 million dollar
6 aggregate on the Declarations pages of the Covil
7 policies issued by Penn National does not apply to

8 premises operations coverage for bodily injury.

9 Number 2, coverage for operations slash
10 premises claims do not convert to completed
11 operations claims following expiration of policy
12 during which operations claim arose.

13 Number 3, Penn National's search for
14 policies it issued to Covil did not accord with
15 insurance industry standards.

16 And that would be the last one. Now,
17 within these in some cases are sub opinions. But
18 those are the -- those are the -- are there three?
19 I think there are three principal ones, yes.

20 Q. Okay. Can you give me the second one
21 again?

22 A. Yeah, sure.

23 Coverage for operations premises claims
24 do not convert completed operations claims
25 following expiration of policy during which

10

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1 operations claim arose.

2 Q. I appreciate there will be, as you put
3 it, sub issues and issues that form the bases of
4 those opinions, but in broad terms are those the
5 three opinions that you've reached in connection

6 with this matter?

7 A. Yes.

8 Q. Are there any other issues that you
9 intend to address between now and the time of trial
10 about which you are trying to reach an opinion?

11 A. I do not know. Sorry.

12 Q. As you sit here today are you aware of
13 any issues that you're still investigating to see
14 if you can reach an opinion?

15 A. No.

16 Q. And are those three issues issues that
17 you were asked to opine on or how did you come to
18 opine on those three issues?

19 A. Well that's a good question. I know
20 that initially the client asked me to explore some
21 areas and then there was dialogue about the areas,
22 so I think it ended up the issues being defined
23 kind of jointly in some ways. So I don't think it
24 was clear, you know, they did it all or I did it
25 all situation.

11

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1 Q. So you've got access to the Exhibit
2 Share, let me just make, for thoroughness here,
3 make sure you see Exhibit 1. Notice of Deposition

4 of Charles Miller?

5 A. Yeah, I'll open that up?

6 Q. Sure.

7 A. Yes, I have Exhibit 1 in front of me.

8 Q. And that is the notice you received for
9 today's deposition?

10 A. Yes.

11 Q. Okay. And let me ask you to refresh
12 and I will now introduce Exhibit 2?

13 A. Okay. I'm opening up Exhibit 2.

14 Q. Okay. It's receiver for Covil
15 Corporation's amended fact and expert disclosures.

16 Do you see that?

17 A. Well, no, my Exhibit 2 is -- wow that's
18 weird. There's a document from an entirely
19 different case.

20 How did -- oh, so I do apologize the
21 exhibits that I am looking at were the same program
22 but for a different case.

23 I see what happened. Somehow I was
24 able to open up this but I do not have -- I'm
25 sorry, I misunderstood what I was looking at. When

12

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1 I did end up in Veritext they gave me a list of

2 exhibits and I just thought it was the exhibits in
3 this case, and now upon further review it's the
4 exhibits in a case I was deposed in probably a year
5 ago that are still on the system here for Veritext.
6 So I do not yet have the exhibits in this matter on
7 that program that we're talking about adds I said
8 before, I apologize.

9 Q. Do you now see on your screen a
10 document Receiver For Covil Corporations amended
11 fact and expert disclosures?

12 A. Yes, I do.

13 Q. Okay. And if I scroll down to the I
14 guess the fourth page of that document it has your
15 name and then a paragraph and issues describing
16 your proposed testimony.

17 Do you see that?

18 A. Yes.

19 Q. Okay. And just to further illustrate
20 this for you, and this is dated November 7, 2022.

21 And just take a moment, if you would,
22 you don't have to read it out loud but just read
23 that paragraph about your anticipated testimony to
24 yourself and let me know when you're finished.

25 A. Yes.

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1 Q. Okay. And had you already as of
2 November 7, 2022 discussed with counsel for the
3 receiver these areas on which you were going to be
4 providing testimony?

5 A. Possibly, probably, yes, I would have
6 seen this before it went out if that's what you
7 mean.

8 Q. When did you -- when were you first
9 contacted about the possibility of providing expert
10 testimony in connection with this matter?

11 A. Bear with me for a moment. Let's see
12 if I can tell you that.

13 My retainer agreement is dated August
14 22nd, 2022, so the actual retention would have been
15 just, you know, a few days before that at most.

16 Q. And how were you first contacted?

17 A. I was first contacted by Mr. Nes, as I
18 recall.

19 Q. Okay. Had you worked with Mr. Nes
20 prior to this matter?

21 A. No.

22 Q. Had you worked with his firm prior to
23 this matter?

24 A. No.

25 Q. Do you know how it is that you came to

14

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1 be contacted by Mr. Nes?

2 A. Not -- I don't remember.

3 Q. And what do you remember about the

4 initial communication in terms of what was

5 described to you about the case and what you were

6 asked to look at?

7 A. Well, it's all been, you know, subsumed

8 in everything else that's happened since then, so I

9 can only assume that what we talked about were the

10 basics of the case and what his current status at

11 that time was and what they were looking for in

12 terms of somebody who could testify about certain

13 issues.

14 Just a moment.

15 So we talked about the court appointed

16 receiver, the background of the case, the

17 reconstruction of the insurance policies, who the

18 insurers were, then Penn National's two policies.

19 He mentioned something about the discovery order,

20 he mentioned that there were at that time I believe

21 two issues, one involving spoliation and one

22 involving the scope of the aggregate limit in the

23 Penn National policies and wanting to have someone
24 testify with regard to that and I think that that
25 was generally what we talked about.

15

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1 Q. Okay. I have marked now as Exhibit 3 a
2 document and I will share my screen so you
3 can -- do you now see Exhibit 3, Mr. Miller?

4 A. Okay. I'm looking at it.

5 Q. Yeah, and so it's a few page document I
6 just want to show you the beginning. It's an
7 e-mail chain. It looks like it appears a November
8 10, 2022 letter enclosing your retainer payment.

9 Do you see that?

10 A. Yes.

11 Q. And then this is the -- you mentioned a
12 moment ago an August 22, 2022 letter. Is this the
13 letter to which you're referring from you to Mr.
14 Nes confirming your retention?

15 A. Yes.

16 Q. Were you told when you were first
17 retained when the matter might come on for a
18 hearing before the court?

19 A. You know, I don't remember if I was.
20 It's usually a question I ask but I don't recall.

21 Q. And did you take notes from your
22 conversations with the receiver or the receiver's
23 counsel?

24 A. Yes, I did.

25 Q. Okay. And do you still have those

16

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1 notes?

2 A. Yes, I do.

3 Q. And were you just looking at some of
4 those notes to refresh your recollection as to what
5 you and Mr. Nes discussed?

6 A. Yes, I was.

7 Q. So once you were retained tell me what
8 you did to go about reaching your opinions in the
9 matter?

10 A. Well, over the period of time that I
11 worked on the case, I conducted research into the
12 insurance industry and related interpretation of
13 the aggregate limits provision in general liability
14 policies going back to at least the 1950s and then
15 I did that research either on my own through
16 sources I have or through the Boston Insurance
17 Library and obtained a good deal of materials as a
18 result of both research efforts and reviewed all of

19 those research materials. I then received a
20 substantial amount of documents from the client.
21 And it included other materials regarding the
22 interpretation in the insurance industry of
23 aggregate limits. Some of those materials I
24 already had from the results of my own research,
25 some I did not. I couldn't tell you which is which

17

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1 now.

2 And there were a number of -- and then
3 over time I received other documents from the
4 client regarding some of the underlying cases. I
5 received depositions from the client of people who
6 had been deposed in this case, as well as
7 depositions of people that have been deposed in the
8 underlying asbestos litigation, and I reviewed
9 those materials as well. So there was a process
10 over a period of time of obtaining and reviewing
11 these kinds of materials.

12 Q. Prior to this case, have you ever been
13 retained as an expert in a matter where an issue in
14 this case was whether or not an aggregate limit in
15 a commercial general liability policy applied to
16 premises operations in connection with bodily

17 injury claims?

18 A. Oh, that's a mouthful. So, no, I don't
19 recall if I have or not.

20 Q. If it was a mouthful I was just doing
21 my best to repeat the first opinion you gave me.

22 A. No, that's okay, I've got it.

23 Q. So let me make the question more
24 simple. The first issue, the first opinion that
25 you gave me earlier, related to the aggregate limit

18

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1 and whether or not it does or does not apply to
2 ongoing operations, premises claims for bodily
3 injury. Have you ever been retained to opine on
4 that issue before?

5 A. Not that I can recall off hand, no.

6 Q. Have you ever written anything, any
7 scholarly piece yourself on that issue before, a
8 law review article, an article for a magazine,
9 anything of that sort?

10 A. I don't believe so. It doesn't come to
11 mind. I don't believe so.

12 Q. Had you ever in your legal practice as
13 a lawyer ever litigated that issue before a court?

14 A. I have no recollection of doing that.

15 Q. In your work in the insurance industry,
16 had you ever addressed that issue as part of your
17 professional responsibilities on behalf of the
18 insurance company?

19 A. That specific issue, I don't recall.

20 We addressed aggregate and currents
21 limits issues frequently, but whether it was that
22 specific issue, I don't recall.

23 Q. And the issue that I understand you're
24 going to opine about in this matter is the specific
25 issue related to whether or not an aggregate limit

19

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1 does or does not apply to ongoing operations,
2 premises liability bodily injury claims correct?

3 A. Yes.

4 Q. And you don't recall whether you have
5 ever addressed that issue before in your work for
6 insurance company, in your legal practice as an
7 expert or as an scholar is that fair?

8 A. In the context of addressing it and in
9 the context of a specific case, I don't recall
10 that.

11 Q. Right.

12 A. You also asked in the context of

13 writing. I don't recall any writings that I've
14 done that have addressed that issue.

15 Q. Well, let me ask the question very
16 broadly, then prior to August of 2022 had you ever
17 addressed that issue? That is the issue of whether
18 or not an aggregate limit stated in a Declarations
19 page in a GL policy does or does not apply to
20 ongoing operations bodily injury claims arising
21 from premises operations?

22 A. Oh, I certainly -- I see now. I
23 certainly have addressed that issue as I recall in
24 my handling of claims because during the time that
25 I was handling claims from 1973 to 1986, it was

20

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1 understood that that aggregate did not apply to
2 bodily injury claims. I have some recollection of
3 that coming up. Whether -- in what specific cases
4 it came up, I don't recall, but it was a general
5 understanding that we had in our claims handling.

6 Q. And I was going to get into your CV and
7 background in a moment. But in your claims
8 handling for Fireman's Fund insurance company?

9 A. Yes.

10 Q. Have you ever worked for any other

11 insurance company?

12 A. No.

13 Q. Okay. The second opinion that you gave
14 me a few moments ago, the coverage for operations
15 slash premise claims do not convert to completed
16 operations following -- well, following the
17 exploration of the policy during which the
18 operations claim arose.

19 Did I state that correctly?

20 A. Yes.

21 Q. Can you elaborate for me a bit more
22 what you mean by that?

23 A. Okay, as I understand it, there is some
24 position taken that if this -- if these claims that
25 we're talking about, these asbestos claims

21

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1 originally arose out of Covil's operations, that as
2 the asbestos injury progressed in these individuals
3 and as the Covil Penn National policies expired,
4 that after that point, somehow these claims would
5 become then completed operations claims and I
6 really emphatically disagree that that's what
7 happens, but that's a summary of it.

8 Q. So let me make sure I understand. So

9 your understanding of Penn National's position is
10 that if a -- if Covil was engaged in ongoing
11 operations from 1986 to 1988 when Penn National had
12 GL coverage in effect for Covil and if a given
13 Plaintiff was exposed during those ongoing
14 operations to an asbestos-containing product sold
15 or installed by Covil, that that would be an
16 ongoing operations loss and even if the diagnosis
17 of the disease occurred later, that would not all
18 of the sudden convert that into a completed
19 operations ^ c loss.

20 MR. NES: Object to the form.

21 THE WITNESS: Yes, I assuming that the
22 Covil policies with Penn National expired in
23 1988 that would be correct.

24 BY MR. BROWN:

25 Q. Just assuming that arguendo for that

22

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1 question?

2 A. Yes.

3 Q. Have you ever written any articles, any
4 scholarly papers on that issue?

5 A. No, no.

6 Q. Have you ever litigated that issue

7 before the court before?

8 A. No.

9 Q. Have you ever encountered that issue in
10 connection with your work with Fireman's Fund
11 before?

12 A. Never heard of it until recently and I
13 have handled lots of asbestos claims and lots of
14 other similar types of cases and this is frankly, I
15 have to say the first time that I have gotten
16 involved in this issue and heard it. I have never
17 seen it raised before.

18 Q. So you have never dealt with it as an
19 expert witness before?

20 A. No, uh-uh, nor in my handling of
21 claims. It was never an issue.

22 Q. What's the source of your understanding
23 that that's Penn National's position?

24 A. The specific source?

25 Q. Yes.

23

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1 A. You know, I probably couldn't tell you
2 right off hand without looking back through the
3 documents that I have. I have also had
4 conversations with counsel. I might have picked

5 that up there. But I don't recall specifically.

6 Q. And I guess my question is did you
7 either read in a deposition that that was for a
8 Penn National employee that that was Penn
9 National's position?

10 A. I don't recall.

11 Q. Did you read in a court filing that
12 Penn National had made that that was Penn
13 National's position?

14 A. Again, I have read lots of court
15 filings. I don't recall specifically.

16 Q. So those are -- are the two what I will
17 call policy construction issues those are the two
18 policy related issues that you intend to opine on
19 in this matter, correct?

20 A. Yes.

21 Q. You do not for example intend to give
22 opinions on trigger or allocation, correct?

23 A. That's true.

24 Q. And then the third opinion you referred
25 was that Penn National's search for policies did

24

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1 not proceed in accordance with insurance industry
2 standards.

3 Did I understand that correctly?

4 A. Yes.

5 Q. And have you ever testified as an
6 expert witness on that issue before?

7 A. On insurance industry standards for
8 searching for lost policies?

9 Q. Yes, sir.

10 A. Yes, I have.

11 Q. And have you ever written any articles
12 on that topic before?

13 A. No, not yet.

14 Q. Did you ever litigate that issue as a
15 practicing attorney?

16 A. Oh, yeah, you know, I don't recall if
17 that came up in some cases or not. I don't recall.

18 Q. Did you ever address that issue in your
19 professional work with Fireman's Fund Insurance
20 Company?

21 A. I may have there, yes.

22 Q. What do you mean by that, you may have?

23 A. Well, in my work in handling asbestos
24 claims or in construction defect litigation, I know
25 that we made searches for policies and for going

1 back periods of time. And therefore it wouldn't be
2 surprising to me that we were searching for
3 policies that we couldn't readily find. It was
4 something that I was aware of that kind of an issue
5 that kind of a problem, how you would go about
6 doing it, but if I -- but I can't pinpoint a
7 specific case in which it happened.

8 Q. Do you intend to offer any opinion in
9 this matter related to Penn National's document
10 retention policy?

11 A. In the context of my third opinion, I
12 do.

13 Q. Okay. And what is that opinion?

14 A. Well, that opinion is in terms of its
15 document retention policy and that opinion was that
16 Penn National's search for lost Covil policies was
17 seriously hampered if not prevented by Penn
18 National's policy of only being able to search for
19 policies by policy number between approximately
20 1974 and the early to mid 1990s.

21 Q. Do you have any other opinions about
22 Penn National's document retention policy other
23 than what you just gave me?

24 A. Sure, I have some sub opinions here, I
25 will read those to you.

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1 Q. Sure.

2 A. In my experience, insurance companies
3 begun to create databases for insurance policy
4 retention in the late 1970s and early 1980s. With
5 regard to that, in my experience, this practice was
6 initiated because of the appearance of asbestos and
7 other long tail claims in the 1970s and early
8 1980s.

9 Next, in my experience these databases
10 provided for policy searches by at least policy
11 number and named insured.

12 And finally Penn National provided for
13 searches for prior policies by name for policies
14 stored in 1991 and 1995 and for prior periods --
15 prior to 1974, as I understand it -- but stopped
16 that practice in between, evidencing the fact that
17 that practice could have been done at Penn National
18 as it has been done in my own experience.

19 Finally, I don't know if this fits into
20 that or not, but under the same third opinion, Penn
21 National failed to timely issue a policy, a policy
22 hold in this case.

23 Q. And are you now reading to me from the

24 document that Mr. Nes recently e-mailed me to get
25 access to. When I get that document will I be able

27

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1 to read what you just said?

2 A. Yeah, exactly.

3 Q. Okay. And what are the source or
4 sources of the industry standards related to
5 document searches and document retention that you
6 just described?

7 A. Bear with me for just a moment. I want
8 to grab a document. I'm just going to print a
9 couple of things off for me here that were also
10 included in my outline but which I neglected to
11 print off prior to the beginning of this.

12 Q. Just let me know when you're ready?

13 A. Yeah, it's just printing right now.
14 Sorry for the delay. So the sources for my opinion
15 in this area are in three sub areas.

16 And the first is you have to look at
17 general investigation standards that apply to
18 insurance operations and particularly claims
19 operations and it's more specifically to coverage
20 issues.

21 And there's a great deal of literature

22 in claims handling textbooks that are used and have
23 been used to train people nationwide on claims
24 handling and that are very familiar in the
25 insurance industry.

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1 And these include texts like Markham's
2 M-a-r-k-h-a-m, the claims environment, Jones
3 Liability Claim Practices Rokes, Rokes, aggressive
4 good faith and successful claims handling and an
5 American Educational Institute Publication they
6 provide a lot of training materials to insurance
7 industry personnel, Loss adjustment and subrogation
8 is some of them that I have cited for this purpose.

9 Now, understand the ones that I'm cited
10 in support for this broad duty to investigate, in
11 other words a thorough and timely investigation are
12 a sampling of the written documentation in the
13 insurance industry for that standard. So I
14 couldn't site them all, it would take too long.
15 But this is a recognized standard in the insurance
16 industry that there must be a thorough and timely
17 investigation generally, particularly when it comes
18 to coverage matters such as we have here.

19 Secondly, in the course of that

20 investigation, the insurance company must look for
21 coverage. It must aggressively look for coverage
22 on the part of the insured. Again, you find this
23 in Markham's text as well as elsewhere. And these
24 materials -- these references are attached to my
25 outline. So in that context, we have to then ask

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1 what are the insurance industry standards for
2 looking for old and lost policies that confirm with
3 those broad requirements.

4 And you find those standards in a
5 variety of sources. First of all, the
6 International Risk Management Institute, or IRMI,
7 which is a robust resource online for insurance
8 claims handling, risk analysis, risk prevention,
9 underwriting, large -- a wide range of issues
10 involving insurance, including the interpretation
11 of policies, the handling of claims and indeed the
12 search for lost policies and what kind of conduct
13 needs to be engaged in order to fulfill those
14 general requirements that I was talking about.

15 There are -- besides IRMI's own
16 publication, there are publications within the IRMI
17 database, including insurance archeology and

18 judicial reconstruction of missing insurance
19 policies, and coverage for pollution claims under
20 lost policies. These are articles authored by
21 others that IRMI publishes and makes available to
22 the insurance industry to provide further guidance
23 to claims handlers Nationwide on what should be
24 done when they are looking for lost policies.

25 And in addition, I believe that there

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1 are publications within FC and S, as well, Fire
2 Casualty and Surety Bulletins, on this -- on these
3 responsibilities as well.

4 In addition, we also need to take a
5 look at matters involving reinsurance for example
6 and we can do that by looking at Harrison's text on
7 Reinsurance Principles and Practices which provides
8 us with guidance on the scope of reinsurance, its
9 purpose and the need for obtaining reinsurance
10 documents in a claims handling situation and in
11 particular in a situation, in my view, as we have
12 here. Again, there's some more materials in the
13 fire casualty and surety bulletin on this issue as
14 well as IRMI again.

15 So there is a robust amount of

16 materials in the insurance industry providing
17 guidance to insurers on one, conducting a thorough
18 and timely investigation, two, during which look
19 for coverage and three what needs to be
20 specifically done when you're searching for lost
21 policies.

22 So those are the sources that I rely on
23 for my initial opinions regarding the kind of
24 investigation that in my view should have been
25 conducted here and was not.

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1 Q. And just --

2 A. Oh, wait a second. And to be clear
3 about this, when I'm talking about these sources
4 I'm also talking about my own experience and
5 knowledge. And which in which I've been engaged in
6 this kind of work and have knowledge of so it all
7 comes together.

8 Q. No, I appreciate that and let me flesh
9 that out a little bit. On this third opinion that
10 is the issue of your opinion that Penn National
11 search for policies did not proceed in accordance
12 with industry standards, if I understood you a few
13 minutes ago, you have testified as an expert in

14 court unquote lost policies cases before, correct?

15 A. Yes.

16 Q. Okay. But you have not written any
17 articles yourself on that topic, correct?

18 A. Correct.

19 Q. And you don't recall ever litigating an
20 issue to that effect in the court in connection
21 with your private practice as an attorney, correct?

22 A. Yeah, I don't recall off hand. I do
23 recall oddly enough researching the issue, proof of
24 lost policies. There's a couple of what we would
25 call here in California seminal cases on the issue

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1 but I can't recall on what context that was right
2 off hand.

3 Q. During your days with Fireman's Fund,
4 the policy -- the company would be called upon to
5 conduct policy searches from time to time and you
6 would have played a role in that, correct?

7 A. Yes, absolutely.

8 Q. So it's that combination of things that
9 leads you to the opinion that you've discussed here
10 today, correct?

11 A. Actually, it's that combination of

12 things plus my review of the literature and the
13 insurance industry regarding the responsibilities
14 for looking for lost policies and the kind of
15 investigation that needs to be conducted, so it's a
16 combination of all of that.

17 Q. Did you say that one of your sub
18 opinions dealt with the retention policy of Penn
19 National?

20 A. Yes.

21 Q. I'm introducing Exhibit 4. But I will
22 share my screen with you, Mr. Miller.

23 A. Thank you.

24 Q. Do you see the document I have now
25 marked as Exhibit 4. Do you see it?

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1 A. Yeah.

2 Q. Okay. And it's a two-page document.
3 I'm really interested in the e-mail on the first
4 page. Just take a moment and read that if you
5 would.

6 A. Yeah, I have, yeah.

7 Q. So this is an e-mail dated November
8 8th, 2022 from you to Mr. Nes, correct?

9 A. Yes.

10 Q. And you state I would be interested in
11 knowing what your document retention expert thinks
12 of this organization and its standards and then
13 referencing the information on Page 2 of the
14 exhibit, correct?

15 A. I guess, yes. I don't -- I don't have
16 Page 2 of the exhibit in front of me so I'm not
17 sure what the --

18 Q. I'm showing it to you right now.

19 A. Oh, could you lower it a little bit.
20 Oh, ARMA, yeah, uh-huh.

21 Q. Okay. So as of November 8th, 2022, was
22 it your understanding that you would not be the
23 document retention expert for the receiver in this
24 matter?

25 A. Well, I had no understanding one way or

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1 another. I should say the only understanding I had
2 was that there was somebody else who had been
3 retained to do that, to do some of that work, but I
4 was also doing some. So how that was going to wash
5 out, I didn't know.

6 Q. And when did you find out that you
7 would be the only individual opining for the

8 receiver on that topic?

9 A. Most recently, like within the last
10 month or so, maybe.

11 Q. Okay. Did you ever speak with the
12 other individual who was perhaps going to be
13 providing testimony on document -- on retention
14 issues?

15 A. No.

16 Q. Okay. Other than counsel for receiver
17 have you spoken with anyone in reaching your
18 opinions in this matter?

19 A. No.

20 Q. Okay.

21 A. Oh, wait a second. I have spoken to
22 one or two people at the Boston Insurance Library
23 regarding the scope of their research, but that's
24 been it.

25 Q. And is that an organization upon which

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1 you rely from time to time in your work to help you
2 research information?

3 A. It's one of them, yes.

4 Q. So I will next introduce Exhibit 5.

5 (WIT-LAST-NAME EXH. #, DESCRIPTION, was

6 marked for identification.)

7 BY MR. BROWN:

8 Q. Counsel and Mr. Miller, do you see now
9 the first page of Exhibit 5?

10 A. Yes.

11 Q. Is this your CV?

12 A. Yes.

13 Q. Okay. And I will give you a minute to
14 look through it and I will scroll down as you need
15 me to. My question is, is this an up-to-date copy
16 of your CV?

17 A. Let's take a look at the list of
18 publications.

19 Q. I didn't see a list of publications.

20 A. Well there are several pages to this
21 CV.

22 Q. These are the only two I was able to
23 obtain online and no CV was produced so this is all
24 I had. Do you have a --.

25 MR. NES: We did produce his CV on our

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1 exhibit list. I believe it's in the 80s.

2 So it was produced.

3 MR. BROWN: Okay. In the exhibits

4 exchanged last night?

5 MR. NES: Right. I don't know where
6 this is from, but I transmitted to y'all
7 what he sent us.

8 BY MR. BROWN:

9 Q. Mr. Miller, do you have a for lack of a
10 better phrase, a CV that you keep up to date to
11 comply with federal court standards for things that
12 are required in terms of publications and testimony
13 and the like?

14 A. Yeah, I have a CV which I endeavor to
15 do the best I can to keep up to date.

16 Q. Is that the document that you supplied
17 to counsel for the receiver?

18 A. Yes.

19 Q. Let me just share this with you just so
20 we can talk about your work background. And
21 I -- we can talk about publications as well. But
22 the -- to make sure I'm understanding so it looks
23 like you graduated from western Washington
24 University in 1970, correct?

25 A. Yes.

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1 Q. And did you work for Fireman's Fund

2 beginning in '72 through '86 -- I'm sorry -- 90?

3 A. 1990, yes, 18 years.

4 Q. Okay. And then you were in private
5 practice from 19 -- you graduated from law school
6 in 1990 and were in your own private practice until
7 2004 and you've been at the insurance law center
8 since that time, correct?

9 A. I've done private practice at the
10 insurance law center as well.

11 Q. Do you still actively represent clients
12 in court?

13 A. Occasionally.

14 Q. So I'm going to ask you about your work
15 at Firemans Fund from 72 to 80 it says you held
16 several positions including senior and branch
17 office general adjustor.

18 Did any of that work from 72 to 80
19 involve dealing with long term exposure claims?

20 A. It started to more so in the late
21 seventies. We started to get involved in long
22 table claims in a few different ways.

23 Q. And in what ways were those?

24 A. Well, there was an appellate -- an
25 early appellate court decision out of the state of

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1 Washington and I think it was out of Spokane called
2 Groul. And it dealt with the liability of two
3 insurers who had successive -- you know one policy
4 and then the other one right after for some sort of
5 long term property damage that was happening
6 progressively.

7 And the court there, as I recall it,
8 held that both insurers were on the hook for the
9 property damage that occurred during their
10 respective policies. It was something along those
11 lines. And so it was an exposure kind of theory in
12 the context of property damage. But this was one
13 of the first cases we had seen like that.

14 And we did have working then with the
15 early formation of the environmental claims
16 facility at Firemans Fund and then in San Francisco
17 at the home office, we explored that issue further
18 as it might impact claims handling in the state of
19 Washington and elsewhere, letting them know about
20 the Groul decision and talking with them about
21 other decisions that may have come down by that
22 point. And I know that there was a good deal of
23 discussion on that.

24 We then got involved -- I then got

25 involved, as I recall it, in managing what we

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1 called the asbestos claims facility in Seattle.

2 That was around 1980, '82 for a couple of years I

3 think. What that involved was claims coming out of

4 the Bremerton shipyard, most of them from the

5 1940s, primary and secondary, by that I mean

6 secondary the man carrying the asbestos home in his

7 clothes, that had led to cancer asbestosis,

8 mesothelioma, and there were in the neighborhood of

9 600 claims.

10 We insured, Firemans Fund insured a

11 major manufacturer at that time of asbestos

12 materials and insulation materials who had been

13 identified at the Bremerton shipyards and so it was

14 a key defendant in all of that litigation.

15 And I managed that facility the

16 asbestos claims facility for whatever reasons that

17 needed to be taken care of during that period of

18 time and became also aware of the various coverage

19 positions that were being advanced as to which

20 insurance policies would need to be applicable and

21 also the need to find those policies because of

22 particularly, the changes in them prior to 1972,

23 let's say.

24 I mean after 1972. So I was somewhat
25 involved and engaged in that work as well. You

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1 know, I've been talking about this and now I'm
2 trying to remember your question. I'm not sure if
3 that's entirely responsive.

4 Q. No, that's very well helpful and I was
5 going to you actually anticipated my next question
6 which was going to be when did you get involved in
7 handling asbestos related bodily injury claims and
8 I think you said in the early 80s is that fair?

9 A. Yeah, 1980 sounds about right.

10 Q. Okay, at that time that is the early
11 80s when you first got involved in handling
12 asbestos related bodily injury claims, what sort of
13 documentation retention policy did Fireman's Fund
14 have?

15 A. Well, I don't recall the specific
16 policy, but I do recall that we could access prior
17 policies, a number of different ways, as I recall.

18 Q. Do you know whether Fireman's Fund, you
19 know, how long at that time in the early 80s, how
20 long Firemans Fund was maintaining historical GL

21 policies?

22 A. I don't recall that.

23 Q. Do you know if Firemans Fund had

24 a -- whatever the time that it was -- had some time

25 limit on how long it would maintain those

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1 historical GL policies?

2 A. I would assume so, given that that's

3 commonly done, but I do not know the specifics.

4 Q. When you say it's commonly done meaning

5 insurers have a common practice of retaining

6 documents for a certain period of time but no

7 longer?

8 A. Yes. That's been my experience.

9 Q. Okay. Did Firemans Fund change its

10 policy -- again, I know you don't remember how long

11 Firemans Fund kept policies in the early 80s, but

12 did Firemans Fund make any changes to its policy

13 while you were managing that unit in the 80s,

14 period?

15 A. Well, I know that there was expressed

16 concern about maintaining them and if that led to a

17 change, I don't really -- I don't specifically

18 recall it. And in terms of addressing what

19 concerns there were, I wouldn't have been surprised
20 but I don't recall the specifics.

21 Q. What were the concerns that were
22 expressed with regards to the policy?

23 A. Whether in fact we were keeping them as
24 far back as we possibly could and the media that we
25 were keeping them on, that kind of thing, I recall

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1 there being concerns about that.

2 Q. And what was the media that you were
3 keeping things on at that time?

4 A. Well, I think that early on it was
5 either hardcopy or microfiche. The Fireman's Fund
6 was one of the early national insurance companies
7 to computerise its operations and particularly in
8 claims and that happened in the late seventies when
9 we all got computers on our desks. And the -- that
10 also happened throughout the company in the
11 computerization of our operations. So I think that
12 that was probably the concern of transferring all
13 of that prior data over to computer databases in a
14 way that could be accessed.

15 Q. In the early 80s when you were managing
16 the asbestos claims facility for Firemans Fund, did

17 Firemans Fund stop the deconstruction of any
18 historical GL policies as a result of asbestos
19 claims now being made against its policyholders?

20 A. Well, stop...

21 Uh, I assume that at some point there
22 was destruction of policies, but after the
23 eighties, early eighties in particular, I don't
24 recall, now that I'm thinking about it -- and you
25 asked this question before about timeframes for

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1 destruction, after I'm thinking -- now that I'm
2 thinking about it, I don't think there were any. I
3 think they kept everything.

4 Q. Meaning that as opposed to keeping
5 documents for ten years thirty years 50 years
6 whatever, that they stopped getting rid of any
7 policies, is that what you're saying?

8 A. Policies and claim files.

9 Q. Okay. And what is your understanding
10 of the industry standards about which you've
11 testified in terms of how documents were -- and in
12 particularly policy-related documents -- were
13 maintained, say in the 1980s as --

14 A. Well, again, maybe I'm misunderstanding

15 your question. The early forms of maintaining
16 policies was either hardcopy and/or microfiche,
17 okay, remember, microfiche, it was awful but
18 nonetheless microfiche. And then it was changed
19 over to computer databases, computerized databases,
20 and that occurred in the 1980s. Maybe I'm not
21 understanding your question.

22 Q. Yeah, and I apologize let me try to be
23 more clear.

24 A. Sure.

25 Q. Let me stop this for a second.

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1 In -- if I understood your testimony
2 earlier, it was common for insurance companies to
3 destroy policy related documents after a period of
4 time and it might be ten years it might be 50 years
5 but whatever the period of time was it was common
6 for insurance companies to destroy policies after a
7 period of time; is that fair?

8 A. Yes, it had been so and my
9 understanding was that that was changed at least in
10 my experience to maintaining all policies.

11 Q. Okay.

12 A. Now, there may have been some

13 categories of policies that had really long
14 destruction dates such as 75 or 100 years, I seem
15 to recall that. What categories those were, I
16 can't tell you. But general liability policies
17 were all kept.

18 Q. Okay. And when did that change occur?

19 A. To the best of my recollection, it was
20 in the late seventies, early 80s.

21 Q. And why did that change occur?

22 A. Well, again, you had -- and I discussed
23 some of this in my outline. You had a number of
24 changes going on in terms of long tail claims. You
25 had the asbestos claims, which had really started

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1 before 1980.

2 And we opened the Seattle asbestos
3 claim facility in 1980 but there were several other
4 Fireman's Fund asbestos facilities already up and
5 running at other different parts of the country.

6 So we had -- the company had gotten
7 involved in this in the late seventies in a very
8 very big way.

9 And so that was a significant reason
10 for the change in and of itself but it also became

11 apparent that there was going to be possibilities
12 of long tail claims in other contexts, particularly
13 with the 1979 -- maybe it was 1980 that they signed
14 it well, I will say in 79 enactment of CERCLA,
15 which imposed liability on various parties for
16 property contamination that could go back a
17 considerable amount of time.

18 There was the Barrell decision out of
19 Texas in the seventies that imposed liability for
20 asbestos claims on manufacturers in a variety of
21 different ways. I remember reading it and being
22 actually quite surprised.

23 And there was the John Mansfield, the
24 John Mansfield bankruptcy proceeding and the
25 litigation up to that that Ms. Frost discusses in

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1 some detail pointing to the fact that this was
2 another sign post that we were going to be dealing
3 with long tail claims.

4 As a result of that Fireman's Fund and
5 in my experience, my personal experience, other
6 insurance companies, formed environmental claims
7 units and these were specialized claims units. And
8 this was done in the early 80s, if not late 70s,

9 specialized claims units that handled just
10 environmental claims, all of which -- almost all of
11 which involved some aspect of long tail and
12 required policy reconstruction.

13 The initial -- I suspect that the
14 initial impetus for that was asbestos but I also
15 was aware that they were handling other kinds of
16 cases early on as well.

17 Q. Are you aware of any insurer other than
18 Fireman's Fund that stopped all destruction of GL
19 policies in the eighties?

20 A. No, I'm not aware of that specifically
21 happening with any other carrier. I am aware that
22 in some cases that I've been involved with, the
23 carriers such as travelers maintain records of
24 their policies going back into the 1960s.

25 Q. Are you -- I'm sorry, go ahead.

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1 A. No, and I'm trying to think if they
2 even went back into the 50s, they may have. What
3 occurs to me now off hand was the 1960s, but at
4 least that.

5 Q. Okay. And have you read any articles
6 or seen any other insurance industry treatises that

7 describe actions of any insurers other than
8 Fireman's Fund related to the suspension of any
9 document destruction in the 1980s?

10 A. I have endeavored to search for that
11 thusfar I haven't found anything.

12 Would it be okay if we took an even the
13 anyone get break?

14 Q. No worries. I've got 2:56 my time so
15 about 2:45 or 11:45.

16 A. That's perfect.

17 THE VIDEOGRAPHER: The time on the
18 monitor is 2:36 p.m. We're going off the
19 record.

20 (A brief recess was held.)

21 THE VIDEOGRAPHER: The time on the
22 monitor is 2:54 p.m. and we're back on the
23 record.

24 BY MR. BROWN:

25 Q. Mr. Miller during the break I was able

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1 to get a copy of the document, the outline of your
2 opinions document that you were describing earlier.

3 A. Yes.

4 Q. And I have now marked that as Exhibit

5 6.

6 A. Okay.

7 Q. So do you see that document with
8 Exhibit 6 sticker on it?

9 A. Yes, I see the first page, yeah.

10 Q. So it looks to me -- and I'm just going
11 to come back to this in detail, not to worry, but
12 it looks to me like the next several pages, so
13 Miller 01365 through Miller 01375, relate to
14 standards concerning loss policies issues. Is that
15 fair to say?

16 A. Yes.

17 Q. And is that a document that has 1365
18 through 1375, is that a document that you prepared?

19 A. Those are three separate documents and
20 I prepared all three.

21 Q. So starting on 1365 here, what we're
22 looking at here, you drafted this, is that fair?

23 A. Yes, I did.

24 Q. Okay. And it looks to me like that
25 runs through 1373. Is that correct?

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1 A. Yes.

2 Q. And you drafted all of that?

3 A. Yes.

4 Q. And then 1374 and 1375 relate to some
5 standards that you have identified, correct?

6 A. Yes.

7 Q. And did you -- I know you have cited
8 things here but did you actually put these two
9 documents, 1374 and 1375 together?

10 A. Yes.

11 Q. And then after that is a document that
12 is captioned opinion outline, Covil v Penn National
13 and that goes from 1376 through 1382, correct?

14 A. Yes.

15 Q. And did you prepare that document?

16 A. Yes.

17 Q. Okay. And I want to start now talking
18 about this opinion outline document. So starting
19 on Page 1376, okay?

20 A. Certainly.

21 Q. Okay. And do you have a printed copy
22 of that in front of you?

23 A. I do.

24 Q. Okay. So let me -- let's talk about
25 what you earlier described as your first opinion,

1 namely with the 1 million dollar aggregate limit on
2 the Declarations pages is the Covil policies issued
3 by Penn National does not apply to premises
4 operations coverage?

5 A. Yes.

6 Q. What is the basis for that opinion?

7 A. Well the initial point here is that
8 aggregate limits generally were not made applicable
9 to operations premises coverage in general
10 liability policies prior to 1986. There may be
11 some exceptions to that but within the standard
12 form of policies and particularly within the ISO or
13 insurance service offices policies those policy
14 aggregates were not made applicable to premises
15 operations bodily injury claims prior to 1986. And
16 what I do is cite here several sources that
17 document that fact.

18 So then we have to turn to the 1986 and
19 1987 policies -- well the 86 through 88 -- issued
20 by Penn National to Covil to determine whether or
21 not those two policies that we do have correspond
22 with or are consistent with what the practice was
23 in the industry through ISO's release of the 1986
24 version, and we find that they are entirely
25 consistent.

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1 For example, the 1973 ISO general
2 liability policy provided that aggregates applied
3 only to completed operations and products liability
4 and to general liability for property damage only.
5 This is consistent with the Penn National policy
6 which from my comparison used the 1973 ISO version
7 and so no aggregate limit in that policy applies to
8 bodily injury arising from premises and operations.
9 You will note I also in that regard note that
10 there's an amendment to the limits of liability.
11 There's limits of liability endorsement in these
12 policies which modifies the occurrence and
13 aggregate limits somewhat.

14 Actually what it does is it doesn't
15 really change anything substantively. It just
16 makes it easier to read what the aggregates apply
17 to because previously the scope of the aggregate
18 for general liability was all bunched in like one
19 or two paragraphs and a number of different things
20 were in it. And ISO went and separated those out
21 to individual categories when it did the 1986
22 version.

23 So it is evident to me that Penn

24 National used the 1973 ISO version which didn't
25 apply aggregates to bodily injury general liability

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1 claims.

2 And we note that although ISO did issue
3 a 1986 revision that applied aggregates to bodily
4 injury claims arising out of operations and
5 premises, that that wasn't used here by Penn
6 National.

7 And indeed we found further
8 confirmation of that fact in the fact that the
9 amendments to limits of liability endorsement has
10 an edition date of March 1981.

11 And so it would have been before the
12 1986 revision and that amendment is consistent with
13 the 1973 policy form itself in terms of the scope
14 of the premises operations bodily injury coverage.

15 It's evident that Penn National was
16 using pre-1986 policy forms in 1986 and thereafter,
17 because the same appears in 87, 88. Even though
18 ISO had issued in 1986 a new policy form, Penn
19 National continued to use the older policy forms.

20 So then I have to take a look at the
21 specific -- the specifics of this case in light of

22 that conclusion and it's evident to me that the
23 plaintiffs in this action are bringing claims
24 against Covil for injury arising out of Covil's
25 operations and therefore they should be covered

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1 under the general liability occurrence coverage
2 which has no aggregate and there's some citations
3 there again to the limitation of aggregates for
4 bodily injury general liability, but I also noted
5 the extensive discussion of Ms. Frost -- Frost in
6 his deposition -- as I noted it on the pages there,
7 regarding the bases for many of these claims, maybe
8 not all quite all of them but certainly most of
9 them and that they are arising out of exposure to
10 Covil's operations and that's specifically alleged
11 and discussed in this Frost deposition.

12 I have also had the opportunity to
13 review some of the original complaints filed as
14 well as some related documents in a few, some of
15 the cases underlying asbestos cases and it was
16 evident to me in reviewing those documents that the
17 claims against Covil are operations claims, in
18 other words, the exposures occurred during Covil's
19 operations and not as a result of completed

20 operations. That would certainly be consistent
21 with the kind of business that Covil did, the
22 removal and installation of asbestos lined
23 insulation and would generate asbestos fibers
24 in -- in the air and caused -- lead to the exposure
25 that these individuals suffered.

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1 Indeed, the stories are rife when I was
2 working on this that in the Bremerton shipyards
3 during the war, some of the workers stated that
4 they could not see the hands in front of their
5 faces because of the thickness of the asbestos
6 fibers that they were installing on the naval
7 ships. But anyway, I digress. So to the extent
8 that Penn National claims that the Covil completed
9 operations products claims are subject that these
10 are completed operations products claims that's
11 also inconsistent with the fact that Penn National
12 has contributed to the settlement of many of those
13 claims contending therein that there is only two 1
14 million dollar aggregates left which would be the
15 operations aggregates and in each policy and that
16 those two policies -- those two aggregates apply
17 and that their conduct there is first of all

18 inconsistent with taking the position that they
19 have that -- that are -- that they
20 shouldn't -- that they have limited coverage -- in
21 the sense that the policy itself is contrary to
22 that position so, you know, you take a look at all
23 of this overall and it's quite evident that Penn
24 National is facing operations claims for asbestos
25 exposure during its policy periods which do not

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1 have an aggregate for bodily injury premises
2 operations claims and therefore each of the claims
3 is a separate and distinct occurrence under the
4 occurrence limit.

5 Q. Okay. That was a lot. So let me just
6 ask you this. Any other bases for your opinions
7 other than what you've just shared with me?

8 A. No. Well, to the extent that I haven't
9 specifically referenced the references in my
10 outline to that effect, those would be included.
11 But this is, you know, representative of my
12 research in this field. I don't think it's a
13 summary of everything that I have looked at or
14 produced. So there's more to this. I just didn't
15 want to put it all in.

16 Q. No, I appreciate that. I guess what
17 I'm asking you is, this is my opportunity, as you
18 understand it, to ask you for the basis of your
19 opinion. I'm just simply asking do you have any
20 bases for your opinion, number one, other than what
21 you've now shared with me and that are in your
22 outline that we've marked as an exhibit?

23 A. Yes, I think so and that would be in
24 the documents I've produced.

25 Q. Okay.

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1 A. To the extent that they are other than
2 the ones that I have summarized in this outline.

3 Q. Okay, so given the testimony, the
4 answer you just gave me along with documents you
5 produced that includes the outline those would be
6 the sum total for the bases of your opinion is that
7 fair?

8 A. Yes, plus my own personal knowledge and
9 experience, you know.

10 Q. Okay. So you made several comments
11 there about the underlying cases?

12 A. Yes.

13 Q. Have you reviewed the complaint in this

14 matter?

15 A. Yes.

16 Q. What underlying cases are referenced in
17 that complaint?

18 A. I don't recall.

19 Q. Were there some?

20 A. I don't -- I don't recall. Without
21 looking at the document, counsel, I just don't
22 remember. I have looked at a lot of documents and
23 I would have to have the document in front of me to
24 refresh my recollection.

25 Q. That's very fair. Let me show you what

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1 I've marked as Exhibit 7.

2 I'm going to share my screen with you

3 Mr. Miller this is a copy of the summons and
4 complaint filed by Covil corporation through its
5 receiver against pen national among others. Do you
6 see that document?

7 A. Yes.

8 Q. And I realize I'm sharing my screen and
9 unless you've got access to Exhibit Share, I will
10 scroll through here and my question simply is if
11 you can identify for me the underlying tort claims

12 and I guess let me back up. Ordinarily when you're
13 litigating a coverage case you're litigating
14 coverage for a specific underlying claim is that
15 correct?

16 A. Usually.

17 Q. So if you're litigating coverage for a
18 construction defect claim, you're referring to the
19 construction of the ABC condo building as a
20 hypothetical, correct?

21 A. Yes, I understand.

22 Q. And when you're litigating over
23 coverage in a general liability policy there could
24 be several questions so for example there could be
25 a duty to defend question and separately a duty to

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1 indemnify question, true?

2 A. Yes, of course.

3 Q. But all of those are in relationship to
4 what the facts and the underlying case are about
5 which we're talking about whether there's coverage,
6 true?

7 A. Whether there's coverage is one of
8 issues that's being addressed, yes.

9 Q. I guess what I mean is there a

10 declaratory judgment action you're not just giving
11 an advisory opinion of coverage in a vacuum.
12 You're saying is there coverage for X claim,
13 correct?

14 A. Usually unless there are cross
15 complaints from the defendant with other causes of
16 action which would enlarge the scope of the
17 declaratory relief action and probably the facts
18 upon which -- the facts which the action must
19 address.

20 Q. Fair enough.

21 So looking at this Exhibit 7, my
22 question -- and if you -- I can just scroll through
23 here, as slow or fast as you want or if you have a
24 copy of the complaint there you can look at it.

25 My question was simply is when you were

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1 talking about your opinion about coverage for the
2 underlying actions, what underlying actions are you
3 referring to?

4 A. Well, generally speaking in paragraph
5 1, you just jumped past it -- no other Paragraph.
6 One down.

7 Paragraph 1 factual background, Covil's

8 operations from 1954 through 1991 included
9 installation blah, blah, blah, disturbance of
10 Thermal insulation and other building materials.
11 Those operations allegedly exposed persons to
12 asbestos who thereby suffered bodily injury.

13 You know, and the alleged bodily injury
14 resulting from the asbestos allegations has
15 resulted in claims and lawsuits against Covil.
16 Those claims and lawsuits may not be specifically
17 referenced in here, but it's generally that is
18 generally acknowledged what you're dealing with.
19 And as a result -- and now we do know from other
20 facts extrinsic to this pleading what they are and
21 what position that Penn National was taking
22 regarding them. In addition I don't have the
23 answer and I thought there was a cross complaint
24 there may not be but to the extent there is, that
25 may have added additional facts regarding

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1 individual claims but we would have to see that as
2 well.

3 Q. Okay. And I appreciate all of that.
4 My question is, when you testified a few minutes
5 ago that you had opinions about Penn National's

6 scope of coverage as it relates to underlying
7 suits --

8 A. Yes.

9 Q. -- what specific underlying suits were
10 you referring to? Is it the John Doe claim? Is it
11 the Jane Smith claim? I just want to make sure
12 we're talking about the same underlying bodily
13 injury claims and lawsuits.

14 A. Oh, okay, well there is correspondence
15 from Penn National outlining -- and I forgot, maybe
16 it was September of last year. I forgot the date.
17 Outlining all of Penn National's contributions to I
18 think 14 different cases. These are the cases that
19 are discussed in specifically -- just a moment,
20 bear with me for a moment. I want to make sure I
21 get this name right -- in Ms. Frost's deposition as
22 I understand. And they include some of the
23 complaints that I have actually looked at. So
24 those are some of the claims that we have concern
25 about because in the correspondence from Penn

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1 National regarding its settlement of those claims,
2 Penn National contends that only two aggregates
3 apply for the operations of Covil during those two

6 And as I understand it, there are
7 numerous other claims being brought against Penn
8 National against Covil. I don't know what claims
9 they are and how large they are, but I understand
10 that there are other claims being brought against
11 Covil or that may be brought against Covil.

19 Q. But you would agree with me that in
20 order to assess coverage, we have to know what the
21 underlying facts are for the claim we're trying to
22 assess coverage for?

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1 As I understand it, among some of those

2 14, maybe a couple of them, there might be a -- and
3 I don't know which ones -- there might be some
4 question as to whether they arise out of
5 operations.

6 But given Ms. Frost's testimony and
7 some of the complaints I have looked at out of
8 those 14, it's very clear they arise out of
9 operations. And so there's really no question
10 there.

11 Of course you would have to look at the
12 facts alleged in the other cases to determine
13 whether it's more likely than not that they arise
14 out of operations as well.

15 It seems likely that they would, given
16 the track record thusfar and the kind of work that
17 Covil did. But I don't disagree that before you
18 make a coverage decision you want to look at the
19 allegations. Nonetheless ahead of time it is
20 beneficial to know what the policy limits are. And
21 in this case, that can be resolved and dealt with
22 even before you know all of the allegations in any
23 other complaints.

24 Q. Let me show you what I've shared my
25 screen with you Mr. Miller and show you what I have

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1 marked as Exhibit 8?

2 A. Thank you. That's the letter. I knew
3 it was September. I couldn't recall the year.

4 Q. September 1, 2022 letter from Penn
5 National to receiver and it mentions 14 separate
6 claims and indemnity payments made by Penn National
7 on those claims; is that what you're referring to?

8 A. Yes.

9 Q. And when you talked about underlying
10 claims, is this -- is it these 14 claims that
11 you're referencing?

12 A. Those 14, it seems to me I've been told
13 somewhere along the line -- and I can stand to be
14 corrected on this -- that there are others as well,
15 either that have been filed or are anticipated to
16 be filed. To that extent, they would add to this.

17 Q. And I will try to be more clear in my
18 question. I'm not suggesting these 14 are the only
19 plaintiffs who have ever sued Covil or ever will.

20 A. Oh, okay.

21 Q. What I'm trying to understand is when
22 you testified few minutes ago that you believe Penn
23 National has certain coverage obligations with
24 regard to underlying suits and referenced facts in

25 the underlying suits to support your opinion, is it

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1 these 14 underlying suits that you're referring to
2 or are there other John Doe plaintiffs out there
3 that you're referring to?

4 A. I believe these are the 14.

5 Q. Okay. So did you review the underlying
6 complaints that each of those 14 people made
7 against Covil?

8 A. No, I didn't review them all, I
9 reviewed about half a dozen of them along with the
10 testimony of Ms. Frost who obviously reviewed
11 extensive amounts of documents in these 14 cases.

12 MR. NES: Counsel, before you move on I
13 just wanted to note for the record that the
14 document that you've put into evidence in
15 this deposition has been marked confidential
16 because of those settlement amounts so we'll
17 designate the deposition to confidential to
18 the extent that exhibit is being discussed
19 for the protection of both parties.

20 MR. BROWN: Agreed. Thank you,
21 counsel.

22 BY MR. BROWN:

23 Q. So Mr. Miller, in what policy -- I
24 understand your comments about -- I'm still talking
25 about your first opinion, okay, the one limited to

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1 the aggregate limits I understand your comments
2 about the industry standards; is there specific
3 language in the Penn National policy to which
4 you're referring that relates to the limits
5 of -- the aggregate limit of liability not
6 applying --

7 A. Yes, I can pull.

8 Q. I can pull up the policy if that will
9 help you.

10 A. Let's start with '86 '87 I think the
11 best thing to do there is to look at the
12 endorsement at Bates 310, amendment limits of
13 liability. And I think that pretty much sets it
14 forth.

15 Q. What I've got is a different version.
16 Any other language that you're referring to in the
17 policy as a basis of your opinion?

18 A. Well, it would be in the basic general
19 liability form as well but this is the amendment to
20 it which changes the format a bit but is the same

21 language, basically.

22 Q. Okay. So does the -- does it matter in
23 your opinion as to whether a particular loss under
24 the Penn National policies constitutes an
25 operations hazard loss versus a completed

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1 operations loss, does it matter when a given
2 Plaintiff was exposed to ongoing operations of
3 Covil?

4 MR. NES: Objection, form.

5 THE WITNESS: Yes, it does.

6 BY MR. BROWN:

7 Q. Let me try to clarify my question in
8 light of the objection.

9 Is your opinion influenced by when a
10 given Plaintiff was exposed to asbestos and Covil's
11 ongoing operations?

12 A. I -- I believe those were some key
13 facts that Ms. Frost testified to as to pinpointing
14 that -- the time of the exposure and when the claim
15 arose. So, yes, she may have -- as I recall it,
16 discussed other factors in that regard but those
17 are two that I recall.

18 Q. And I appreciate that. I'm asking for

19 your opinion and I'm still talking about opinion 1?

20 A. Oh, yeah.

21 Q. What difference does it make if any
22 when a given Plaintiff was exposed to Covil's
23 ongoing operations in relationship to whether
24 coverage in your mind under the Penn National
25 policy is an ongoing operations loss or completed

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1 operations loss?

2 MR. NES: Objection, form.

3 THE WITNESS: If I follow your question
4 correctly that's actually addressed in part
5 in my second opinion where I note that
6 there's a difference between trigger of
7 coverage for bodily injury as a trigger of
8 coverage and the time of injury, which is
9 the source of the injury. The source of the
10 injury, or the time of the injury,
11 determines what coverage applies and then
12 how many policies subsequent to that apply
13 or how many policies are then triggered is
14 determined by the bodily injury and when
15 that occurred.

16 So the first trigger is the first

17 exposure but the first trigger is also the
18 first source of injury and in here the first
19 source of injury, based on what I have seen,
20 are Covil's operations.

21 And so that becomes the policy during
22 that operation and the exposure becomes the
23 determining factor in what type of coverage
24 applies.

25 BY MR. BROWN:

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1 Q. Let me try this with a hypothetical?

2 A. Yeah.

3 Q. Let's say a John Doe Plaintiff who says
4 I was working at a facility and I worked there from
5 1970 until 2000.

6 A. Okay.

7 Q. So I worked there for thirty years.

8 And that obviously would include 1986
9 to 1988 during the two Penn National policy
10 periods, correct?

11 A. Sure, yeah.

12 Q. And if John Doe alleges in his
13 complaint and/or testified in his deposition, I was
14 exposed, and during each of those thirty years when

15 I was working at the plant, and Covil was working
16 alone alongside me for each of those years from
17 1970 up until Covil went out of business in the
18 early 90s. So from 86 to 88 I had actual exposure
19 and I was working alongside Covil during its
20 ongoing operations. Okay?

21 A. Okay.

22 Q. Are you with me?

23 A. Yeah.

24 Q. Assuming those are the facts, would you
25 say that that as it relates to the '86 to '88 Penn

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1 National policies for Covil, that that is an
2 ongoing operations loss under the Penn National
3 policies?

4 A. Clearly, so absolutely.

5 Q. Okay. Now, let's assume that the same
6 John Doe says, I began to work there in 1990, um,
7 and I prior to that had never worked anywhere where
8 there was an asbestos containing product and never
9 worked near any Covil employee since 1990 so by his
10 own allegations he puts the first date of exposure
11 after the two Penn National policies ended.

12 Would you agree with me that those two

13 Penn National policies would not be triggered in
14 that situation?

15 A. That is true.

16 Q. Okay. So now let's assume -- because I
17 think this kind of gets to the heart of what we
18 were discussing, let's assume that Jane/John Doe
19 Plaintiff says I worked there from 1970 to 2000.

20 A. Okay.

21 Q. No I'm sorry, John Doe Plaintiff says I
22 started working there in 1970 in the same way and I
23 worked alongside Covil employees during Covil's
24 ongoing operations from 1970 to 1980.

25 A. Right.

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1 Q. And in 1980, I stopped and I never
2 worked in a facility any longer --

3 A. Okay.

4 Q. -- but I then had asbestos containing
5 products in it to my knowledge. I did something
6 else other than work in that industrial setting at
7 that time but I was exposed to Covil's ongoing
8 operations from 70 to 80 and lo and behold four
9 years later I was diagnosed with an asbestos
10 related bodily injury disease. Okay?

11 A. Uh-huh.

12 Q. So you understand my hypothetical?

13 A. Yes, I do.

14 Q. Okay. So in that regarding would you
15 agree with me that the coverage was first triggered
16 under whatever coverage program Covil happened to
17 have in 1970 on John Doe's date of first exposure?

18 A. Yes.

19 Q. And that coverage at least in some
20 jurisdictions, would be triggered on a continuous
21 basis during -- even after 1980 when he was removed
22 from the environment under a so called exposure and
23 residence theory until diagnosis?

24 A. That goes a bit beyond my call in this
25 case but it's my understanding generally and I

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1 guess I will put my lawyer hat on, that would be
2 the case as I understand it.

3 Q. So in that example would any -- in your
4 opinion, would the -- bringing it back to this
5 case, would the 1986 to 1988 Penn National policies
6 be triggered that John Doe claim?

7 A. The bodily injury that occurred during
8 the 1986/88 policies if it did continue during

9 those policies those policies would be triggered
10 however that would not answer the question as to
11 whether they were completed operations or premises
12 operations risks, or hazards as we call them.^ c

13 Q. I'm coming to that. They would be
14 triggered under what some court, some commentators
15 referred to as an exposure in residence theory,
16 meaning the Plaintiff was not actively exposed any
17 longer that the asbestos fibers are in his lungs
18 correct.

19 MR. NES: Objection to form.

20 THE WITNESS: Correct.

21 BY MR. BROWN:

22 Q. So in that hypothetical do you have any
23 opinion whether any coverage triggered under the
24 '86 to '88 Penn National policies would constitute
25 an operations hazard or a completed operations

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1 hazard?

2 A. Given how you have described it it
3 would be clearly operations.

4 Q. Why is that true?

5 A. Because at the time he was exposed from
6 1970 initially, there-- we don't know first of all

7 whether there were completed operations coverage
8 but we're assuming that maybe there were, from 1970
9 it was during the times -- as I understand the
10 scenario, it was during the time that he was
11 exposed when Covil was working he was working
12 adjacent to Covil or whatever but he was exposed as
13 a result of their operations it's an
14 operations -- it's an operations coverage. And
15 that's the source. The source doesn't change. The
16 source continues throughout his injury period. It
17 doesn't convert. But what happens is that then the
18 trigger of coverage, the bodily injury, not the
19 source, the bodily injury then determines how many
20 subsequent policies are triggered.

21 The -- as you've explained it it sounds
22 like the '86 to '88 policies from Penn National
23 would be triggered because bodily injury occurs to
24 them. However the original source of the injury is
25 still operations. That does not change.

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1 Q. So your testimony is that in that
2 example where the given individual had not been
3 exposed to any ongoing operations of Covil for six
4 years prior to the inception of the Penn National

5 policy --

6 A. Yes.

7 Q. -- the Penn National policy was
8 triggered under a state court ruling and got the
9 ongoing operations loss even though the individual
10 was no longer exposed to Covil's ongoing operations
11 in '86 to '88?

12 A. Absolutely because it couldn't be a
13 completed operations because his injury didn't
14 arise after he left employment and after, as the
15 facts are, Covil handed over its -- oh, I don't
16 have the language in front of me -- you know,
17 handed over ownership or whatever it is -- you know
18 what I'm talking about -- of the -- of what it
19 installed to the owner. It didn't happen. It
20 happened before that. So there wasn't any other
21 continued -- any other source after 1980. There
22 wasn't a source, there wasn't -- he wasn't exposed
23 during -- after 1980 to any completed operations of
24 Covil. That's probably better said.

25 Q. So are you aware of any case in any

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1 jurisdiction that holds what you just said under

2 that fact pattern that holds that would be an

3 ongoing operations loss after a policy that
4 incepted many years after a plaintiff was no longer
5 exposed to the ongoing operations of the defendant?

6 A. No, I'm not, but I'm not here to talk
7 about the case law. I'm here to talk about how
8 things get handled within the insurance industry.
9 That's different. And so I haven't been asked to
10 do that kind of research and analysis and I don't
11 presume to know the answer to that question, but
12 I'm asked what is it in the industry. And once the
13 source of the injury is established, that remains
14 the source through all subsequent policies. And
15 this has been long the case in the insurance
16 industry in my own experience.

17 Q. And what industry -- can you point me
18 to a written industry standard that you're
19 referring to?

20 A. Well, there's some discussion about it
21 in CGL policy handbook that I cite on page 4, there
22 and then IRMI also notes something -- let me read
23 this and I cite this on page 4 -- the CGL policy
24 definition of bodily injury makes clear that a
25 death sustained at a later time caused by an injury

1 occurring in an earlier period will be covered by
2 policy in effect at the time the injury was
3 sustained. So regardless of what happens to the
4 injury, how it morphs, if you will, changes, what
5 it results in after the policy period has expired
6 is still determined by what happened during the
7 original policy period. It doesn't change. And
8 that's always been the way that I have handled it
9 and other people that I know in the insurance
10 industry have handled it.

11 Q. The IRMI quote you just read talks
12 about whether there would be coverage, not whether
13 it be would be covered as a completed operations
14 hazard loss or a products completed operations
15 hazard loss correct?

16 A. Yes, but it does underscore the
17 principle that's involved in here that after the
18 policy is expired, any changes in the injury in any
19 way look back to the earlier period or the policy
20 in effect at the time of the injury as the policy
21 that provides coverage.

22 Now, we get into a little different
23 sort of thing here, I will admit because of the
24 trigger of coverage triggering subsequent policies,
25 but that doesn't change the basic premise that is

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1 discussed in this and elsewhere, in this IRMI
2 quotation and elsewhere that even though the
3 trigger the bodily injury continues, the source
4 does not. The source is the same.

5 Q. Do you have a copy of the Penn National
6 policies in front of you?

7 A. Yeah.

8 Q. Okay. I will mark just for
9 completeness as Exhibit 9 a copy of the 86/87 Penn
10 National policy and I can share my screen or it
11 might be easier if you had the document in front of
12 you just to read it but I want to talk about the
13 definition of the completed operations hazard. Are
14 you familiar with the policy?

15 A. Sure, oh, sure just a second. Could
16 you -- I know it's here.

17 Q. I will bring it up on the share screen
18 if you want.

19 A. Would you mind? It would be helpful.

20 Q. Okay, no worries. It's on page Penn
21 National policies 36 on the -- on the exhibit. Let
22 me see if I can enlarge it.

23 A. Oh, yeah, this is helpful. Thank you.

24 There we are.

25 Q. I will try to make it as large as I

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1 can. Can you see that definition, Mr. Miller?

2 A. Oh, yeah, uh-huh.

3 Q. Okay. So have you read this language
4 before in connection with your work in this case?

5 A. Oh, in this case and many others.

6 Q. Okay. So for a completed operations
7 hazard loss to occur, completed operations hazard
8 would include bodily injury arising out of
9 operations only if the bodily injury occurs after
10 such operations have been completed and occurs away
11 from premises owned by or rented to the named
12 insured. I didn't read every word but did I get
13 the main points there?

14 A. Sure.

15 MR. NES: Objection, form.

16 BY MR. BROWN:

17 Q. All right, I will read the whole thing
18 just to remedy the objection.

19 Completed operations hazard includes
20 bodily injury and property damage arising out of
21 operations or reliance upon a representation or

22 warranty made at any time with respect thereto but
23 only if the bodily injury or property damage occurs
24 after such operations have been completed or
25 abandoned and occurs away from premises owned by or

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1 rented to the named insured.

2 Did I read that correctly?

3 A. Yes, you did.

4 Q. Okay. So in my -- the completed
5 operations hazard necessarily includes bodily
6 injury that arose out of the operations of the
7 insured at some time, correct?

8 A. Yes.

9 Q. And would you agree with me, as you
10 understand the facts of these underlying suits that
11 bodily injury occurred away from the premises owned
12 by or run by Covil?

13 A. That would seem to be the case, yes.

14 Q. So the issue is whether the bodily
15 injury occurred after Covil's operations had been
16 completed or abandoned, correct?

17 A. Yes.

18 Q. And how could bodily injury in my
19 hypothetical occur to that hypothetical Plaintiff

20 in '86 to '88 from ongoing operations if the John
21 Doe Plaintiff was no longer working there from '86
22 to '88?

23 A. Because the injury -- the bodily injury
24 did not occur after the operations had been
25 completed, it occurred during the operations. And

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1 this is a critically important distinction because
2 if you don't make that distinction, then you end up
3 with a tremendous amount of confusion as to when
4 the completed operations hazard applies let alone
5 the operations hazard. So he sustained his injury
6 as a result of operations. That doesn't change.
7 It doesn't morph into completed operations.

8 Q. Did you review the definition of
9 products hazard in the policy?

10 A. Yes, I did.

11 Q. Would any of the underlying claims as
12 you understand them invoke the products hazard
13 coverage under the Penn National policy?

14 A. No, not to my knowledge.

15 Q. Why not?

16 A. Well, in the first thing is that what
17 we're doing with a service here, an application for

18 the most part, the material to those pipes, the
19 insulation, that commonly does not invoke the
20 product hazard because it arises out of an
21 operations or a service and therefore it doesn't
22 invoke the products hazard. It's not like you
23 would put as products is commonly understood you
24 put an item in the stream of commerce for sale and
25 you give up possession of that item as is required.

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1 This occurred while this injury occurred while you
2 still have possession so the products hazard cannot
3 apply.

4 Q. So the products hazard includes bodily
5 injury arising out of Covil's products but only if
6 that bodily injury occurs away from premises owned
7 by or rented by Covil and after physical possession
8 of such products has been relinquished from others
9 correct?

10 A. Yes.

11 Q. So from '86 to '88 in my hypothetical
12 where the individual stops working alongside Covil
13 in 1980 from '86 to '88 what physical possession of
14 products was Covil maintaining that was causing
15 injury to the Plaintiff.

16 MR. NES: Object to the form.

17 THE WITNESS: Well, there wasn't any
18 physical possession of products at that
19 point because the products hazard doesn't
20 apply here to begin with because this
21 clearly arises out of an operations hazard
22 not a product because, as I said, this isn't
23 a situation in which the insured has put an
24 item that commonly is understood and applied
25 in the stream of commerce for sale.

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1 BY MR. BROWN:

2 Q. So in your opinion, then, because Covil
3 is putting its products into a plant as opposed to
4 in the market for sale, it could never be a
5 products hazard loss, correct?

6 MR. NES: Objection to form.

7 THE WITNESS: That's right, unless it
8 decided to sell the insulation and it was
9 installed by someone else, maybe that would
10 be the case. But otherwise, if it's doing
11 the service, you have to evaluate the
12 coverage based on the activity of the
13 policyholder. That activity is a service.

14 And what kind of a service is it, it's the
15 operations service. And that's what kicks
16 in the coverage.

17 Q. Okay. I'm going to mark Exhibit 10 and
18 let me share my screen with you. Mr. Miller do you
19 see this document I have now marked as Exhibit 10,
20 at least the first page?

21 A. Yes.

22 Q. Okay.

23 A. I had forgotten about this, thank you.

24 Q. So I earlier showed you the impairment
25 letter from Penn National that identified 14 cases

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1 and we talked about those being the underlying
2 matters upon which you have given your opinions
3 correct?

4 A. Yes.

5 Q. And you told me you had some
6 information about those underlying claimants?

7 A. Yes.

8 Q. Okay, this is a chart --

9 A. Yes.

10 Q. I will roll through this with you.

11 But I believe you will find that this

12 chart describes each of those individuals that were
13 described on the Penn National impairment letter,
14 correct?

15 A. Yes.

16 Q. All right.

17 A. And just to add to my testimony
18 earlier, this chart had slipped my mind when I was
19 talking about what I had reviewed about what I
20 called the underlying cases and it would have
21 included this chart as well.

22 Q. So my question is did you review
23 anything at all about the underlying cases other
24 than this chart?

25 A. Oh, yeah, I had some of the complaints

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1 I had some of the -- I might have had a deposition
2 or two. I had some other pleadings in some of the
3 cases. You know, a little package on each one of
4 maybe four or five or six cases, something like
5 that. I think it was maybe 6.

6 MR. BROWN: Brad was this packet
7 included in what you provided to us in his
8 file?

9 MR. NES: Yes, so I sent him a cover

10 e-mail from our paralegal we referenced the
11 Bates rage because it's thousands of pages
12 but it was produced.

13 BY MR. BROWN:

14 Q. And are each of these did you -- do you
15 recall any facts of those cases or make any notes
16 about the facts of those cases other than what
17 you've seen in this chart?

18 A. Well, I didn't make any notes, I do
19 recall reading in the complaints the allegations
20 that would suffice in my opinion to invoke the
21 operations coverage the worker the individual
22 talking about where he worked, Covil being there at
23 the time, things of this nature, but I don't
24 have -- you know, I don't have that specifically in
25 front of me.

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1 Q. Okay. And based upon your
2 understanding of the evidence and exposure, is it
3 your testimony that each of these would constitute
4 ongoing operations, losses under the '86 to '88
5 Penn National policies?

6 THE WITNESS: I'm not sure of that. I
7 have been told that possibly a couple of

8 them -- and I don't know which ones -- may
9 not. Otherwise, I have -- it's my
10 understanding, based on what I have
11 reviewed, that they all fall within the
12 operations coverage.

13 BY MR. BROWN:

14 Q. Without -- leaving aside whether it
15 would be you know this claim or that claim which
16 one it was, conceptually what would make the
17 distinction between which one of those would be
18 ongoing operations versus completed operations as
19 you understand it?

20 A. Well, somehow the individual wasn't
21 injured until after Covil had ceased work on all or
22 part of its work and turned that work over to the
23 owner and then somehow later the individual was
24 exposed to asbestos from the insulation that was
25 applied. There may be numerous factual ways that

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1 that could happen, but nonetheless that would
2 generally be my assumption.

3 Q. So, again, hypothetically if a John Doe
4 Plaintiff first worked in a plant in 1983, and was
5 first exposed to any asbestos in 1983 going

6 forward, but Covil's work at that plant had stopped
7 in 1980, then that would be a completed operations
8 hazard loss for that given Plaintiff? Is that what
9 you're saying?

10 A. It could be. As you said earlier,
11 sometimes you have to take a look at the facts but
12 and in that case, I think it would be appropriate
13 to do so to verify that the individual did not
14 suffer an injury until 1983 after -- at the plant
15 that Covil had previously worked at and had turned
16 the product over to the owner, as is required in
17 one or more of those criteria for completed
18 operations in the policy provision.

19 Q. Okay. So your testimony then would be
20 it doesn't matter when the Penn National policies
21 were in effect. It matters when Covil did its work
22 in relation to when again the Plaintiff was
23 exposed?

24 A. No, as I said, there are two things you
25 look at. The first thing you look at is the

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1 source. Was it the original source of the injury
2 operations or was it completed operations products
3 or premises. Those are the four basic hazards that

4 are covered. Some people say contractual liability
5 is another one, but be that as it may. So those
6 are the four. So you have to take a look at the
7 source of the injury initially. And then you look
8 at subsequent policies that are triggered by virtue
9 of the bodily injury. That's a different question.
10 And that will tell you what in the line policy are
11 triggered as a result of the source. The source
12 doesn't change.

13 Q. You told me a few minutes ago that you
14 weren't tasked to find case law?

15 A. No.

16 Q. Or something along those lines?

17 A. No.

18 Q. So you weren't aware of any such cases
19 but you were relying upon industry standards that
20 that's how claims were paid?

21 A. Yes.

22 Q. Are there any written industry
23 standards you can point me to that effect or is it
24 just your experience?

25 A. Well, to some extent they're discussed

2 on Page 4 in the CGL policy handbook, for example,
3 but -- which I didn't quote, but I think we've
4 produced that so you can take a look at that.

5 Other than that, thusfar I haven't
6 found a specific source but it surely has been my
7 experience in handling injury cases whether they be
8 long tail or not so I'm relying on my experience in
9 that regard as well.

10 Q. So you mentioned in reference to Page
11 4. Let me bring that up. Is this reference to
12 what you're referring?

13 A. Yeah.

14 Q. Do you see CGL policy handbook, et al.?

15 A. Yes.

16 Q. So this says the CGL policy definition
17 of bodily injury makes clear that a death sustained
18 at a later time caused by an injury occurring at an
19 earlier period would be covered by the policy in
20 effect at the time the injury was sustained.

21 Did I read that correctly?

22 A. Yes, you did.

23 Q. That strikes me as relating to whether
24 a policy is triggered and hence whether coverage
25 exists not whether any such coverage is a completed

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1 operations hazard loss or an ongoing operations
2 loss?

3 A. Well, this also underlies the point
4 that the policy in effect at the time the injury
5 occurs at the time the bodily injury occurs; is the
6 one that remains in effect even for continuous
7 injuries after the expiration of the policy such as
8 a subsequent death arising from the original cause.

9 It's the -- it offers insight into that
10 basic proposition, I believe.

11 Q. And you earlier referenced this IRMI
12 quote that I think starts maybe at the bottom of
13 Page 3 and runs into the top of Page 4. Let me
14 just pull that up.

15 A. Yes.

16 Q. Do you see that?

17 So in looking at that, there's a quote
18 from the Connecticut Insurance law journal article,
19 from 2006, correct?

20 A. Yes.

21 Q. Okay. And that was -- that stip pen
22 article was in one of the -- was part of the
23 documents you reviewed, correct?

24 A. Yes.

25 Q. And stiple according to that article is

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1 a law professor and indicated that he wrote that
2 article based on work he had done as an expert for
3 policyholders in asbestos coverage litigation,
4 correct?

5 A. I don't know about that.

6 Q. And this says that although the type of
7 injury to the third party claimant is critical to
8 the question of trigger, the time of injury does
9 not have any bearing on the classification of the
10 coverage. The source of the injury determines
11 whether the losses within coverage is appropriately
12 regarded as general premises operations liability
13 matter or a products completed operation matter or
14 subject to an exclusion, correct?

15 A. Yes, absolutely.

16 Q. I will tell you what at the last break
17 I also got your more complete CV. Do you see this,
18 Mr. Miller?

19 A. Oh, I see, there, there we go. That's
20 the more recent one it looks like it's seven pages.

21 Q. Yeah and I will scroll through here so
22 you can see it all but is this up to date as far as

23 you --

24 A. Go down to publications and

25 presentations, you know, I haven't been to -- just

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1 go back up to presentations. Yeah, I

2 haven't -- oh, I have put that in there. I have

3 put the guides, okay, I did put those in, okay, I

4 had forgotten I had put those in. There's also

5 three additional presentations I did during 2021

6 for trial guides webinars on selection of bad faith

7 cases, discovery in bad faith cases and litigating

8 bad faith cases. I did that with somebody else.

9 But they're not on there yet and I've been dilatory

10 and I must do that.

11 Now, in terms of publications could you

12 go down the list?

13 Yes, in 2020.

14 And since then I have also done another

15 article with two other authors that's just coming

16 out now, although it's been available for several

17 months on the history of general liability coverage

18 and what that history tells us about what loss or

19 damage means and some other subjects related to

20 that. So I've got to put that on there. So those

21 are the only updates.

22 Q. Okay. I'll tell you what, let's take a
23 short break.

24 THE WITNESS: Ten minutes.

25 MR. BROWN: Yeah, sounds good.

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1 THE WITNESS: Okay, good.

2 THE VIDEOGRAPHER: The time on the
3 monitor is 3:53 p.m. and we're going off the
4 record.

5 THE VIDEOGRAPHER: The time on the
6 monitor is 4:55 p.m. and we're back on the
7 record.

8 BY MR. BROWN:

9 Q. Mr. Miller, in connection with the
10 opinions we were just discussing about the dividing
11 line between ongoing operations and completed
12 operations, does the fact that some of the
13 underlying claimants were complaining about so
14 called take home exposure make any difference in
15 your mind?

16 A. Take home exposure.

17 Q. You had mentioned take home exposure.

18 A. Sure, like the guy gets it all over his

19 clothes and he takes it home and the wife washes
20 them and gets covered with asbestos dust itself.

21 Q. Correct.

22 A. Those would be derivative of the
23 original exposure, so I don't think it would change
24 things. I can't see how it would.

25 Q. So the -- as to whether or not

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1 something would be for example a products hazard
2 loss or a completed operations loss, the fact that
3 the bodily injury to the Plaintiff at home when he
4 or she was first exposed, that in your view
5 wouldn't matter because their claims derivative of
6 however the family member was exposed?

7 A. Sure. And the products completed
8 operations definitions would clearly provide that
9 they wouldn't apply because products and completed
10 operations and both as you know, require that the
11 operation either be turned over to the owner in
12 some way or that the product be released by
13 whomever has the product. And going home with it,
14 neither one of those have happened.

15 Q. Because when you go home with it it's
16 no longer in the possession of Covil correct?

17 A. Well now you've confused me. Oh, I
18 see. The asbestos material itself as you're saying
19 I just want to make sure I'm understanding this.
20 The asbestos material itself is no longer in
21 possession of Covil because the man who was exposed
22 to it has walked out of the plant with it all over
23 him. But there has been no intention to give up
24 possession of it which is a requirement if you look
25 at the three criteria for completed operations in

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1 one way or another. So it would still be
2 derivative and not a completed operations.

3 Q. And what's the basis for that comment
4 that it's derivative. Are you referring to
5 specific case laws specific industry standard?
6 What's the basis for that?

7 A. Oh, well, just reviewing the policy
8 terms themselves, applying it as we're supposed to
9 apply it based on the policy terms applied in the
10 industry to the facts that you have just provided
11 to us. And frankly that was the way we handled it,
12 because we had some derivative -- what I call
13 derivative claims.

14 Q. When you say we, you mean when you were

15 working for Fireman's Fund and Fireman's Fund was
16 assessing take-home exposure claimants Fireman's
17 Fund would treat it as derivative of the claim of
18 the individual who worked there?

19 A. Oh, yeah, absolutely.

20 Q. Okay. And other than that's the way
21 Fireman's Fund handled it, is there a -- is there a
22 case treatise any sort of document that you can
23 point me to suggest that that's an industry
24 standard?

25 A. Not that I'm currently aware of in

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1 terms of case law actually the answer should be two
2 things.

3 First of all in terms of case law, I
4 haven't looked at anything there. In terms of
5 treatises or other textbooks and materials in the
6 industry, not that I'm currently aware of.

7 Q. When you say you haven't looked at
8 cases you mean you haven't done any research
9 specifically related to this matter, correct?

10 A. Legal research, no, I have done none.

11 Q. But you're certainly familiar with the
12 case law, I mean you've been in business for 50

13 years?

14 A. Yeah.

15 Q. And have been practicing law for thirty
16 years?

17 A. Come on now, we don't have to go over
18 that now, do we? The length of time is what I'm
19 talking about.

20 Q. You have alluded to and cited multiple
21 cases for various propositions this afternoon and I
22 just want to make sure that those -- I assume those
23 are your general base of knowledge, not something
24 that you have done specific research for this case,
25 correct?

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1 A. General base of knowledge, I think so.
2 Like I was cited to just a moment the Frost
3 deposition testimony with regard to the Johns
4 Mansfield matters and how they keyed or should have
5 keyed knowledge to the industry as to when policies
6 should -- the insurance industry as to when
7 policies should start to be saved, at least then.
8 So, you know, my reference was to her in that
9 regard.

10 Q. So you're relying upon another expert

11 for the receiver for that opinion?

12 A. Yeah, and then I have also referred to
13 Borrell as I said in the 70s I read it when it came
14 out because we were working on long tail stuff and
15 the Groul decision and I read it or I was answering
16 your question in the context of how Fireman's Fund
17 was treating these kinds of cases. I was trying to
18 give you some history there.

19 Q. What did Fireman's Fund set it up
20 differently in light of the Johns Mansfield case?

21 A. I'm not sure what you mean.

22 Q. You've mentioned Ms. Frost's opinion
23 several times this afternoon and you're relying
24 upon when she had to say --

25 A. Yes, yes.

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1 Q. -- and you've alluded to the Johns
2 Mansfield litigation and the trust that was set up
3 et cetera and you recall her testifying about that
4 in your deposition, correct?

5 A. Oh, yes yes.

6 Q. So I guess my question is what kind of
7 different programs were set up by Fireman's Fund in
8 response to the John Mansfield decision?

9 A. You know, I don't know if you can trace
10 it to a specific case like that because so much
11 else was going on at the time and had started in
12 the late 70s. So it was just something else to
13 throw in the hopper because I was never aware of
14 any specific action taken with regard to that.

15 Q. And were you aware of any specific
16 action that was taken by the insurance industry as
17 a whole that became an industry standard in
18 response to the Johns Mansfield decision?

19 A. That's far too broad. I don't think I
20 can get a handle on that.

21 Q. Okay. So I'm not sure what the -- is
22 the answer no or is the answer that you --

23 A. It's just look any action the industry
24 took in response to Johns Mansfield. Maybe I
25 misheard the question. But that could be an

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1 infinite number of things and I can't get my hands
2 around that. I don't now who to deal with that.

3 Q. I apologize. Can you point to any
4 industry standard that was established as a result
5 of the Johns Mansfield case that related to
6 document retention policies?

7 A. No.

8 Q. Okay.

9 A. No, I can't do that because, as I said,
10 it's part of the mix of a dynamic that was going on
11 at the time of a lot of different things that were
12 giving rise to the awareness about policy retention
13 and it was one of those things. There were others
14 as well.

15 Q. Okay.

16 Are there any -- I want to talk about
17 your opinions 1 and 2 that is the operations versus
18 completed operations divide, as I will call it.

19 And my question now is simply this, are
20 there any basis for your opinion on opinions 1 and
21 2 other than what we've now talked about and/or
22 contained in Exhibit 6? And I will share my screen
23 again, just to confirm Exhibit 6 is the record
24 report you prepared.

25 A. Well, the report in terms of 1 and 2,

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1 the report I prepared the documents that I have
2 reviewed and produced to the extent that they
3 provide additional support for the opinions I'm
4 making and weren't cited in my outline because I

5 didn't cite everything in my outline and then based
6 on my own experience and knowledge, those would be
7 the bases, the present bases for my opinions as to
8 1 and 2 in the outline.

9 Q. And so I guess my question is, what
10 bases are there in the documents or otherwise for 1
11 and 2 that we haven't talked about today?

12 A. I think we've pretty much covered
13 everything, just to be sure about it, the documents
14 and the policies, yeah, I these we've pretty much
15 covered it all.

16 Q. All right, I want to talk about your
17 third opinion, the Penn National search for issues
18 that column did not accord with insurance industry
19 standards okay?

20 A. Uh-huh.

21 Q. And I'm going to go back up in this
22 exhibit Exhibit 6 to the initial document you
23 prepared that begins: Insurance industry standards
24 regarding located old or lost policies.

25 A. Yes.

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1 Q. Do you have that in front of you. I
2 can share my screen but do you have a copy of that

3 in front of you?

4 A. I certainly do.

5 Q. Okay, let's just look at that if we
6 can.

7 A. Sure.

8 Q. What is your understanding of when Penn
9 National first received notice that Covil was
10 making a claim under -- against Penn National for
11 coverage in relationship to bodily injury, asbestos
12 bodily injury exposures?

13 A. I don't recall the date.

14 Q. Okay. Do you recall the year?

15 A. No, not off hand.

16 Q. Okay. Do you recall how that first
17 notification came to Penn National?

18 A. No. I know it's in the stuff that I
19 read but it doesn't come to mind right away. It's
20 in a document some place if we can see that that
21 would be helpful but I try to keep this stuff in
22 mind but that's a lot of stuff here.

23 Q. Is there a -- would how Penn National
24 was first made aware that Covil was seeking
25 coverage and when that awareness was gained be

1 point factors in your opinion?

2 A. To what. I don't know.

3 Q. To your opinion that Penn National
4 different comply with industry standards in its
5 search for policies?

6 A. Well, that's a very broad hypothetical.
7 I suppose theoretically it possibly could but how,
8 I'm not exact Liz sure what that would be.

9 Q. Okay, let me threw to flush that out?

10 A. Please.

11 Q. Your opinion that Penn National
12 searched for policies in issued to Covil did not
13 accord can industry standards?

14 A. Correct.

15 Q. Did Penn National have an obligation to
16 search for policies at issue to Covil before Covil
17 made a demand for coverage to Penn National?

18 A. Oh, well, yes, because thank you,
19 because in 2018, there was a Request for Production
20 in the Finch case for Covil documents and that
21 would have invoked Penn National's obligation to
22 conduct a serve at that time, and as I point out
23 also impose litigation hold.

24 To answer further to your question, I
25 understand that Covil wasn't named -- well, no, I

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1 don't remember when they were named as a defendant.
2 But nonetheless, the Finch Subpoena would have done
3 that. And that may have been before the actual
4 tender. I don't remember the tender date but to
5 the extent that it is before the actual tender,
6 that would certainly invoke the obligation to
7 search for that.

8 Q. So you said that was in 2018. Do you
9 know in Covil had ever made a demand on promissory
10 note for coverage related to bodily injury asbestos
11 exposures prior to 2018?

12 A. No. As I said, I don't recall the
13 date, whether it was before or after.

14 Q. So would it be fair to say that
15 whenever Covil first made a demand for coverage
16 from Penn National saying we've been sued for
17 asbestos related bodily injury claims, we think you
18 provided coverage for us, and we want you to come
19 in and defend and indemnify us, okay?

20 Whenever that was, that would have been
21 the beginning of Penn Nationals' obligation to
22 search for coverage documents is that fair.

23 MR. NES: Objection, form.

24 THE WITNESS: If that occurred before
25 the Subpoena that we're talking about in the

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1 Finch case that would have been then, rather
2 than at the time of the Subpoena in the
3 Finch case.

4 BY MR. BROWN:

5 Q. Assuming that that did not happen prior
6 to the Subpoena in the Finch case would the
7 Subpoena in the Finch case be the first time that
8 Penn National had an obligation to conduct a search
9 in your opinion?

10 A. Yes, based on what I can see and what I
11 can remember, yes, that would be the first time.

12 Q. And I'm not -- I apologize I'm not
13 trying to be difficult in this case, I'm just
14 trying to establish that before anybody came to
15 Penn National and said hey we think you have
16 coverage for Covil there would be no reason for
17 Penn National to search for policies for Covil,
18 correct?

19 A. I don't think so.

20 Q. That's all I'm trying to get at.

21 A. Okay, I see we're on the same page

22 there.

23 Q. So when Covil came to Penn National
24 seeking coverage by way of a Subpoena or a tender,
25 what in your opinion should Penn National have done

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1 at that time?

2 A. Well, Penn National should have
3 initiated an investigation into the coverages, the
4 policies that have been issued to Covil and that
5 usually starts with an interview with the
6 policyholder regarding that history and a review
7 with the policyholder as I point out in this
8 document we've been looking at, a review with the
9 policyholder as to where older documents concerning
10 insurance coverage may be at and whether those
11 sources have been reviewed or not, along with a
12 number of other questions that would lead to other
13 possible sources for policy information.

14 It's a broad-based investigation as the
15 outlines that I've put together here in this
16 document we've been looking at point 2.

17 Q. What is your understanding of what Penn
18 National in fact did?

19 A. Penn National looked -- said it

20 couldn't find anything in its policies because in
21 its -- in its archived policies, paper and
22 microfiche because it didn't index by policy by
23 policyholder name, it could only index by policy
24 number.

25 Q. So didn't Penn National actually look

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1 for the two policies based on the policy numbers
2 that had been given?

3 A. Yes, I believe there was a search for
4 that, of course, yes.

5 Q. And they found those policies, correct?

6 A. Surprisingly, yes, it was amazing.

7 They found those two policies because the -- Covil
8 somehow had those policy numbers.

9 Q. And they responded to the Subpoena with
10 that information, correct?

11 A. I don't recall the specific response to
12 the Subpoena but I would resume so.

13 Q. I mean, they turned the policies over?

14 A. Yes yes.

15 Q. We've been talking about them all day.

16 A. Yeah, sure, they turned them over to
17 the best I can -- yeah.

18 Q. And what is based on the industry
19 standards, what more should Penn National have done
20 at that point to look for policies?

21 A. Okay, so again it meets with the
22 insured, goes over a number of possible sources for
23 where policy information may still be stored or
24 available. And then it looks at many of the types
25 of sources that I have outlined in -- that are in

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1 my outline here and there's a number of them, of
2 places internally in the insurance company and
3 externally with the policyholder or elsewhere, such
4 as with the broker or the agent. It's a broad
5 based investigation into looking for other
6 information. Of course in this case -- Well, I
7 will get to that in a minute.

8 Q. What is your understanding of what Penn
9 National actually did?

10 A. It looked at its own database for
11 policies and then said couldn't find any others
12 besides the two that it had that it find because it
13 indexed only by policy number and not insureds
14 name.

15 Q. Did Penn National, as far as you know

16 talk to the insured or the insured's counsel?

17 A. If they -- to the extent that they did,
18 I found no substantive record to that effect as to
19 what they did there. And specifically no
20 substantive record as to how they explored the
21 various possible sources that the insured may have
22 for such records. It's really quite surprising to
23 me and I have had this happen I don't know how many
24 times when you sit down with a policyholder and you
25 start going over things that you need, at some

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1 point the policyholder says, oh, now I remember.

2 You know, it happens all the time.

3 Q. Do you know what if Covil was still in
4 business in 2018?

5 A. No, it was not, there was a receiver
6 appointed by that point.

7 Q. Do you know what ability Penn National
8 had to sit down with Covil as you described it and
9 gather that information?

10 A. No, I don't no know, because I didn't
11 see any substantive indication that Covil I mean
12 that Penn National tried to locate prior employees,
13 owners, whatever you have, brokers, agents

14 accountants, all of these potential sources to see
15 if they might still be available and might still
16 have records that's the kind of search that I have
17 seen done.

18 Q. The agent is a defendant in this
19 lawsuit, correct.

20 A. Well, yeah. Now you refresh me of
21 that. That's not an issue I paid a whole lot of
22 attention to but you're right.

23 Q. Do you know if the agency is still in
24 business?

25 A. I have no idea.

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1 Q. Let me ask you to look at Exhibit 6
2 which is your report that we looked at today?

3 A. Yeah.

4 Q. Specifically the first page of the
5 insurance industry standards regarding locating
6 older or lost policies.

7 A. Sure.

8 Q. And down on the first page you said,
9 Reconstruction of older policies becomes an
10 important if not critical objective where an
11 insured faces claims arising from asbestos exposure

12 over several years --

13 A. Yes.

14 Q. -- often this reconstruction is done
15 through the use of secondary evidence.

16 Correct?

17 A. Yes.

18 Q. If you don't have the policy itself, it
19 has to be done through secondary evidence, correct?

20 A. If you don't have the policy itself,
21 yes. If you can pull together the necessary
22 secondary evidence, that is true.

23 Q. Right. And that's the definition of
24 secondary evidence, is evidence that tends to prove
25 up the terms and conditions of the policy that are

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1 not the policy itself, correct?

2 A. Yes, and another aspect of that,
3 however, is that you may have portions of the
4 policy; and that may also help you. I have seen
5 that happen.

6 Q. "So you say that indeed one insurance
7 industry source offers that greater weight might be
8 accorded to secondary documents in the following
9 order..."

10 And then you you list them.

11 A. Yes.

12 Q. Insurer documents. We've talked about
13 that.

14 Two, broker document or third-party.

15 Do you know what if any worker or
16 third-party documents there were here?

17 A. No, I don't. I saw nothing substantive
18 concerning Penn National's investigation of those
19 policy documents.

20 Q. And policyholder documents, do you know
21 what policyholder documents there were here other
22 than the policies themselves?

23 A. No, because again I saw no substantive
24 evidence of Penn National's search for the broad
25 range of potential documents that Covil may have

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1 had.

2 Q. So then you come down to say, Other
3 types of recognized secondary evidence that an
4 insured can seek include records produced by
5 insurance brokers, premium invoices, loss
6 prevention surveys, et cetera.

7 Correct?

8 A. Oh, I see you skipped a couple
9 paragraphs. I just lost you for a moment.

10 Q. My apologies. I was just trying to
11 talk about the kinds of secondary evidence that
12 were quoted?

13 A. Yes, the kinds of things that you can
14 look for, yes.

15 Q. And are you aware in this case of any
16 of those things being available to try to establish
17 the terms and existence of the policy other than
18 the two for which we actually have the policies
19 themselves?

20 A. No, I haven't seen any substantive
21 evidence that any of this was sought or that Penn
22 National sought to obtain these, so I can't talk
23 about availability for something that Penn National
24 didn't do.

25 Q. Well isn't it true that an industry

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1 standard is that when an insured is trying to prove
2 up a lost policy, that the burden is on the insured
3 to come up with some secondary evidence to as to
4 why they think a policy exists?

5 A. They're supposed to assist in that

6 regard. I don't doubt that. And that's why the
7 named insured is in that first list; they're
8 supposed to assist.

9 But with the assistance of the
10 Insurance Company who has or should have much more
11 experience and knowledge about how to go about
12 doing this sort of thing.

13 Q. And are you aware of any secondary
14 evidence that Covil or anyone on its behalf
15 produced that tended to prove the existence of any
16 policy other than the '86 to '88 policies?

17 A. No.

18 Q. Okay.

19 A. There's no substantive indication of
20 any of that, so --

21 Q. Do you --

22 A. -- that I have seen.

23 Q. Is part of your opinion, Mr. Miller,
24 that Penn National had policies for years other
25 than '86 to '88?

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1 A. I don't know, because they couldn't
2 find them. Well, yes, now, they did find, after
3 the law firm -- oh, man, I'm going to have to

4 resurrect this -- the law firm that was ordered by
5 the court to do the search.

6 Q. Bryson waters.^ c

7 A. Yeah, thank you. They went in and did
8 a search and they found four additional policies
9 marine, auto, maybe Workers' Comp. I don't
10 remember if there was a fourth one or what it was.
11 During the same period as the general liability
12 policies, however, those four policies also covered
13 an additional year, like '86, '87 or 88/89. I
14 don't remember.

15 But combined together, those four
16 policies covered three years. So additional
17 policies were discovered in that informal search
18 that the law firm did.

19 Q. Do you know where they found those
20 policy numbers?

21 A. Where they found the policies or the
22 policy numbers?

23 Q. How did they have the policy numbers to
24 look for those policies, do you know?

25 A. No, I don't know. They just went in,

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1 as I read it, and did a search on their own

2 -- which I thought was a manual search, but maybe
3 not -- and they came up with four policies.

4 Q. So let me just follow-up to make sure
5 I'm clear. Is it -- is it your opinion that Penn
6 National issued a general liability policy to Covil
7 for any period of time other than '86 to '88?

8 A. That's the only one we have, so I don't
9 have an opinion as to the rest because Penn
10 National says it can't search for anything else.

11 Q. Okay.

12 A. And the only one that has found
13 anything is the Ellis search and maybe that was a
14 manual search, I don't know, but somehow they were
15 able to find, despite Penn National's statement,
16 but that's as far as we can go at this point.

17 Q. Do you know if there were any periods
18 of missing GL coverage for Covil surrounding the
19 '86 to '88 Penn National policies?

20 A. Not off hand, no.

21 MR. NES: Object to form.

22 BY MR. BROWN:

23 Q. Would that be a relevant factor in your
24 mind?

25 A. It would be something that would be

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1 looked at in the context of the search, yes.

2 Q. And if there were other GL coverage in
3 effect, say, from '84 to '85 and '86 and then '88
4 to '89 and '89 to '90 with other carriers with Penn
5 National having those two years that we've
6 identified from '86 to '88, wouldn't that make it
7 more likely than not in your mind that Penn
8 National did not have coverage other than for those
9 two years?

10 MR. NES: Objection, form.

11 THE WITNESS: No, not at all, not at
12 all.

13 BY MR. BROWN:

14 Q. Why not?

15 A. Because policyholders go back and forth
16 with their insurance companies. They may be with I
17 and A for three years and then go to Cigna for two
18 years and then maybe another big commercial
19 carrier, Fireman's Fund, for another year, and then
20 come all the way back to whatever the original one
21 was I said, to their -- to that original carrier.
22 They may bounce around depending on what kind of
23 rates their broker can get. And I've seen that
24 happen. So it doesn't preclude them writing other

25 policies at all.

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1 Q. But you would not expect one insurer in
2 that situation to have multiple primary GL policies
3 with different carriers for the same year, correct?

4 MR. NES: Objection, form.

5 THE WITNESS: Well, you know, I have
6 actually seen that happen.

7 BY MR. BROWN:

8 Q. How often have you seen that happen?

9 A. It's not very -- I haven't seen it
10 happen very much in my own personal experience, so
11 I can't say how often it happens in the rest of the
12 world, but I have seen that happen.

13 Q. Isn't it true, Mr. Miller, that the
14 expectation is that GL carriers -- I mean that
15 policyholders buy one primary GL coverage per year?
16 Hasn't that been your experience, every year? They
17 might not have excess layers but one primary GL
18 policy per year?

19 A. Generally speaking I would agree with
20 you but it doesn't preclude the possibility that
21 they have additional ones.

22 Q. All right. And they do that because

23 it's -- it's cheaper to go out and get excess
24 coverage up the tour than it is to get another
25 dollar one primary GL policy, correct?

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1 A. It can be, yeah it depends on the scope
2 of coverage of the other CGL policy the primary and
3 so it may have a narrow scope of coverage like
4 limited to a specific site or something like that
5 or a specific type of operation, something like
6 that.

7 Q. And certainly insureds do that but
8 you've been in this business a long time.

9 I mean, isn't it fair to say that most
10 commercial policies in your experience if they buy
11 a basic garden variety GL policy first dollar
12 coverage duty to defend defense costs outside
13 limits, that they buy that policy, that while they
14 might buy excess coverage to get higher liability
15 or indemnity limits, they're not going to go buy
16 another first dollar GL policy for that same year
17 with the same scope of coverage. That would be
18 very unusual, correct?

19 A. That would be uncommon, I agree. It
20 would be uncommon.

21 Q. And so this --

22 A. But let me ask this, though.

23 Does your scenario assume that the
24 primary care -- that the insured, rather than get a
25 separate policy, has a primary policy and then has

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1 excess layers above that?

2 Q. Correct.

3 A. Oh, okay, I just wanted to make sure.

4 Q. And getting back to Covil, my question
5 is, we know that Penn National had coverage from
6 '86 to '88 because we had those two policies,
7 correct?

8 A. Yeah.

9 Q. Okay. And if Covil could not identify
10 any GL policy from, say, 84 to 86, that might raise
11 the question as to whether Penn National had the
12 policy during those years as well, in addition to
13 the '86 to '88 timeframe, correct?

14 A. It could, yeah.

15 Q. But if other carriers had coverage
16 right up until '86 when the first Penn National
17 policy incepted and after '88 when the second Penn
18 National policy ended, then wouldn't that be some

19 evidence that Penn National only issued policies
20 for those two years, meaning that there was no
21 missing policy, so to speak, in that window of
22 time?

23 A. In that limited window of time?

24 MR. NES: Objection.

25 BY MR. BROWN:

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1 Q. Yes.

2 A. So that gets around the problem that
3 I -- the scenario that I offered a while ago that
4 they wait a couple three years and then they go
5 back to the original carrier again.

6 So within that limited period of time,
7 would that indicate that there wasn't any other
8 Penn National policy '84 to '89, let's say.
9 Because there's some evidence of -- I'm doing this
10 to make sure I get this right -- because there's
11 evidence of the issuance of liability policies for
12 a couple of years before our period, the Penn
13 National policy, and maybe for a couple of years
14 after the Penn National policy. That could be the
15 case. But what we would want to do is we would
16 want to look at those policies that were issued

17 before and after our ^ c Penn National period of
18 time to determine exactly what they covered and
19 whether they're limited to certain types of
20 exposures for this insured. Thereby possibly
21 requiring Covil to get additional liability
22 coverage. I don't know, I haven't seen them, so I
23 can't offer any further opinion on that.

24 Q. You've not reviewed any policies other
25 than the two Penn National policies, correct?

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1 A. That's true.

2 Q. So whether the scope of coverage
3 afforded by other insurers either before or after
4 Penn National is the same, more broad, more narrow,
5 you don't have an opinion on; true?

6 A. No, I don't. I haven't seen them.

7 Q. Going back to your outline --

8 A. Yes.

9 Q. -- Exhibit 6, on the bottom of Page 3,
10 top of Page 4 you say, Insured can also investigate
11 various business records which can be used as a
12 source of secondary evidence.

13 And then you identify various
14 documents, accounting ledger sheets, canceled

15 premium checks, et cetera; correct?

16 A. Yes.

17 Q. Are you aware of any evidence of any of
18 those things here that would tend to establish any
19 coverage for Penn National other than '86 to '88?

20 A. No, I am not. I didn't see any
21 substantive evidence of an investigation by Penn
22 National into these areas.

23 Q. And you also talk about umbrella or
24 excess policies?

25 A. Yes.

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1 Q. And typically it would be common would
2 it not for an umbrella or excess policy to list a
3 primary policy in the schedule of underlying
4 insurance, true?

5 A. The immediate excess carrier would.
6 Whether the subsequent excess or umbrella is is
7 another thing.

8 Q. Have you seen any evidence that there
9 was any umbrella or excess policy that listed a
10 purported Penn National policy a primary GL policy
11 for Covil other than the '86 to '88 timeframe?

12 A. No, I haven't seen any evidence of

13 that, so I don't know if it exists or not.

14 Q. Similarly, you talk about claim files.

15 Are you aware of any claim files that would tend to
16 show that there is a Penn National policy in effect
17 other than '86 to '88.

18 A. No, I'm not aware of any claim files.

19 Q. We talked about facultative and treaty
20 reinsurance obligations. Are you aware of any
21 reinsurance treaties or information to suggest that
22 Penn National ever sought reinsurance for a GL
23 policy for Covil other than in the '86 to '88
24 timeframe?

25 A. Or even during that timeframe,

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1 actually. No, I saw no indication that Penn
2 National conducted any investigation of
3 reinsurance.

4 Q. Okay. So I understand your point and
5 you mentioned earlier that Penn National in your
6 opinion should have had a way to search for policy
7 documents other than through policy number?

8 A. Yes.

9 Q. Other than that, isn't it true that
10 Penn National did all it could have done to

11 investigate potential for coverage in this matter?

12 In other words, given the limitations
13 that it had, which was to only search by policy
14 number, and given the lack of secondary evidence of
15 any other policies that we've just discussed, isn't
16 it true there was nothing more Penn National could
17 have done to look for policies other than the two
18 it found?

19 A. Well, your question assumes that
20 there's a complete lack of secondary evidence. And
21 I have seen no indication of that, because I have
22 seen no indication of Penn National looking at
23 that, looking for that or even primary evidence at
24 all of these other sources that Penn National
25 should have considered and looked into.

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1 Rather, Penn National just looked at
2 its own limited record base, and, you know, that's
3 all it did. And that clearly doesn't comply with
4 industry standards.

5 Q. So your opinion is that Penn National
6 didn't review documents if there's no evidence of
7 it ever existing?

8 A. I'm not sure I followed that question,

9 could you --

10 Q. Your opinion is that Penn National did
11 something wrong by not looking for secondary
12 evidence but yet there's no secondary evidence at
13 which they could have looked.

14 MR. NES: Object to form.

15 THE WITNESS: I don't know if there's
16 no secondary evidence because I saw no
17 evidence that Penn National looked for it.

18 If Penn National looked for it and then
19 reported in their file, which is illusive, I
20 guess, their file, while we have done this
21 this this and there's no secondary evidence,
22 that would be significant. But we don't see
23 that. We don't see any effort to even look
24 for secondary evidence.

25 BY MR. BROWN:

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1 Q. Okay. So let me come back to the
2 question of storing documents in a terminal digit
3 system. You're aware that's how Penn National did
4 it?

5 A. Yeah, right, yeah.

6 Q. Are you aware of other insurers storing

7 historical policy documents on a terminal digits
8 system?

9 A. I don't know if it was terminal digit
10 or not, but I am aware that one of the features of
11 other insurers that I have seen is to store it by
12 policy number, whether it was terminal digit or
13 some other aspect of policy number, off hand I
14 couldn't tell you.

15 Q. And what other insurers have you seen
16 that have done that?

17 A. Okay. Well, Fireman's Fund, Travelers,
18 and I have been involved in three or four of these
19 other cases like this and I can't remember the
20 insurers right off hand. I would have to go back
21 and look.

22 Q. Would you agree it was an industry
23 standard to store and maintain documents based on a
24 policy number?

25 A. As one of the criteria. I have never

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1 seen anybody do it just based on policy number
2 because one of the important things to think about
3 here is that when policy holders come to you for
4 coverage they don't often have -- we're lucky to

5 get them here, the policy numbers for historic
6 policies, and the industry recognizes that.

7 Q. And that was going to be my next
8 question. You don't have an issue with Penn
9 National storing documents and tracking them by
10 policy number. Your contention is they should have
11 done it some other way as well?

12 A. Some other way as well as they did do
13 it in the years before and now the years after,
14 evidencing that it can be done by Penn National.

15 Q. You talked earlier about about the
16 destruction of policies. If one assumes that Penn
17 National's first notice of Covil seeking coverage
18 or someone seeking coverage on Covil's behalf was
19 in 2018 and if Penn National's document retention
20 policy for GL policies was 25 years, given that
21 Covil went out of business in '91, '92, is it fair
22 to say that Penn National would not have had any
23 policies for Covil in 2018 given it's 25-year
24 document retention policy?

25 A. You would certainly think so, but they

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1 did.

2 Q. And found those two policies?

3 A. They found those -- they found those
4 two policies which theoretically should have
5 been -- theoretically should have been subject to
6 their 25 year destruction program which I think is
7 a bit short and I think they recognize that, but
8 they weren't. And I can't recall the fellow's
9 name, he was deposed here twice, said he couldn't
10 explain why that's the case. Obviously the
11 destruction program has some holes in it.

12 Q. Well, it has some holes in the sense
13 that those policies in the '80s shouldn't have been
14 destroyed 25 years later but in fact it's to
15 Covil's benefit here that they weren't because we
16 have the policies, right?

17 A. Well, you know, I don't think that Penn
18 National did it -- held onto them for Covil's
19 benefit, I think Penn National made a mistake in
20 not destroying them early pursuant to its premature
21 policy destruction. So that's a very odd way of
22 putting it, I would tend to think.

23 Q. Why is that an odd way of putting it?
24 The reality is that had the policies been destroyed
25 then we would be here potentially arguing about

1 whether or not the policies existed but we don't
2 have to do that because we have the policies?

3 A. We have the policies and the
4 destruction policy didn't work so what does that
5 tell us. Well, are there other policies where it
6 didn't work? Because it doesn't seem to be that
7 effective, the deconstruction policy.

8 Did anybody take that into account?
9 No, because they can't search beyond the policy
10 number, so -- and they didn't conduct at least
11 substantively that I can see any other type of
12 search.

13 Q. You mentioned that you thought the
14 25-year timeframe was too short. I thought we
15 discussed that earlier.

16 A. No.

17 Q. Do you contend that's outside industry
18 standards to have a 25-year document destruction
19 policy?

20 A. Given what happened in the late 70s and
21 early 80s and I think that -- why do I keep
22 forgetting her name. Frost. I think Frost
23 testifies to this. But what's significant there,
24 is that the destruction policy for the Workers'
25 Comp policies was 50 years.

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1 Now, if they can do that for Workers'
2 Compensation, where there's no long tail kind of
3 injury exposure, they certainly can do it for their
4 CGLs and similar policies where there is a long
5 term exposure and where they should or did know
6 about it, and, in fact, did search -- did create
7 searches for policyholder name at one point. They
8 certainly could have done it, the 50 years, given
9 what happened in the late seventies and early 80s
10 and after that, 25 years is nothing.

11 Q. Whether they could have done it and
12 whether it was outside industry standards to do it
13 for 25 years are two different questions, right?

14 A. Say that again.

15 Q. Whether they could have held documents
16 longer forever, or whether it was outside of
17 industry standard to have a 25-year destruction
18 policy is two different questions, right?

19 A. I suppose so.

20 Q. Okay. And where do you gain the
21 industry standard that the 25-year policy for GL
22 policies was too short?

23 A. Oh, well, from my own experience of

24 what they are and from the fact that they had a 50
25 year one on the Workers' Compensation one here and

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1 from Frost's deposition, I believe she discusses it
2 in there about length of time that these policies
3 should be kept.

4 Q. Other than the testimony of the
5 receiver and other expert in this case, can you
6 point me to any other document or anything that
7 would say that that was outside of industry
8 standard?

9 A. No, not off hand, however, what I did
10 note -- excuse me, I need to turn this off. What I
11 did note was that the head of administrative
12 services was in charge of all of this and he's the
13 guy who was deposed. Sorry, I can't think of his
14 name.

15 Q. Reifschneider?

16 A. Reifschneider, thank you. He's the one
17 who designed this program and going back several
18 years. And presumably was the one who did the 25
19 years. But there's no evidence at all that -- and
20 he doesn't have a claims background. Most of his
21 work is paying the rent and seeing that the rental

22 cars -- the company cars are taken care of and so
23 on and so forth. He doesn't have any real
24 background in this area, nor does he -- there's no
25 evidence of this -- confer with underwriting people

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1 and claims people who are facing these kinds of
2 long tail claims as to how long this should be. Or
3 anyone else to develop an appropriate destruction
4 and I think I thought that was a significant
5 failure on the part of Mr. Reifschneider and Penn
6 National to make an effort to accurately determine
7 what they should be.

8 Q. I've marked as Exhibit 12, Penn
9 National document retention policy. We've talked
10 about it quite a bit and I want to make sure that
11 we're -- looking at the same document let me share
12 my screen with you, Mr. Miller Exhibit 12 and I
13 note similar to Mr. Nes's comment, this is
14 confidential materials and it has been marked as
15 such but is this records retention policy that
16 you've -- it's a lengthy document.

17 A. Yes, it is.

18 Q. Is this policy? I can scroll through
19 the whole thing?

20 A. No, it's the '96 records retention
21 policy.

22 Q. Yes, sir.

23 A. Yeah, that's the one I saw.

24 Q. May 28th, 1996. So this is the records
25 retention policy that you've described?

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1 A. Yes.

2 Q. Do you believe this policy is at odds
3 with industry standards because it allows for the
4 destruction of GL policies after 25 years?

5 A. That was my understanding?

6 Q. Okay. Well, I guess my question is, Is
7 that your opinion?

8 A. Well that's from what I've read, that
9 they had a 25-year destruction policy on CGL and
10 they had a 50-year destruction policy on Workers'
11 Comp.

12 Q. And I guess my question is, is it your
13 opinion that that is at odds with an industry
14 standard?

15 A. I am not aware of a specific industry
16 standard on the length of time. It is at odds with
17 my own experience in this regard and what I think

18 an insurance company should do given what the
19 insurance industry faced and learned in the late
20 seventies, early 80s.

21 Q. Have you ever testified in any case to
22 that -that view that you just described that is the
23 view that in light of risks being confronted by the
24 insurance industry in the '70s and '80s, that the
25 insurer should have not destroyed any GL policies,

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1 have you ever been an expert in a case where you
2 gave that opinion before?

3 A. I don't specifically recall one way or
4 another off hand unfortunately.

5 Q. You said you have testified in some
6 lost policy cases, thought right?

7 A. Yes that's true.

8 Q. How many lost policy cases have you
9 testified in?

10 A. Maybe 3 to 6 cases like that over the
11 years. I've been doing this a long time so that's
12 just kind of a stab in the dark.

13 Q. And were those cases for insurers or
14 for policyholders?

15 A. They would have been for policyholders,

16 yes.

17 Q. And was the nature of the testimony in
18 those cases about whether or not supposed secondary
19 evidence was sufficient to establish the terms and
20 conditions of the policy?

21 A. That issue came up in those cases. In
22 some of those cases, at least.

23 Q. Okay. With regard to your third
24 opinion, that Penn National searched for policies
25 it issued to covil did not accord with insurance

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1 industry standards. Do you have any basis for that
2 opinion other than what you've now testified to or
3 what's contained in -- I believe it was Exhibit 6.

4 A. And what may be contained in the other
5 documents that I heave produced that I haven't
6 summarized here, because it would be just too much,
7 that pertain to this issue as well as my own
8 experience and knowledge, which we may have
9 previously covered, but I just want to make sure.

10 Q. So let me be more clear in my question.

11 Other than what you've discussed here
12 this afternoon, what has been in the documents that
13 you've produced, including Exhibit 6 --

14 A. Yes.

15 Q. -- which I will show to you to make
16 sure we're talking about the same thing.

17 A. Yes, we're all on the same page.

18 Q. And of course your own experience and
19 beliefs are there any other basis for that --

20 A. I would prefer to characterize it as my
21 own experience and knowledge. I have a lot of
22 beliefs, but they don't pertain here.

23 Q. In any other basis for that third
24 opinion other than what we just discussed?

25 A. No, I think that's it.

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1 Q. And just so I'm clear, you're not
2 offering the opinion that Penn National had
3 coverage for any specific period of time, rather
4 than you're offering the opinion that Penn
5 National's search for policies that might have
6 existed for other periods of time was inadequate?

7 A. Yes, but I am offering opinions that
8 there was coverage during certain periods of time,
9 maybe I misunderstood the question.

10 Q. Are you of the opinion that there was
11 GL coverage for Covil issued by Penn National for

12 any periods of time other than '86 to '88?

13 A. No, no, we don't have any policies, so
14 I can't offer that opinion.

15 Q. And no secondary evidence of GL
16 policies for any other periods of time, is that
17 true?

18 MR. Nes: Objection to form.

19 THE WITNESS: That's right, not that
20 I'm aware of, anyway.

21 MR. BROWN: Okay, I think that's all I
22 have, Mr. Miller I appreciate your patience
23 as we all work through our technology issues
24 here today. I don't know if counsel has any
25 questions but I appreciate your time.

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1 THE WITNESS: Thank you sir.

2 EXAMINATION

3 BY MR. NES:

4 Q. Mr. Miller this is Brad Nes for the
5 receiver for Covil corporation.

6 You were asked several questions by
7 Mr. Brown about secondary evidence of coverage
8 prior to the 1986/87 policy period.

9 A. Yes.

10 Q. Do you remember that testimony
11 generally?

12 A. Yes, generally.

13 Q. Were you asked to opine on whether or
14 not there was secondary evidence of GL coverage
15 prior to 1986, 87?

16 A. No I was not.

17 Q. Did you review the documents that you
18 were produced to you with an eye forwards looking
19 for secondary evidence of coverage prior to 1986?

20 A. No, I did not.

21 Q. No further questions.

22 A. Okay, do I can by the way I will read
23 and sign just to have their.

24 THE VIDEOGRAPHER: The time on the
25 monitor is 4:59 p.m. and this concludes the

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1 deposition

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

v.

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

Defendants.

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

**DEFENDANT PENN NATIONAL'S
OBJECTIONS TO
THE RECEIVER'S DESIGNATION
OF TRIAL EXHIBITS**

Defendant Pennsylvania National Mutual Casualty Insurance Company ("Penn National"), by and through counsel and pursuant to the Scheduling Order entered in the above action, hereby provides the following objections to the list of trial exhibits designated by the Receiver for Covil Corporation (the "Receiver"). Penn National's objections have been input as codes; the key to the codes is as follows:

CODE	OBJECTION
106	South Carolina Rule of Evidence 106 (Remainder of or Related Writings or Statements)
402	South Carolina Rule of Evidence 402 (Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible)
403	South Carolina Rule of Evidence 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time)
408	South Carolina Rule of Evidence 408 (Compromise and Offers to Compromise)
702	South Carolina Rule of Evidence 702 (Testimony by Experts)
802	South Carolina Rule of Evidence 802 (Hearsay Rule)

F	Lack of foundation
NP	Not produced
Privilege	Document is protected by attorney-client privilege or work product protection

Penn National submits these objections subject to a full reservation of its rights, including but not limited to the following:

1. Penn National reserves the right to object to all exhibits on hearsay grounds depending on the Receiver's use of the document at trial.
2. Penn National reserves the right to object to all exhibits on grounds that the exhibit is cumulative.
3. When an exhibit is a composite document, Penn National incorporates by reference all objections to component documents.
4. Penn National reserves the right to object to documents when the Receiver provided the incorrect PDF or provided an incorrect description for the document.
5. Regarding documents on the Receiver's trial exhibit list that are duplicative of other exhibits on its list, Penn National incorporates by reference their objections to all versions of the document.
6. Penn National makes this submission subject to its reservation of that its compliance with pretrial deadlines ordered by the Court in this matter does not vest the Court with jurisdiction to proceed prior to the Court of Appeals sending the remittitur on Penn National's appeal of the May 5, 2022 and May 26, 2022 Orders on the Receiver's Motions to Compel.

Exhibit No.	Document	Document Identification	Confidential	Objection
1	GL Policy Number 515 50 28 53-7	Penn National Policies 000001 – 000043		
2	GL Policy Number 515 50 28 53-8	Penn National Policies 000044 – 000091		
3	Boyd Wright Affidavit in Opposition to Receiver's Motion for Summary Judgment, dated October 22, 2021			
4	Inland Marine Policy	PNI-1225 – 1324		
5	Auto Policy	PNI-1325 – 1611		
6	Auto, Inland Marine, and Workers Compensation Policies	PNI-0393 – 0596		
7	Penn National-Covil Underwriting File	PNI-0304 – 0392		
8	Penn National Document Retention Policies	PNI-0598 – 1158		
9	Litigation Hold Procedure	PNI-1159 – 1161		
10	Dec. 17, 2021 Litigation Hold Email			
11	Microfiche Destruction Dates Spreadsheet	PNI-0597	X	
12	Underlying subpoena served in <i>Finch</i> asbestos suit dated May 29, 2018			
13	Penn National's June 15, 2018 letter and documents served in response to subpoena in <i>Finch</i> asbestos suit			
14	Sept. 1, 2022 Letter from Boyd Wright to Peter Protopapas	Covil v Penn 2098_000001 – 000002	X	
15	Estate of Jerry W. Archer, Sr. asbestos file	Covil v. Penn 2098_000003-166		402, 403, 802
a)	Complaint	Covil v. Penn 2098_000003-68		402, 403, 802
b)	Work Sites	Covil v Penn 2098_000069		402, 403, 802
c)	Plaintiff's Responses to Interrogatories	Covil v Penn 2098_000070-81		402, 403, 802
d)	Plaintiff's Responses to Master Interrogatories and	Covil v Penn 2098_000082-147		402, 403, 802

	Request for Production of Documents			
e)	Deposition transcript of B. Glenn – dated July 28, 2010	Covil v Penn 2098_000148-66		402, 403, 802
16	Estate of Robert J. Ashworth asbestos file	Covil v Penn 2098_000167-638		402, 403, 802
a)	Complaint	Covil v Penn 2098_000167-215		402, 403, 802
b)	Work Sites	Covil v Penn 2098_000216-17		402, 403, 802
c)	Plaintiff's Responses to Interrogatories	Covil v Penn 2098_000218-29		402, 403, 802
d)	Plaintiff's Responses to Master Interrogatories and Request for Production of Documents	Covil v Penn 2098_000230-85		402, 403, 802
e)	Covil Motion for Summary Judgment.pdf	Covil v Penn 2098_000286-90		402, 403, 802
f)	Deposition transcript excerpt of D. Rollins – dated June 7, 2019	Covil v Penn 2098_000291-96		402, 403, 802
g)	Plaintiff's Opposition to Covil's Motion for Summary Judgment	Covil v Penn 2098_000297-303		402, 403, 802
h)	Deposition transcript of D. Rollins – dated Feb. 18, 2019	Covil v. Penn 2098_000304-441		402, 403, 802
i)	Deposition transcript of D. Rollins – dated Feb. 19, 2019	Covil v. Penn 2098_000442-528		402, 403, 802
j)	Invoices	Covil v. Penn 2098_000529-36		402, 403, 802
k)	Project listings document	Covil v. Penn 2098_000537-42		402, 403, 802
l)	Deposition transcript of R. Ashworth – dated Aug. 2, 2017 (de bene esse)	Covil v Penn 2098_000543-588		402, 403, 802
m)	Deposition transcript of R. Ashworth – dated Aug. 2, 2017 (discovery)	Covil v Penn 2098_000589-638		402, 403, 802
17	Robert E. Aspray asbestos file	Covil v Penn 2098_000639-829		402, 403, 802
a)	Complaint	Covil v Penn 2098_000639-99		402, 403, 802
b)	Work History	Covil v Penn 2098_000700-3		402, 403, 802

c)	Second Amended Complaint	Covil v Penn 2098_000704-52		402, 403, 802
d)	Plaintiff's Responses to Standard Interrogatories	Covil v Penn 2098_000753-66		402, 403, 802
e)	Covil's Amended Motion for Summary Judgment	Covil v Penn 2098_000767-70		402, 403, 802
f)	Plaintiff's Response in Opposition to Covil's Motion for Summary Judgment	Covil v Penn 2098_000771-87		402, 403, 802
g)	Deposition transcript of P. Haynes – dated June 30, 2020	Covil v Penn 2098_000788-829		402, 403, 802
18	Jerry V. Campbell asbestos file	Covil v. Penn 2098_000830-1441		402, 403, 802
a)	Complaint	Covil v Penn 2098_000830-912		402, 403, 802
b)	First Amended Complaint	Covil v Penn 2098_000913-1002		402, 403, 802
c)	Work Sites	Covil v Penn 2098_001003		402, 403, 802
d)	Plaintiffs' Answers to Standard Interrogatories	Covil v Penn 2098_001004-1013		402, 403, 802
e)	Plaintiffs' Responses to Master Interrogatories and Request for Production of Documents	Covil v Penn 2098_001014-1156		402, 403, 802
f)	Plaintiffs' Supplemental Answers to Standard Interrogatories	Covil v Penn 2098_001157-58		402, 403, 802
g)	Plaintiffs' Supplemental Responses to Master Interrogatories and Requests for Production	Covil v Penn 2098_001159-1210		402, 403, 802
h)	Covil's Motion for Summary Judgment	Covil v Penn 2098_001211-16		402, 403, 802
i)	Deposition transcript of M. Sanders – dated Feb. 1, 2022	Covil v Penn 2098_001217-55		402, 403, 802
j)	Deposition transcript of M. Sanders – dated Feb. 2, 2022	Covil v Penn 2098_001256-1303		402, 403, 802
k)	Deposition transcript of M. Sanders – dated Feb. 4, 2022	Covil v Penn 2098_001304-51		402, 403, 802
l)	Deposition transcript of J. Campbell – dated Oct. 21, 1999	Covil v Penn 2098_001352-1402		402, 403, 802

m)	Deposition transcript of J. Campbell – dated July 28, 2021	Covil v Penn 2098_001403-41		402, 403, 802
19	Estate of Julian D’Amico, Jr. asbestos files	Covil v Penn 2098_001442-1918		402, 403, 802
a)	Complaint	Covil v Penn 2098_001442-1517		402, 403, 802
b)	Plaintiff’s Responses to Standard Interrogatories	Covil v Penn 2098_001518-1531		402, 403, 802
c)	Plaintiff’s Responses to Master Interrogatories and Request for Production of Documents	Covil v Penn 2098_001532-1609		402, 403, 802
d)	Covil’s Motion for Summary Judgment	Covil v Penn 2098_001610-13		402, 403, 802
e)	Plaintiff’s Opposition to Covil’s Motion for Summary Judgment	Covil v Penn 2098_001614-24		402, 403, 802
f)	Deposition transcript of J. D’Amico – dated Oct. 11, 1999	Covil v Penn 2098_001625-43		402, 403, 802
g)	Deposition transcript of J. D’Amico – dated Oct. 26, 1994	Covil v Penn 2098_001644-1881		402, 403, 802
h)	Deposition transcript of J. D’Amico – Jan. 30, 2001	Covil v Penn 2098_001882-1918		402, 403, 802
20	Galen Garren asbestos files			402, 403, 802
a)	Complaint	Covil v Penn 2098_001919-84		402, 403, 802
b)	Plaintiff’s Responses to Standard Interrogatories	Covil v Penn 2098_001985-97		402, 403, 802
c)	Plaintiff’s Responses to Master Interrogatories and Request for Production of Documents	Covil v Penn 2098_001998-2014		402, 403, 802
d)	Covil’s Motion for Summary Judgment	Covil v Penn 2098_002015-20		402, 403, 802
e)	Deposition transcript of G. Garren – dated Oct. 13, 2021	Covil v Penn 2098_002021-2104		402, 403, 802
f)	Deposition transcript of G. Garren – dated Oct. 14, 2021	Covil v Penn 2098_002105-29		402, 403, 802
21	Estate of Beverly D. Jolly asbestos files	Covil v Penn 2098_002130-2266		402, 403, 802
a)	Complaint	Covil v Penn 2098_002130-71		402, 403, 802

b)	Second Amended Complaint	Covil v Penn 2098_002172-2213		402, 403, 802
c)	Work Sites	Covil v Penn 2098_002214		402, 403, 802
d)	Plaintiffs' Responses to Standard Interrogatories	Covil v Penn 2098_002215-45		402, 403, 802
e)	Covil's Motion for Summary Judgment	Covil v Penn 2098_002246-55		402, 403, 802
f)	Covil's Amended Motion for Summary Judgment	Covil v Penn 2098_002256-66		402, 403, 802
22	Ronnie J. Jonas asbestos files	Covil v Penn 2098_002267-2683		402, 403, 802
a)	Complaint	Covil v Penn 2098_002267-2341		402, 403, 802
b)	Plaintiff's Responses to Standard Interrogatories	Covil v Penn 2098_002342-55		402, 403, 802
c)	Plaintiff's Responses to Master Interrogatories and Request for Production of Documents	Covil v Penn 2098_002356-2426		402, 403, 802
d)	Covil's Motion for Summary Judgment	Covil v Penn 2098_002427-31		402, 403, 802
e)	Plaintiff's Opposition to Covil's Motion for Summary Judgment	Covil v Penn 2098_002432-2442		402, 403, 802
f)	Deposition transcript of George Fincher – dated Oct. 22, 2020	Covil v Penn 2098_002443-2569		402, 403, 802
g)	Deposition transcript of C. Bell – dated Nov. 20, 2020	Covil v Penn 2098_002570-2683		402, 403, 802
23	Estate of Teddy L. Knight, Sr. asbestos files	Covil v Penn 2098_002684-3194		402, 403, 802
a)	Complaint	Covil v Penn 2098_002684-2748		402, 403, 802
b)	Work Sites	Covil v Penn 2098_002749-51		402, 403, 802
c)	Plaintiffs' Responses to Standard Interrogatories	Covil v Penn 2098_002752-63		402, 403, 802
d)	Plaintiffs' Responses to Master Interrogatories and Request for Production of Documents	Covil v Penn 2098_002764-2842		402, 403, 802
e)	Covil's Amended Motion for Summary Judgment	Covil v Penn 2098_002843-48		402, 403, 802

f)	Plaintiffs' Opposition to Covil's Motion for Summary Judgment	Covil v Penn 2098_002849-58		402, 403, 802
g)	Deposition transcript of R. Cassidy – dated March 19, 2020	Covil v Penn 2098_002859-2950		402, 403, 802
h)	Deposition transcript of K. Knight – dated March 19, 2020	Covil v Penn 2098_002951-3194		402, 403, 802
24	Edward R. Morgan, Sr. asbestos files	Covil v Penn 2098_003195-4118		402, 403, 802
a)	Complaint	Covil v Penn 2098_003195-3292		402, 403, 802
b)	First Amended Complaint	Covil v Penn 2098_003293-3396		402, 403, 802
c)	Plaintiffs' Responses to Standard Interrogatories	Covil v Penn 2098_003397-3460		402, 403, 802
d)	Plaintiffs' Responses to Standard Interrogatories	Covil v Penn 2098_003461-72		402, 403, 802
e)	Covil's Motion for Summary Judgment	Covil v Penn 2098_003473-79		402, 403, 802
f)	Plaintiffs' Opposition to Covil's Motion for Summary Judgment	Covil v Penn 2098_003480-93		402, 403, 802
g)	Opposition exhibits excerpts	Covil v Penn 2098_003494-3772		402, 403, 802
h)	Deposition transcript of E. Morgan – dated Feb. 22, 2021	Covil v Penn 2098_003773-3809		402, 403, 802
i)	Deposition transcript of E. Morgan – dated Feb. 23, 2021 (preservation)	Covil v Penn 2098_003810-55		402, 403, 802
j)	Deposition transcript of E. Morgan – dated Feb. 23, 2021	Covil v Penn 2098_003856-3920		402, 403, 802
k)	Deposition transcript of E. Morgan – dated Feb. 26, 2021	Covil v Penn 2098_003921-4023		402, 403, 802
l)	Deposition transcript of E. Morgan – dated March 1, 2021	Covil v Penn 2098_004024-93		402, 403, 802
m)	Deposition transcript of E. Morgan – dated March 2, 2021 (preservation)	Covil v Penn 2098_004094-4100		402, 403, 802
n)	Deposition transcript of E. Morgan – dated March 2, 2021	Covil v Penn 2098_004101-4118		402, 403, 802

25	Estate of Gary J. Moss asbestos files			402, 403, 802
a)	Complaint	Covil v Penn 2098_004119-4204		402, 403, 802
b)	Amended Complaint	Covil v Penn 2098_004205-89		402, 403, 802
c)	Plaintiff's Responses to Standard Interrogatories	Covil v Penn 2098_004290-4303		402, 403, 802
d)	Plaintiff's Responses to Master Interrogatories and Requests for Production of Documents	Covil v Penn 2098_004304-74		402, 403, 802
e)	Covil's Motion for Summary Judgment	Covil v Penn 2098_004375-79		402, 403, 802
f)	Deposition transcript of G. Moss – dated April 6, 2010	Covil v Penn 2098_004380-4459		402, 403, 802
26	Nicholas L. Murphy asbestos files	Covil v Penn 2098_004460-5005		402, 403, 802
a)	Complaint	Covil v Penn 2098_004460-4537		402, 403, 802
b)	First Amended Complaint	Covil v Penn 2098_004538-4620		402, 403, 802
c)	Second Amended Complaint	Covil v Penn 2098_004621-4704		402, 403, 802
d)	Plaintiffs' Responses to Standard Interrogatories	Covil v Penn 2098_004705-79		402, 403, 802
e)	Covil's Motion for Summary Judgment	Covil v Penn 2098_004792-96		402, 403, 802
f)	Deposition transcript of N. Murphy – dated April 28, 2020	Covil v Penn 2098_004797-4834		402, 403, 802
g)	Deposition transcript of N. Murphy – dated April 29, 2020	Covil v Penn 2098_004835-69		402, 403, 802
h)	Deposition transcript of N. Murphy – dated April 30, 2020	Covil v Penn 2098_004870-95		402, 403, 802
i)	Deposition transcript of N. Murphy – dated May 1, 2020	Covil v Penn 2098_004896-4927		402, 403, 802
j)	Deposition transcript of N. Murphy – dated May 7, 2020	Covil v Penn 2098_004928-69		402, 403, 802
k)	Deposition transcript of N. Murphy – dated May 8, 2020	Covil v Penn 2098_004970-5005		402, 403, 802
27	Estate of Waymon F. Sims, Jr. asbestos files	Covil v Penn 2098_005006-5181		402, 403, 802

a)	Complaint	Covil v Penn 2098_005006-73		402, 403, 802
b)	Plaintiff's Responses to Standard Interrogatories	Covil v Penn 2098_005074-85		402, 403, 802
c)	Plaintiffs' Responses to Master Interrogatories and Request for Production of Documents	Covil v Penn 2098_005086-5156		402, 403, 802
d)	Covil's Motion for Summary Judgment	Covil v Penn 2098_005157-62		402, 403, 802
e)	Plaintiff's Opposition to Covil's Motion for Summary Judgment	Covil v Penn 2098_005163-81		402, 403, 802
28	Tommy D. Wannamaker asbestos files	Covil v. Penn 2098_005182-5730		402, 403, 802
a)	Complaint	Covil v Penn 2098_005182-5265		402, 403, 802
b)	Second Amended Complaint	Covil v Penn 2098_005266-5345		402, 403, 802
c)	Third Amended Complaint	Covil v Penn 2098_005346-5418		402, 403, 802
d)	Plaintiff's Responses to Standard Interrogatories	Covil v Penn 2098_005419-34		402, 403, 802
e)	Plaintiff's Responses to Standard Interrogatories	Covil v Penn 2098_005435-45		402, 403, 802
f)	Covil's Motion for Summary Judgment	Covil v Penn 2098_005446-50		402, 403, 802
g)	Deposition transcript of T. Wannamaker – dated April 1, 2021	Covil v Penn 2098_005451-97		402, 403, 802
h)	Deposition of T. Wannamaker: Statement on the Record – dated April 2, 2021	Covil v Penn 2098_005498-5508		402, 403, 802
i)	Deposition transcript of T. Wannamaker – dated April 13, 2021	Covil v Penn 2098_005509-5626		402, 403, 802
j)	Deposition transcript of T. Wannamaker – dated April 14, 2021	Covil v Penn 2098_005627-5730		402, 403, 802
29	Article: Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute, 12 Conn. Ins. L. J. 349 (2005- 2006)			402, 403, 802, NP

30	Insurance Protection for Products Liability and Completed Operations – What Every Lawyer Should Know, Nebraska Law Review, Vol. 50, No. 3, Spring 1971			402, 403, 802, NP
31	Risk and Insurance: Sixth Edition, James L. Athearn and S. Travis Pritchett (University of South Carolina)			402, 403, 802, NP
32	Introduction to Risk Management and Insurance: Seventh Edition, Mark Dorfman (University of North Carolina at Charlotte)			402, 403, 802, NP
33	General Liability Coverage, 1986: 3rd Edition (1985)			402, 403, 802, NP
34	Risk & Insurance (IRM) – Insurance Glossary - definition of “premises-operations”			402, 403, 802, NP
35	Comprehensive General Liability Insurance: FC&S Bulletins, National Underwriter Co. (1985)			402, 403, 802, NP
36	P. Protopapas email to F. Benedek, Penn National’s VP of Claims, regarding tender of <i>Timothy Howe v. Air & Liquid Systems Corporation</i> , et al. (York County, SC, 2015-CP-46-03456), dated August 5, 2019.			
37	B. Wright letter to P. Protopapas in response to August 5, 2019 letter regarding tender of <i>Timothy Howe v. Air & Liquid Systems Corporation</i> , et al. (York County, SC, 2015-CP-46-03456), dated August 21, 2019.			
38	Hartford Accident and Indemnity Company’s Third-Party Complaint (<i>Zurich</i>			

	<i>American Insurance Company v. Hartford Accident and Indemnity Company</i> , MDNC, No. 1:18-cv-932), dated October 2, 2019.			
39	Summons on Penn National (<i>Zurich American Insurance Company v. Hartford Accident and Indemnity Company</i> , MDNC, No. 1:18-cv-932), dated October 3, 2019.			
40	Covil's 30(b)(6) notice of deposition of Penn National, dated November 19, 2019			
41	Penn National's Motion to Dismiss Hartford's Third-Party Complaint (<i>Zurich American Insurance Company v. Hartford Accident and Indemnity Company</i> , MDNC, No. 1:18-cv-932), dated November 21, 2019.			
42	Penn National's Answers to Covil's First Set of Interrogatories (<i>Zurich American Insurance Company v. Hartford Accident and Indemnity Company</i> , MDNC, No. 1:18-cv-932), dated December 18, 2019.			
43	Penn National's Responses to Covil's First Set of Requests for Admission (<i>Zurich American Insurance Company v. Hartford Accident and Indemnity Company</i> , MDNC, No. 1:18-cv-932), dated December 18, 2019.			
44	30(b)(6) deposition notice served on Penn National (<i>Zurich American Insurance Company v. Hartford Accident and Indemnity Company</i> , MDNC, No. 1:18-			

	cv-932), dated November 5, 2019.			
45	B. Yntema letter to B. Edwards objecting to 30(b)(6) deposition notice served on Penn National (<i>Zurich American Insurance Company v. Hartford Accident and Indemnity Company</i> , MDNC, No. 1:18-cv-932), dated November 12, 2019.			
46	B. Edwards email to B. Yntema re <i>Zurich v. Covil</i> (North Carolina), dated November 15, 2019.			
47	Covil's subpoena duces tecum to Penn National, dated November 25, 2019 (<i>Hopper v. Air & Liquid Systems Corporation, et al.</i> , No. 19-CP-40-00076).			
48	South Carolina Department of Insurance's notification of acceptance of service of Covil's 11/25/2019 subpoena duces tecum to Penn National, dated November 26, 2019 (<i>Hopper v. Air & Liquid Systems Corporation, et al.</i> , No. 19-CP-40-00076).			
49	Penn National's responses to Covil's subpoena duces tecum, dated December 9, 2019 (<i>Hopper v. Air & Liquid Systems Corporation, et al.</i> , No. 19-CP-40-00076).			
50	Penn National's Answers to Covil's First Set of Interrogatories and Responses to Covil's First Set of Requests for Admission, dated December 18, 2019 (<i>Zurich American Insurance Company v. Covil Corporation, et al.</i> , MDNC No. 1:18-cv-000932).			

51	Penn National's Answers to Covil's First Set of Interrogatories, dated May 15, 2020 (<i>Covil v. Penn National</i> , Court of Common Pleas for the Fifth Judicial Circuit, County of Richland, SC, 2020-CP-40-01226).			
52	Penn National's Responses to Covil's First Set of Requests for Production, dated May 15, 2020 (<i>Covil v. Penn National</i> , Court of Common Pleas for the Fifth Judicial Circuit, County of Richland, SC, 2020-CP-40-01226).			
53	Covil's subpoena duces tecum to Penn National, dated February 8, 2021 (<i>Finch and Covil v. USF&G</i> , Court of Common Pleas for the Fifth Judicial Circuit, County of Richland, SC, 2019-CP-40-03003).			
54	Letter from D. Harris to M. Shisko dated Feb. 12, 2021			
55	Penn National's objections to Covil's subpoena duces tecum to Penn National, dated February 22, 2021 (<i>Finch and Covil v. USF&G</i> , Court of Common Pleas for the Fifth Judicial Circuit, County of Richland, SC, 2019-CP-40-03003).			
56	Penn National's supplemental objections to Covil's subpoena duces tecum to Penn National, dated March 9, 2021 (<i>Finch and Covil v. USF&G</i> , Court of Common Pleas for the Fifth Judicial Circuit, County of Richland, SC, 2019-CP-40-03003).			

57	Penn National's Answers to the Receiver of Covil Corporation's First Set of Interrogatories, dated May 10, 2021			
58	Penn National's Responses to the Receiver of Covil Corporation's Request for Production, dated May 10, 2021			
59	Penn National's Supplemental Answers to the Receiver of Covil Corporation's First Set of Interrogatories, dated June 11, 2021			
60	Penn National's Supplemental Responses to the Receiver of Covil Corporation's Request for Production, dated June 11, 2021			
61	Receiver's Notice of Filing of Late-Produced Policies, dated June 15, 2021 (<i>Finch and Covil v. USF&G</i> , Court of Common Pleas for the Fifth Judicial Circuit, County of Richland, SC, 2019-CP-40-03003).			
62	Order granting Covil's motions to compel, dated July 1, 2021 (<i>Finch and Covil v. USF&G</i> , Court of Common Pleas for the Fifth Judicial Circuit, County of Richland, SC, 2019-CP-40-03003).			
63	Order granting Covil's motions to compel and ordering Ellis & Winters' review of Penn National's documents, dated November 5, 2021.			
64	Penn National's Responses to Plaintiff's Second Set of Requests for Production, dated December 20, 2021			

65	B. Yntema letter to B. Nes regarding Penn National's litigation hold and document retention policy, dated December 28, 2021.			
66	Order granting Receiver's Motion for Protective Order requiring Penn National to preserve all historic insurance policies, dated February 11, 2022			
67	Penn National's Responses to the Receiver for Covil's Third Set of Requests for Production dated Feb. 17, 2022			
68	Penn National's Responses to the Receiver of Covil Corporation's First Set of Requests for Admission, dated February 17, 2022			
69	Penn National's Answers to the Receiver of Covil Corporation's Second Set of Interrogatories, dated February 17, 2022			
70	Notice of Filing of Ellis & Winters, LLP Report Identifying Three Additional Covil Insurance Policies After One Day of Searching (attaching Ellis & Winters March 22, 2022 Letter Report to the Court)			
71	Order on Discovery Motions, dated May 5, 2022			
72	6/11/2021 Affidavit of B. Wright			
73	7/9/2021 Affidavit of B. Reifsnyder			
74	7/23/2021 Affidavit of B. Reifsnyder			
75	12/22/2021 Affidavit of B. Reifsnyder			
76	1/7/2021 Deposition Transcript of B. Wright			

77	8/3/2021 Deposition Transcript of B. Reifsnyder			
78	8/26/2021 Deposition Transcript of B. Wright			
79	7/13/1977 Deposition Transcript Excerpts of P. Covil			402, 403, 802, F, NP
80	Covil Corporation Certificate of Incorporation			F, NP
81	Resume of Work Performed by Covil Corporation	COV_005785-89		802, F, NP
82	Order on Discovery Motions, dated November 16, 2022			
83	Deposition Transcript of Edwin L. Rice, dated October 3, 1991			402, 403, 802, F, NP
84	11/10/2022 Deposition Transcript of B. Reifsnyder			
85	Pretrial Report of Gary J. Moss dated 9/27/21		X	402, 403, 802, F, NP
86	Pretrial Report of Jerry W. Archer dated 7/24/20		X	402, 403, 802, F, NP
87	Initial Report of Nicholas L. Murphy dated 7/22/21		X	402, 403, 802, F, NP
88	Initial Report of Tommy D. Wannamaker dated 5/5/22		X	402, 403, 802, F, NP
89	Initial Report of Waymon F. Sims dated 2/9/22		X	402, 403, 802, F, NP
90	Covil Certificate Revocation of Authority dated 7/30/93			
91	Court Order (<i>Zurich American Insurance Company v. Hartford Accident and Indemnity Company</i> , MDNC, No. 1:18-cv-932), dated February 24, 2020.			
92	Court Order (<i>Zurich American Insurance Company v. Hartford Accident and Indemnity Company</i> , MDNC, No. 1:18-cv-932), dated April 22, 2020.			
93	Penn National's Interim Report Regarding Progress of Document Sampling/Review of Penn National's Insurance			

	Policy Related Documents, Pursuant to the November 5, 2021 Order of the Court, dated December 7, 2021			
94	Sharla J. Frost CV	FROST 0999-1008		
95	Charles M. Miller, Esq. CV	MILLER 01350-59		

Respectfully submitted this the 30th day of November, 2022.

/s/ David G. Harris II
David L. Brown
N.C. State Bar No. 18942 (*Pro Hac Vice to be filed*)
David G. Harris II
S.C. State Bar No. 101951
GOLDBERG SEGALLA LLP
701 Green Valley Road, Suite 310
Greensboro, North Carolina 27408
Telephone: 336.419.4900
Email: dbrown@goldbergsegalla.com
dharris@goldbergsegalla.com

Attorneys for Plaintiff Penn National

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,

Plaintiff,

vs.

PENNSYLVANIA NATIONAL MUTUAL
INSURANCE CO., et al.,

Defendants.

Case Number 2020-CP-40-02098

**RECEIVER'S MOTION IN LIMINE TO
EXCLUDE EVIDENCE OF THE
RECEIVER'S COMPENSATION AND
QUALIFIED SETTLEMENT FUND**

COMES NOW THE PLAINTIFF, in the above-styled case, and files this the Receiver for Covil Corporation's Motion in Limine to Exclude Evidence of the Receiver's Compensation and Information Related to the Qualified Settlement Fund, and in support thereof would respectfully show this Court the following:

I. FACTUAL AND PROCEDURAL BACKGROUND

1. Covil, by and through its duly appointed Receiver, Peter D. Protopapas, has brought suit against Penn National, one of its insurers. In the forthcoming trial, Covil seeks relief on two main bases. First, Covil seeks declaratory judgments as to Penn National's specific obligations toward Covil, its insured. Second, Covil seeks discovery sanctions related to Penn National's discovery conduct in this case. Neither issue relates to Mr. Protopapas's compensation nor any agreements he may or may not have reached with other Defendants and/or other insurers of Covil.
2. On November 17, 2022, Mr. Protopapas was deposed. Penn National spent a significant amount of time in the deposition probing into both the methods of Mr. Protopapas's compensation as well as the existence and maintenance of the Covil Qualified Settlement

Fund (“QSF”). Such inquiries are irrelevant to the upcoming trial. Moreover, on November 23, 2022, Penn National designated two exhibits on its exhibit list related to the QSF (Penn National’s Trial Exhibits 25, Order Granting Joint Motions to Establish Covil QSF and Exhibit 26, QSF Operating Agreement) and further designated the entirety of Mr. Protopapas’s deposition, inclusive of the above-referenced inquiries related to compensation, the QSF, etc.

3. Specifically, in Mr. Protopapas’s deposition, Penn National asked about his specific compensation, about the nature of the compensation (*i.e.*, hourly or contingency, as well as for receivership versus for coverage counsel status), and about specifics related to alleged settlements with other insurers.
4. None of this is relevant.

II. LEGAL STANDARD

5. “Evidence which is not relevant is not admissible.” Rule 402, SCRE. “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 than it would be without evidence. Rule 401, SCRE. Relevant evidence may be excluded when its probative value is “substantially outweighed by the danger of unfair prejudice, confusion of the issues” or the evidence is misleading. *State v. Spears*, 393 S.C. 466, 479, 713 S.E.2d 324, 331 (Ct. App. 2011) (quoting Rule 403, SCRE).

III. ARGUMENT AND AUTHORITIES

- A. ***The Receiver’s Compensation Is Not Relevant To This Declaratory Judgment Action.***

6. First, Covil seeks exclusion at the outset of any evidence related to the Receiver's compensation. For example, Covil seeks exclusion of Penn National's Exhibit 33 – the Deposition of Peter D. Protopapas – in part for Pages 15-23 and 137-41. This evidence is irrelevant under Rule 402 because it is not probative of any material fact at issue related to Penn National's obligations under the insurance policies it issued to Covil or to Penn National's discovery obligations in this case.

B. Payments Into the Qualified Settlement Fund By Other Insurers Is Not Relevant To This Declaratory Judgment Action.

7. Second, Covil seeks exclusion at the outset of any evidence related to the Covil QSF involving other former Defendants. This includes but is not limited to Mr. Protopapas's role in the Qualified Settlement Funds and the value of the Qualified Settlement Funds. For example, Covil seeks exclusion of Penn National's Exhibit 33 – the Deposition of Peter D. Protopapas – in part for Pages 15-23 and 137-41, as well as Exhibits 25 and 26.
8. This evidence is also irrelevant under Rule 402 because it is not probative of any material fact at issue related to Penn National's obligations under the insurance policies it issued to Covil or to Penn National's discovery obligations in this case.

IV. CONCLUSION

9. For the foregoing reasons, Covil respectfully requests this Motion in Limine be granted.

(Signature page follows)

Respectfully submitted,

s/ Jonathan M. Robinson

Jonathan M. Robinson (S.C. Bar No. 68285)

G. Murrell Smith (S.C. Bar No. 66263)

Shanon N. Peake (S.C. Bar No. 102723)

Smith Robinson, LLC

2530 Devine Street, 3rd Floor

Columbia, SC 29205

Phone: (803) 254-5445

ATTORNEYS FOR THE RECEIVER FOR COVIL
CORPORATION

This 30th Day of November, 2022

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,

Plaintiff,

vs.

PENNSYLVANIA NATIONAL MUTUAL
INSURANCE CO., et al.,

Defendants.

Case Number 2020-CP-40-02098

**THE RECEIVER FOR COVIL
CORPORATION'S OBJECTIONS TO
PENN NATIONAL'S PRE-MARKED
TRIAL EXHIBITS**

**THE RECEIVER FOR COVIL CORPORATION'S
OBJECTIONS TO PENN NATIONAL'S PRE-MARKED TRIAL EXHIBITS**

Exhibit No.	Exhibit	Objection(s)	Basis
1	Complaint		
2	Penn National's Answer		
3	Subpoena 5.29.2018	Limited Objection to Exhibit C - Hearsay (S.C. R. Evid 802).	Object to asbestos claimant's coverage chart attached as Exhibit C to the extent it is offered as an out of court statement to prove the truth of the matter asserted therein.
4	Letter from Boyd Wright to Sabrina Stone with attached documents in Response to Subpoena 6.15.2018		
5	Penn National's Policy 1986-1987		
6	Penn National's Policy 1987-1988		
7	Covil's General Liability Underwriting Materials		
8	Non-CGL Policy Documents Produced by Penn National		

9	Covil's Policy Charts	Not Relevant (S.C. R. Evid. 402); Hearsay (S.C. R. Evid 802). Hearsay (S.C. R. Evid. 802)	Covil's attorneys' work product in another coverage action is not probative of any fact that is of consequence to the determination of the declaratory judgment action or appropriate discovery sanctions in this matter; the document is inadmissible hearsay to the extent that it is an out of court statement offered to prove the truth of the matter asserted.
10	Subpoena Duces Tecum to Penn National 2.8.2021		
11	Brady Yntema's Letter to Marghretta Shisko 2.8.2021		
12	Receiver's Responses to Penn National's First Set of Interrogatories		
13	Receiver's Responses to Penn National's First Request for Production of Documents		
14	Affidavit of Boyd Wright 6.3.2021		
15	Affidavit of Boyd Wright 6.11.2021		
16	Brent Reifsnyder Affidavit 7.9.2021		
17	Brent Reifsnyder Affidavit 7.23.2021		
18	Brent Reifsnyder Affidavit 12.22.2021		
19	Penn National's Document Retention Policy		
20	Penn National's Litigation Hold Policy		
21	Penn National's Litigation Hold Notice		
22	Ellis & Winters Report 3.22.2022		
23	Y2K10 Database Spreadsheet		

24	Impairment Letter from Penn National to Receiver 9.1.2022		
25	Order Granting Joint Motions to Establish Covil QSFs	Not Relevant (S.C. R. Evid. 402)	Not probative of any fact that is of consequence to the determination of the declaratory judgment action or appropriate discovery sanctions.
26	QSF Operating Agreement		
27	Motions to Compel/Sanctions by Receiver Against Other Insurers	Not Relevant (S.C. R. Evid. 402)	Not probative of any fact that is of consequence to the determination of the declaratory judgment action or appropriate discovery sanctions.
28	Boyd Wright Depo Trans/Exhibits 1.7.2021		Covil reserves the right to object to specific page/line designations and exhibits in accordance with the Court's scheduling order for deposition designations
29	Boyd Wright Depo Trans/Exhibits 8.26.2021		Covil reserves the right to object to specific page/line designations and exhibits in accordance with the Court's scheduling order for deposition designations
30	Brent Reifsnyder Depo Trans/Exhibits 8.3.2021		Covil reserves the right to object to specific page/line designations and exhibits in accordance with the Court's scheduling order for deposition designations
31	Brent Reifsnyder Depo Trans ROUGH DRAFT 11.10.2022		Covil reserves the right to object to specific page/line designations and exhibits in accordance with the Court's scheduling order for deposition designations
32	Sharla Frost Depo Trans/Exhibits 11.9.2022		Covil reserves the right to object to specific page/line designations and exhibits in accordance with the Court's scheduling order for deposition designations
33	Peter Protopapas Depo Trans ROUGH DRAFT 11.17.2022		Covil reserves the right to object to specific page/line designations and exhibits in accordance with the Court's scheduling order for deposition designations
34	Bernd G. Heinze - CV		
35	James A. Robertson - CV		

36	Joint Stipulation Regarding Finch	Not Relevant (S.C. R. Evid. 402)	Not probative of any fact that is of consequence to the determination of the declaratory judgment action or appropriate discovery sanctions.
37	Penn National's Responses to First Set of Interrogatories		
38	Penn National's Responses to First Request for Production of Documents		
39	Penn National's Supplemental Responses to First Set of Interrogatories		
40	Penn National's First Supplemental Responses to First Request for Production of Documents		
41	Penn National's Responses to Second Set of Interrogatories		
42	Penn National's Responses to Second Request for Production of Documents		
43	Penn National's Responses to Third Request for Production of Documents		
44	Penn National's Supplemental Responses to Third Request for Production of Documents		
45	Penn National's Responses to Requests for Admission		
46	Penn National's Objection to Subpoena (Finch) 2.22.2021		
47	Penn National's Supplemental Objection to Subpoena (Finch) 3.9.2021		

48	Penn National Interim Reports		
49	Covil Corporation's Amended Expert Disclosures		
50	Defendant's Fact and Expert Witness Disclosures	Limited Objection - Hearsay (S.C. R. Evid 802).	Object to the extent Defendant's disclosures are offered as an out of court statement to prove the truth of the matter asserted therein.

Respectfully submitted,

s/ Jonathan M. Robinson

Jonathan M. Robinson (S.C. Bar No. 68285)

G. Murrell Smith (S.C. Bar No. 66263)

Shanon N. Peake (S.C. Bar No. 102723)

Smith Robinson, LLC

2530 Devine Street, 3rd Floor

Columbia, SC 29205

Phone: (803) 254-5445

ATTORNEYS FOR THE RECEIVER FOR
COVIL CORPORATION

This 30th Day of November, 2022

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

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,

**DEFENDANT PENN NATIONAL'S
MOTION TO CONFIRM JURY
TRIAL DEMAND**

v.

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

Defendants.

COMES NOW Defendant Pennsylvania National Mutual Casualty Insurance Company ("Penn National"), pursuant to Rules 38, 39, and 40 of the South Carolina Rules of Civil Procedure, and hereby moves the Court to confirm its jury trial demand in this action.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff, Covil Corporation, by and through its duly appointed Receiver Peter D. Protopapas (hereinafter "Receiver"), originally filed its Summons and Complaint in this action on April 27, 2020, asserting causes of action against Penn National for Declaratory Judgment and Breach of Contract. After the case was removed to federal court and ultimately remanded back to this Court, Penn National filed an Answer to the Receiver's Complaint on March 31, 2021. In this Answer, Penn National specifically requested "a trial by jury on all issues so triable."¹ At no time subsequent to the filing of Penn National's Answer has the Receiver ever moved to strike Penn National's jury trial demand, or otherwise moved for the action to be heard non-jury. Further, as

¹ A copy of Penn National's previously filed Answer is attached hereto as **Exhibit A**.

the Court has previously noted, Penn National has not waived its right to request entitlement to a jury trial “on all or any matters pertaining to this litigation.”²

The trial in this action is currently scheduled for the week of December 12, 2022. In preparation for trial, the parties are in the process of submitting proposed witnesses, exhibits, facts, and law to the Court. Further, the parties have been taking depositions in this action on contested issues for use at the trial of this case. During the November 14, 2022 pre-trial hearing in this matter, the Court stated that no determination as to whether or not the action was to proceed as a jury trial could be made because there was nothing pending before the Court at the time. Therefore, Penn National now brings this Motion requesting that the Court confirm its jury trial demand and entitlement to same.

ARGUMENT

Under South Carolina law, “[t]he right of trial by jury . . . shall be preserved to the parties inviolate.” Rule 38(a), SCRPC. Further, “[i]ssues of fact in an action for the recovery of money . . . or specific . . . personal property must be tried by a jury, unless a jury trial be waived.” *Id.* South Carolina’s rules of procedure allow a party to demand a jury trial by including same “upon a pleading of the party.” Rule 38(b), SCRPC. Where a party does not specify particular issues he wishes to be tried to jury, “he shall be deemed to have demanded trial by jury for all the issues so triable.” Rule 38(c), SCRPC.

Where a party has demanded a jury trial, “the action *shall* be designated upon the calendar and in the clerk’s filebook as a jury action.” Rule 39(a), SCRPC (emphasis added). Where such a demand is made:

[t]he trial of all issues so demanded *shall be by jury*, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral

² November 7 and November 8, 2022 correspondence, attached hereto as **Exhibit B**.

stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist.

Id. (emphasis added).

Thus, where a party makes a jury trial demand, pursuant to the South Carolina Rules of Civil Procedure the case is to be automatically placed upon the jury roster. Further, a case can only be removed from the roster by either a filed written stipulation, an oral stipulation of both parties made in open court and entered in the record, or by Court order upon a Motion or its own initiative. *Id.* Here, where there has been no stipulation filed or entered into the record, and no motion or Court order finding there are no issues of fact, under the plain language of the South Carolina Rules of Civil Procedure, the case *must proceed as a jury trial*. Therefore, Penn National asks that the Court confirm its right to a jury trial at this time.

Indeed, there is nothing in the record at this time that would demonstrate Penn National is not entitled to a jury trial on all factual issues. The Complaint alleges claims for breach of contract and declaratory judgment against Penn National. Both of these causes of action may be properly tried by a jury. *See Soil Remediation Co. v. Nu-Way Env't'l*, 325 S.C. 231, 234, 482 S.E.2d 554, 555-56 (1997) (citing *Café Assoc. Ltd. V. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991); *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990)) (“where a contract is capable of more than one construction, the question of what the parties intended becomes one of fact to be submitted to the jury.”); *Coakley v. Horace Mann Ins. Co.*, 376 S.C. 2, 5-6, 656 S.E.2d 17, 18-19 (2007) (the terms of an insurance policy “are to be construed according to contract law”) (citation omitted); *NGM Ins. Co. v. Low Country Finish Carpentry, Inc.*, 2012 U.S. Dist. LEXIS 200367 at * 7-9, (D.S.C. Oct. 31, 2012) (denying summary judgment and finding question of applicability of certain policy provisions was a jury question); Rule 57, SCRCP (“the right to trial by jury [for a

declaratory judgment] may be demanded under the circumstances and in the manner provided in Rules 38 and 39”); S.C. Code § 15-53-90 (“When a [declaratory judgment action] involves the determination of an issue of fact such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions . . . [and] [a]ll existing rights to jury trials are hereby preserved.”). Further, while Penn National does not contend that spoliation is a cause of action, federal courts in South Carolina have held that where there is a question as to whether any spoliation occurred in the first instance, this determination is properly placed before a jury before determination of whether sanctions are merited. *See, e.g. Evans v. Quintiles Transnat’l Corp.*, 2015 U.S. Dist. LEXIS 171750 at * 13-14 (D.S.C. Dec. 23, 2015) (holding that where there was a factual dispute as to whether an allegedly spoliated computer file ever even existed, it was proper to allow the jury to resolve the threshold issue of its existence). Thus, Penn National’s jury trial demand is proper in this action and, absent an order to the contrary, Penn National is entitled to a trial by jury.

CONCLUSION

Based on the foregoing, Penn National respectfully asserts that proper demand has been made for a jury trial and, therefore, under the plain language of the South Carolina Rules of Civil Procedure, the case must proceed on the jury trial roster at this time, as no stipulation or order has found otherwise. Further, Penn National’s demand for a jury trial is proper in this action, given the settled law as to Plaintiff’s causes of action and the existence of factual questions in this case.

Respectfully submitted, this the 28th day of November, 2022.

GOLDBERG SEGALLA LLP

/s/ Alexander E. Davis

Alexander E. Davis

S.C. Bar # 100061

Email: aedavis@goldbergsegalla.com

David G. Harris II

S.C. State Bar # 101951

Email: dharris@goldbergsegalla.com

Brady A. Yntema (admitted *pro hac vice*)

N.C. State Bar #: 25771

Email: byntema@goldbergsegalla.com

701 Green Valley Road, Suite 310

Greensboro, NC 27408

Phone: 336.419.4900

Fax: 336.419.4950

Attorneys for Defendant Penn National

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

v.

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

Defendants.

Case No. 2020-CP-40-02098

**DEFENDANT PENNSYLVANIA
NATIONAL MUTUAL CASUALTY
INSURANCE COMPANY'S
ANSWER TO COMPLAINT FOR
DECLARATORY JUDGMENT
AND BREACH OF CONTRACT**

COMES NOW Defendant Pennsylvania National Mutual Casualty Insurance Company
("Penn National"), by and through counsel, and hereby responds to the Complaint as follows:

1. It is admitted, upon information and belief, that Peter Protopapas was appointed as a Receiver in other civil actions to which Penn National was and is not a party and which are wholly unrelated to this action, and it is further admitted that Peter Protopapas is a lawyer who maintains his principal place of business in Richland County, South Carolina. Except as admitted, denied.

2. It is admitted that Penn National is a corporation organized under the laws of the Commonwealth of Pennsylvania with its principal place of business located in the Commonwealth of Pennsylvania. Except as admitted, denied.

3. Defendant Penn National is without information or knowledge sufficient to admit or deny the allegations of paragraph 3. To the extent a response is required, denied.

4. Admitted, upon information and belief.

5. Denied.

6. Denied.

7. The allegations of paragraph 7 are vague and lack clarity in that they allege certain allegations have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, the allegations of paragraph 7 are denied.

8. It is admitted that Penn National issued a Comprehensive General Liability policy to Covil with policy periods of March 31, 1986 to March 31, 1987, with one renewal of March 31, 1987 to March 31, 1988. Except as admitted, denied.

9. Denied.

10. Penn National is without information or knowledge sufficient to either admit or deny the allegations of paragraph 10. To the extent a response is required, denied.

11. Penn National is without information or knowledge sufficient to either admit or deny the allegations of paragraph 11. To the extent a response is required, denied.

12. The allegations of paragraph 12 state legal conclusions to which a response is not required. To the extent a response is required, denied.

13. It is admitted, upon information and belief, that Peter Protopapas was appointed as a Receiver in other civil actions to which Penn National was and is not a party and which are wholly unrelated to this action, and it is further admitted that Peter Protopapas is a lawyer who maintains his principal place of business in Richland County, South Carolina. Except as admitted, denied.

14. The allegations of paragraph 14 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which

such allegations have been asserted. As such, it is unclear as to whether an actual or justiciable controversy indeed exists with respect to any particular allegations, cases, or matters asserted against Covil, and therefore, the allegations of paragraph 14 are denied.

15. The allegations of paragraph 15 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, it is unclear as to whether “judicial declarations are necessary or appropriate at this time” with respect to any particular allegations, cases, or matters asserted against Covil, and therefore, the allegations of paragraph 15 are denied.

16. The allegations of paragraph 16 state legal conclusions to which a response is not required. To the extent a response is required, denied.

17. The allegations of paragraph 17 state legal conclusions to which a response is not required. To the extent a response is required, denied.

18. The allegations of paragraph 18 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, the allegations of paragraph 18 are denied.

19. The allegations of paragraph 19 simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 19 are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

20. The allegations of paragraph 20 state legal conclusions to which a response is not required. To the extent a response is required, denied.

21. It is admitted Penn National issued a Comprehensive General Liability policy to Covil with policy periods of March 31, 1986 to March 31, 1987, with one renewal of March 31, 1987 to March 31, 1988. Except as admitted, denied.

22. The allegations of paragraph 22 simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 22 are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

23. The allegations of paragraph 23 simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 23 are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

24. The allegations of paragraph 24 simply state a request for a declaration of this Court to which a response is not required. To the extent a response is required, Penn National does not have information or knowledge sufficient to either admit or deny the allegations of paragraph 24, and therefore, denies such allegations. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

25. The allegations of paragraph 25, including each subpart, simply state a request for a declaration of this Court to which a response is not required. The allegations of paragraph 25, including each subpart, are also vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. To the extent a response is required, denied. It is specifically denied that Plaintiff is entitled to the declaration requested in these allegations.

26. The allegations of paragraph 26 are vague and lack clarity in that the Complaint alleges that certain allegations and lawsuits have been asserted against Covil without any identification of the parties asserting such allegations or the cases or matters in which such allegations have been asserted. As such, it is unclear as to whether a justiciable controversy indeed exists with respect to any particular allegations, cases, or matters asserted against Covil, and the allegations of paragraph 26 are denied.

27. The allegations of paragraph 27 are not directed to Penn National. To the extent a response is required, denied.

28. The allegations of paragraph 28 are not directed to Penn National. To the extent a response is required, denied.

29. The allegations of paragraph 29 are not directed to Penn National. To the extent a response is required, denied.

30. The allegations of paragraph 30 are not directed to Penn National. To the extent a response is required, denied.

31. The allegations of paragraph 31 are not directed to Penn National. To the extent a response is required, denied.

32. The allegations of paragraph 32 are not directed to Penn National. To the extent a response is required, denied.

33. To the extent the allegations of paragraph 33 assert or imply that certain coverage existed under the Penn National's insurance policy, such allegations are specifically denied. The allegations of paragraph 33 otherwise appear not be directed to Penn National. To the extent a response to such allegations is required, denied.

34. The allegations of paragraph 34 are not directed to Penn National. To the extent a response is required, denied.

35. The allegations of paragraph 35 are not directed to Penn National. To the extent a response is required, denied.

36. The allegations of paragraph 36 simply state a request for a declaration of this Court to which a response is not required. Further, the allegations of paragraph 36 are not directed to Penn National. To the extent a response is required, denied.

GENERAL DENIAL

Except as specifically admitted above, Penn National denies each and every allegation of Plaintiff's Complaint.

FIRST DEFENSE

Penn National moves to dismiss this action pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure in that there is no subject matter jurisdiction over the claims asserted inasmuch as (1) the Receiver does not have legal standing to pursue such claims, and (2) the Plaintiff has failed to comply with the conditions precedent to filing suit under Penn National's policy issued to Covil with policy periods of March 31, 1986 to March 31, 1987, with one renewal of March 31, 1987 to March 31, 1988 (the "Penn National Policy").

SECOND DEFENSE

Penn National moves to dismiss this action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure in that the Complaint fails to state a claim upon which relief can be granted. Specifically, Plaintiff fails to allege actual factual allegations to support a claim for a declaration by this Court as to coverage under Penn National's policies. Plaintiff's Complaint does not aver any policy language that it contends affords coverage for the claims at issue or the manner in which the claims asserted against Covil in the "Covil Asbestos Suits" could trigger coverage under the Penn National Policy or identify any of the "Covil Asbestos Suits" for which it seeks declarations from this Court as to coverage under the Penn National Policy.

THIRD DEFENSE

The Plaintiff failed to tender or submit the underlying lawsuits referenced in Plaintiff's Complaint in a timely manner under the Penn National Policy and otherwise failed to comply with the provisions of the Penn National Policy. Therefore, Plaintiff's claims in this action are barred.

FOURTH DEFENSE

Penn National's rights, liabilities, and obligations are defined and controlled by the terms and provisions of the Penn National Policy. The terms and provisions of the Penn National Policy, including, but not limited to, any and all applicable policy definitions, conditions, exclusions, limitations, and endorsements, do not provide coverage for the claims, lawsuits, or matters alleged in Plaintiff's Complaint. Accordingly, Plaintiff's claims against Penn National in this action, which are grounded on the theory that Penn National had an obligation to provide coverage to Covil under the Penn National Policy for the claims, lawsuits, or matters asserted against Covil should be dismissed.

FIFTH DEFENSE

Plaintiff's claims may be barred by failure to reduce or mitigate its damages as required by law.

SIXTH DEFENSE

Penn National pleads the equitable doctrines of waiver, estoppel, and laches in bar of the claims against Penn National in this action.

SEVENTH DEFENSE

Penn National pleads the applicable statute of limitations and/or statute of repose in bar of any claims or recovery against Penn National in this action.

WHEREFORE, Penn National respectfully prays the Court as follows:

1. That Plaintiff have and recover nothing of it in this action;
2. That the Plaintiff's claims against it be dismissed, with prejudice;
3. That the costs of this action be taxed against the Plaintiff;
4. For a trial by jury on all issues so triable; and
5. For such other and further relief as to the Court may seem just and proper.

This the 31st day of March, 2021.

GOLDBERG SEGALLA LLP

/s/ David G. Harris II

David G. Harris II (S.C. Bar No. 101951)

dharris@goldbergsegalla.com

Brady A. Yntema (N.C. Bar No. 25771)

byntema@goldbergsegalla.com

701 Green Valley Road; Suite 310

Greensboro, NC 27408

Telephone: 336.419.4900

Facsimile: 336.419.4950

Attorneys for Defendant Penn National



November 7, 2022

VIA E-MAIL ONLY (cposwal@sccourts.org)

The Honorable Jean H. Toal
c/o Ms. Zitel Poswal
Judicial Law Clerk
South Carolina Court Administration
1220 Senate Street, Suite 221
Columbia, SC 29201

RE: *Covil Corp. v. Penn National Mut. Cas. Ins. Co.* (Richland County);
2020-CP-40-02098

Dear Chief Justice Toal:

I am writing on behalf of Pennsylvania National Mutual Casualty Insurance Company ("Penn National") in advance of the Pre-Trial Hearing currently scheduled to be conducted on Monday, November 14, 2022. It is expected that the Receiver will request an "evidentiary" hearing on issues involving alleged spoliation and a non-jury trial on issues involving Penn National's coverage for Covil under Policy Nos. 515 50 28 53 7 and 515 50 28 53 8 – specifically regarding certain coverage issues regarding Penn National's aggregate coverage limit under such policies.

Penn National requested a jury trial on all issues so triable by way of its Answer to the Receiver's Complaint for Declaratory Judgment and Breach of Contract. Fact and expert witnesses are scheduled to be conducted by the parties in November and December leading up to the trial date of December 12 or 14, 2022. Please allow this letter to respectfully confirm that Penn National preserves its right to and requests a jury trial on all factual issues in this case, including on spoliation and coverage issues.

Should you need anything further with respect to this matter, please do not hesitate to contact me.

Sincerely,

GOLDBERG SEGALLA, LLP

A handwritten signature in black ink, appearing to read 'BYA', is written over the printed name of Brady A. Yntema. Below the signature, the name 'David H. Harris' is printed.

Brady A. Yntema
David H. Harris

cc: All Counsel of Record

Please send mail to our scanning center at: PO Box 727, Buffalo NY 14201

From: Poswal, Chukwuzitelu <cposwal@sccourts.org>
Sent: Tuesday, November 8, 2022 10:42 AM
To: Carter, Jane
Cc: Lindsay Valek; Peter Protopapas; Nes, W. Brad; Jon Robinson; Patterson, Nancy L.; Shanon Peake; murrell@smithrobinsonlaw.com; Edwards, Brady; Harris, David G.; Yntema, Brady A.
Subject: RE: Covil v. Penn (2019CP4002098) Rescheduled Pretrial Hearing

Good morning, Mr. Yntema.

Chief Justice Toal has instructed me to inform you that your participation and your client, Penn National's participation in pretrial hearings, discovery activities and any other activities past, present or future pertaining to *Covil v. Penn National* will in no way waive Penn National's right to insist that it is entitled to a jury trial on all or any matters pertaining to this litigation. She will place an order reserving and preserving Penn National's position on its right to a jury trial on the record at the commencement of the Pretrial hearing on Monday, Nov. 14, 2022.

Best,

Zitel Poswal

Judicial Law Clerk
South Carolina Court Administration
1220 Senate Street, Suite 221
Columbia, SC 29201
cposwal@sccourts.org
Office: 803-734-0833

From: Carter, Jane <jcarter@goldbergsegalla.com>
Sent: Monday, November 7, 2022 2:35 PM
To: Poswal, Chukwuzitelu <cposwal@sccourts.org>
Cc: Lindsay Valek <Lindsay@rplegalgroup.com>; Peter Protopapas <pdp@rplegalgroup.com>; Nes, W. Brad <brad.nes@morganlewis.com>; Jon Robinson <jon@smithrobinsonlaw.com>; Patterson, Nancy L. <nancy.patterson@morganlewis.com>; Shanon Peake <shanonp@smithrobinsonlaw.com>; murrell@smithrobinsonlaw.com; Edwards, Brady <brady.edwards@morganlewis.com>; Harris, David G. <dharris@goldbergsegalla.com>; Yntema, Brady A. <byntema@goldbergsegalla.com>
Subject: Covil v. Penn (2019CP4002098) Rescheduled Pretrial Hearing

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Dear Ms. Poswal:

Please find attached a letter from counsel for Penn National to Chief Justice Toal. If you have any questions, please do not hesitate to contact me.

Thank you.

Jane Carter

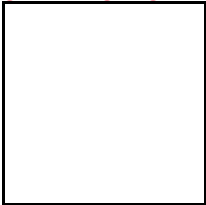
Jane Carter | Legal Assistant

701 Green Valley Road | Suite 310 | Greensboro, NC 27408

DIRECT 336.419.4905 | **EXT** 4905 | **FAX** 336.419.4950

jcarter@goldbergsegalla.com

goldbergsegalla.com



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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,

Plaintiff,

v.

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

Defendants.

CASE NUMBER: 2020-CP-40-02098

**THE RECEIVER FOR COVIL  
CORPORATION'S AMENDED TRIAL  
EXHIBIT LIST**

**THE RECEIVER FOR COVIL CORPORATION'S  
AMENDED TRIAL EXHIBIT LIST**

| <b>Exhibit<br/>No.</b> | <b>Document</b>                                                                                                   | <b>Document Identification</b>            | <b>Confidential</b> |
|------------------------|-------------------------------------------------------------------------------------------------------------------|-------------------------------------------|---------------------|
| 1)                     | GL Policy Number 515 50 28<br>53-7                                                                                | Penn National Policies<br>000001 – 000043 |                     |
| 2)                     | GL Policy Number 515 50 28<br>53-8                                                                                | Penn National Policies<br>000044 – 000091 |                     |
| 3)                     | Boyd Wright Affidavit in<br>Opposition to Receiver's<br>Motion for Summary<br>Judgment, dated October 22,<br>2021 |                                           |                     |
| 4)                     | Inland Marine Policy                                                                                              | PNI-1225 – 1324                           |                     |
| 5)                     | Auto Policy                                                                                                       | PNI-1325 – 1611                           |                     |
| 6)                     | Auto, Inland Marine, and<br>Workers Compensation<br>Policies                                                      | PNI-0393 – 0596                           |                     |
| 7)                     | Penn National-Covil<br>Underwriting File                                                                          | PNI-0304 – 0392                           |                     |
| 8)                     | Penn National Document<br>Retention Policies                                                                      | PNI-0598 – 1158                           |                     |
| 9)                     | Litigation Hold Procedure                                                                                         | PNI-1159 – 1161                           |                     |

| Exhibit No. | Document                                                                                                        | Document Identification           | Confidential |
|-------------|-----------------------------------------------------------------------------------------------------------------|-----------------------------------|--------------|
| 10)         | Dec. 17, 2021 Litigation Hold Email                                                                             |                                   |              |
| 11)         | Microfiche Destruction Dates Spreadsheet                                                                        | PNI-0597                          | X            |
| 12)         | Underlying subpoena served in <i>Finch</i> asbestos suit dated May 29, 2018                                     |                                   |              |
| 13)         | Penn National's June 15, 2018 letter and documents served in response to subpoena in <i>Finch</i> asbestos suit |                                   |              |
| 14)         | Sept. 1, 2022 Letter from Boyd Wright to Peter Protopapas                                                       | Covil v Penn 2098_000001 – 000002 | X            |
| 15)         | Estate of Jerry W. Archer, Sr. asbestos file                                                                    | Covil v. Penn 2098_000003-166     |              |
| a)          | Complaint                                                                                                       | Covil v. Penn 2098_000003-68      |              |
| b)          | Work Sites                                                                                                      | Covil v Penn 2098_000069          |              |
| c)          | Plaintiff's Responses to Interrogatories                                                                        | Covil v Penn 2098_000070-81       |              |
| d)          | Plaintiff's Responses to Master Interrogatories and Request for Production of Documents                         | Covil v Penn 2098_000082-147      |              |
| e)          | Deposition transcript of B. Glenn – dated July 28, 2010                                                         | Covil v Penn 2098_000148-66       |              |
| 16)         | Estate of Robert J. Ashworth asbestos file                                                                      | Covil v Penn 2098_000167-638      |              |
| a)          | Complaint                                                                                                       | Covil v Penn 2098_000167-215      |              |
| b)          | Work Sites                                                                                                      | Covil v Penn 2098_000216-17       |              |
| c)          | Plaintiff's Responses to Interrogatories                                                                        | Covil v Penn 2098_000218-29       |              |
| d)          | Plaintiff's Responses to Master Interrogatories and Request for Production of Documents                         | Covil v Penn 2098_000230-85       |              |
| e)          | Covil Motion for Summary Judgment.pdf                                                                           | Covil v Penn 2098_000286-90       |              |

| Exhibit No. | Document                                                                  | Document Identification           | Confidential |
|-------------|---------------------------------------------------------------------------|-----------------------------------|--------------|
| f)          | Deposition transcript excerpt of D. Rollins – dated June 7, 2019          | Covil v Penn<br>2098_000291-96    |              |
| g)          | Plaintiff's Opposition to Covil's Motion for Summary Judgment             | Covil v Penn<br>2098_000297-303   |              |
| h)          | Deposition transcript of D. Rollins – dated Feb. 18, 2019                 | Covil v. Penn<br>2098_000304-441  |              |
| i)          | Deposition transcript of D. Rollins – dated Feb. 19, 2019                 | Covil v. Penn<br>2098_000442-528  |              |
| j)          | Invoices                                                                  | Covil v. Penn<br>2098_000529-36   |              |
| k)          | Project listings document                                                 | Covil v. Penn<br>2098_000537-42   |              |
| l)          | Deposition transcript of R. Ashworth – dated Aug. 2, 2017 (de bene esse)  | Covil v Penn<br>2098_000543-588   |              |
| m)          | Deposition transcript of R. Ashworth – dated Aug. 2, 2017 (discovery)     | Covil v Penn<br>2098_000589-638   |              |
| 17)         | Robert E. Aspray asbestos file                                            | Covil v Penn<br>2098_000639-829   |              |
| a)          | Complaint                                                                 | Covil v Penn<br>2098_000639-99    |              |
| b)          | Work History                                                              | Covil v Penn<br>2098_000700-3     |              |
| c)          | Second Amended Complaint                                                  | Covil v Penn<br>2098_000704-52    |              |
| d)          | Plaintiff's Responses to Standard Interrogatories                         | Covil v Penn<br>2098_000753-66    |              |
| e)          | Covil's Amended Motion for Summary Judgment                               | Covil v Penn<br>2098_000767-70    |              |
| f)          | Plaintiff's Response in Opposition to Covil's Motion for Summary Judgment | Covil v Penn<br>2098_000771-87    |              |
| g)          | Deposition transcript of P. Haynes – dated June 30, 2020                  | Covil v Penn<br>2098_000788-829   |              |
| 18)         | Jerry V. Campbell asbestos file                                           | Covil v. Penn<br>2098_000830-1441 |              |
| a)          | Complaint                                                                 | Covil v Penn<br>2098_000830-912   |              |
| b)          | First Amended Complaint                                                   | Covil v Penn<br>2098_000913-1002  |              |

| Exhibit No. | Document                                                                                 | Document Identification       | Confidential |
|-------------|------------------------------------------------------------------------------------------|-------------------------------|--------------|
| c)          | Work Sites                                                                               | Covil v Penn 2098_001003      |              |
| d)          | Plaintiffs' Answers to Standard Interrogatories                                          | Covil v Penn 2098_001004-1013 |              |
| e)          | Plaintiffs' Responses to Master Interrogatories and Request for Production of Documents  | Covil v Penn 2098_001014-1156 |              |
| f)          | Plaintiffs' Supplemental Answers to Standard Interrogatories                             | Covil v Penn 2098_001157-58   |              |
| g)          | Plaintiffs' Supplemental Responses to Master Interrogatories and Requests for Production | Covil v Penn 2098_001159-1210 |              |
| h)          | Covil's Motion for Summary Judgment                                                      | Covil v Penn 2098_001211-16   |              |
| i)          | Deposition transcript of M. Sanders – dated Feb. 1, 2022                                 | Covil v Penn 2098_001217-55   |              |
| j)          | Deposition transcript of M. Sanders – dated Feb. 2, 2022                                 | Covil v Penn 2098_001256-1303 |              |
| k)          | Deposition transcript of M. Sanders – dated Feb. 4, 2022                                 | Covil v Penn 2098_001304-51   |              |
| l)          | Deposition transcript of J. Campbell – dated Oct. 21, 1999                               | Covil v Penn 2098_001352-1402 |              |
| m)          | Deposition transcript of J. Campbell – dated July 28, 2021                               | Covil v Penn 2098_001403-41   |              |
| 19)         | Estate of Julian D'Amico, Jr. asbestos files                                             | Covil v Penn 2098_001442-1918 |              |
| a)          | Complaint                                                                                | Covil v Penn 2098_001442-1517 |              |
| b)          | Plaintiff's Responses to Standard Interrogatories                                        | Covil v Penn 2098_001518-1531 |              |
| c)          | Plaintiff's Responses to Master Interrogatories and Request for Production of Documents  | Covil v Penn 2098_001532-1609 |              |
| d)          | Covil's Motion for Summary Judgment                                                      | Covil v Penn 2098_001610-13   |              |
| e)          | Plaintiff's Opposition to Covil's Motion for Summary Judgment                            | Covil v Penn 2098_001614-24   |              |

| Exhibit No. | Document                                                                                | Document Identification          | Confidential |
|-------------|-----------------------------------------------------------------------------------------|----------------------------------|--------------|
| f)          | Deposition transcript of J. D'Amico – dated Oct. 11, 1999                               | Covil v Penn<br>2098_001625-43   |              |
| g)          | Deposition transcript of J. D'Amico – dated Oct. 26, 1994                               | Covil v Penn<br>2098_001644-1881 |              |
| h)          | Deposition transcript of J. D'Amico – Jan. 30, 2001                                     | Covil v Penn<br>2098_001882-1918 |              |
| 20)         | Galen Garren asbestos files                                                             | Covil v Penn<br>2098_001919-2129 |              |
| a)          | Complaint                                                                               | Covil v Penn<br>2098_001919-84   |              |
| b)          | Plaintiff's Responses to Standard Interrogatories                                       | Covil v Penn<br>2098_001985-97   |              |
| c)          | Plaintiff's Responses to Master Interrogatories and Request for Production of Documents | Covil v Penn<br>2098_001998-2014 |              |
| d)          | Covil's Motion for Summary Judgment                                                     | Covil v Penn<br>2098_002015-20   |              |
| e)          | Deposition transcript of G. Garren – dated Oct. 13, 2021                                | Covil v Penn<br>2098_002021-2104 |              |
| f)          | Deposition transcript of G. Garren – dated Oct. 14, 2021                                | Covil v Penn<br>2098_002105-29   |              |
| 21)         | Estate of Beverly D. Jolly asbestos files                                               | Covil v Penn<br>2098_002130-2266 |              |
| a)          | Complaint                                                                               | Covil v Penn<br>2098_002130-71   |              |
| b)          | Second Amended Complaint                                                                | Covil v Penn<br>2098_002172-2213 |              |
| c)          | Work Sites                                                                              | Covil v Penn 2098_002214         |              |
| d)          | Plaintiffs' Responses to Standard Interrogatories                                       | Covil v Penn<br>2098_002215-45   |              |
| e)          | Covil's Motion for Summary Judgment                                                     | Covil v Penn<br>2098_002246-55   |              |
| f)          | Covil's Amended Motion for Summary Judgment                                             | Covil v Penn<br>2098_002256-66   |              |
| 22)         | Ronnie J. Jonas asbestos files                                                          | Covil v Penn<br>2098_002267-2683 |              |
| a)          | Complaint                                                                               | Covil v Penn<br>2098_002267-2341 |              |
| b)          | Plaintiff's Responses to Standard Interrogatories                                       | Covil v Penn<br>2098_002342-55   |              |

| <b>Exhibit No.</b> | <b>Document</b>                                                                         | <b>Document Identification</b>   | <b>Confidential</b> |
|--------------------|-----------------------------------------------------------------------------------------|----------------------------------|---------------------|
| c)                 | Plaintiff's Responses to Master Interrogatories and Request for Production of Documents | Covil v Penn<br>2098 002356-2426 |                     |
| d)                 | Covil's Motion for Summary Judgment                                                     | Covil v Penn<br>2098 002427-31   |                     |
| e)                 | Plaintiff's Opposition to Covil's Motion for Summary Judgment                           | Covil v Penn<br>2098 002432-2442 |                     |
| f)                 | Deposition transcript of George Fincher – dated Oct. 22, 2020                           | Covil v Penn<br>2098 002443-2569 |                     |
| g)                 | Deposition transcript of C. Bell – dated Nov. 20, 2020                                  | Covil v Penn<br>2098 002570-2683 |                     |
| 23)                | Estate of Teddy L. Knight, Sr. asbestos files                                           | Covil v Penn<br>2098 002684-3194 |                     |
| a)                 | Complaint                                                                               | Covil v Penn<br>2098 002684-2748 |                     |
| b)                 | Work Sites                                                                              | Covil v Penn<br>2098 002749-51   |                     |
| c)                 | Plaintiffs' Responses to Standard Interrogatories                                       | Covil v Penn<br>2098 002752-63   |                     |
| d)                 | Plaintiffs' Responses to Master Interrogatories and Request for Production of Documents | Covil v Penn<br>2098 002764-2842 |                     |
| e)                 | Covil's Amended Motion for Summary Judgment                                             | Covil v Penn<br>2098 002843-48   |                     |
| f)                 | Plaintiffs' Opposition to Covil's Motion for Summary Judgment                           | Covil v Penn<br>2098 002849-58   |                     |
| g)                 | Deposition transcript of R. Cassidy – dated March 19, 2020                              | Covil v Penn<br>2098 002859-2950 |                     |
| h)                 | Deposition transcript of K. Knight – dated March 19, 2020                               | Covil v Penn<br>2098 002951-3194 |                     |
| 24)                | Edward R. Morgan, Sr. asbestos files                                                    | Covil v Penn<br>2098 003195-4118 |                     |
| a)                 | Complaint                                                                               | Covil v Penn<br>2098 003195-3292 |                     |
| b)                 | First Amended Complaint                                                                 | Covil v Penn<br>2098 003293-3396 |                     |

| Exhibit No. | Document                                                                                 | Document Identification           | Confidential |
|-------------|------------------------------------------------------------------------------------------|-----------------------------------|--------------|
| c)          | Plaintiffs' Responses to Standard Interrogatories                                        | Covil v Penn<br>2098 003397-3460  |              |
| d)          | Plaintiffs' Responses to Standard Interrogatories                                        | Covil v Penn<br>2098 003461-72    |              |
| e)          | Covil's Motion for Summary Judgment                                                      | Covil v Penn<br>2098 003473-79    |              |
| f)          | Plaintiffs' Opposition to Covil's Motion for Summary Judgment                            | Covil v Penn<br>2098 003480-93    |              |
| g)          | Opposition exhibits excerpts                                                             | Covil v Penn<br>2098 003494-3772  |              |
| h)          | Deposition transcript of E. Morgan – dated Feb. 22, 2021                                 | Covil v Penn<br>2098 003773-3809  |              |
| i)          | Deposition transcript of E. Morgan – dated Feb. 23, 2021 (preservation)                  | Covil v Penn<br>2098 003810-55    |              |
| j)          | Deposition transcript of E. Morgan – dated Feb. 23, 2021                                 | Covil v Penn<br>2098 003856-3920  |              |
| k)          | Deposition transcript of E. Morgan – dated Feb. 26, 2021                                 | Covil v Penn<br>2098 003921-4023  |              |
| l)          | Deposition transcript of E. Morgan – dated March 1, 2021                                 | Covil v Penn<br>2098 004024-93    |              |
| m)          | Deposition transcript of E. Morgan – dated March 2, 2021 (preservation)                  | Covil v Penn<br>2098 004094-4100  |              |
| n)          | Deposition transcript of E. Morgan – dated March 2, 2021                                 | Covil v Penn<br>2098 004101-4118  |              |
| 25)         | Estate of Gary J. Moss asbestos files                                                    | Covil v. Penn<br>2098 004119-4459 |              |
| a)          | Complaint                                                                                | Covil v Penn<br>2098 004119-4204  |              |
| b)          | Amended Complaint                                                                        | Covil v Penn<br>2098 004205-89    |              |
| c)          | Plaintiff's Responses to Standard Interrogatories                                        | Covil v Penn<br>2098 004290-4303  |              |
| d)          | Plaintiff's Responses to Master Interrogatories and Requests for Production of Documents | Covil v Penn<br>2098 004304-74    |              |
| e)          | Covil's Motion for Summary Judgment                                                      | Covil v Penn<br>2098 004375-79    |              |
| f)          | Deposition transcript of G. Moss – dated April 6, 2010                                   | Covil v Penn<br>2098 004380-4459  |              |

| <b>Exhibit No.</b> | <b>Document</b>                                                                         | <b>Document Identification</b>   | <b>Confidential</b> |
|--------------------|-----------------------------------------------------------------------------------------|----------------------------------|---------------------|
| 26)                | Nicholas L. Murphy asbestos files                                                       | Covil v Penn<br>2098 004460-5005 |                     |
| a)                 | Complaint                                                                               | Covil v Penn<br>2098 004460-4537 |                     |
| b)                 | First Amended Complaint                                                                 | Covil v Penn<br>2098 004538-4620 |                     |
| c)                 | Second Amended Complaint                                                                | Covil v Penn<br>2098 004621-4704 |                     |
| d)                 | Plaintiffs' Responses to Standard Interrogatories                                       | Covil v Penn<br>2098 004705-79   |                     |
| e)                 | Covil's Motion for Summary Judgment                                                     | Covil v Penn<br>2098 004792-96   |                     |
| f)                 | Deposition transcript of N. Murphy – dated April 28, 2020                               | Covil v Penn<br>2098 004797-4834 |                     |
| g)                 | Deposition transcript of N. Murphy – dated April 29, 2020                               | Covil v Penn<br>2098 004835-69   |                     |
| h)                 | Deposition transcript of N. Murphy – dated April 30, 2020                               | Covil v Penn<br>2098 004870-95   |                     |
| i)                 | Deposition transcript of N. Murphy – dated May 1, 2020                                  | Covil v Penn<br>2098 004896-4927 |                     |
| j)                 | Deposition transcript of N. Murphy – dated May 7, 2020                                  | Covil v Penn<br>2098 004928-69   |                     |
| k)                 | Deposition transcript of N. Murphy – dated May 8, 2020                                  | Covil v Penn<br>2098 004970-5005 |                     |
| 27)                | Estate of Waymon F. Sims, Jr. asbestos files                                            | Covil v Penn<br>2098 005006-5181 |                     |
| a)                 | Complaint                                                                               | Covil v Penn<br>2098 005006-73   |                     |
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| 28)         | Tommy D. Wannamaker asbestos files                                                                                                                     | Covil v. Penn<br>2098 005182-5730 |              |
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| i)          | Deposition transcript of T. Wannamaker – dated April 13, 2021                                                                                          | Covil v Penn<br>2098 005509-5626  |              |
| j)          | Deposition transcript of T. Wannamaker – dated April 14, 2021                                                                                          | Covil v Penn<br>2098 005627-5730  |              |
| 29)         | Article: Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute, 12 Conn. Ins. L. J. 349 (2005-2006)          | MILLER 00841-916                  |              |
| 30)         | Insurance Protection for Products Liability and Completed Operations – What Every Lawyer Should Know, Nebraska Law Review, Vol. 50, No. 3, Spring 1971 | MILLER 00211-43                   |              |
| 31)         | Risk and Insurance: Sixth Edition, James L. Athearn and S. Travis Pritchett (University of South Carolina)                                             | MILLER 00146-8                    |              |

| Exhibit No. | Document                                                                                                                                                                                                                   | Document Identification | Confidential |
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| 32)         | Introduction to Risk Management and Insurance: Seventh Edition, Mark Dorfman (University of North Carolina at Charlotte)                                                                                                   | MILLER 00196-8          |              |
| 33)         | General Liability Coverage, 1986: 3rd Edition (1985)                                                                                                                                                                       | MILLER 00203-9          |              |
| 34)         | Risk & Insurance (IRM) – Insurance Glossary - definition of “premises-operations”                                                                                                                                          | MILLER 00210            |              |
| 35)         | Comprehensive General Liability Insurance: FC&S Bulletins, National Underwriter Co. (1985)                                                                                                                                 | MILLER 00199-202        |              |
| 36)         | P. Protopapas email to F. Benedek, Penn National’s VP of Claims, regarding tender of <i>Timothy Howe v. Air &amp; Liquid Systems Corporation, et al.</i> (York County, SC, 2015-CP-46-03456), dated August 5, 2019.        |                         |              |
| 37)         | B. Wright letter to P. Protopapas in response to August 5, 2019 letter regarding tender of <i>Timothy Howe v. Air &amp; Liquid Systems Corporation, et al.</i> (York County, SC, 2015-CP-46-03456), dated August 21, 2019. |                         |              |
| 38)         | Hartford Accident and Indemnity Company’s Third-Party Complaint ( <i>Zurich American Insurance Company v. Hartford Accident and Indemnity Company</i> , MDNC, No. 1:18-cv-932), dated October 2, 2019.                     |                         |              |
| 39)         | Summons on Penn National ( <i>Zurich American Insurance Company v. Hartford Accident and Indemnity Company</i> ,                                                                                                           |                         |              |

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|             | MDNC, No. 1:18-cv-932), dated October 3, 2019.                                                                                                                                                                    |                         |              |
| 40)         | Covil's 30(b)(6) notice of deposition of Penn National, dated November 19, 2019                                                                                                                                   |                         |              |
| 41)         | Penn National's Motion to Dismiss Hartford's Third-Party Complaint ( <i>Zurich American Insurance Company v. Hartford Accident and Indemnity Company</i> , MDNC, No. 1:18-cv-932), dated November 21, 2019.       |                         |              |
| 42)         | Penn National's Answers to Covil's First Set of Interrogatories ( <i>Zurich American Insurance Company v. Hartford Accident and Indemnity Company</i> , MDNC, No. 1:18-cv-932), dated December 18, 2019.          |                         |              |
| 43)         | Penn National's Responses to Covil's First Set of Requests for Admission ( <i>Zurich American Insurance Company v. Hartford Accident and Indemnity Company</i> , MDNC, No. 1:18-cv-932), dated December 18, 2019. |                         |              |
| 44)         | 30(b)(6) deposition notice served on Penn National ( <i>Zurich American Insurance Company v. Hartford Accident and Indemnity Company</i> , MDNC, No. 1:18-cv-932), dated November 5, 2019.                        |                         |              |
| 45)         | B. Yntema letter to B. Edwards objecting to 30(b)(6) deposition notice served on Penn National ( <i>Zurich American Insurance Company v. Hartford Accident and Indemnity Company</i> , MDNC,                      |                         |              |

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|             | No. 1:18-cv-932), dated November 12, 2019.                                                                                                                                                                                                                 |                         |              |
| 46)         | B. Edwards email to B. Yntema re Zurich v. Covil (North Carolina), dated November 15, 2019.                                                                                                                                                                |                         |              |
| 47)         | Covil's subpoena duces tecum to Penn National, dated November 25, 2019 ( <i>Hopper v. Air &amp; Liquid Systems Corporation, et al.</i> , No. 19-CP-40-00076).                                                                                              |                         |              |
| 48)         | South Carolina Department of Insurance's notification of acceptance of service of Covil's 11/25/2019 subpoena duces tecum to Penn National, dated November 26, 2019 ( <i>Hopper v. Air &amp; Liquid Systems Corporation, et al.</i> , No. 19-CP-40-00076). |                         |              |
| 49)         | Penn National's responses to Covil's subpoena duces tecum, dated December 9, 2019 ( <i>Hopper v. Air &amp; Liquid Systems Corporation, et al.</i> , No. 19-CP-40-00076).                                                                                   |                         |              |
| 50)         | Penn National's Answers to Covil's First Set of Interrogatories and Responses to Covil's First Set of Requests for Admission, dated December 18, 2019 ( <i>Zurich American Insurance Company v. Covil Corporation, et al.</i> , MDNC No. 1:18-cv-000932).  |                         |              |
| 51)         | Penn National's Answers to Covil's First Set of Interrogatories, dated May 15, 2020 ( <i>Covil v. Penn National</i> , Court of Common Pleas for the Fifth Judicial Circuit, County of Richland, SC, 2020-CP-40-01226).                                     |                         |              |

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| 52)         | Penn National's Responses to Covil's First Set of Requests for Production, dated May 15, 2020 ( <i>Covil v. Penn National</i> , Court of Common Pleas for the Fifth Judicial Circuit, County of Richland, SC, 2020-CP-40-01226).                       |                         |              |
| 53)         | Covil's subpoena duces tecum to Penn National, dated February 8, 2021 ( <i>Finch and Covil v. USF&amp;G</i> , Court of Common Pleas for the Fifth Judicial Circuit, County of Richland, SC, 2019-CP-40-03003).                                         |                         |              |
| 54)         | Letter from D. Harris to M. Shisko dated Feb. 12, 2021                                                                                                                                                                                                 |                         |              |
| 55)         | Penn National's objections to Covil's subpoena duces tecum to Penn National, dated February 22, 2021 ( <i>Finch and Covil v. USF&amp;G</i> , Court of Common Pleas for the Fifth Judicial Circuit, County of Richland, SC, 2019-CP-40-03003).          |                         |              |
| 56)         | Penn National's supplemental objections to Covil's subpoena duces tecum to Penn National, dated March 9, 2021 ( <i>Finch and Covil v. USF&amp;G</i> , Court of Common Pleas for the Fifth Judicial Circuit, County of Richland, SC, 2019-CP-40-03003). |                         |              |
| 57)         | Penn National's Answers to the Receiver of Covil Corporation's First Set of Interrogatories, dated May 10, 2021                                                                                                                                        |                         |              |
| 58)         | Penn National's Responses to the Receiver of Covil Corporation's Request for                                                                                                                                                                           |                         |              |

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|             | Production, dated May 10, 2021                                                                                                                                                                                      |                         |              |
| 59)         | Penn National's Supplemental Answers to the Receiver of Covil Corporation's First Set of Interrogatories, dated June 11, 2021                                                                                       |                         |              |
| 60)         | Penn National's Supplemental Responses to the Receiver of Covil Corporation's Request for Production, dated June 11, 2021                                                                                           |                         |              |
| 61)         | Receiver's Notice of Filing of Late-Produced Policies, dated June 15, 2021 ( <i>Finch and Covil v. USF&amp;G</i> , Court of Common Pleas for the Fifth Judicial Circuit, County of Richland, SC, 2019-CP-40-03003). |                         |              |
| 62)         | Order granting Covil's motions to compel, dated July 1, 2021 ( <i>Finch and Covil v. USF&amp;G</i> , Court of Common Pleas for the Fifth Judicial Circuit, County of Richland, SC, 2019-CP-40-03003).               |                         |              |
| 63)         | Order granting Covil's motions to compel and ordering Ellis & Winters' review of Penn National's documents, dated November 5, 2021.                                                                                 |                         |              |
| 64)         | Penn National's Responses to Plaintiff's Second Set of Requests for Production, dated December 20, 2021                                                                                                             |                         |              |
| 65)         | B. Yntema letter to B. Nes regarding Penn National's litigation hold and document retention policy, dated December 28, 2021.                                                                                        |                         |              |
| 66)         | Order granting Receiver's Motion for Protective Order                                                                                                                                                               |                         |              |

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| 67)         | Penn National's Responses to the Receiver for Covil's Third Set of Requests for Production dated Feb. 17, 2022                                                                                         |                         |              |
| 68)         | Penn National's Responses to the Receiver of Covil Corporation's First Set of Requests for Admission, dated February 17, 2022                                                                          |                         |              |
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| 71)         | Order on Discovery Motions, dated May 5, 2022                                                                                                                                                          |                         |              |
| 72)         | 6/11/2021 Affidavit of B. Wright                                                                                                                                                                       |                         |              |
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| 77)         | 8/3/2021 Deposition Transcript of B. Reifsnyder                                                                                                                                                        |                         |              |
| 78)         | 8/26/2021 Deposition Transcript of B. Wright                                                                                                                                                           |                         |              |

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| 79)         | 7/13/1977 Deposition Transcript Excerpts of P. Covil                                                                                                 |                                 |              |
| 80)         | Covil Corporation Certificate of Incorporation                                                                                                       | Covil v. Penn<br>2098_005893-4  |              |
| 81)         | Resume of Work Performed by Covil Corporation                                                                                                        | Covil v. Penn<br>2098_005895-9  |              |
| 82)         | Order on Discovery Motions, dated November 16, 2022                                                                                                  |                                 |              |
| 83)         | Deposition Transcript of Edwin L. Rice, dated October 3, 1991                                                                                        | MILLER 00766-824                |              |
| 84)         | 11/10/2022 Deposition Transcript of B. Reifsnyder                                                                                                    |                                 |              |
| 85)         | Pretrial Report of Gary J. Moss dated 9/27/21                                                                                                        | Covil v. Penn<br>2098_005900-24 | X            |
| 86)         | Pretrial Report of Jerry W. Archer dated 7/24/20                                                                                                     | Covil v. Penn<br>2098_005925-38 | X            |
| 87)         | Initial Report of Nicholas L. Murphy dated 7/22/21                                                                                                   | Covil v. Penn<br>2098_005939-51 | X            |
| 88)         | Initial Report of Tommy D. Wannamaker dated 5/5/22                                                                                                   | Covil v. Penn<br>2098_005952-70 | X            |
| 89)         | Initial Report of Waymon F. Sims dated 2/9/22                                                                                                        | Covil v. Penn<br>2098_005971-9  | X            |
| 90)         | Covil Certificate Revocation of Authority dated 7/30/93                                                                                              |                                 |              |
| 91)         | Court Order ( <i>Zurich American Insurance Company v. Hartford Accident and Indemnity Company</i> , MDNC, No. 1:18-cv-932), dated February 24, 2020. |                                 |              |
| 92)         | Court Order ( <i>Zurich American Insurance Company v. Hartford Accident and Indemnity Company</i> , MDNC, No. 1:18-cv-932), dated April 22, 2020.    |                                 |              |



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| 93)         | Penn National's Interim Report Regarding Progress of Document Sampling/Review of Penn National's Insurance Policy Related Documents, Pursuant to the November 5, 2021 Order of the Court, dated December 7, 2021 |                         |              |
| 94)         | Sharla J. Frost CV                                                                                                                                                                                               | FROST 0999-1008         |              |
| 95)         | Charles M. Miller, Esq. CV                                                                                                                                                                                       | MILLER 01350-59         |              |
| 96)         | Deposition Transcript of Sharla J. Frost, dated November 9, 2022                                                                                                                                                 |                         |              |
| 97)         | Deposition Transcript of Scott Maier, dated November 21, 2022                                                                                                                                                    |                         |              |
| 98)         | Deposition Transcript of Charles M. Miller, dated November 28, 2022                                                                                                                                              |                         |              |
| 99)         | Deposition Transcript of Boyd Wright, dated November 30, 2022                                                                                                                                                    |                         |              |
| 100)        | Hearing Transcript, dated January 25, 2021                                                                                                                                                                       |                         |              |
| 101)        | Covil Certificate of Administrative Dissolution                                                                                                                                                                  |                         |              |
| 102)        | Article: A New Set of Hurdles for Manville (the New York Times, by Tamar Lewin): dated Feb. 17, 1986                                                                                                             |                         |              |
| 103)        | Declaration of Sharla Frost, dated December 5, 2022                                                                                                                                                              |                         | X            |

Discovery is ongoing. The Receiver reserves the right to list additional trial exhibits at the conclusion of discovery.

Dated: December 5, 2022

Respectfully submitted,

s/ Shanon N. Peake

Jonathan M. Robinson (S.C. Bar No. 68285)

**Shanon N. Peake (S.C. Bar No 102723)**

Smith Robinson, LLC

2530 Devine Street, 3<sup>rd</sup> Floor

Columbia, SC 29205

Phone: (803) 254-5445

G. Murrell Smith, Jr. PO Box 580

Sumter, SC 29151-0580

803-778-2471

ATTORNEYS FOR THE RECEIVER FOR COVIL  
CORPORATION

DB1/ 134433387.1

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,

Plaintiff,

v.

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

Defendants.

CASE NUMBER: 2020-CP-40-02098

**RECEIVER FOR COVIL  
CORPORATION'S PROPOSED  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**RECEIVER FOR COVIL CORPORATION'S  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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Peter D. Protopapas, as Receiver for Covil Corporation (“Covil”), by and through the undersigned counsel, hereby respectfully submits the Receiver’s Proposed Findings of Fact and Conclusions of Law,<sup>1</sup> pursuant to Rule 52 of the South Carolina Rules of Civil Procedure, and in support thereof would respectfully intend to show the following:

**I. INTRODUCTION**

This Court appointed the Receiver to marshal the full extent of Covil’s assets including, without limitation its insurance policies.<sup>2</sup> For years, however, Penn National Mutual Insurance Company (“Penn National”) has obstructed the Receiver’s efforts. Despite receiving repeated requests for over three years to produce *all insurance policies* protective of Covil, Penn National refused to search its historic records unless it was provided with a specific policy number for each policy sought. Penn National’s intransigence forced this Court to issue a series of escalating orders compelling Penn National’s participation in the discovery process, including this Court’s November 2021 discovery order appointing Covil’s underlying defense counsel, Ellis & Winters, to conduct an independent review of Penn National’s files. But it was not until December 2021 that Penn National admitted that it had been actively and systemically *destroying* historic occurrence-based liability policies and policy-related documents *the entire time* on an *annual* basis. Penn National was destroying these historic policy documents:

(1) without issuing any litigation holds to prevent the automatic purges of Covil’s unlocated policy documents;

(2) without reviewing such historic policy documents for responsiveness to the Covil litigation requests before destruction; and

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<sup>1</sup> The Receiver reserves the right to submit a revised/final Proposed Findings of Fact/Conclusions of Law after the evidentiary hearing/trial proceedings have concluded.

<sup>2</sup> Penn National Trial Ex. 1, Covil’s Complaint at Attachment A, Receiver Order at 1 (“This order is inclusive of, but not limited to, 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”).

(3) without maintaining records of the historic, occurrence-based liability policies and policy-related documents Penn National had destroyed.<sup>3</sup>

It is axiomatic under South Carolina law that a party to potential litigation, such as Penn National, has a duty to preserve evidence that may be relevant to reasonably foreseeable litigation. If evidence that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, or is otherwise disposed of, destroyed, or not preserved, then the court may order a range of measures to address the prejudice. Accordingly, the Receiver respectfully seeks an order from this Court, following an evidentiary hearing in order to make factual findings, that Penn National spoliated evidence and fashioning appropriate remedies to address the harm, as discussed below.

With this declaratory judgment action, the Receiver also seeks to resolve several threshold legal issues relating to the proper interpretation and meaning of the Penn National Policies, including, but not limited to:

- the proper interpretation of the aggregate limit of liability for bodily injury and property damage combined single limit contained on the declarations page of the Penn National Policies when applied to asbestos-related suits filed against Covil (“the Covil Asbestos Suits”);
- the proper interpretation of the “completed operations hazard” definition contained in Penn National’s Policies when applied to the Covil Asbestos Suits;
- which party bears the burden of proving that a bodily injury alleged in Covil Asbestos Suits falls within the “completed operations hazard” and “products hazard” for purposes of applying the aggregate limit of liability;
- whether the bodily injuries alleged in twelve covered Covil Asbestos Suits under the Penn National Policies and 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 Penn National’s Policies’ aggregate limit of liability;

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<sup>3</sup> Penn National’s discovery misconduct resulted in numerous other discovery orders against Penn National in this case, including discovery orders granting Covil’s motions to compel on January 25, 2021; July 1, 2021; November 5, 2021; May 5, 2022; and November 16, 2022.



- whether 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; and
- whether the 1986-1987 Penn National Policy contains the “Completed Operations Hazard and Products Hazard” Exclusion, GL2104.

The facts relevant to these issues are not complex and may not be genuinely disputed by Penn National. Nonetheless, an actual and justiciable controversy exists between the Receiver for Covil and Penn National concerning Penn National’s obligations to Covil. Judicial declarations are necessary and appropriate at this time so that Covil may ascertain its rights against Penn National.

## **II. PROPOSED FINDINGS OF FACT**

### **A. Covil Corporation’s Business and the Covil Asbestos Suits**

Covil, a South Carolina insulation contractor, had a highly successful business, which included installing and removing insulation, including asbestos insulation, between 1948 and 1991. As more fully explained below, long after the company was administratively dissolved, in November 2018, it failed to respond to two asbestos personal injury suits brought against it, and this Court appointed a receiver for Covil. Since that time, Penn National, one of Covil’s insurers, has contributed to the defense and indemnity of certain Covil Asbestos Suits, but only based on its own understanding of the coverage afforded under those policies.

**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.<sup>4</sup> The company was incorporated in 1954.<sup>5</sup> Over the next thirty years, Covil grew to become a major regional insulation contractor, applying asbestos-containing insulation in a variety of heavy industrial facilities across South Carolina.<sup>6</sup> In 1991, Covil was administratively dissolved.<sup>7</sup>

**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 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 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 Taylor v. Air & Liquid Sys. Corp.*, C.A. No. 2018-CP-40-04940 (S.C. Comm. Pl. Nov. 2, 2018). On November 2, 2018, Peter Protopapas was appointed

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<sup>4</sup> *See* Covil Trial Ex. 79, Deposition of Palmer Covil in *Evelyn White v. Combustion Engineering Company, Inc., et al.*, D.S.C. Nos. 77-1369, 77-1384, 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.”).

<sup>5</sup> *See* Covil Trial Ex. 80, Certificate of Incorporation.

<sup>6</sup> *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).

<sup>7</sup> Covil Trial Ex. 101, Certificate of Administrative Dissolution.

the Receiver of Covil Corporation. 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). 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 and the products that it supplied to industrial sites throughout the southeastern United States (the “Covil Asbestos Suits”).

As Covil’s expert, Sharla Frost, has attested, Covil faces potential verdict risks in the Covil 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.<sup>8</sup> 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. *Id.*

As to the evaluation of verdict risk based on the plaintiff’s disease/medical diagnosis, Ms. Frost has attested as follows:

[P]laintiffs’ experts in the asbestos litigation have long testified that mesothelioma is a signature disease, meaning that if an individual is diagnosed with mesothelioma, the mesothelioma was almost certainly caused by exposure to asbestos. When a worker inhales a fiber of asbestos, that fiber can become lodged in the lung lining, the mesothelium, or in the interior of the lung. Over time, that asbestos fiber can cause a mutation in the cell; the mutation then replicates as the mutated cells divide; ultimately manifesting as mesothelioma, cancer of the lining of the lung, or as lung cancer, a tumor inside the lung itself. Most jurisdictions hold that a bodily injury occurs at the time that the plaintiff first inhales an asbestos fiber, and the bodily injury continues as cells continue to mutate until the point where the claimant develops a diagnosed case of either mesothelioma or lung cancer. Because

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<sup>8</sup> Covil Trial Ex. 103, Declaration of S. Frost at 3.

of the signature disease relationship between mesothelioma and asbestos, combined with the well-established medical literature regarding the nature of pain and suffering of a claimant diagnosed with mesothelioma, a claimant with a diagnosis of mesothelioma represents a relatively high risk of a verdict for a defendant in cases where a defendant can be tied to a specific asbestos exposure.

While mesothelioma cases present the highest verdict risk, lung cancer cases also present an elevated risk of an adverse verdict for a defendant. Because lung cancer can be attributed to a variety of causes other than asbestos, in contrast to mesothelioma, which is considered a signature disease, defendants may have opportunities to offer alternative causation theories for a particular plaintiff's lung cancer diagnosis. While an alternative causation defense does not guarantee a defense a verdict in a case, it may decrease the risk of an adverse verdict.

*Id.* at 3-4. Therefore, once a plaintiff's disease process is identified, an individual with experience in the 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 has attested as follows:

Understanding the types of exposures that may arise from a particular defendant's work operations is critical to evaluating the verdict risk that a specific case represents. For an insulation contractor defendant like Covil, the cases that present the highest verdict risk involve direct worker exposures. That is, where Covil employees are present on a particular work site installing, removing, replacing, repairing, or maintaining asbestos containing thermal insulation, and where there is direct exposure to a worker resulting from or incident to that work being performed by the Covil insulation workers because that worker is working at that same site while the Covil operations are still in progress. When a worker is directly involved in the installation, removal, replacement, repair, or 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 him to manipulate the asbestos containing materials himself. (These workers are typically described in the relevant industrial hygiene and medical literature as "bystanders.") Stated simply, manipulation of asbestos containing thermal insulation is recognized to liberate asbestos into the ambient air. This presents an exposure risk for both the

insulation workers and any other workers who may be in proximity to them. Likewise, removal of old asbestos insulation, known in the trade as “rip out,” presents a particularly high-risk of worker exposure because old insulation deteriorates over time, making it more likely to release respirable particles into the air when it is disturbed. Application of asbestos cement products, used for insulating joints and connections also presents a risk of exposure for mixers, applicators, and bystanders. Those products typically came in dry form in bags requiring them to be mixed with water to create a cement paste. The process of mixing and applying those asbestos containing cement products has been described in the industrial hygiene literature as being very dusty and presenting a high risk of exposure to respirable fibers of asbestos

*Id.* at 4-5.

**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.<sup>9</sup> 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”) 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”),<sup>10</sup> and produced what it characterized as “true and accurate” copies of those specific policies.<sup>11</sup> 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”).<sup>12</sup> Further, Penn National issued inland marine coverage

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<sup>9</sup> See Covil Trial Exs. 1, 2, 4, and 5.

<sup>10</sup> Penn National Trial Ex. 2, Penn National’s Answer to Complaint, ¶ 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.

<sup>11</sup> Covil Trial Exs. 1-3.

<sup>12</sup> Covil Trial Ex. 5.

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”).<sup>13</sup>

**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 [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.<sup>14</sup>

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

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<sup>13</sup> Covil Trial Ex. 4.

<sup>14</sup> Covil Trial Ex. 1, 1986-1987 Policy at Penn National Policies at 000002; Covil Trial Ex. 2, 1987-1988 Policy at Penn National Policies at 000045.

**product hazard** shall not exceed the limit of **bodily injury** liability stated in the declarations as “aggregate.”<sup>15</sup>

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**.<sup>16</sup>

The applicable “Definitions” section of the Penn National Policies contains the following 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;<sup>17</sup>
- “**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 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.<sup>18</sup>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;<sup>19</sup>
- “**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

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<sup>15</sup> Covil Trial Ex. 1, 1986-1987 Policy at Penn National Policies 000004; Covil Trial Ex. 2, 1987-1988 Policy at Penn National Policies at 000047.

<sup>16</sup> *Id.*

<sup>17</sup> Covil Trial Ex. 1, 1986 to 1987 Policy at Penn National Policies at 000036; Covil Trial Ex. 2, 1987 to 1988 Policy at Penn National Policies at 000081.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*



- “**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.<sup>20</sup>

There is no definition of the term “aggregate” in the “Definitions” section of the Penn National Policies.<sup>21</sup>

### **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.<sup>22</sup>

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) the plaintiff worked at each such work site, and the overlap in terms of those time periods with periods of time when Covil insulation employees performed work operations at the same work site.<sup>23</sup>

As detailed in Ms. Frost’s Declaration, twelve of the fourteen 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 plaintiff’s worksites at the same time that the plaintiff was working at those same jobsites, and Covil’s contracting work allegedly caused the

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See Covil Trial Ex. 14, Letter from B. Wright to P. Protopapas dated September 1, 2022.

<sup>23</sup> See Covil Trial Ex. 103, S. Frost Declaration at 3-22.



plaintiff to be exposed to asbestos. *Id.* As Ms. Frost explained, these cases each present a high verdict risk, and therefore are 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 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.”<sup>24</sup>

**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 and again in 2020.**

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 the *Finch* matter served Penn National with a subpoena requesting “all liability insurance policies and endorsements issued to Covil between 1969 and 1995[.]”<sup>25</sup> At that time, Covil faced significant potential liability in the asbestos personal injury case, *Ann Finch*, which ultimately resulted in a \$32 million verdict against Covil.<sup>26</sup> Although Penn National was not involved in the defense of the *Ann Finch* case, the underlying asbestos personal injury plaintiff counsel, Dean Omar, served the subpoena on Penn National. Penn National responded to the subpoena on June 15, 2018, but

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<sup>24</sup> *Id.* at 4.

<sup>25</sup> Covil Trial Ex. 12, Finch Subpoena to Penn National, at p. 5.

<sup>26</sup> *Id.*

only searched for Covil policies by the exact policy numbers provided to it by the asbestos claimant's counsel.<sup>27</sup>

Then, in October 2019, Penn National was named as a defendant in the Covil coverage litigation in the Middle District of North Carolina.<sup>28</sup> 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."<sup>29</sup> 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.*"<sup>30</sup> Therefore, no later than October 2019, Penn National was on notice in that the Receiver sought both named insured as well as additional insured coverage for Covil in ongoing litigation.

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

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<sup>27</sup> Covil Trial Ex. 13, Penn National Subpoena Response, dated June 15, 2018.

<sup>28</sup> 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.*, M.D.N.C. No. 1:18-cv-932, ECF 104 (Oct. 2, 2019). 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. Ultimately, Judge Eagles determined to narrow the scope of the Middle District of North Carolina action only to the insurance coverage implicated in the *Finch* case, and Penn National was dismissed, without prejudice, as a third-party defendant in that action for that reason. *See id.* at ECF 297.

<sup>29</sup> Covil Trial Ex. 42, Dec. 18, 2019 Penn National Discovery Responses at Interrogatory No. 1.

<sup>30</sup> *Id.*

related to such policies, and/or form language used in such policies issued by [Penn National] during the 1950-1986 time period.”<sup>31</sup> Penn National did not produce or describe those policies, nor did it assert that they were confidential or proprietary.<sup>32</sup>

In February 2020, the Receiver filed suit against Penn National in this Court.<sup>33</sup> The Receiver again served Penn National with discovery requesting any policy issued by Penn National that included Covil as an insured.<sup>34</sup> The Receiver also requested Penn National’s document retention policies from 1950 through 2018.<sup>35</sup> Penn National repeated its responses from the North Carolina case.<sup>36</sup>

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[.]”<sup>37</sup> Subsequent discovery revealed that that Penn National had not conducted a fulsome 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.<sup>38</sup>

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<sup>31</sup> *Id.* at Interrogatory No. 9.

<sup>32</sup> *Id.*

<sup>33</sup> Covil Corp. v. Pa. Nat’l Mut. Cas. Ins. Co., C.A. No. 2020-CP-40-01226 (Com. Pl. filed Feb. 28, 2020).

<sup>34</sup> Covil Trial Ex. 52, (May 15, 2020 Penn National Discovery Responses) at RFP No. 2.

<sup>35</sup> *Id.* at RFP No. 11.

<sup>36</sup> *See id.*

<sup>37</sup> Penn National Trial Ex. 1, Covil Complaint at p. 11(¶ B.).

<sup>38</sup> Ex. 57, May 10, 2021 Penn National Responses to Receiver’s Interrogatories at Interrogatory No. 1.

**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, and 2020 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.<sup>39</sup> 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 of the need to preserve documents that potentially identify insurance coverage for Covil.<sup>40</sup>

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 that were destroyed between 2018 and 2020 for references to Covil

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<sup>39</sup> Covil Trial Ex. 64, Dec. 20, 2021 Penn National Responses to Receiver's Second Requests for Production 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. However, such a purge does not take place until the conclusion of the year/start of the following year. Because the discovery dispute at issue in this action relating to the assertion that Covil may have been listed as an 'additional insured' on the policies of other Penn National insureds – which dispute began in January 2021 – no policy-related documents have been destroyed or purged since the onset of the discovery dispute in this matter."). 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.

<sup>40</sup> See Covil Trial Ex. 84, B. Reifsnyder Dep. Transcript, dated Nov. 11, 2022 at 41-42 ("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 ("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 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.")

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, and 2020.<sup>41</sup>
- Penn National admitted that it disposed of policy-related documents pursuant to its standard record purge policy and practice in 2018, 2019, and 2020.<sup>42</sup>
- Penn National admitted that it disposed of liability insurance policies in 2018, 2019, and 2020.<sup>43</sup>
- Penn National admitted that it did not issue a litigation hold for any Covil litigation until December 2021.<sup>44</sup>
- 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.<sup>45</sup>
- 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.<sup>46</sup>
- Penn National admitted that it cannot identify each and every named insured, additional insured or supplemental insured listed in the paper and microfiche-policy-related documents it destroyed, purged, or otherwise disposed of since 2018.<sup>47</sup>

**3. 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.<sup>48</sup>

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<sup>41</sup> Covil Trial Ex. 68, Penn National’s Feb. 17, 2022 Resp. to RFA at 2.

<sup>42</sup> *See id.* at 3, 5, 7.

<sup>43</sup> *See id.* at 4, 6, 8.

<sup>44</sup> *See id.* at 21.

<sup>45</sup> *See id.* at 11, 13, 15.

<sup>46</sup> *See id.* at 12, 14, 16.

<sup>47</sup> *See id.* at 23.

<sup>48</sup> Covil Trial Exs. 1, 4, and 5.

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.<sup>49</sup> The 1987-1988 policy includes a similar list on the “Special Named Insured” Endorsement.<sup>50</sup> 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 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.”<sup>51</sup>

**4. Insurers, such as Penn National, have known about the need to preserve legacy occurrence-based general liability policies since at least 1986.**

The insurance industry as a whole has been on notice regarding the need to preserve legacy occurrence-based insurance policies because of the claims arising out of the asbestos personal injury litigation since at least 1986. As Sharla Frost explains, “The Manville Corporation filed for bankruptcy in 1982 and came out of . . . bankruptcy in 1986, starting the

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<sup>49</sup> Covil Trial Ex. 1, p. 11.

<sup>50</sup> Covil Trial Ex. 2, p. 10.

<sup>51</sup> Covil Trial Ex. 50, Penn National Answer to Interrogatory No. 1.

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.”<sup>52</sup>

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, “In 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. Cir. 1988); Bkrtcy. Ct. Op. 134(a); *In re Johns-Manville Corp.*, 68 B.R. 618, 621 (Bkrtcy. 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.<sup>53</sup>

Penn National has no excuse for failing to suspend its systemic document destruction or purge policy and failing to preserve all Covil documents with a litigation hold during the pendency of the litigation relating to Covil.

**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 led Covil to file six motions to compel against Penn National between January 15, 2021 and April 11, 2022,

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<sup>52</sup> Covil Trial Ex. 96, Dep. of Sharla Frost at 12:15-13:5.

<sup>53</sup> *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.”).

and this Court to enter six separate orders over the course of two years to extract 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.

**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.<sup>54</sup> As more fully detailed below, this was despite 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, process 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.<sup>55</sup>

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<sup>54</sup> Covil Trial Ex. 71, May 5, 2022 Order, p. 4.

<sup>55</sup> *Id.*, p. 4.



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 refused to 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 searches Penn National performed.<sup>56</sup> 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."<sup>57</sup> 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.<sup>58</sup> Finally, Mr. Wright confirmed that he was "not aware that a search . . . through the entire company records occurred."<sup>59</sup>

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

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<sup>56</sup> See Covil Trial Ex. 76, B. Wright 1-7-21 Dep. at 9:5-12, 43:14-44:18.

<sup>57</sup> *Id.* at 39:7-16, 21-25.

<sup>58</sup> *Id.* at 45:14-25.

<sup>59</sup> *Id.* at 67:4-6.

possible agents that might have been involved in procuring this coverage from Penn National,” and “[gave] Penn National 15 days to respond to it.”<sup>60</sup> The Court 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.”<sup>61</sup>

**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.<sup>62</sup> Despite this Court’s warning, Penn National’s first reaction to the subpoena included “a policy number for any policy that may relate to Covil or the Contractors listed.”<sup>63</sup> 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.”<sup>64</sup> 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.”<sup>65</sup> 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 were “not relevant to this action because such policies do not provide coverage to Covil Corporation.”<sup>66</sup>

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

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<sup>60</sup> Covil Trial Ex. 100, Hearing Transcript at 141.

<sup>61</sup> *Id.* at 143.

<sup>62</sup> Covil Trial Ex. 53, Letter and Subpoena to Penn National dated Feb. 8, 2021.

<sup>63</sup> Covil Trial Ex. 54, Letter from D. Harris to M. Shisko dated Feb. 12, 2021.

<sup>64</sup> Covil Trial Ex. 55, Penn National’s Subpoena Response, dated Feb. 22, 2021.

<sup>65</sup> *Id.*, p. 5.

<sup>66</sup> *Id.*, p. 7.

protective of Covil in its discovery responses in another case.<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup>

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<sup>67</sup> Covil Trial Ex. 62, Order granting Covil’s motions to compel, dated July 1, 2021 (*Finch and Covil v. USF&G*, Court of Common Pleas for the Fifth Judicial Circuit, County of Richland, SC, 2019-CP-40-03003), p. 4.

<sup>68</sup> *Id.*, pp. 5-6.

<sup>69</sup> *Id.*, p. 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.<sup>70</sup> In his July 9 affidavit, Mr. Reifsnyder explained that non-electronic archives were stored on microfilm and in paper form.<sup>71</sup> The affidavit outlined the storage and search procedures for both archive forms. Importantly, Reifsnyder attested, “Policy 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.<sup>72</sup>

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.<sup>73</sup> Instead, he stated he “considered other alternative means of searching Penn National’s non-electronically-stored paper documents[.]”<sup>74</sup> 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.”<sup>75</sup>

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

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<sup>70</sup> See Covil Trial Ex. 73., Aff. of B. Reifsnyder, dated July 9, 2021.

<sup>71</sup> *Id.*, ¶ 6.

<sup>72</sup> *Id.*, ¶¶ 8, 16.

<sup>73</sup> See Covil Trial Ex. 74, Aff. of B. Reifsnyder, dated July 23, 2021

<sup>74</sup> *Id.*, ¶ 6.

<sup>75</sup> *Id.*, ¶ 7.

- he spent *less than five minutes* trying to locate documents responsive to the Court's Order.<sup>76</sup>
- he did not take any steps to search for policy-related documents based on the contractor or job site lists provided by Covil.<sup>77</sup>
- 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.<sup>78</sup>
- 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.<sup>79</sup>
- Penn National itself designed the system of organizing its records by policy number.<sup>80</sup>
- he only considered 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."<sup>81</sup>
- 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.<sup>82</sup>

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 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 "additional insured," such as Covil, as well.<sup>83</sup> Without a policy number, Mr. Wright admitted, Penn National

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<sup>76</sup> Covil Trial Ex. 77, August 3, 2021 B. Reifsnyder Dep. at 65:3–11.

<sup>77</sup> *Id.* at 49:20–50:1.

<sup>78</sup> *Id.* at 50:2–9.

<sup>79</sup> *Id.* at 47:10–24.

<sup>80</sup> *Id.* at 43:11–16.

<sup>81</sup> *Id.* at 50:20–51:3.

<sup>82</sup> *Id.* at 52:7–24, 55:23–56:5, 57:2–12, 59:8–13, 59:14–60:10, 62:17–63:3.

<sup>83</sup> Covil Trial Ex. 78, August 26, 2021 B. Wright Dep. at 23:22–24.

would “have to look in the policy documents to see if there was any supplemental insureds.”<sup>84</sup> 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.<sup>85</sup>

**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.”<sup>86</sup> The Order required interim reports, with the first to be made on December 7, 2021.<sup>87</sup>

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 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.”<sup>88</sup>

**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 insulation contractor insureds with long-tail liability in the

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<sup>84</sup> *Id.* at 23:22-24:1.

<sup>85</sup> *Id.* at 36:6-11.

<sup>86</sup> Covil Trial Ex. 63, November 5, 2021 Order, p. 1.

<sup>87</sup> *Id.*, p. 2.

<sup>88</sup> *Id.*, p. 1.

asbestos litigation; (b) Penn National routinely purged its policy documents, including microfiche; and (c) there was no litigation hold for Covil until December 2021.

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

Penn National's corporate representative testified in a 1991 deposition that it was possible to search their policy index by policyholder name.<sup>89</sup> Now, Brent Reifsnyder testified that the only way to search for historic policies is by policyholder *number* using the system he created in 2010.<sup>90</sup> In fact, Mr. Reifsnyder admitted that Penn National designed the 2010 electronic system of organizing its records by policy number only.<sup>91</sup> Specifically, Mr. Reifsnyder himself designed the computer system, 2k10, in 2010 to 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 25-year document retention policy for insurance policies.<sup>92</sup>

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.<sup>93</sup> The policy does not, however, provide details for how the document destruction process should

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<sup>89</sup> 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, November 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.").

<sup>90</sup> See Covil Trial Ex. 84, November 10, 2022 B. Reifsnyder Dep. at 112: 10-17.

<sup>91</sup> Covil Trial Ex. 84, November 10, 2022 B. Reifsnyder Dep. at 43:11-16.

<sup>92</sup> See *id.* at 64: 1-24.

<sup>93</sup> *Id.* at 127:17-21; Covil Trial Ex. 8, Penn National Document Retention Policy.

take place.<sup>94</sup> As a result, Mr. Reifsnyder was left with preparing his own system, and he did: the 2k10 System.<sup>95</sup>

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.<sup>96</sup> Mr. Reifsnyder described the policyholder name as “extraneous information.”<sup>97</sup> Penn National produced a spreadsheet of the output of the 2k10 System in this case, which shows that the oldest policy subject to the destruction program as of the time the spreadsheet was printed was a 1982 policy.<sup>98</sup>

**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.<sup>99</sup> 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

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<sup>94</sup> Covil Trial Ex. 84, November 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.”).

<sup>95</sup> *Id.* at 59:17 – 60:22.

<sup>96</sup> *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.”).

<sup>97</sup> *Id.* at 91:25-92:23.

<sup>98</sup> Covil Trial Ex. 11, Microfiche Destruction Spreadsheet; *see also* Covil Trial Ex. 84, November 10, 2022 B. Reifsnyder Dep. at 62.

<sup>99</sup> Covil Trial Ex. 84, November 10, 2022 B. Reifsnyder Dep. at 103.



printed list as the policies are collected.<sup>100</sup> No copies of those lists were maintained.<sup>101</sup> 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.<sup>102</sup>

Penn National is unable to recreate or understand who the policyholders were for the policies that were destroyed in previous years.<sup>103</sup> As Mr. Reifsnyder explained when asked about the policies that were destroyed in 2019, for instance, “So everything is only by policy number. 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.”<sup>104</sup>

Mr. Reifsnyder testified 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.<sup>105</sup> No one performs an independent quality control or spot

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<sup>100</sup> 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.”).

<sup>101</sup> *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.”).

<sup>102</sup> *Id.* at 46-47; *see also id.* at 53 (“what was purged for 2019 would have been pulled 2018, 2019 in preparation for their eventual purge early the following year”).

<sup>103</sup> *Id.* at 44.

<sup>104</sup> *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.”).

<sup>105</sup> *Id.* at 78:6-9.

checking of the documents to be destroyed.<sup>106</sup> Further, there is no list of destroyed policies for anyone to review over the course of the project of pulling the policies.<sup>107</sup>

**c. Penn National did not put a litigation hold notice in place until December 2021 – more than three years after it became aware of the need to search for Covil insurance policies.**

On November 19, 2021, the parties held a telephone conference to discuss Penn National's policy search efforts.<sup>108</sup> 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 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 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.<sup>109</sup>

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<sup>106</sup> *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.”).

<sup>107</sup> *Id.* at 77:25-78:5.

<sup>108</sup> See Covil Trial Ex. 66, Motion for Protection dated Feb. 11, 2022, p. 2; see also Covil Trial Ex. 93, Penn National's Interim Report to the Court, dated December 7, 2021, p. 1.

<sup>109</sup> Covil Trial Ex. 64, Penn National's Responses to Plaintiff's Second Set of Requests for Production, dated December 20, 2021.

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.”<sup>110</sup>

In so holding, this Court found, “It 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.”<sup>111</sup>

This Court’s concern over the effectiveness of the litigation hold was not misplaced: 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

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<sup>110</sup> See Covil Trial Ex. 66, Motion for Protection dated Feb. 11, 2022, p. 3.

<sup>111</sup> *Id.*, pp. 2-3.

litigation hold policy.<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup>

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.<sup>115</sup>

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<sup>112</sup> Covil Trial Ex. 10, Dec. 17, 2021 Litigation Hold Email.

<sup>113</sup> Covil Trial Ex. 97, Scott Maier Dep. Transcript, dated November 21, 2022, 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.").

<sup>114</sup> *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.").

<sup>115</sup> Covil Trial Ex. 99, Boyd Wright Dep. Transcript, dated Nov. 30, 2022 at 41:9-42:3.

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.”<sup>116</sup> 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 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.*”<sup>117</sup>

### **III. PROPOSED CONCLUSIONS OF LAW**

#### **A. This Court Should Issue the Following Declarations As To The Interpretation and Meaning Of The Insurance Policies That Penn National issued to Covil.**

##### **1. 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 American 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 insurance, and their language must be given its plain, ordinary and popular

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<sup>116</sup> *Id.* at 44:9-15.

<sup>117</sup> *Id.* at 54:4-11 (emphasis added).

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.’” *Beaufort 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. Phoenix 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 *Beaufort 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.*<sup>118</sup>

“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)).

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<sup>118</sup> 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)). “An ambiguous contract is one capable of being understood in more ways than just on or one unclear in meaning because it expresses its purpose in an indefinite manner. *Id.* (citations omitted).

**2. 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.**

**a. The distinction between operations, completed operations, and products claims.**

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.”<sup>119</sup> 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.”<sup>120</sup>

The 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 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).

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<sup>119</sup> 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).

<sup>120</sup> *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. 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.”).



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)).<sup>121</sup>

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<sup>121</sup> 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 Intern. 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* 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.*



**b. 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.”<sup>122</sup> The term “aggregate” is not defined in the Penn National Policies.<sup>123</sup> Therefore, to understand the parties’ intent with respect to the total limit of liability, the Penn National Policies must be read as a whole.<sup>124</sup> 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.*”<sup>125</sup>

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.”

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

<sup>122</sup> Covil Trial Ex. 1, 1986-1987 Policy at 000028; Covil Trial Ex. 2, 1987-1988 Policy at 000071

<sup>123</sup> Covil Trial Ex. 1 at 000036; Covil Trial Ex. 2 at 000081.

<sup>124</sup> Covil Trial Ex. 99, B. Wright Dep. Transcript, dated Nov. 30, 2022, at 12:1-8.

<sup>125</sup> Covil Trial Ex. 14, B. Wright letter to P. Protopapas, dated September 1, 2022 (emphasis added).

the **products hazard** shall not exceed the limit of bodily injury liability stated in the declarations as “aggregate”.<sup>126</sup>

Figure 1 – Reproduction of Penn National Policy at 1 & 4

**Bodily Injury and Property Damage Liability**  
Completed Single Limit  
\$ 1,000,000 each occurrence \$ 1,000,000

**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 or 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 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 products hazard shall not exceed the limit of bodily injury liability stated in the declarations as "aggregate".

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.<sup>127</sup>

<sup>126</sup> Covil Trial Ex. 1 at 4 (emphasis in original; highlighting added).

<sup>127</sup> 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.

**c. An aggregate limit of liability was generally not made applicable to premises-operations coverage in comprehensive general liability policies.**

Covil's expert witness on insurance industry customs and practices, Charles Miller, is prepared to testify at trial that aggregate limits were not the norm for general liability claims in the 1973 Insurance Services Office ("ISO")<sup>128</sup> standard comprehensive general liability ("CGL") policy form, and the Penn National Policies are identical to the 1973 ISO standard CGL policy form language.<sup>129</sup> 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.<sup>130</sup> Insurers were willing to write CGL coverage without aggregate limits for certain hazards, primarily premises-operations hazards, because they were expected to have low loss frequency.<sup>131</sup>

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Covil respectfully requests that this Court declare, consistent with 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; it does not apply to "operations" bodily injury claims.

**3. 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

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<sup>128</sup> ISO is an organization that developed standard policy forms used in the insurance industry.

<sup>129</sup> See Covil Trial Ex. 98, Deposition Testimony of Covil's Expert Witness Charles Miller at 55:2-15.

<sup>130</sup> Exhibit 0006 to C. Miller's Dep. Transcript at 01376.

<sup>131</sup> *Id.*

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:

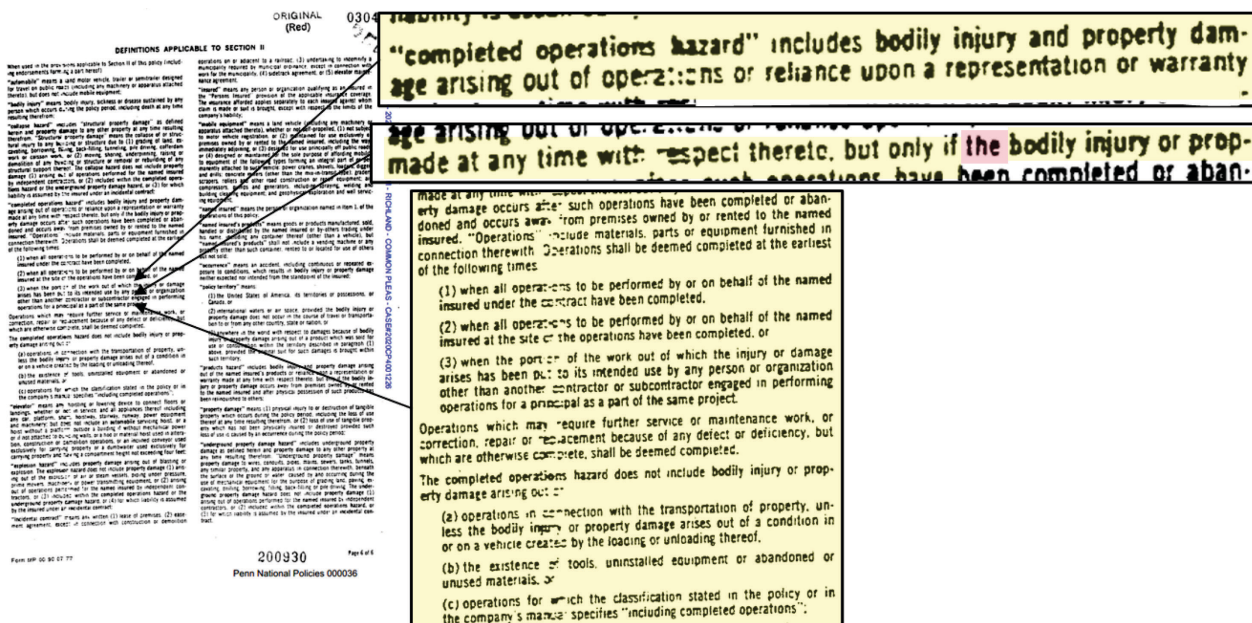
- If the exposure happens during operations, the resulting claim for damages is within the premises-operations hazard.
- If the injury is caused by the insured's operations, the resulting claim for damages is within the premises-operations hazard.
- If the exposure happens after operations are completed, 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.” Thus, if *any* bodily injury occurs *before* the operations are completed, then “*the*” bodily injury could not have occurred *after* the operations were completed.

Figure 2 – Reproduction of Penn National Policy



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 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.<sup>132</sup>

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<sup>132</sup> 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, 369-70 (2005/2006) (quoting Gilbert L. Bean (Liberty Mutual Insurance Company), “Address at the Mutual Insurance



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 367 (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.

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

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Technical Conference on New Comprehensive General and Automobile Program: The Effect on Manufacturing Risks” (Nov. 15-16,1965)).

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 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](http://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.”<sup>133</sup>

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:

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.<sup>134</sup>

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<sup>133</sup> 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).

<sup>134</sup> Covil Trial Ex. 33, Insurance Services Office, *General Liability Coverage*, at 26 (1985) (emphasis added).

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.*<sup>135</sup>

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.”<sup>136</sup> 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.<sup>137</sup>

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 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.

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<sup>135</sup> *Id.* at 28 (emphasis added).

<sup>136</sup> *Id.* at 106.

<sup>137</sup> 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).

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).

This is how the policies at issue have applied historically. That is all that Covil seeks in this case.

**4. 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 and 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.

**5. 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,<sup>138</sup> 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 limit 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 forgoing, the bodily injury allegedly suffered by these claimants are "operations" claims and not "completed operations" or "products" claim. The Receiver requests that this Court declare as a matter of law that the aggregate limit of liability of the Penn National Policies do 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.

**6. Penn National Cannot Meet Its Burden To Prove that the 1986-1987 Policy Contains The "Completed Operations Hazard and Products Hazard" Exclusion.**

Penn National asserts in this lawsuit that the Penn National Policies "do not provide coverage for the claims, lawsuits, or matters alleged in Plaintiff's Complaint."<sup>139</sup> Specifically, Penn National argues that certain asbestos claims that seek damages for bodily injury within the

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<sup>138</sup> See Covil Trial Ex. 14, Letter from B. Wright to P. Protopapas dated September 1, 2022.

<sup>139</sup> Penn National Trial Ex. 2, Penn National Answer, p. 7 (Fourth Defense).

“completed operations hazard” and the “products hazard” of the 1986-1987 Policy are excluded by endorsement GL 21 04 (07/66), Exclusion (Completed Operations Hazard and Products Hazard).<sup>140</sup>

Penn National cannot dispute that endorsement GL 21 04 (07/66) is not listed on the declarations page under the section which identifies all forms and endorsements applicable to the 1986-1987 Policy:

Figure 3 – Reproduction of Penn National Policy

The image shows a reproduction of a Penn National insurance policy declarations page. A yellow rectangular box highlights a section of the page containing the following text:

Section II - Forms and Endorsements only  
 GL0104(7/66) GL9918(3/83) GL0032(4/84) GL2133(2/85) 70-1656(7/85)  
 GL0031(4/84) CGL-1 MP-1 PI-1 GL0300(7/81) 70-260 73-3010  
 Section III - Forms and Endorsements only  
 MP0450(12/79) MP5231(7/77) MP0307(7/77)

Below the highlighted section, there is a table with columns for 'ENDORSEMENTS' and 'LIMITS OF LIABILITY'. The table lists various endorsements and their corresponding limits. A red arrow points from the highlighted section to the table. At the bottom of the page, there is a small yellow box with the number '1' and the text 'Penn National Policies 000001'.

Penn National therefore claims that the declarations page contains an error and that endorsement GL 21 04 (07/66) “was inadvertently left off the policy.”<sup>141</sup> Specifically, Penn National asserts that a Change Endorsement was issued on May 23, 1986 adding the GL 21 04 endorsement.<sup>142</sup> Penn National has proffered no evidence whatsoever that Covil, as the insured,

<sup>140</sup> See, e.g., Covil Trial Ex. 37, B. Wright Letter to P. Protopapas, dated August 21, 2019.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*



agreed to the Change Endorsement or that Covil ever intended for endorsement GL 21 04 (07/66) to be incorporated into the 1986-1987 Policy. Significantly, the “Insured’s Signature” is missing from the Change Endorsement. Likewise, GL 21 04 (07/66), which “required” certain information “when this endorsement is issued subsequent to preparation of policy,” as was allegedly the case here, is missing the “required” information and is not countersigned by an “Authorized Representative” of Covil:

Figure 4 – Reproduction of Penn National Policy

The figure shows two documents from Penn National Policies. The left document is a 'CHANGE ENDORSEMENT' form (MP 12 01 00 01 70) with a yellow box highlighting the 'Insured's Signature' field, which is empty. The right document is 'GL 21 04 (Ed. 07 66)' with a yellow box highlighting the required information fields: 'Endorsement effective', 'Policy No.', 'Endorsement No.', 'Named insured', and 'Countersigned by (Authorized Representative)'. All these fields are empty. Arrows point from the yellow boxes to the caption.

South Carolina Supreme Court authority makes clear that “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.

Here, Penn National cannot meet its heavy burden to show that the 1986-1987 Policy contains the “Completed Operations Hazard and Products Hazard” Exclusion. Covil therefore requests that this Court declare as a matter of law that, despite Penn National’s “Fourth Defense” to the contrary, Penn National cannot disclaim coverage for damages because of bodily injury



under the 1986-1987 Policy pursuant to a “Completed Operations Hazard and Products Hazard” Exclusion.

**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 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.<sup>143</sup> It requires an insurer to fulfill the promise of coverage actually made to a policyholder under the terms of the insurance policy.

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<sup>143</sup> 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.*, No. 2021-001209, 2022 WL 3221920, at \*2 (S.C. Aug. 10, 2022) (holding that policy terms “must be interpreted under their common meaning”); *B.L.G. Enters., 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.”).

Adhering to this principal, 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 (2011). The Court reached this determination “rel[ying] heavily” on *Boston Gas Co. v. Century Indem. Co.*, 454 Mass. 337, 364–65, 910 N.E.2d 290, 311 (2009), which the Court explained “provides the reading of the relevant policy language that we believe is correct.” 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.” 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. 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.<sup>144</sup>

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

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<sup>144</sup> 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. *Crossmann*, 395 S.C. at 63-64.

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 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. Covil’s legal liability must be because of “bodily injury . . . to which this insurance applies,” and 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 reinforce 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 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.”); *Cannon Elec., Inc. v. Ace Prop. & 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.”<sup>145</sup>

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. 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.<sup>146</sup> 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.”

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<sup>145</sup> “Any.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/any>. Accessed 2 Dec. 2022.

<sup>146</sup> South Carolina has adopted a modified continuous trigger of coverage. *Crossmann*, 395 S.C. at 55. Coverage is triggered at the time of an injury-in-fact and continuously thereafter through progressive damage.