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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 10**

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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 Federal 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 Federal 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 1st day of June, 2020.

GOLDBERG SEGALLA LLP

/s/ David G. Harris II

David G. Harris II (S.C. Bar No. 101951)

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Attorneys for Defendant Penn National

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the registered participants as identified on the Notice of Electronic Filing (NEF).

This the 1st day of June, 2020.

GOLDBERG SEGALLA LLP

/s/ David G. Harris II

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Attorney for Defendant Penn National

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

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

**Stipulation of Dismissal of South Carolina
Property and Casualty
Insurance Guaranty Association
(Without Prejudice)**

Pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure, Plaintiff Covil Corporation and Defendant South Carolina Property and Casualty Insurance Guaranty Association (“the Association”) stipulate to the dismissal, without prejudice, of the Association from this action. The parties further agree that this stipulation does not operate as an adjudication on the merits and that the parties will each bear their own costs.

WE SO STIPULATE:

s/Erik T. Norton

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Attorney for the Receiver

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

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

NOTICE OF DISMISSAL OF
DEFENDANT
SAM J. CRAIN & CO., INC. WITHOUT
PREJUDICE

Pursuant to SCRCP Rule 41(a)(1) of the South Carolina Rules of Civil Procedure, Plaintiff Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas, ("Covil"), hereby dismisses, without prejudice, all claims against Sam J. Crain & Co., Inc. (hereinafter "Crain") in the above referenced matter. Sam J. Crain & Co., Inc. has not served a responsive pleading in the above referenced matter.

Respectfully submitted,

This 6th day of November 2022

s./ Peter D. Protopapas

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Receiver

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 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
STATUS REPORT**

In response to this Court's scheduling of a status conference on September 8, 2022, the Receiver for Covil provides this status report of the case containing the following information: (1) procedural history of the case, (2) status of discovery, and (3) request for trial and anticipated length of trial.

I. PROCEDURAL HISTORY

The procedural history of this case is extensive and the below provides a chronology of relevant events:

4.27.2020 This matter began with the initial summons and complaint brought by the Receiver for Covil against Pennsylvania National Mutual Casualty Insurance Co., Sam Crain & Co. Inc, and South Carolina Property and Casualty Insurance Guaranty Association on April 27, 2020.

The Receiver brought causes of action against:

- a. Pennsylvania National Mutual Casualty Insurance Co. (“Penn National”) for Declaratory Judgment seeking a declaration that the Receiver is entitled to compensation (First Cause of Action), the Penn National policies and related documents in Penn National’s possession are the property of the Receivership (Second Cause of Action, and declaration of the rights and responsibilities of Penn National under the policies issued to Covil Corporation (Third Cause of Action).
- b. Sam Crain & Co for Failure to procure insurance (Fourth Cause of Action and for Breach of Contract (Fifth Cause of Action).
- c. The South Carolina South Carolina Property and Casualty Insurance Guaranty Association for a declaration as to their responsibilities for the Mission Insurance Company (“Mission”) umbrella policy where Mission is now out of business (Sixth Cause of Action).

5.22.2020	Penn National removed this matter to federal court.
6.1.2020	Penn National filed an Answer to Complaint.
6.16.2020	Covil moved the Federal Court to remand the matter to State Court.
3.30.2021	The Federal Court issued its Order remanding the case to State Court.
3.31.2021	Penn filed an answer to the complaint and sought a jury trial for “all issues so triable”.
4.9.2021	Discovery is initiated by Covil.
11.5.2021	The Court issues an Order addressing several discovery disputes.
2.11.2021	The Court issues an Order addressing additional discovery disputes.

- 5.5.2022 The Court issues an Order addressing further discovery disputes.
- 5.16.2022 Penn National moves the Court for Reconsideration of its 5.5.2022 Discovery Order, which Covil opposes.
- 5.26.2022 The Court issues its Order denying the Motion to Reconsider.

COURT OF APPEALS CHRONOLOGY

- 5.31.2022 Penn National files its Notice of Appeal of Orders dated 5.5.2022 and 5.26.2022.
- 6.6.2022 Covil moves the Court of Appeals to dismiss the appeal as interlocutory.
- 8.9.2022 Court of Appeal grants Covil's Motion to dismiss appeal as interlocutory.
- 8.24.2022 Penn National files its Petition for Rehearing En Blanc which is now **pending**.

SUPREME COURT CHRONOLOGY

- 6.16.2022 Penn National files Petition for Writ of Certiorari (Appellate case number 2022-000785).
- 8.22.2022 The Supreme Court issues its Order Denying Penn National's Petition for Writ of Certiorari.

II. STATUS OF DISCOVERY

On August 24, 2022, following the Supreme Court of South Carolina's denial of Penn National's petition for a writ of certiorari (Appellate Case Number 2022-000785), the Court of Appeals' dismissal of Penn National's separate, parallel appeal on the same issue (Appellate Case Number 2022-000761), and this Court's denial of Penn National's motion for reconsideration (Case Number 2020-CP-40-02098), counsel for the Receiver sent a letter to counsel for Penn National requesting that Penn National "immediately obey" the Court's May 5, 2022 Discovery Order, as instructed by the Court. To date, Penn National has not responded.

A. Outstanding Depositions

Immediate compliance with the Court's Discovery Order includes, but is not limited to, sitting for the depositions noticed by the Receiver on May 13th and May 31st respectively (i.e., Penn National's 30(b)(6) deposition and the deposition of Scott Maier). The Receiver has asked for deposition dates, but has not received a response.

B. Outstanding Documents

In addition, the Receiver has not received Penn National's responses to Covil's Fourth Set of Requests for Production, which was served on May 13th. The Receiver asked that Penn National provide all responsive documents by September 1, 2022, but has not received a response.

Finally, the Court's May 5, 2022 Discovery Order directed Penn National to "produce immediately" to Covil the following documents:

- "all code keys for its policy prefixes, including but not limited to the documentation identifying prefixes with policy lines of business identified in Ellis & Winters' report";
- "all information that was disclosed to Ellis & Winters and used as a basis for identifying policy numbers for the three newly discovered Covil insurance policies located by Ellis & Winters on March 17, 2022"; and
- "underwriting documentation in its possession, custody, or control for all the Receiverships for which Mr. Protopapas is the court-appointed Receiver."¹

Again, the Receiver asked Penn National to confirm that these documents would be produced by September 1, 2022, but has not received a response.

Upon completion of the above outstanding discovery, the Receiver will be ready for trial.

¹ See Court's May 5, 2022 Order at 10-11.

III. REQUEST FOR DATES FOR PRE-TRIAL CONFERENCE AND TRIAL

The Receiver respectfully requests that the Court set dates for:

- (1) pre-trial conference in November 2022; and
- (2) combined evidentiary hearing and non-jury trial in December 2022.

The Receiver requests an evidentiary hearing regarding Penn National's spoliation of evidence in order for the Court to make factual findings regarding the scope of the harm to Covil and to fashion appropriate remedies to address that harm. The Receiver also asks for a non-jury trial on Covil's declaratory relief against Penn National concerning Penn National's obligations to Covil under Policy Nos. 515 50 28 53 7 and 515 50 28 53 8.

The Receiver further requests that the Court combine the evidentiary hearing regarding spoliation with the trial on declaratory judgment issues into a single trial that lasts no more than three days. The Receiver also requests that the Parties be allowed to submit proposed findings of fact and conclusions of law in advance of trial. The Receiver anticipates calling three expert witnesses live at trial (with no more than 1 hour direct examination, 1 hour cross examination, and 15 minutes for redirect) and entering the testimony of three fact witnesses via deposition testimony. The Receiver also anticipates offering between 25 to 30 exhibits at trial.

Respectfully submitted,

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Attorney for the Receiver

This 6th Day of September, 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
RESPONSE TO THE RECEIVER'S
PRE-TRIAL STATUS REPORT**

v.

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

Defendants.

In advance of the pre-trial hearing to be conducted Monday, November 14, 2022, Pennsylvania National Mutual Casualty Insurance Company ("Penn National") submits this response to the Receiver for Covil Corporation's Pre-Trial Hearing Status Report ("Status Report") to address certain issues therein. This response is not meant to be inclusive of all issues that may be discussed at the hearing, but rather to specifically respond to the issue of Penn National's jury trial request and its preservation of same.

RESPONSE TO THE RECEIVER'S STATUS REPORT

In its Status Report, the Receiver for Covil Corporation (the "Receiver") contends that Penn National is not entitled to a jury trial based on the following three assertions: 1) the action is a declaratory judgment action and is, therefore, a non-jury action; 2) issues relating to spoliation are not jury issues; and 3) Penn National has waived its right to a jury trial. Penn National briefly addresses each of these contentions in turn.

(1) Factual Issues for Trial by Jury:

The Receiver recognizes that in determining whether there is a right to a jury trial the principle question is whether the action is legal or equitable inasmuch as there is no right to a trial by jury for equitable actions. See Receiver's Status Report p. 2. The Receiver further recognizes that a declaratory judgment action for the determination of insurance coverage is an "action at law." *Id.* However, while it is true that contracts may be construed by a court, "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." *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)). Under South Carolina law, the terms of an insurance policy "are to be construed according to contract law." *Coakley v. Horace Mann Ins. Co.*, 376 S.C. 2, 5-6, 656 S.E.2d 17, 18-19 (2007) (citation omitted). Thus, just as with other contracts, the construction of an insurance policy may be a question of fact for the jury. *E.g. 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).

Here, there are factual issues that will need to be resolved by a fact-finder. For example, the existence of policies issued by Penn National is a fact issue that will need to be resolved by a fact-finder (as discussed below). Indeed, the Court's recent pre-trial scheduling order includes a deadline for the parties to submit proposed findings of fact. Any disagreement over these proposed findings of fact will result in a question of fact, and Penn National is entitled to have such questions, along with any ambiguities in construction, submitted to a jury.

See e.g. Collins v. Frasier, 378 S.C. 249, 252, 662 S.E.2d 464, 466 (Ct. App. 2008) (“Juries resolve questions of fact”).

(2) Jury Issues as to Alleged Spoliation:

As to spoliation, while there is no recognized cause of action, there are threshold issues of fact to resolve before there can be any determination that spoliation even took place. Courts have held that such determinations are properly put to a jury. *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). To the extent that the Receiver claims that Penn National has spoliated Covil policies, there will likely be factual issues regarding whether such alleged spoliated policies ever existed in the first place. For this reason, fact issues for a jury to determine would exist with respect to the issue of spoliation.

(3) Penn National Has Not Waived Its Right to a Jury Trial:

Penn National disputes that it has waived its right to a jury trial. Penn National made a proper demand for a jury trial in this action by way of its Answer to the Receiver’s Complaint for Declaratory Judgment and Breach of Contract. Counsel for Penn National has never agreed to a non-jury trial in this action and has not waived this right “by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record” as is required by Rule 39, SCR. Indeed, as is clear from the transcript of the September 8, 2022 hearing, counsel for Penn National, who had to attend the proceedings remotely because of COVID-19, advised the Court that he had difficulty hearing the Receiver’s requests as to possible trial dates and pre-trial deadlines, but yet repeated his understanding of same, which did not include

any discussion of the trial being a non-jury trial. Penn National has not waived its right to a jury trial on all issues so triable in this action, and any argument to the contrary should be disregarded.¹

Respectfully submitted, this the 11th day of November, 2022.

GOLDBERG SEGALLA LLP

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Attorneys for Defendant Penn National

¹ Penn National does not, at this time, have knowledge of all the factual issues that may be sought to be tried and, therefore, reserves its right to assert entitlement to a jury trial on any other issues in this action, as appropriate.

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

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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 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

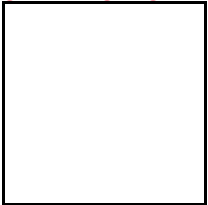
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STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

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.

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

PLAINTIFF'S NOTICE THAT IT SEEKS  
ONLY DECLARATIONS CONCERNING  
ITS POLICIES WITH PENNSYLVANIA  
NATIONAL MUTUAL CASUALTY  
INSURANCE COMPANY

Plaintiff Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas, ("Covil"), hereby provides Notice to this Honorable Court and all interested parties that it seeks only declarations concerning its policies with Defendant Pennsylvania National Mutual Casualty Insurance Company (hereinafter "Penn National") in the above captioned matter. The Receiver has only pled causes of actions for declaratory relief as to Defendant Penn National. The Receiver's Complaint does not seek monetary damages from Defendant Penn National. The only legal cause of action was for breach of contract against Defendant Sam J. Crain & Co., Inc. who is a defunct entity and is being dismissed without prejudice simultaneously with this filing.

This 6th day of November 2022

s./ Peter D. Protopapas

Peter D. Protopapas, Esquire SC Bar 68304

Rikard & Protopapas, LLC

2110 N. Beltline Blvd

Columbia, SC 29204

803.978.6111

[pdp@rplegalgroup.com](mailto:pdp@rplegalgroup.com)

- 4269 -

Receiver



I N D E X

| <u>Witness/Description</u>  | <u>Page No.</u> |
|-----------------------------|-----------------|
| Status Conference . . . . . | 3               |
| Certificate Page. . . . .   | 18              |

NO EXHIBITS INTRODUCED.

1           THE COURT: All right, court will come to order. This  
2 is the matter of Covil, C-o-v-i-l, Covil Corporation  
3 against Pennsylvania National and others. This is  
4 2020-CP-40-02098. In the courtroom we have Mr. Protopapas  
5 for Covil; he is the receiver and a lawyer for Covil. We  
6 have Brad Nes and Murrell Smith from Morgan, Lewis, Bockius  
7 as counsel for the receiver. Mr. Brady Yntema from  
8 Goldberg and Segalla is Penn National's principal attorney.  
9 Mr. Yntema is attending via WebEx. He is ill with COVID,  
10 and we are deeply appreciative of his being willing to  
11 attend the hearing in this format. And Mr. David Harris is  
12 also here virtually.

13           Are you not, Mr. Harris? I see you.

14           And Mr. Harris is also with Goldberg and Segalla and  
15 is representing Penn National.

16           All right, Mr. Protopapas, you may proceed.

17           MR. PROTOPAPAS: Thank you, Your Honor. We'd like to  
18 give you a procedural status of the Covil-Penn matter. As  
19 the court's aware, this is the second Covil-Penn case. The  
20 first Covil-Penn case dealt with a coverage issue over 50  
21 or so thousand dollars for the Rollins case. That's  
22 currently -- Court of Appeals has affirmed. There's a  
23 petition for cert pending, and that case is working its way  
24 to ultimate conclusion.

25           *Covil v. Penn* two is the case we're here about today.

1 As the court recalls, there had been extensive discovery  
2 practice and motions practice in that matter that  
3 ultimately led to an order of this court in May of -- April  
4 of 2022 that Penn National, we argue, took an interrogatory  
5 appeal from. That appeal was to the South Carolina Court  
6 of Appeals. We moved to dismiss; Penn National opposed it,  
7 and the Court of Appeals granted the motion to dismiss in  
8 August. Penn National has moved to reconsider that order;  
9 we, of course, have opposed it at the Court of Appeals. On  
10 a parallel path, Penn National filed a petition for  
11 *certiorari* to the South Carolina Supreme Court. That  
12 petition was denied by the South Carolina Supreme Court as  
13 well as in August.

14 It seemed appropriate that with our 2020 civil action  
15 number that we give the court an update as to where we  
16 stand and advise the court of where we believe the best  
17 path forward is. Your Honor is intimately familiar with  
18 Covil and the two legacy liability insurance policies that  
19 Penn National issued and admits to issuing for '86 to '87  
20 and for 1987 to 1988. We believe those legacy liability  
21 policies are ripe for adjudication by this court as to the  
22 obligations that Penn National has to Covil to defend and  
23 to indemnify Covil for asbestos liability claims.

24 We believe, Your Honor, that that issue can be  
25 resolved in a nonjury trial as the court's schedule would

1 allow. It is a straight-up declaratory judgment on two  
2 insurance policies. Our research has indicated that that  
3 is a proper nonjury matter for this court.

4 We have three experts that would testify at trial. We  
5 don't believe it would take more than half to  
6 three-quarters of a day for us to put our case up. We  
7 don't believe that the rebuttal or response would be more  
8 than a day, and we could have the case finished in two  
9 nonjury days. And the pace this court operates, it could  
10 well be one day.

11 And so we feel thirty exhibits at most from the  
12 plaintiff's side. We think that what, what the court has  
13 done in the past, which is preliminary findings of fact  
14 with exhibits presented to the court in advance, then  
15 trial, the testimony, a presentation of the testimony, and  
16 a streamlined process. The court is educated on all these  
17 issues, and then that issue will end.

18 There is discovery that's still outstanding. As the  
19 receiver, Your Honor, I don't believe it's in the best  
20 interests of Covil to delay this trial and these policies  
21 to allow the six to nine-month process that Ellis Winters  
22 would need to comb through the microfiche that Penn  
23 National has if the motion to reconsider is ultimately  
24 denied by the Court of Appeals.

25 So, the heart of that appeal, Your Honor, is the Ellis



1 and Winters project which has been stalled since the court  
2 issued its order. So, nothing -- Ellis Winters has not had  
3 an opportunity to begin that process simply because of this  
4 appeal, and from the perspective of the receivership, we  
5 need this insurance policy to be as responsive as it can  
6 be.

7 Now, Penn National disagrees with us and the meaning  
8 of those policies, disagrees on the scope of the erosion or  
9 aggregate limits and all those traditional legacy liability  
10 issues. But what we would ask the court is allow Ellis and  
11 Winters at the appropriate moment to move forward with  
12 enforcement of that discovery order. Allow us to take our  
13 deposition of Penn National, allow them to depose our  
14 experts, and let's set this thing for a nonjury trial and  
15 put to bed a big chunk, perhaps the last, the last Covil  
16 coverage action, I believe, that is pending in federal or  
17 state court.

18 And it is a 2020 action, Your Honor, and I do  
19 apologize it's taken us this long to get here. I don't  
20 like having cases that are two years old before this court,  
21 but we'll be ready at trial to try those two policies and  
22 the spoliation issues surrounding those policies on the  
23 document destruction. We can be ready as soon as December,  
24 and that would...

25 THE COURT: Why is there a motion still pending for

1 reconsideration in light of the Supreme Court's denial of  
2 *certiorari*?

3 MR. PROTOPAPAS: It's a motion for an *en banc*  
4 decision, Your Honor, and we believe that will be -- we  
5 were hoping that would be denied in relatively quick order,  
6 but it deals only with this one discovery issue that Ellis  
7 and Winters is ---

8 THE COURT: I am very, very familiar with what it  
9 deals with, and I am very unhappy that we are still talking  
10 about sixty to ninety days or longer than that to do this  
11 discovery. I know what was said when the firms talked  
12 about this. These documents are stored at Iron Mountain, a  
13 national manager of paper records and digitized records for  
14 governments and private corporations all over America.  
15 It's not going to take them that kind of time to digitize  
16 these records and make them searchable. That's what  
17 they're in the business of doing. So, that piece of it is  
18 something I don't understand.

19 MR. PROTOPAPAS: Your Honor, we, we don't disagree  
20 with the court. We put our trust into Ellis and Winters,  
21 who, my understanding, has stopped all activity until the  
22 appeal is concluded, feeling that it would be inappropriate  
23 for them to proceed forward until that appeal is finally  
24 completed.

25 THE COURT: Have they been paid?

1 MR. PROTOPAPAS: I apologize, Your Honor. I have not  
2 asked. I, I ---

3 THE COURT: Let me turn to Mr. Yntema.

4 MR. YNTEMA: Your Honor, I apologize. You're breaking  
5 up on me a little bit, but I did hear that ---

6 THE COURT: I'm not hearing -- whoa, whoa, whoa. Wait  
7 a minute. I'm not hearing you.

8 (A PAUSE.)

9 THE COURT: Mr. Yntema, I'm going to come up here  
10 where I can see and hear you a little bit better. I'm at a  
11 podium right here.

12 First of all, tell me why appellate activity is still  
13 being pursued here in light of the fact that the Supreme  
14 Court denied *certiorari*.

15 MR. YNTEMA: Your Honor, the Supreme Court denied  
16 *certiorari* in its original jurisdiction. That's what we  
17 petitioned the Supreme Court to review. The Court of  
18 Appeals motion of the receiver did, in fact, dismiss the  
19 appeal. We've asked for a petition for rehearing *en banc*;  
20 that's currently pending. There was -- I won't go on in  
21 detail about the briefing, but the core issue was whether  
22 it was indeed a discovery order or essentially was a order  
23 holding Penn National in contempt or as a sanction order  
24 enforcing an order that had Penn National conducting a  
25 search at its sole expense by way of a third party, and

1       then allowing the microfiche to be digitized and be used at  
2       the receiver's sole expense. That was the main issue with  
3       respect to as to whether it was an interlocutory appeal or  
4       not.

5           THE COURT: Let me stop you there, Mr. Yntema. Those  
6       issues, you are raising these issues of whether it's a  
7       discovery or a sanctions order before the Court of Appeals  
8       now?

9           MR. YNTEMA: Yes, Your Honor, we have.

10          THE COURT: Well, you did not raise those issues in  
11       front of me. So, how in the world are you going to ask an  
12       appellate court to review trial court orders if you haven't  
13       asked the trial court to make any determinations about  
14       that?

15          MR. YNTEMA: I think in our motion for reconsideration  
16       we did address that issue at, at trial court level, and  
17       Your Honor denied our motion for reconsideration, which I  
18       appreciate and I understand.

19          THE COURT: Well, I won't spend a great deal of time  
20       debating it, but I certainly will go back and look at it.  
21       It strikes me that it's simply a delaying tactic, and I'm  
22       frustrated about that, to be honest with you. But  
23       hopefully that will be resolved fairly shortly when the  
24       Court of Appeals tells us whether it wants to continue with  
25       the case or whether it's going to dismiss the *en banc*

1 request. I guess we'll just have to wait on that.

2 Has Ellis and Winters been paid?

3 MR. YNTEMA: Your Honor, we did make a payment to  
4 them, I believe, in the spring after their first phase of  
5 searching through the insurance repository for Penn  
6 National was complete and after the reporting to the court  
7 was complete. They were paid in full. I'm not sure if  
8 they have incurred any other expenses since that time.  
9 I'm, I'm, I'm not sure if they have since if was mainly  
10 motion practice thereafter, and then an appeal was taken.  
11 So, I don't think there has been any conduct or expenses  
12 incurred by Ellis and Winters since that time, nor have I  
13 been notified of that.

14 THE COURT: Okay. All right.

15 (A PAUSE.)

16 MR. SMITH: Chief Justice, Murrell -- for the record,  
17 Murrell Smith for Covil. One issue we got is that, is that  
18 the experts are not going to be available on December 5th  
19 for us, and more importantly for me -- I hope to  
20 participate in this case. As you know, we have an  
21 organizational session after the election.

22 THE COURT: Oh, yeah.

23 MR. SMITH: And so it's going to be on December 6th  
24 and 7th. So, if we could try this case on the 12th, Your  
25 Honor, that would be great if you would -- could do that.

1 This is a nonjury case. Hopefully, Court Administration or  
2 if you got that December block carrying over -- but we  
3 would request December 12th would probably be the best time  
4 for us, and we could have our experts ready also.

5 And then, you know, Your Honor, I will -- if we have  
6 to try the case in the new year, I'll skip session, but  
7 it's a little difficult for me now for me to skip session  
8 where ---

9 THE COURT: No, you're the chief presiding officer, so  
10 you can't.

11 MR. SMITH: Yes, ma'am. That's, that's my concern is  
12 I have to turn it over to Mr. Pope, and you know how Mr.  
13 Pope can mess things up.

14 THE COURT: No comment.

15 MR. SMITH: Thank you.

16 THE COURT: All right, hang on for a minute. Let me  
17 go back.

18 MR. YNTEMA: I wonder if I may? I'm not sure if it's  
19 appropriate for me to ---

20 THE COURT: Yes, sir, say again?

21 MR. YNTEMA: Yes. Your Honor, yesterday was the first  
22 time that I had seen a suggestion of a December trial date  
23 and a suggestion that the receiver had three experts that  
24 have yet to be disclosed to us. I certainly haven't had an  
25 opportunity to check with any experts that we may have or

1 with respect to their availability during the December  
2 timeframe. So, I just wanted to put that out there for  
3 Your, for Your Honor's consideration.

4 I don't know. I know Mr. Smith may have some  
5 conflicts early on next year, and -- but as far as a trial  
6 date in, in, in 2023, we are certainly willing to consider  
7 that as well.

8 THE COURT: Well, I'm not inclined to wait until June  
9 of 2023 to try this matter, this nonjury matter; I'm not  
10 going to do that. I'm going to go back here and look at  
11 December just for a minute, but what you're asking is, in  
12 fact, to not have it tried until they get out of session  
13 next year. I'm not going to do that.

14 They've been ready to proceed on this thing and tried  
15 to get through the discovery and all this kind of thing,  
16 and it's been a foot dragging operation by Penn National  
17 the whole time and I just can't -- well, I'm not going to  
18 allow that to continue. Let me look at my calendar a  
19 minute.

20 (A PAUSE.)

21 THE COURT: What I'm going to do is this. I'm going  
22 to set this case for December the 14th -- that is a  
23 Wednesday -- with the thought that it would take no more  
24 than three days to try because I've got four cases in that  
25 December block. They're all in Charleston, and I can't

1 tell about these cases. We settled the one I thought we  
2 had there; that was disposed and now we've got these  
3 others, but one of them is a 2018 case. So, you know,  
4 unless it settles, that's probably the one that we would  
5 deal with, and it could be tried in a week, in which case I  
6 could move the thing up.

7 (A PAUSE.)

8 THE COURT: I'm going to tentatively say the 12th and  
9 as you all know, I'm going to meet with the Asbestos  
10 Steering Committee next Monday, and let me see what I can  
11 find out about this December term, but I'm going to  
12 tentatively set it for Monday here. So, we'll see if we  
13 can get a spot to lay our head, and it would be nonjury.  
14 So, if we had to go to one of those family court  
15 courtrooms, we could do it. And as I say, that's tentative  
16 right now. I will finalize that next Monday after I meet  
17 with the asbestos people, if that's okay.

18 MR. PROTOPAPAS: Thank you, Your Honor.

19 THE COURT: Okay. What else do we need first of all  
20 from you, Mr. Protopapas, or from Mr. Smith by way of this  
21 matter?

22 MR. PROTOPAPAS: Nothing further, Your Honor.

23 THE COURT: All right. Are there ---

24 MR. YNTEMA: Your Honor.

25 THE COURT: I'm get to you in a minute. I'm not



1 leaving you out. Don't worry, Mr. Yntema. You'll have  
2 plenty of chances.

3 Do we need any kind of pretrial hearing on any of this  
4 stuff? Probably so.

5 MR. PROTOPAPAS: I believe, Your Honor, thirty days in  
6 advance a pretrial, and we can propose with Mr. Yntema a  
7 schedule for proposed order, findings of fact, conclusions  
8 of law, and an exhibit list, and a trial schedule.

9 THE COURT: All right, the 24th is Thanksgiving. All  
10 right, all right, let's have a pretrial hearing on November  
11 the 18th; that's the previous Friday from Thanksgiving.  
12 So, we would have November the 18th for a pretrial hearing  
13 on all outstanding motions, and then we would have the  
14 trial on December the 12th.

15 Now I will turn to you, Mr. Yntema.

16 MR. YNTEMA: Yes. Thank you, Your Honor. Brady  
17 Yntema from Penn National. I, I -- you broke up on me.  
18 Now I, I hear you clearly now, and you have stated that  
19 you're looking at December 12th tentatively, and you were  
20 talking as though maybe the December 14th date may be the  
21 most likely for you. Is that right?

22 THE COURT: What's that?

23 MR. YNTEMA: You had broken up on me a little bit and  
24 I apologize, but it seems, it seems that you've, you've set  
25 the trial, tried to set the trial for December 12th and --

1 but you had, you had discussed potentially actual start  
2 date of that trial being in the middle of the week of  
3 December 14th. Is that correct?

4 THE COURT: Yes, and what I was trying to say is the  
5 second week of the Charleston term, that I've got asbestos  
6 cases then, but I don't know that I could say it's for more  
7 than a week. Are you saying the 14th works better for you  
8 than the 12th?

9 MR. YNTEMA: I can't speak to either right now. I  
10 haven't had that opportunity to speak to any of my folks.  
11 I just want to get an understanding from the court what  
12 your -- what the court is inclined as far as the dates. It  
13 sounds like you're setting it for December 12th tentatively  
14 but likely it may go on December 14th?

15 THE COURT: That's correct. I'm going to let you know  
16 for sure about that after I meet this coming Monday with my  
17 Asbestos Steering Committee. This is a group of plaintiff  
18 and defendants' bar that we try to work out the blocks for  
19 the whole year, and I can find out then from the people  
20 that are involved in that December block of four cases what  
21 realistically I can expect out of those, and then I can let  
22 you know about that week in December.

23 MR. YNTEMA: I appreciate that, and then, and then we  
24 have, just to be clear, November 18th is what you were  
25 inclined to have a -- schedule a pretrial conference?

1           THE COURT: Yeah. That would be on November the 18th.  
2 That's a Friday.

3           MR. YNTEMA: Yes, Your Honor, thank you, and then the  
4 last thing I think I understood -- I just want to make sure  
5 I'm clear -- is that I guess Mr. Nes will be contacting me  
6 or Mr. Protopapas will be contacting me to discuss the, the  
7 -- a scheduling order that we could have proposed to the  
8 court to -- for this case leading up to the pretrial  
9 conference.

10          THE COURT: Sure, sure, sure. You and Mr. Protopapas,  
11 Mr. Smith, and all the rest of the folks involved in this  
12 case will a full opportunity to see if you can get together  
13 and decide what an agenda is going to look like for this  
14 thing.

15          MR. YNTEMA: Appreciate that, and I guess just for  
16 other conversation is that I know Mr. Protopapas and I and,  
17 and the receivers' counsel have had some conversations  
18 about potential settlement options and things of that  
19 nature, and I, I would be inclined to continue to work  
20 toward that endeavor. I didn't know if the court would be  
21 amenable to having some sort of potential mediation  
22 deadline incorporated into the pretrial -- into the, into  
23 the, I guess, scheduling order.

24          THE COURT: Well, talk with them about how that would  
25 work. I am always amenable to things that encourage

1 settlement, as you know. So, and lord knows if there's a  
2 case where that ought to be done, it's this one. So, this  
3 doesn't exclude that at all.

4 Anything further?

5 MR. PROTOPAPAS: No, ma'am.

6 THE COURT: All right, I close the proceedings. Thank  
7 you very much so all.

8 --- END OF TRANSCRIPT OF RECORD ---

**CERTIFICATE**

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED  
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH  
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO  
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE  
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE  
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING  
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE  
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON  
THE 8TH DAY OF SEPTEMBER, 2022.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,  
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

*/s/ELIZABETH B. HARRIS, CVR-M-CM*

COLUMBIA, SOUTH CAROLINA

NOVEMBER 6TH, 2022

1 State of South Carolina ) Court of General Sessions  
2 County of Richland ) Fifth Judicial Circuit  
3  
4 Covil Corporation, by and ) Transcript of Record  
through its duly appointed )  
5 Receiver, Peter D. Protopapas, )  
6 )  
Plaintiff, )  
7 vs. ) 2020-CP-40-02098  
8 Pennsylvania National Mutual )  
Casualty Insurance Company, )  
9 et al., )  
10 \_\_\_\_\_ Defendant. \_\_\_\_\_)

11 November 14, 2022  
12 Columbia, South Carolina

13 B E F O R E:

14 The Honorable Jean H. Toal, Judge  
15

16 A P P E A R A N C E S:

17 W. Brad Nes, Esquire  
Nancy L. Patterson, Esquire  
18 Peter D. Protopapas, Esquire  
On behalf of Covil Corporation  
19

Brady A. Yntema, Esquire  
20 Alexander E. Davis, Esquire  
On behalf of Pennsylvania National Mutual Casualty  
21 Insurance Company  
22

23 Reported by: Stacy S. Johnson, RPR  
24 Circuit Court Reporter  
25

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E X H I B I T S

\*\*NO EXHIBITS WERE INTRODUCED\*\*

1           (The following proceedings were held November 14,  
2   2022, beginning at 10:21 AM.)

3           THE COURT: All right. The next matter is Covil  
4   Corporation, by and through its appointed receiver,  
5   Peter Protopapas, against Penn Mutual -- Penn National  
6   Mutual Casualty Insurance company. This is  
7   2020-CP-40-02098.

8           To be heard today is Covil's motion to compel  
9   Penn National. This is one in a series of motions to  
10  compel.

11          Mr. Protopapas is present along with his attorneys  
12  and Mr. Yntema is present along with his colleague,  
13  Mr. Davis.

14          MR. DAVIS: Yes, Your Honor.

15          THE COURT: And I'm ready to proceed.

16          Now let me say a few things on the front end just  
17  to be sure I clarify my communications at the beginning  
18  of this hearing.

19          Mr. Yntema sent me something while I was on the  
20  road with class reunions and family gatherings and all  
21  that kind of thing, concerned about waiving things by  
22  attending this hearing, I assume, and so I sent back  
23  the response to Mr. Yntema saying that his attendance  
24  at this hearing would not in any way waive anything.

25          I want to be sure that you understand that that



1 doesn't mean I ruled on all these other claims of waiver  
2 and so forth, but they're still out there. All I've done  
3 so far is to try to bring some closure to this bitterly  
4 fought issue of discovery.

5       So what I simply said was his principal in the  
6 insurance company does not need to be present at this  
7 hearing today and that his appearance here would not  
8 waive any claims he has about the responsibility of  
9 Penn National in this matter or any other arguments  
10 that would have to do with what this appearance means.

11       I can't really understand why that would have been  
12 of concern. This is a normal case that has been much  
13 complicated by this discovery dispute, but the case  
14 itself is a very straightforward matter and in that  
15 connection the plaintiff has sought for a good long  
16 time now, well over a year, maybe two years, to discover  
17 certain insurance policies and we're still at square  
18 zero on that matter.

19       So that's kind of where we are as I see it at the  
20 beginning of this hearing.

21       Mr. Protopapas, who speaks for you?

22       MR. PROTOPAPAS: Your Honor, Peter Protopapas,  
23 receiver for Covil. Brad Nes will be on my behalf on  
24 the motions to compel. Nancy Patterson will be dealing  
25 with the proposed trial schedule. We're currently set

1 for December -- or the week of December 12th for a  
2 nonjury trial regarding the coverage dispute between  
3 Covil and Penn. The parties are robustly engaged in  
4 discovery. We are mediating tomorrow. We have findings  
5 of fact, conclusions of law coming due, as well as any  
6 other appropriate pre-trial motions and activity.

7 So for purposes of today, Your Honor, I spoke with  
8 Mr. Yntema and we have the motions to compel issue and  
9 then we'd like to discuss with you the proposed trial  
10 schedule and the jury/nonjury issue that Mr. Yntema and  
11 his client has presented, and with that, Your Honor,  
12 I'll turn it over to Mr. Nes.

13 MR. NES: Thank you, Your Honor.

14 Brad Nes for the receiver for Covil Corporation.  
15 We have two motions to compel currently pending or two  
16 separate motions to compel, and I believe a brief history  
17 of how we got here would be helpful before we get to the  
18 actual substance of the motions.

19 In terms of the timeline, the Finch plaintiffs and  
20 the -- the lawyers for the Finch plaintiffs originally  
21 served Penn National with a subpoena in June of 2018  
22 asking for all of their liability policies. Then in  
23 2019 --

24 THE COURT: Stop right there.

25 MR. NES: Sure.

1           THE COURT: All right. Covil served a subpoena on  
2 Penn National June of 2018 asking for?

3           MR. NES: It was actually in June of 2018. It was  
4 the asbestos plaintiffs in Finch that served a subpoena  
5 directly on Penn National. It was not Covil yet that  
6 served that subpoena. They had come across -- the  
7 plaintiffs in Finch had come across policy numbers and  
8 two of those policy numbers were a 1986-1987 general  
9 liability policy and a 1987-1988 general liability policy.

10          So they served a subpoena on Penn National asking  
11 for those particular policies, as well as any liability  
12 policies that were issued to or covering Covil between  
13 1965 and, I believe, 1995.

14          THE COURT: All right. Now at that point the  
15 relationship between Covil and Penn National was that  
16 Covil was a defendant in a Federal court action in North  
17 Carolina brought by the Finch family against Covil for  
18 liability in connection with the development by Finch  
19 of mesothelioma?

20          MR. NES: That's correct, Your Honor.

21          THE COURT: Had that case been brought to verdict  
22 when this subpoena was filed?

23          MR. NES: It had not, Your Honor.

24          THE COURT: All right. So this is -- this is a  
25 pre-trial motion by the Finches against Penn National,

1     which they allege is one of its insurers for this  
2     particular suit in North Carolina, right?

3           MR. NES:   That's correct.   They were searching for  
4     all of the available coverage.

5           THE COURT:   Okay.   And so what happened?

6           MR. NES:   Then we skip to 2019.   There's the  
7     coverage action in North Carolina.

8           THE COURT:   Well, I mean, what happened with the  
9     subpoena?

10          MR. NES:   In response to the subpoena, Penn  
11     National did a very narrow search.   They looked for  
12     those particular policies numbers that the Finch  
13     plaintiffs provided and they produced certain parts of  
14     those policies to the Finch plaintiffs, but they did no  
15     further search because the argument that they developed  
16     in June of 2018, which is their argument to this day,  
17     is that unless you give us a specific policy number,  
18     there's nothing else we're going to do to search for  
19     the policy.

20          THE COURT:   And just out of curiosity, where did  
21     Finch get the policy numbers?

22          MR. NES:   I believe those policy numbers were  
23     in documents that were produced during the underlying  
24     asbestos litigation.   I don't recall exactly what  
25     document the policy number came from.

1           THE COURT:   Were they record -- what I'm trying  
2   to find out is whether Penn National had supplied those  
3   in the past.   I know there was -- at some point in that  
4   litigation the Federal judge involved in hearing the  
5   matter said I want -- there was a squabble about what  
6   kind of coverage existed and the Federal judge said  
7   bring forth the policies.

8           MR. NES:    It was not Penn National that brought  
9   forth any evidence of the coverage.

10          THE COURT:   I got you.

11          MR. NES:    Then we jump to 2019 and there's the  
12   coverage action in North Carolina and in the coverage  
13   action in North Carolina, a carrier, I believe it was  
14   Hartford, sent document requests to Penn National and  
15   similarly to the --

16          THE COURT:   Stop there.   This coverage action in  
17   North Carolina, was it in North Carolina Federal court  
18   or state court?

19          MR. NES:    It was in North Carolina Federal court,  
20   Your Honor, on the heels of --

21          THE COURT:   Was it the same -- same judge that  
22   had dealt with the Finch matter?

23          MR. NES:    Yes, Your Honor.

24          THE COURT:   It was, wasn't it?

25          MR. NES:    That's exactly right.   So on the heels

1 of the jury verdict in Finch, Zurich files a coverage  
2 action against Covil and the other defendants.

3 THE COURT: Right. The Finch verdict at that point  
4 had been rendered, 34 million dollars, and now the  
5 coverage action is brought and who brings that coverage  
6 action?

7 MR. NES: Zurich, Your Honor. Zurich Insurance  
8 Company.

9 THE COURT: Zurich, right. And it brings the  
10 action against who?

11 MR. NES: It brings the action against Covil and  
12 several carriers. I don't believe Penn National was  
13 among the original defendants in that coverage action.

14 THE COURT: But The Hartford was one of those  
15 names?

16 MR. NES: Yes. That's correct.

17 THE COURT: And The Hartford then tried to subpoena  
18 policies from Penn National, right?

19 MR. NES: That's right. They served discovery  
20 requests to Penn National in that coverage litigation.

21 THE COURT: And what happened then?

22 MR. NES: In response to Penn National -- in  
23 response to that discovery request, for the first time  
24 Penn National provided a very interesting response.  
25 They object to the scope of the request asking for all

1 policies, but interestingly they say we cannot search  
2 for all available policies that may be responsive  
3 because we can only search by policy number. That's  
4 the gist of what their response is.

5 So as of 2019 they are getting requests for all  
6 of the policies that may be covering Covil, but their  
7 response is we can't search our historic records which  
8 may have responsive documents because we can only search  
9 by policy number.

10 THE COURT: All right.

11 MR. NES: Then in 2021 we have this action or the  
12 early iteration of this action and the current action.

13 THE COURT: And this action was commenced in 2020?

14 MR. NES: That's correct, Your Honor.

15 THE COURT: And this action is an action brought  
16 by Covil against Penn National and others seeking  
17 coverage?

18 MR. NES: That's correct, Your Honor.

19 THE COURT: Coverage for what?

20 MR. NES: We are seeking coverage for declarations  
21 specifically as to how the current policies that are  
22 known, the 1986-1987 general liability policy, respond  
23 to asbestos cases, and then discovery of any other  
24 policies that may have been issued other than the two  
25 known policies.

1           THE COURT:   So the action that was brought in  
2   2020 by Covil against Penn National and others was a  
3   declaratory judgment action specifying that it sought  
4   a declaration as to the coverage of the known policies  
5   and to explore through discovery, obtain other policies,  
6   and seeking declarations as to the coverage of those  
7   policies on Covil's responsibility for mesothelioma  
8   claims, right?

9           MR. NES:   That's absolutely correct, Your Honor.

10          THE COURT:   All right.

11          All right.   And that was 2020 when that started?

12          MR. NES:   That's right.

13          THE COURT:   What then happened?

14          MR. NES:   We served discovery.   The same basic  
15   discovery that the Finch plaintiffs served and that  
16   was served in the North Carolina Federal coverage  
17   action asking for all policies that cover Covil either  
18   as a named insured or an additional or supplemental  
19   insured and the response back was exactly the same,  
20   it was cut and pasted, which is unless you provide us  
21   a policy number we can't search our historic records  
22   because the system was designed so that you could only  
23   search by policy number.

24          THE COURT:   Stop there for a moment.   The first  
25   time we get into a discussion with Penn National about



1 its coverage, it's in connection with the Finch case,  
2 and then ultimately what happens with Finch, the big  
3 verdict is entered in the Federal courts of North  
4 Carolina. A coverage action is brought with respect to  
5 Finch here in South Carolina in state court and that is  
6 the matter I hear and that involves Penn National and?

7 MR. NES: This current case? I'm sorry. I lost  
8 the --

9 THE COURT: This current case --

10 MR. NES: Yes.

11 THE COURT: -- is a case that involves coverage  
12 for Finch as well as?

13 MR. NES: Oh, I'm sorry, Your Honor. This case  
14 does not involve Finch. The current case that you have  
15 does not involve Finch.

16 THE COURT: Right. So what happened with -- with  
17 the Finch case in terms of their coverage?

18 MR. NES: So they made the argument that there pol  
19 -- the two known policies, the 1986 and 1987 policies,  
20 had an exclusion that would have preempted them from  
21 having to provide coverage for Finch --

22 THE COURT: Right.

23 MR. NES: -- and that was accepted at the time and,  
24 therefore, they were not asked to participate in the  
25 specific Finch case.

1           THE COURT:   And that was accepted by what, the  
2   Federal court of North Carolina?

3           MR. NES:    It was accepted by the parties because  
4   the exclusion had to do with a products exclusion and  
5   so here --

6           THE COURT:   Okay.   So this is -- in connection  
7   with the settlement, they resolved their differences  
8   in which the subpoena to Penn National was filed, they  
9   were resolved by settlement?

10          MR. NES:    That's right.   So it was ultimately  
11   determined that the claim -- the specific claim that  
12   was brought in Finch would not be covered by the  
13   two specific policies that Penn National provided,  
14   therefore, there was no further either discovery or  
15   motions practice with respect to Penn National.

16          THE COURT:   And the policies that were provided by  
17   Penn National in the Finch case, were they commercial  
18   general liability policies?

19          MR. NES:    They were, Your Honor.

20          THE COURT:   All right.   And they had exclusion  
21   for what?

22          MR. NES:    They had -- both policies have forms  
23   contained in the documents that were produced that  
24   have an exclusion for completed operations and product  
25   claims.

1 THE COURT: Well, do the --

2 MR. PROTOPAPAS: Just to clarify on the Finch  
3 settlement portion, Your Honor, due to the actions of  
4 USF&G and due to the actions of Zurich, I didn't feel  
5 it appropriate to even push the issue even further with  
6 Penn National, which had not been put on notice of the  
7 Finch case on day one, and had proceeded for years  
8 without Penn National even knowing it was going on.

9 THE COURT: That's what I -- that's what I was  
10 getting to.

11 MR. PROTOPAPAS: I decided to stay away -- as  
12 receiver, I made a decision to focus on what I  
13 considered the wrongful actors.

14 THE COURT: The Covil case was tendered to -- for  
15 defense to USF&G and some others?

16 MR. PROTOPAPAS: Zurich.

17 THE COURT: Zurich. And then later on Zurich  
18 tried to look and see whether it was possible to get  
19 some contributions from other insurers. Penn National  
20 took the position yes, it had commercial general  
21 liability coverage, but it had an exclusion. Of course,  
22 that depends on what the nature of the lawsuit is. If  
23 the nature of the lawsuit involves things a CGL policy  
24 would normally cover, like per occurrence exposure,  
25 then that's a different situation from what was being

1     litigated with Penn National in connection with the  
2     Finch case.  Am I right?

3             MR. NES:  That's correct, Your Honor.  So the  
4     scope, for example, of the declarations we seek in this  
5     case are -- relate to operations claims.

6             THE COURT:  Right.

7             MR. NES:  There was no operations claim in the  
8     Finch case.

9             THE COURT:  Got you.  Okay.

10            All right.  Continue.

11            MR. NES:  And to be clear, with respect to the  
12     exclusions, we do not necessarily accept that one of  
13     the two exclusions is actually part of the 1986 --

14            THE COURT:  It hasn't been litigated.

15            MR. NES:  Exactly.

16            THE COURT:  It hasn't been raised or litigated.  
17     That is the gist of what Mr. Protopapas was trying to  
18     project.  Penn National, as ultimately developed, has a  
19     policy that might relate to the matters -- it certainly  
20     relates to Covil and the question is whether it related  
21     to Finch and Mr. Protopapas, on behalf of Covil, who  
22     -- for whom these policies are assets, made the decision  
23     to settle the Finch case with the involvement of the --  
24     of other insurers, but not Penn National, and one of  
25     the reasonings behind that is they didn't know about

1 Penn National to begin with having tendered -- when  
2 Finch was first being considered.

3 Of course, some of that had to do with how Covil  
4 was represented at that time well before the receiver  
5 got involved. The situation changed dramatically when  
6 a receiver, who was representing Covil and not its  
7 insurers, got involved. Am I right?

8 MR. NES: That is correct, Your Honor.

9 THE COURT: All right.

10 MR. NES: So we're now in 2020. This current  
11 action in this court is filed and when discovery begins  
12 the same discovery is served. We want all policies that  
13 cover Covil either as a named insured or supplemental  
14 or additional insured and the response back is the same,  
15 which is the system is designed so that you can only  
16 search by policy number.

17 And as this Court will recall, we had many hearings  
18 as to how we could lighten the load for Penn National to  
19 try to search their facilities so that they could produce  
20 these policies and the response back time and time again  
21 was simply if you don't give us a policy number, we're  
22 not gonna search our historic records.

23 That culminated in an order in November of '21 in  
24 which the Court directed Covil's outside asbestos  
25 underlying counsel, Ellis and Winters, to examine the

1 documents in Penn National's historic warehouses and  
2 offsite at Iron Mountain and to come and report to the  
3 Court as to how these policies could be identified, and  
4 Ellis and Winters reported back in March of 2022. That  
5 followed a hearing in which these issues were discussed  
6 and one of their recommendations was to digitalize a  
7 certain percentage of those historic records and then  
8 once those historic records were digitalize, the receiver  
9 would be able to search for responsive documents in their  
10 possession.

11 THE COURT: Now stop right there.

12 All right. It develops -- we didn't know until  
13 Ellis and Winters got involved what the physical nature  
14 of the records in Iron Mountain was; isn't that correct?

15 MR. NES: That's correct. There was a -- there was  
16 a distinction between documents that were on historic  
17 microfiche, there were certain paper documents that  
18 were at Iron Mountain. It was very confusing as to how  
19 those policies were stored. There was a discussion  
20 about a terminal digit system and that was essentially  
21 the assignment that Ellis and Winters was given and  
22 throughout the -- between November and March is when  
23 they were able to identify and understand how it is  
24 that Penn National keeps those records.

25 THE COURT: And how it is they keep their records,

1 as I understand it, is that there are microfiche that  
2 contain all -- the universe of all the policies that  
3 you are trying to seek?

4 MR. NES: That's gonna --

5 THE COURT: They're all on microfiche, right?

6 MR. NES: That is what it currently appears. Part  
7 of the discovery that we've sought is to confirm that,  
8 which we still don't have formal discovery responses  
9 that would confirm that, but as we know right now the  
10 policies that would -- that you would expect to have,  
11 general liability policies covering Covil, are '92 or  
12 prior, and they've made the representation that all of  
13 those policies are, yes, on microfiche.

14 THE COURT: All right. And those microfiche are  
15 at Iron Mountain?

16 MR. NES: No, those are actually at Penn National's  
17 headquarters in a file room.

18 THE COURT: So just stopping there for a moment,  
19 why were we led around the mulberry bush for years about  
20 Iron Mountain when it turns out that these -- the records  
21 that we are -- that contain the material that has been  
22 requested many, many times in discovery is in Penn  
23 National's headquarters on microfiche? How did that  
24 happen?

25 MR. NES: That's an answer that I think,

1 respectfully, opposing counsel's gonna have to answer  
2 because we still don't have a -- what we think is a  
3 sufficient answer for that and part of what we want  
4 with the upcoming hearing both on spoliation and  
5 discovery sanctions is for the Court to take the broad  
6 view of how discovery has unfolded in this case and  
7 answer questions just as that.

8 THE COURT: But this whole squabble is a squabble  
9 about getting a copy of the insured's policy, right?

10 MR. NES: That's correct.

11 THE COURT: It's not any kind of big, huge,  
12 complicated electronic discovery thing or a trade  
13 secret thing or anything like that. These are policies  
14 of insurance that were issued covering Covil --

15 MR. NES: That's correct.

16 THE COURT: -- and that is what you are seeking?

17 MR. NES: Yes, Your Honor.

18 THE COURT: And turns out that the -- that all of  
19 those policies for the period of time you want, which  
20 is '92 and prior, are on microfiche at Penn National's  
21 headquarters?

22 MR. NES: Yes, Your Honor.

23 THE COURT: All right.

24 Now Ellis and Winters is the insurer's counsel?

25 MR. NES: No, Your Honor. That -- that is Covil's



1 underlying asbestos counsel.

2 THE COURT: Covil's underlying asbestos counsel.

3 All right. Now has -- and Covil's underlying --  
4 they are Covil's underlying defense counsel?

5 MR. NES: Yes.

6 THE COURT: And they are -- their contention is  
7 we are defending Covil and in that connection we are  
8 bringing a DJ action to find out about these policies?

9 MR. NES: No, Your Honor. To clarify Ellis and  
10 Winters' role, when we got to November of last year and  
11 Penn National kept telling you that if you don't have a  
12 policy number, we can't do anything, the Court decided  
13 an alternative path. Because Ellis and Winters is  
14 familiar with Covil as underlying defense counsel and  
15 because they have an independent obligation when they  
16 are asked for responsive insurance policies to produce  
17 those in the underlying litigation, the Court felt they  
18 were best positioned to review Penn National's archives  
19 to determine how could we as underlying asbestos counsel,  
20 who had to produce the same policies, how would we search  
21 through Penn National's records, and by doing interviews  
22 with the main individuals and custodians at Penn National  
23 is when they finally clarified what was offsite at Iron  
24 Mountain and what was contained on the microfiche and  
25 their suggestion to the Court in a March 22nd report was

1 take these microfiche, have them digitalize and then  
2 search those once they're in digital format.

3 THE COURT: Now so that's what happens in March of  
4 2020. Ellis and Winters makes the report. Then what  
5 happened?

6 MR. NES: Then this Court has a hearing in April  
7 which leads to a May 5th discovery order and then this  
8 Court does three important things. First, it orders  
9 exactly the relief that the receiver requested, which  
10 is -- or excuse me -- that Ellis and Winters recommended  
11 in their report, which was the microfiche would be  
12 processed and digitalized. Number two, that their motion  
13 to quash the deposition would be denied. And then the  
14 Court held in abeyance our other motion to compel on the  
15 theory that we should take the deposition first. If we  
16 can get the information that we want from the deposition,  
17 then the other motions are essentially not needed, and  
18 then we'll move on. The Court asked us to report back  
19 after we took our deposition as to whether or not the  
20 motions to compel would be needed.

21 We took the beginning of that motion -- excuse me  
22 -- the beginning of that deposition of Penn National on  
23 spoliation last week and having learned what we learned  
24 in that deposition, there are certain issues specifically  
25 in the prior motion this Court held in abeyance that we

1 believe are now ripe for ruling.

2 THE COURT: All right.

3 MR. NES: And I think in terms of the timeline,  
4 there are two other issues that I think are important.  
5 The first is that the May 5th order is still on appeal,  
6 and that has a bit of a convoluted history where Penn  
7 National appealed -- I'm sorry.

8 THE COURT: Well, pre-trial discovery matters are  
9 not appealable matters and the Court of Appeals has  
10 dismissed the appeal for that reason.

11 MR. NES: That's right, Your Honor. So the Court  
12 of Appeals dismissed it, the Supreme Court dismissed a  
13 direct appeal they made simultaneously. They have now  
14 filed a motion for reconsideration back in the Court of  
15 Appeals, which has not been ruled on yet.

16 THE COURT: Right.

17 All right. Of course, the rules say that a Court  
18 may continue to move forward with things that are not  
19 affected by appeal and if this thing is not an appealable  
20 matter, then why should the Court be delayed from looking  
21 at this motion to compel and moving forward?

22 MR. NES: We don't believe it should be. And  
23 there's also a separate reason, which is the May 5th  
24 order is forward looking. It says you've got your box  
25 of -- boxes of microfiche, how are we going to deal with

1     searching through those, but the May 5th order is looking  
2     forward. The discovery we're looking for has to do with  
3     spoliation, which we haven't even talked that. The  
4     spoliation piece has a similar time band.

5           THE COURT: Let me just stop you for a minute  
6     before we get to spoliation, all right? We now know  
7     from Ellis and Winters that there are several boxes of  
8     microfiche that are in the headquarters of Penn National  
9     and they contain the policies for the years we're talking  
10    about?

11          MR. NES: Yes, Your Honor. I believe it's --

12          THE COURT: General liability policies.

13          MR. NES: I believe it's 154 boxes.

14          THE COURT: All right. And has there been any  
15    attention given to how long a period of time that  
16    would take? I mean, we are now in an age where you can  
17    speak into a device and your voice can immediately be  
18    translated into language and we are in an era now of  
19    digitalization where things can be digitized very, very  
20    quickly and translated into a readable form and then  
21    searched to search for particular terms within those  
22    documents, and that technology is changing and has been  
23    changing even since 2020 when this dispute -- discovery  
24    dispute first arose. We're now in 2022 and digitization  
25    continues to be a very, very expansive situation.

1           Have you got any notion of what it would take to  
2           just go on and digitize these things?

3           MR. NES: Yes, Your Honor. I believe that Ellis  
4           and Winters said that it would be a rolling process,  
5           but it would take anywhere from three to nine months  
6           depending on the technology that was available,  
7           et cetera.

8           So they have not actually had vendors come in to  
9           make the specific bids because Penn National has taken  
10          the position that now that this is on appeal they don't  
11          have to do anything to enforce that order.

12          THE COURT: Okay.

13          MR. NES: As I mentioned though, that's forward  
14          looking, and the discovery that we're looking for right  
15          now is backwards looking because we have to look at that  
16          timeline again, which starts in 2018.

17          Throughout the course of this litigation, we  
18          discovered that Penn National did not issue a litigation  
19          hold in this case. We also discovered that they have a  
20          process in which an automatic destruction takes place at  
21          the end of or beginning of the next calendar year where  
22          they destroy historic insurance policies.

23          We learned this because of the Court's November  
24          order getting Ellis and Winters involved. The very  
25          first call with Ellis and Winters, opposing counsel, a

1 gentleman named Brent Reifsnyder, who's Penn National's  
2 director of administration, and myself, they were  
3 discussing how it was that we would go about examining  
4 the microfiche, and Mr. Reifsnyder mentioned almost in  
5 passing that the annual policy purge was coming, so we  
6 inquired well --

7 THE COURT: This was in November of 2021?

8 MR. NES: This is November of 2021.

9 So we immediately inquired on that call do you  
10 have a litigation hold in place and are you searching  
11 for the documents that you destroy on an annual basis  
12 for any reference to Covil, and the answer was no.

13 So that day we hang up the phone and we immediately  
14 issue a document request and a deposition notice. That  
15 discovery that we learned following November 2021 is  
16 this. First, that in 2018, 2019 and 2020, Penn National  
17 had their automatic purge policy where they destroyed  
18 historic general liability occurrence policies. Number  
19 two, that in all of those calendar years, 2018, 2019  
20 and 2020, they did not issue a litigation hold, and in  
21 each of those three calendar years they did not search  
22 for any of their insurances policies to determine whether  
23 Covil was a named insured or an additional insured.

24 Moreover, they did not keep a record of what they  
25 were destroying. So today they cannot tell us what

1 specific policies were destroyed in 2018, 2019 and 2020.  
2 They did not stop their annual purge until December 17th  
3 of 2021.

4 THE COURT: Now wait a minute. They purged in  
5 2018, 2019 and 2020, and what's the nature of the purge?  
6 What's the universe that they're purging each of those  
7 years?

8 MR. NES: So what they do is they take throughout  
9 the course of a calendar year and they pull documents  
10 that they believe are outside of their document  
11 destruction range. They --

12 THE COURT: And what -- what is the -- what I'm  
13 trying to figure out is if they've got some kind of  
14 timeline they follow, are we gonna take a hunk of the  
15 records from 2005 to 2006 and we're gonna destroy them  
16 if ten years is their window of destruction or twenty  
17 years or whatever it is? What's the detail on that?

18 MR. NES: So now you've hit what this motion is  
19 about. So their story is well, we only pull them if  
20 it hits twenty-five years from the date of nonrenewal,  
21 and it's automatic. Once you hit twenty-five years from  
22 nonrenewal, then you show up on a list, we then pull it  
23 during the calendar year and destroy it at the end of  
24 the year.

25 THE COURT: Well, how do they determine that a

1 particular group of records are in that twenty-five  
2 years from nonrenewal?

3 MR. NES: Penn National created a system in 2010  
4 called the 2K10 system.

5 THE COURT: What?

6 MR. NES: It's called a 2K10 document management  
7 system and this -- this brings to a head why we're in  
8 the situation we are. This is what Mr. Reifsnyder  
9 actually testified to last week for the first time.

10 In 2010, as the director of administration for  
11 Penn National's historic policies, one of his jobs was  
12 to figure out how he was going to keep the records, and  
13 what he decided to do was take all of these indexing  
14 and put it into a data system so it would be easily  
15 searchable.

16 THE COURT: What kind of things?

17 MR. NES: He took all of the historic policies that  
18 were on microfiche and he wanted to create a system so  
19 that they could search for those policies digitally so  
20 that they didn't have to manually --

21 THE COURT: So you're saying he had all of the  
22 microfiches, the same ones we're talking about that we  
23 want to digitize and search for Covil and he had them  
24 and he says they could only be searched by policy number,  
25 right?



1           MR. NES:   That's right.

2           THE COURT:   So he digitized now to search for some  
3 other term?

4           MR. NES:   What he did is he took information from  
5 those microfiche that he took the policy numbers --

6           THE COURT:   Well, how -- how did he do that? Did  
7 he look at each policy?

8           MR. NES:   That -- that is what is -- apparently  
9 that is the testimony. He had --

10          THE COURT:   So in 2010 they took the microfiche  
11 and looked at each policy to determine which ones were  
12 twenty-five years non-renewed or --

13          MR. NES:   No, Your Honor. What they did was they  
14 took all of the microfiche and they just had essentially  
15 a clerk look for policy numbers and collate a policy  
16 number into the system so that if I then later wanted  
17 to say I have this particular policy number somebody  
18 gave me, I could put it into a computer system and it  
19 would tell me what box it was in. That was the system --

20          THE COURT:   Do we know how long it took that person  
21 to do that?

22          MR. NES:   We do not, Your Honor, but what we do  
23 know is that at the time that was being done they made  
24 a conscious choice not to look at those policies for  
25 insured name or additional insurance status, so.

1           THE COURT: But they did go through each one of  
2           them and select a particular piece of information and  
3           you're telling me now in 2022 they can't do a little  
4           better job if they went back through those microfiches  
5           and tried to pull out information on each policy --  
6           they pulled out it by a manual look it sounds like.

7           MR. NES: That's correct, Your Honor.

8           THE COURT: And they did it in 2010 and presumably  
9           there is some information about how long it took them  
10          to do that, right?

11          MR. NES: That's correct, Your Honor, and they --  
12          they have not provided that.

13          THE COURT: And you've asked them for that and  
14          they have not provided it?

15          MR. NES: That's correct.

16          THE COURT: Okay. So they went through each  
17          policy at that time and decided they were gonna pick  
18          out policy numbers and pieces that would be separately  
19          maintained?

20          MR. NES: That's right.

21          THE COURT: And then they did a search of  
22          microfiches to find that policy number?

23          MR. NES: That's right. And --

24          THE COURT: Now you're asking them with modern  
25          technology at our beck and call to go back through

1     them and look at each of those things again and digitize  
2     more than that, right?

3             MR. NES:   That's precisely correct.

4             THE COURT:   Okay.

5             MR. NES:   So what we also learned during these --  
6     both the written discovery and the depositions is that  
7     during the course of this litigation Mr. Reifsnyder  
8     would print out a copy of all of the policies they were  
9     gonna destroy in that calendar year and then he had a  
10    staff of five individuals --

11            THE COURT:   Print out a copy of the actual policy  
12    itself?

13            MR. NES:   No, a list of all the policies to be  
14    destroyed.

15            THE COURT:   A list of the numbers?

16            MR. NES:   That's right.

17            THE COURT:   So just print out the numbers?

18            MR. NES:   That's exactly right.

19            THE COURT:   How did they know what date those  
20    numbers referred to?  They obviously pulled out  
21    something more than just the policy number, right?

22            MR. NES:   So the other information that is  
23    contained in this 2K10 system is the date of nonrenewal,  
24    so the computer system can easily calculate, for example,  
25    a policy is non-renewed in 1995, twenty-five years

1 later it is X date, so in the beginning of the calendar  
2 year Mr. Reifsnyder can go to his computer and say I  
3 want to pull all of the documents that have been  
4 non-renewed in the last twenty-five years and then print  
5 that list out, leaves it outside of his office and a  
6 staff of five individuals at their leisure consult this  
7 list and throughout the course of the year pull those  
8 policies by hand, and that includes pulling microfiche.  
9 So microfiche was actually destroyed in 2018, 2019 and  
10 2020.

11 THE COURT: And have you determined the mic --  
12 which years of policy -- of nonrenewal were involved in  
13 the destruction?

14 MR. NES: No. That's the key problem because the  
15 story we get is that look, we -- we only pull it if  
16 it's twenty-five year later to the day, but we know that  
17 can't be the full story because Covil's policies exist.  
18 So if you have an '86 and an '87 policy, at some point  
19 that should have run up on the twenty-five year mark.

20 THE COURT: I mean, 2010, twenty-five years before  
21 is 1985.

22 MR. NES: Right. So what we have now is we get  
23 into the QC process. How is it that the staff when  
24 they go to pull those assets of companies, which are  
25 worth millions of dollars, what's the QC process, and

1 the answer was virtually nothing. Once those staff  
2 members, who are not full-time document custodians,  
3 once these staff members who have a huge portfolio of  
4 issues, they're dealing with real estate, they're  
5 dealing with leases, on their spare time, they look at  
6 this list, they go to the microfiche, they pull it out  
7 or they order documents from Iron Mountain, and in that  
8 process --

9 THE COURT: Why do they destroy them at all if  
10 the universe is just a bunch of case full boxes with  
11 the microfiche in them?

12 MR. NES: That is -- that would be consistent with  
13 their document retention policy that they would destroy  
14 even occurrence-based policies after twenty-five years.  
15 That is the policy of the company that clearly is not  
16 always followed.

17 So one of the problems we have though, and that  
18 relates directly to the request that we're moving to  
19 compel, is the request is Request Number 11. All  
20 documents and communications related to the process of  
21 identification, collection and disposal of insurance  
22 policies and policy-related documents pursuant to  
23 Penn National's document retention and purge policies  
24 and practices, and we narrowed that range for purposes  
25 of our motion to compel from 2010 to the present.

1           And the purpose for that is the story, again, that  
2   we've been told is that there are or there were at some  
3   time a spreadsheet that would identify what was actually  
4   destroyed. Not recreating it today to try to assume  
5   what we did two, three, four, years ago, but the actual  
6   spreadsheets that were used. They -- clearly the hard  
7   copies were not maintained, so what we want is for the  
8   e-mails of Mr. Reifsnyder and the five individuals that  
9   he mentioned during his deposition to be searched to  
10   see if they can pull the e-mail to determine what was  
11   actually destroyed.

12           I am skeptical that that exists because of the  
13   nature of how these documents were pulled and destroyed,  
14   but to the extent that they do exist, that would be  
15   probative for getting a report.

16           The second category of documents we asked for,  
17   there are, I believe, seventeen separate requests, but  
18   they essentially boil down to inquiries about the  
19   document retention policy itself.

20           As I said a minute ago, they have a real problem  
21   that their document retention policy calls for the  
22   destruction of documents twenty-five years after  
23   nonrenewal. We know that that process is not consistent  
24   because the Covil policies currently exist. So in -- the  
25   actual document retention policy calls for information I

1 think would be helpful. It calls for a random review of  
2 documents as Step 7, it calls for a scheduled review in  
3 addition to the random review to determine whether the  
4 document retention policy is being used correctly.  
5 Everyone who receives a litigation hold notice, for  
6 example, is supposed to send an acknowledgment that they  
7 received the litigation hold.

8 These are all parts of the policies and procedures  
9 that they would produce, so we asked them to produce  
10 those documents to clarify how the document retention  
11 policy actually works and with respect to the litigation  
12 holds who received those and did they acknowledge they  
13 received them, and for that set of discovery we have  
14 been given a -- clearly a wall.

15 THE COURT: All right. Now let me see if I  
16 understand this. They say they have a policy that they  
17 have not produced for you yet that talks about how a  
18 litigation hold is handled?

19 MR. NES: There are two policies; one of which  
20 they have produced, one of which they have not produced.

21 THE COURT: All right. What did they produce?

22 MR. NES: They produced a sheet that was essentially  
23 what the employee was supposed to do if they received a  
24 litigation hold and that includes collecting all the  
25 relevant documents, sending an acknowledgement letter,

1     having a call with the in-house counsel to determine  
2     where their responsive documents are.

3           THE COURT:   Now these are just clerical people,  
4     right?

5           MR. NES:    That's right.

6           THE COURT:   All right.   And who would they receive  
7     the litigation hold from?

8           MR. NES:    So there's a gentleman named Scott Maier,  
9     who's an in-house lawyer at Penn National.   He's the one  
10    who on December 17th sent the one and only litigation  
11    hold that we're aware of in this case and he only sent  
12    it to one person as far as we know, a gentleman named  
13    Brent Reifsnyder, but we have no acknowledgment e-mail  
14    or paper record as to how Mr. Reifsnyder responded to  
15    that.

16          And as we've said before, the e-mails, for example,  
17    that Mr. Reifsnyder had contemporaneously could have  
18    been critical if those doc -- if those e-mails still  
19    exist as to what documents were selected in '18, '19  
20    and '20, but we have no record even to this day that  
21    Mr. Reifsnyder stopped an e-mail purge that is also  
22    part of their e-mail system.

23          So the other set of documents that we are moving  
24    to compel on have to do with claim files.   At the trial  
25    of this case in four weeks, we will be identifying



1     fourteen asbestos claims that Penn National contributed  
2     to the settlement. They sent a letter to Mr. Protopapas  
3     on September 21st and they identified fourteen claims  
4     that they had contributed to and they claim that those  
5     fourteen cases apply to the aggregate limit. We are  
6     asking this Court, in part, for a declaration --

7             THE COURT: Now let me stop you a minute.

8             MR. NES: Yes.

9             THE COURT: They sent a list of fourteen asbestos  
10     claims that they claim have been settled and the part  
11     they -- the money they paid in settlement should be  
12     deducted from the remaining coverage of the rest of  
13     these things?

14            MR. NES: That's exactly right.

15            THE COURT: Now do you-all have the policies  
16     they're talking about or do you?

17            MR. NES: We do. We have those two policies.

18            THE COURT: This is the '85 and '86, '86 and '87  
19     policies?

20            MR. NES: '86 to '87, '87 to '88.

21            THE COURT: So those two policies they say they've  
22     settled fourteen asbestos claims against one or both of  
23     those policies and that has reduced the coverage in those  
24     policies?

25            MR. NES: That's right. We argue that they are

1 interpreting their policies incorrectly. That those  
2 claims do not apply to the aggregate limit or at least  
3 most of those claims do not apply to the aggregate limit  
4 because our argument is, is that these are operations  
5 claims and that under the plain language of the policies  
6 operations claims do not apply to the aggregate limit of  
7 either of those policies.

8 But as part of this understanding of how Penn  
9 National decided to characterize or categorize those  
10 claims as applying to the aggregate limit, we asked  
11 them to produce claim files. We asked for claim files  
12 at the very beginning of this litigation. It was  
13 Request Number 4. We didn't receive anything.

14 So in October, the beginning of last month, I sent  
15 an e-mail asking them to supplement their production  
16 to provide us with the claim files for those fourteen  
17 claims, I didn't receive a response, so I sent a separate  
18 e-mail asking them and reminding them to supplement the  
19 response. I did not get a response. Finally, I sent a  
20 letter saying if you do not produce these claim files,  
21 you're forcing us to move yet again for a motion to  
22 compel. No response. We file the motion, then in a  
23 footnote we get a response they will produce 61,000 pages  
24 of documents at some undetermined time, so clearly they  
25 are accepting that those documents are relevant --

1 THE COURT: 61,000?

2 MR. NES: 61,000 pages of documents in claim files.

3 THE COURT: For fourteen claim files?

4 MR. NES: Yes, Your Honor. And that number, to be  
5 fair, doesn't really shock my conscious because the  
6 claim file mostly will probably be the discovery of the  
7 underlying asbestos claims.

8 So once those -- those should be -- despite the  
9 breadth of the number, those are files that should be  
10 able to be pulled in a day. I mean, this is not  
11 complicated. An insurance company keeps a claim file.  
12 Those files normally in my experience have the internal  
13 correspondence of the claims adjuster, any analysis or  
14 assessments of coverage, aggregate limit, et cetera,  
15 and the underlying asbestos claim, and those should all  
16 be in a one or a couple of places.

17 They have accepted that those are relevant, they  
18 need to be produced, but they still forced us to file  
19 this motion to compel, so we would ask that the Court  
20 grant the motion and provide a date certain when they  
21 need to produce those documents and we would ask by no  
22 later than December 1st.

23 THE COURT: And all this search now, this laborious  
24 search for the claims files now, has been precipitated  
25 by their continued failure to produce the insurance

1 policies that insured Covil. This all goes back to the  
2 same old thing. You've been trying since 2020 to get  
3 copies of the pertinent insurance policies that covered  
4 Covil claims. They have now at some point said we paid  
5 fourteen claims for Covil, but they haven't produced a  
6 claims file. Presumably those claims files would have  
7 some reference to the insurance policies.

8 MR. NES: That's correct, Your Honor.

9 THE COURT: Right now we don't know what the period  
10 of time the claims files -- have they given you any  
11 information about over what period of time these claims  
12 -- or have you figured out any --

13 MR. NES: Well, we know that the fourteen claims  
14 are claims that we tendered -- the receiver tendered to  
15 Penn National for coverage and Penn National participated  
16 in these particular settlements with other carriers. So  
17 they were not --

18 THE COURT: So these are just receiver tendered.  
19 They don't go back in time at all to talk about the  
20 broader issue of this other coverage?

21 MR. NES: That's exactly right. This is a separate  
22 issue that none of these claims were tendered before  
23 February of 2020, so the claim file itself in terms of  
24 their analysis will be very small presumably. There  
25 will be correspondence with the receiver and there will

1 be internal correspondence.

2 THE COURT: And, again, the claims file is a  
3 backwards way of trying to get to the coverage of these  
4 policies, but relating for a minute to the destruction  
5 issue, these are all things that should be within the  
6 ambit of destruction, correct?

7 MR. NES: That's correct, Judge.

8 THE COURT: They're still in those microfiches that  
9 are sitting in the -- at Penn National headquarters as  
10 far as you know?

11 MR. NES: No, the claim files themselves --

12 THE COURT: No, no.

13 MR. NES: I'm sorry.

14 THE COURT: Getting these claim files may be of  
15 interest to you for other reasons, but the big thing  
16 that drove you there at this moment in connection with  
17 the suit I've got is because you can't figure out any  
18 other way to start getting concrete information about  
19 the policies that covered Covil?

20 MR. NES: That's correct.

21 THE COURT: And this is another way of doing that.

22 MR. NES: Yes, Your Honor.

23 THE COURT: And for these universe of things, have  
24 they put a litigation hold now on their destruction?

25 MR. NES: We have not seen any litigation hold that

1 applies outside of Mr. Brent Reifsnyder.

2 THE COURT: And Reifsnyder says what about the  
3 litigation hold?

4 MR. NES: So what he says is that when he received  
5 the litigation hold, he stopped what his purge process  
6 is and his purge process are the microfiche or anything  
7 at Iron Mountain. Because the fourteen claims for the  
8 currently -- the current asbestos claims are being  
9 handled in the present, we have no reason to believe  
10 that those would be offsite at Iron Mountain or apply to  
11 the document retention policy.

12 THE COURT: Okay. All right.

13 MR. NES: Thank you, Your Honor.

14 THE COURT: So just reviewing for a moment, at  
15 this time we have got a whole bunch of discovery that  
16 is still -- that I've issued orders on a good many  
17 times and that Penn National now claims is subject to  
18 a stay because of their continued appeal at the Court  
19 of Appeals. Meanwhile, we have a trial that's gonna  
20 take place on December the 14th, right?

21 MR. NES: That's right, Your Honor. And to be  
22 clear, we don't -- there were several requests that we  
23 made that related directly to the May 5th order and we  
24 communicated to counsel that to the extent that there  
25 were requests directly related to the May 5th order,

1 despite our difference about whether we think it really  
2 should be stayed or not, we're not asking for anything  
3 forward looking. Everything we're looking for right  
4 now is simply backwards looking that has nothing it do  
5 with the May 5th order, has to do with their document  
6 retention policy and how it applied. And to show that  
7 they're being inconsistent with their argument, one of  
8 the issues that was in the May 5th order was the motion  
9 to quash the depositions. This Court denied that motion  
10 and they did appeal that, but they put a witness up  
11 anyway. So despite the fact that the deposition --

12 THE COURT: Well, there shouldn't be anything more  
13 clearly a part of discovery than the taking of a  
14 deposition and those matters are clearly not stayed by  
15 appeal.

16 MR. NES: That's right, Your Honor. So the very  
17 matters that I deposed Mr. Reifsnyder on last week  
18 and the -- if I can depose him on it, surely I get  
19 the documents that I should have gotten before the  
20 deposition.

21 THE COURT: All right.

22 All right. Mr. Yntema.

23 MR. YNTEMA: Good morning, Your Honor.

24 THE COURT: Good morning.

25 MR. YNTEMA: Brady Yntema for Penn National Mutual.

1           THE COURT:  You're gonna have to speak up a lot  
2 more than you are.  I'm not hearing you at all with  
3 that.

4           I don't mind if you sit, Mr. Yntema.  The main  
5 thing you need to do is speak into that microphone.

6           It's not working?  Has it got the green light on?

7           MR. YNTEMA:  The green light's on, yes.  I can --

8           THE COURT:  I'd prefer you to sit if that's what  
9 it's gonna take to be sure you're heard in this  
10 microphone.

11          MR. YNTEMA:  I don't think that microphone is  
12 actually even working.

13          THE COURT:  Well --

14          MR. YNTEMA:  I can -- I can speak louder.

15          THE COURT:  -- let's get that straight before you  
16 start on an argument here, okay?

17          MR. YNTEMA:  I can speak louder if that would help.

18          THE COURT:  Well, that's gonna be how it's gonna  
19 have to be.

20          All right.  Let me say this.  Hold for a minute.

21          It's about time that you've had a break anyway.

22          It's now -- well, they've got the clock wrong.

23          MR. NES:  11:15, Your Honor.

24          THE COURT:  It's 11:15, of course.

25          All right.  Let's take a fifteen minute break and



1 let's get some people from the clerk's office in here  
2 to get this sound system working correctly.

3 MR. NES: Yes, Your Honor.

4 THE COURT: Thank you so much.

5 Court will be at ease.

6 (Recess taken at 11:17 AM.)

7 (Back on the record at 11:31 AM.)

8 THE COURT: All right. Mr. Yntema for Penn  
9 National.

10 MR. YNTEMA: Yes, Your Honor. Again, Brady Yntema  
11 for Penn National, a defendant in this case.

12 Your Honor, I was not expecting an entire  
13 recitation this morning of -- of where we've been and  
14 why we're here today, but I'm happy to go back and  
15 point out a few things as far as from Penn National's  
16 perspective where we -- where we've been and kind of  
17 where we are today.

18 It is -- Mr. Nes is right. In 2018, Penn National  
19 first received a subpoena in the Finch case. That  
20 subpoena was ordered by the Court, and the firm Dean  
21 Omar, who represented the plaintiffs in that asbestos  
22 case, issued the subpoena to many insurance carriers,  
23 but one -- but the subpoena to many insurance carriers  
24 was received by Penn National and in that subpoena it  
25 listed a policy -- one policy number that they had record

1 of that Penn National could search for.

2 Penn National conducted that search and responded  
3 to the subpoena and produced all policies it could find  
4 based on the policy numbers that were provided in 2018.  
5 Thereafter -- and keep in mind Penn National had never  
6 been tendered the Finch case. Penn National to that  
7 point had never been notified of the Finch case.

8 Thereafter -- in fact, in Penn National's response  
9 I believe the verdict in Finch came down a few months  
10 after that. Penn National had never tendered any  
11 judgment or asked to participate in that judgment until  
12 it was brought into the lawsuit -- the coverage lawsuit  
13 that was pending in the Finch matter in the Middle  
14 District of North Carolina in 2019. I believe in the  
15 fall of 2019 either Zurich or The Hartford third-partied  
16 Penn National in. Covil did not file that action against  
17 Penn National -- the initial action against Penn National.

18 THE COURT: Let me just ask you something about  
19 what occurred then. The first you know about a dispute  
20 that might involve your coverage for Covil is 2018,  
21 correct, when you got subpoenaed like a lot of other  
22 insurance companies did in the Finch case and were  
23 provided a policy number, right?

24 MR. YNTEMA: Penn National wasn't aware of any  
25 coverage dispute. It was aware that they were receiving

1 a subpoena --

2 THE COURT: You received a subpoena in 2018 asking  
3 that you produce a policy that covered Covil Corporation,  
4 correct?

5 MR. YNTEMA: Yes, with --

6 THE COURT: In connection with the Finch matter,  
7 correct?

8 MR. YNTEMA: It was in the Finch matter. The  
9 subpoena was received -- it was issued in the Finch  
10 case, yes.

11 THE COURT: Right. Listen. We can spend all day  
12 doing this kind of dance. You -- you first got the  
13 notice in 2018 that there was interest in Penn National's  
14 coverage of Covil Corporation.

15 MR. YNTEMA: That's correct.

16 THE COURT: All right. At that time did you --  
17 did Penn National put any kind of litigation hold on the  
18 destruction of any policies for commercial general  
19 liability that might relate to this period of time?

20 MR. YNTEMA: No.

21 THE COURT: Why not?

22 MR. YNTEMA: At that time they were -- simply  
23 received a subpoena and it's not unusual to receive  
24 subpoenas -- you know, for an insurance carrier to  
25 receive a subpoena in any case across the country

1     wanting to know if they have coverage for a particular  
2     defendant.  It may be an asbestos case or any sort of  
3     commercial general liability-type case.

4           THE COURT:  All right.  Then we move to 2019.  By  
5     2019 you now know that they -- that Covil contends that  
6     you have coverage and they give you a policy number,  
7     correct?

8           MR. YNTEMA:  In 2019, the -- the policy numbers  
9     that were provided were the same policy numbers that  
10    were provided --

11          THE COURT:  Penn National was third-partied into  
12    an action in 2019, correct?

13          MR. YNTEMA:  Yes, Your Honor.

14          THE COURT:  And that third-partying we talk of  
15    colloquially here, but that was a contention by one of  
16    the other parties in the matter that Penn National had  
17    coverage for Covil, correct, in connection with  
18    commercial general liability?

19          MR. YNTEMA:  Under the two policies that had been  
20    produced by way of their subpoena response in 2018.

21          THE COURT:  All right.  But -- you had knowledge  
22    at that point then of Covil, a big thermal insulation  
23    company in South Carolina and other places, and the  
24    contention was made in -- the matter in which your  
25    company was third-partied in is that it had coverage for

1     claims involving mesothelioma and liability flowing from  
2     asphalt from asbestos that Covil Corporation sold. You  
3     had information about that at that time; did you not?

4           MR. YNTEMA: That it was asbestos claims against  
5     Covil at that time in 2019?

6           THE COURT: Yes.

7           MR. YNTEMA: Yes.

8           THE COURT: And you also had information at that  
9     time that you had coverage; did you not?

10          MR. YNTEMA: We were aware we had -- we may have  
11     coverage under the policies that we produced in response  
12     to subpoena.

13          THE COURT: You had policies.

14          All right. At that point did you put a litigation  
15     hold on anything that would relate to the period of time  
16     for which it was claimed that exposures were had that  
17     led to possible coverage by your company?

18          MR. YNTEMA: No.

19          THE COURT: You would have known, would you not,  
20     at that time that the coverage that was being talked  
21     about was coverage related to not claims made coverage,  
22     but per occurrence coverage as it would have existed in  
23     policies for 1986-1987 and 1987-1988? You were aware  
24     that that was the claim being made; were you not?

25          MR. YNTEMA: Yes, I believe so. I think I

1 understand the question.

2 THE COURT: Right. And you put no other -- you  
3 put no hold on the destruction of records that might  
4 pertain to that period of time?

5 MR. YNTEMA: We had produced the two policies that  
6 we had received a request for and those were --

7 THE COURT: Now I'm not asking about that. You  
8 now know that there's a claim that your company  
9 provided coverage to Covil Corporation and you are  
10 aware from the third-party allegations made that there  
11 is a claim that you have coverage for far more than  
12 that period of time or a particular claim. It's a  
13 broader claim than that; is it not? That third-party  
14 situation.

15 MR. YNTEMA: And if Your Honor would look, I think  
16 Your Honor mentioned the whole world -- with the whole  
17 world that we're looking at and the world that we're  
18 looking at is Covil ceased operations, you know, before  
19 1992. Effectively ceased as a corporation.

20 THE COURT: So -- well, what -- what difference  
21 does that make to anything we're talking about now?  
22 You know somewhere between 2018 and 2019 that Covil  
23 Corporation is being sued and in that connection whether  
24 it's alive or not alive the contention is being made  
25 that your company wrote commercial general liability

1 policies covering Covil that might or might not have  
2 bearing on the coverage being asserted in these claims.

3 MR. YNTEMA: Covil ceased operations --

4 THE COURT: What does that have to do with anything?

5 MR. YNTEMA: I think it means a lot, Your Honor,  
6 if I -- if I can answer that question.

7 THE COURT: Yes, sir. You're not answering my  
8 question.

9 MR. YNTEMA: I'm going to.

10 THE COURT: You are not answering my question, so  
11 let me just say that to begin with. If part of that is  
12 that we don't care if they're out of business, that's  
13 something else to be litigated, but what I'm asking you  
14 is what your policy was for records that you have of  
15 Covil Corporation and you're trying to answer me by  
16 saying well, they've been out of business for a long  
17 time. That shouldn't make any difference in terms of  
18 your retention of records or anything, should it? Or  
19 do you go through them and figure out who's out of  
20 business and then knock those out?

21 MR. YNTEMA: Well, Penn National's document  
22 retention policy is twenty-five years from the date of  
23 cancellation or nonrenewal.

24 THE COURT: Well, then that -- so that doesn't  
25 make any difference whether the company is alive and in

1 business or not, does it?

2 MR. YNTEMA: Well, as far as the document retention  
3 policy for corporations that were -- that were dissolved  
4 in 1992, those -- those policies would have been slated  
5 for purge in 2017.

6 THE COURT: You mean you keep -- wait a minute.  
7 You mean you keep records of policyholders who are now  
8 dissolved or out of business? I thought what you were  
9 trying to tell me is that you just simply had something  
10 that said if they did not renew their policy with you,  
11 you would go twenty-five years from that time and then  
12 destroy the policy as I understood that to be.

13 Am I not --

14 MR. YNTEMA: Cancellation, non-renew date. Yes,  
15 Your Honor. Twenty-five years.

16 THE COURT: Well, then that cancellation non-renew  
17 date has nothing to do with whether the corporation was  
18 in business or not, does it?

19 MR. YNTEMA: Well, because the policy -- there  
20 couldn't have been a policy for Covil issued by Penn  
21 National. I mean, mind you -- I'll step back. The  
22 policies that were provided by Penn National were 1986  
23 through 1988. Those were the dates -- those are the  
24 years of coverage that Penn National we know of issued  
25 policies to Covil, but what the argument is, is that



1 Penn National should have put a litigation hold in place  
2 in 2018 when they received a subpoena.

3 Looking back twenty-five years from when Covil  
4 ceased operations, fast-forward twenty-five years, 2017  
5 would have been twenty-five years from the date it ceased  
6 operations. Those policies were subject to destruction  
7 in 2017 or before. Anytime I -- in 2018 or thereafter,  
8 a litigation hold would have been of no consequence. We  
9 had already moved on.

10 Now why was -- why was Covil's policy in existence?  
11 Why did Penn National have it and they were able to  
12 produce it and the answer has been we don't know; that  
13 it was there and it was in existence. That's the answer  
14 that Brent Reifsnyder just gave last week. He was the  
15 person that was in charge as the records custodian for  
16 the policies during that period of time and he said I  
17 don't know how that policy existed, but it did, and then  
18 also it shows that once we purge policies twenty-five  
19 years out or whatnot, we move on.

20 THE COURT: Well --

21 MR. YNTEMA: There will be another --

22 THE COURT: Mr. Yntema?

23 MR. YNTEMA: Yes.

24 THE COURT: You know, you don't get to decide based  
25 on not looking at your records that you don't have any

1 records because the company's been dissolved. You don't  
2 get to make that decision in discovery. In discovery,  
3 if you are being sued, which you are now for -- and the  
4 issue is the issue of coverage of policies, you don't  
5 get to decide that you're not gonna look and see unless  
6 there's a policy number. You've got the records. You  
7 say you've got the records. You got them in your main  
8 office, not at Iron Mountain the way we were told for  
9 over a year, that it would be terrible to search because  
10 it was all such a voluminous record, but you have them  
11 at your home office and they're on microfiche, the kind  
12 of technology that can be easily converted into something  
13 that can be searched.

14 So I don't understand the argument that it doesn't  
15 make any difference because this company has been out of  
16 business. You didn't keep records like that, did you?

17 MR. YNTEMA: Like what?

18 THE COURT: You didn't keep records of what you  
19 were gonna obtain based on whether a company was out of  
20 business, did you?

21 MR. YNTEMA: We kept a cancellation non-renew date.  
22 I'm trying to make -- I'm trying to bring sense to the  
23 gravity of what their argument is, is that twenty-five  
24 years from the date that Covil dissolved was 2017.

25 THE COURT: But you produced no records of any of

1     that kind. You just simply say I'm gonna tell you  
2     without you being able to look and see what their  
3     retention policy is, where it's written down or anything  
4     else; that this is when I say we started destroying  
5     records and this is why a litigation hold doesn't mean  
6     anything, but you have not showed them any basic records  
7     for them to be able to verify what you continue to assert  
8     to this Court and what your 30(b)(6) witness has to say  
9     about it. They are entitled to the records themselves  
10    to be able to test the truth of what you're telling this  
11    Court.

12           MR. YNTEMA: I want to make sure I understand,  
13    Your Honor. I'm not trying to be flippant about  
14    anything. The records that you're referencing that  
15    they're entitled to see, we have produced thousands of  
16    pages of records. We've produced the Y10K database that  
17    Mr. Nes referenced. It's sitting right here. We printed  
18    it out and we served it and we served it on --

19           THE COURT: The records they want are not any of  
20    that. The records they want are the policies themselves  
21    as issued to their clients and that -- that is something  
22    that's so basic that an insurance company has to produce.  
23    If a policyholder, even one from long ago, even one  
24    dissolved is sued and they ask for your records about  
25    whether you had a policy that covered them at a period in

1 time when policies covered such things as occurrences,  
2 meaning exposure that don't manifest until twenty-five  
3 years later, they are entitled to those policies. You  
4 say in answer we have those policies, but we have an  
5 awkward way of maintaining them on microfiche and you  
6 can only access the microfiche if you know the number.  
7 Now we know that before that became the method of  
8 searching them, you had those microfiche all along and  
9 at some point in 2010 you paid a clerk within Penn  
10 National operations to have an index made of those  
11 microfiche and you decided the way to make the index was  
12 the policy number and the last date of renewal or the  
13 date of nonrenewal, which would be the last date that  
14 the policy was effective is another way of saying that.  
15 That -- you did that in 2010. It's able to be done.

16 Now what they would like to do is look at that raw  
17 data just like your clerks did and see if they can  
18 determine more directly whether Covil has other policies  
19 that cover it. That's what this whole dispute is about.

20 MR. YNTEMA: We have opened our insurance  
21 repository to as you know --

22 THE COURT: You have not opened these microfiche  
23 for them to sit down and take those documents and  
24 digitize them and search them, have you?

25 MR. YNTEMA: We opened the insurance repository to

1 Ellis and Winters for their search, unfettered access to  
2 our microfiche, to all of our documents at Iron Mountain.  
3 They took a sampling. They went through the process from  
4 December or November all the way through -- until their  
5 report to the Court in March. They gave the clerk  
6 parameters. This -- these are the important policy  
7 documents. They're only the microfiche of concern  
8 because Covil existed up until like 1992 or before.  
9 Microfiche is what -- is the concern. The only way to  
10 do -- the only way to search the microfiche based on  
11 their report was by either a manual search, which would  
12 take years to do, or a -- or a digitized search.

13 THE COURT: How long did it take to do that search  
14 in 2010 that developed the index?

15 MR. YNTEMA: My understanding based on my  
16 recollection, and I may stand corrected, it was like  
17 nine months.

18 THE COURT: Well, gosh, that's not years and years  
19 and years, and that was a manual search --

20 MR. YNTEMA: Well, this was a manual --

21 THE COURT: Wait a minute. Wait a minute. That  
22 was a manual search that extracted a certain couple of  
23 pieces of information and put them on an index. It  
24 would have been a very simple matter to have done one  
25 further thing, which is to put on that index the name

1 of the insured. That was not done.

2 MR. YNTEMA: Historically Penn National had always  
3 saved their archived policies by policy number.

4 THE COURT: Well, I understand that, but that is  
5 not a helpful thing for an insured who does not have  
6 access to their records. We have an insured that's in  
7 that category and they quite reasonably now are saying  
8 you've still got the records, you took nine months in  
9 an age way before digitization. What would happen if  
10 you took each of those microfiche and ran it through  
11 any number of systems that can look at those things and  
12 translate them? Gosh, we know we can do that on our  
13 little cell phones now. We take a picture of something  
14 and then search it. I can do that right now with things  
15 that are just pieces of paper floating around my house  
16 that I want to send to somebody. This is not rocket  
17 science what's being asked here. These are microfiches  
18 and they can be digitized and it's not gonna take any  
19 nine months the way technology is today.

20 And so my question to you is why have you not  
21 allowed the -- the representatives of Covil to access  
22 this material and do just what I suggested?

23 MR. YNTEMA: There was great concern when your  
24 Court ordered Penn National to do just that and to  
25 digitize all of their microfiche and give it to the

1 receiver and receiver's counsel for their unfettered  
2 use. As I stated at the hearing last spring, we had  
3 grave concern as to the confidential nature of all of  
4 these policies being just simply digitized and handed  
5 over to receiver's counsel.

6 THE COURT: So your answer to that was to just not  
7 cooperate at all with discovery. I have corporations  
8 every day that come into my courtroom and what they do  
9 if they have concerns about the confidentiality of the  
10 information, they digitize it and then they provide it  
11 under a system where a protective order is issued. You  
12 decided on the front end simply to not provide any of it  
13 and then say it's because the way we had it set up, the  
14 time, we took nine months to make an index of it and sort  
15 it by policy number. I don't regard that as a good faith  
16 effort to respond to discovery, Mr. Yntema.

17 MR. YNTEMA: I think it's being taken out of -- out  
18 of context. I do, Your Honor. I do. I mean, I've  
19 been through this process. I've been in front of  
20 Your Honor many times and every time there's -- out  
21 of all due respect, I mean, I've been here and I've  
22 answered the questions that Your Honor has had about  
23 how Penn National stores its policies, and acknowledging  
24 we've had these discussions, and we had discussions.  
25 You've considered many affidavits from Penn National.

1 Penn National has been deposed on these exact questions  
2 repeatedly throughout -- throughout this case. And as  
3 far as --

4 THE COURT: Mr. Yntema?

5 MR. YNTEMA: Yes.

6 THE COURT: Answer me this. Again, the illustration  
7 I'm giving you, they are trying to determine whether  
8 there are other policies that cover Covil. You're saying  
9 you can't even determine that yourself because you are  
10 going to continue to rely on an index that was made by  
11 a clerk in 2010 that selected out the number and the  
12 expiration date of the policy or the nonrenewal date, as  
13 it's sometimes called, and you're saying that gives you  
14 blanket coverage from having to answer their discovery,  
15 but it has been suggested to you time and time again that  
16 the way to deal with that is to do just what I talked  
17 about, take a picture of the microfiche or in some way  
18 digitize it. If it took a hand effort of one clerk  
19 nine months to do it, I can't imagine why a concerted  
20 effort that involved a commercial company couldn't do  
21 all that in a lot less time than that with the use of  
22 digitized photography and then a search. That way is  
23 done all the time all over this country in every kind  
24 of context from a personal one to a business one. It's  
25 done every day. So don't tell me about how disappointed



1     you are that I don't agree with you in the various  
2     hearings we've had. I want you to respond specifically  
3     to what I just proposed to you now for the second time.

4             Why cannot these microfiche be digitized pretty  
5     simply and then searched for whatever wording there is  
6     in them that is needed to forward this litigation of  
7     that coverage?

8             MR. YNTEMA: It can be, but, again, I go back to  
9     Penn National's concern as to why Penn National felt  
10    the feel need to take it up on appeal was because of the  
11    concern about the confidentiality of all these other  
12    policies, the world that was being produced for the  
13    receiver's and their counsel's unfettered access.

14            THE COURT: You never raised confidentiality in any  
15    way to this Court when we argued this thing these many  
16    times. What you raised to the Court is it's impossible  
17    because it's by number and now we've got this thing of  
18    nonrenewal that's come up since. What it first was,  
19    was the numbers, we don't have the number, we can't  
20    do it and its onerous and terrible and the thing's  
21    too voluminous, then slowly but surely that's been  
22    chipped away, but now we're in a situation where after  
23    I make my ruling on what is now the seventh motion to  
24    compel, you finally say oh, we're concerned about  
25    confidentiality.

1           Did you ever make any projection to this Court  
2           about protecting the confidentiality of these records?

3           MR. YNTEMA:   In the spring of this past year when  
4           we had the hearing before the May 5th hearing.

5           THE COURT:   Of course, and that's when I got Ellis  
6           and Winters to be the mediator here and you didn't  
7           disclose to them what we're learning right now in this  
8           courtroom as of today.

9           MR. YNTEMA:   Yes, Your Honor.   Ellis and Winters  
10          was appointed by this Court in November to conduct its  
11          search and then after the search was conducted and they  
12          reported their recommendations, then thereafter the  
13          Court asked -- and then ordered that Penn National  
14          digitize all those microfiche records and incur the --  
15          the sole cost of that and give the receiver and its  
16          counsel unfettered use of all the policies that are  
17          listed on the microfiche and at that hearing I did state  
18          a concern, there was a concern of Penn National's as to  
19          the confidential nature of digitizing these microfiche  
20          and then producing them for --

21          THE COURT:   You haven't made any motion to that  
22          effect or prepared any kind of proposal to the Court  
23          about how confidentiality could be maintained.

24          MR. YNTEMA:   Just based on the unprecedented nature  
25          of that order, Penn National --

1           THE COURT: Unprecedented nature? What are you  
2 talking about?

3           MR. YNTEMA: For Penn National. Unprecedented  
4 nature for Penn National to have to digitalize all this  
5 microfiche and disclose it to other outside parties.  
6 Penn National felt that I had no choice but to appeal  
7 that. They felt it was more an order in contempt or  
8 sanctions.

9           THE COURT: We're not arguing here today about  
10 your appeal. We're arguing today about some specific  
11 information that this -- that Covil desires that looks at  
12 the -- what has occurred with all this other discovery  
13 dispute and now focuses itself rather specifically on  
14 fourteen policies and what it takes to get information  
15 about those policies.

16           So I don't understand where you're going with this  
17 broader argument about what the appeal means or doesn't  
18 mean. You know, the history would indicate that at  
19 a certain point in time that appeal will, again, be  
20 dismissed, and to me that has nothing to do with the  
21 hearing I'm having here today.

22           So how about respond to what's being said here  
23 today and whether you're gonna cooperate with them?

24           MR. YNTEMA: I think what Your Honor is --

25           THE COURT: Because what you've done every single

1 time every time a request is made you just don't answer  
2 it.

3 MR. YNTEMA: I disagree with that, Your Honor.  
4 We have answered those requests. We have complied with  
5 court orders, we have responded to discovery. The  
6 discovery that's at issue today is a fourth request for  
7 production that was served and then we took the appeal  
8 of the Court's order and the matter was up on appeal.

9 The Court's order was that -- that -- it's our  
10 understanding that there would be a time where there  
11 would be -- a Rule 30(b)(6) deposition would be conducted  
12 and then the motion to compel would be held in abeyance  
13 until that time. A Rule 30(b)(6) deposition has occurred  
14 and now we're here today on a motion to compel.

15 THE COURT: That's correct. And so far what I've  
16 heard you talk about is your appeal and a whole bunch  
17 of other things and the fact that you still rely on the  
18 fact that you can't easily access this material that's  
19 on microfiche to discover whether Covil's got other  
20 policies, but now it turns out they've got at least  
21 fourteen other policies because there are fourteen other  
22 claims that -- that you dealt with and they want to know  
23 about those policies.

24 MR. YNTEMA: Your Honor, just right now at issue  
25 in this case, in this case, are essentially two policies;

1 1986 through 1988.

2 THE COURT: Yeah, and you're saying that the  
3 fourteen claims there you've given them everything they  
4 want to know about the policies, but hey, by the way, we  
5 don't owe you anything or it's got to be reduced by what  
6 we've already paid out. That's basically your answer.  
7 That's not what they're asking.

8 They're asking a broader question and it's a  
9 response to the receiver's fourth request for production  
10 to which you've never made any response and now they  
11 have focussed very specifically on a piece of that and  
12 that is the one that they first propounded on October  
13 the 12th, you didn't respond, they then on October 27th  
14 asked you again, and here we still are with no response  
15 to those requests and now we've got the deposition's  
16 been taken and we know that there are fourteen cases  
17 in which there's coverage. You say it's all '86 and  
18 '87 and '88 policies. We don't know that. They're  
19 asking you for something different. In fact, to get  
20 at it the other way, they are also asking you for the  
21 claims files and you have not responded to that.

22 MR. YNTEMA: We have responded. I believe I  
23 responded in a prior e-mail to Mr. Nes, which I didn't  
24 print out today because I didn't think I would be arguing  
25 about this, but I did -- I did communicate that Penn

1 National would be producing its claims files.

2 THE COURT: That's not a -- that's not good enough  
3 with a trial date. Those things should be immediately  
4 produced. They are in the universe of things that is  
5 right there dead center of what they've already requested,  
6 which was broad enough to include these, but now they've  
7 zeroed in specifically on these claims files because of  
8 the 30(b)(6). They should have been immediately produced  
9 and still we had to come to court again for the seventh  
10 time and talk about compelling.

11 MR. YNTEMA: The claims files were agreed to be  
12 produced before this hearing and --

13 THE COURT: Well, they haven't been produced yet.

14 MR. YNTEMA: Right, and my understanding is that  
15 we agreed to produce them prior to December 1st for  
16 sure.

17 THE COURT: Well, that's --

18 MR. YNTEMA: As of this morning I hadn't checked  
19 with my client to see where in the process they are in  
20 getting that information so that I can produce it.

21 THE COURT: Well, that's a little beyond what it's  
22 gonna take to get ready for a December 14th trial,  
23 Mr. Yntema, with all of the other things that have to  
24 be done in this case.

25 How is it that you-all just kind of seized on

1 December the 1st as the date which you would produce  
2 those things?

3 MR. YNTEMA: I think it was suggested by Mr. Nes,  
4 but that's -- my recollection is that it was actually  
5 suggested by Mr. Nes this morning.

6 THE COURT: Well, prior to this morning's suggestion  
7 by Mr. Nes, you haven't yet responded and said yay, we're  
8 gonna produce them at a certain time, have you?

9 MR. YNTEMA: Yes. I mean, I think I was --

10 THE COURT: This morning?

11 MR. YNTEMA: This morning?

12 THE COURT: Is that when you told them December 1st  
13 is when you're gonna produce them?

14 MR. YNTEMA: No, Your Honor. No, Your Honor.  
15 I think that -- that was something that's been  
16 represented by -- by counsel and Mr. Nes before this  
17 morning --

18 THE COURT: Uh-huh.

19 MR. YNTEMA: -- and that's why, you know, we  
20 represented in our -- in our papers to the Court that  
21 we would be producing the claims file.

22 THE COURT: Well, how do you intend to relate that  
23 if you do, the claim file, back to the policies which  
24 back up that claim?

25 MR. YNTEMA: I think the claim file would just be

1     simply to address the asbestos cases that Penn National  
2     has been defending since it received its first tender  
3     in February of 2020. I mean, we -- Penn National has  
4     been participating in defense of Covil since it received  
5     the first asbestos tender under its coverage for Covil  
6     and has been participating in the defense, has been  
7     participating in mediations for every asbestos tender.  
8     And fourteen isn't the number to date that's been  
9     tendered. Mr. Protopapas may have the exact number,  
10    but it's been many, many, many, many more asbestos  
11    cases other than just the fourteen that was recently  
12    represented in Penn National's letter to the receiver  
13    saying now we've paid these settlement amounts for  
14    these particular fourteen cases and our position is  
15    this is an impairment of the policy limits under the  
16    two policies that are in dispute in this case.

17           THE COURT: And my projection to you is this.  
18    Only when you're -- when something serves your advantage,  
19    that being the contention that hey, yeah, we did  
20    participate in fourteen different claims, but we -- we  
21    want you to know on the front end that -- that all that  
22    money's gonna be taken out of what you can afford to  
23    look at for the claims you're now pursuing. That's --  
24    the fourteen claims we're talking about are not claims  
25    that they're tendering to you right now, they're claims



1     you've already paid and you already participated in  
2     settlement of and that is another way of through the  
3     back -- through another route trying to figure out what  
4     kind of policies you do have and what kind of claims  
5     you have paid because you've answered nothing based on  
6     the direct request for that except to say oh, it's too  
7     secret, it's too confidential, you're not gonna protect  
8     it or we can't access it because of our way of indexing  
9     these things since 2010 or it might already be gone  
10    because we've destroyed these things and even after we  
11    know there's plenty of litigation about coverage at  
12    Penn National, we continue to do whatever it is we're  
13    doing, which has not been quite defined in terms of  
14    destroying old policies. That's -- that's the picture  
15    I'm getting, Mr. Yntema.

16           MR. YNTEMA: I'm sorry I painted that picture and  
17    that wasn't my intent. I mean, I think that --

18           THE COURT: What was your intent then about saying  
19    that hey, the fourteen ones we've already paid, but  
20    we're still not gonna give you the policy numbers on any  
21    of that because we can't access them, but by the way, if  
22    we could give them to you, it's a declining policy so  
23    you don't get to look at as much coverage as you might  
24    think.

25           I mean, do you think that's a reasonable way to

1 deal with the more direct question of what kind of  
2 coverage do you have, what kind of policies do you have,  
3 and what periods of time, this or some other period,  
4 do they cover?

5 MR. YNTEMA: I'm just gonna tell you as far as  
6 those fourteen cases, it was a letter from Penn National  
7 just letting the receiver know how much they had paid  
8 in settlements for these block of fourteen cases.

9 THE COURT: And that was so that you --

10 MR. YNTEMA: It was updating the receiver on the  
11 status of -- of the policy.

12 THE COURT: So that -- so the receiver could know  
13 that the little handful of policies it's gotten for  
14 '86-'87 and '87-'88, by the way, we've already paid  
15 fourteen claims and so those policies don't have as  
16 much in them as you think. That was basically the  
17 purpose for that particular advisory to the receiver;  
18 was it not?

19 MR. YNTEMA: I think Penn National has somewhat  
20 of an obligation to inform its insured --

21 THE COURT: Right. No question about that.

22 MR. YNTEMA: -- about claims paid --

23 THE COURT: And don't they have a similar obligation  
24 to inform Covil of all the coverage that Penn National  
25 has got, if any?

1           MR. YNTEMA: All the coverage that Penn National is  
2 aware of, yes, and able to find.

3           THE COURT: Well, you're able to find more than what  
4 you've given them. Would you agree with that?

5           MR. YNTEMA: I don't --

6           THE COURT: You've got the microfiche. You haven't  
7 destroyed those, right?

8           MR. YNTEMA: Microfiche are still present at Penn  
9 National's headquarters, correct, yes.

10          THE COURT: And you've got the ability to search  
11 them by hand as you did before or digitize them or  
12 whatever it takes to see if there are policies, don't  
13 you?

14          MR. YNTEMA: There is a -- they can be digitized.  
15 There's no option to do that.

16          THE COURT: Well, you could --

17          MR. YNTEMA: Whenever Penn National was ordered to  
18 digitize it, it had never digitized -- no one had ever  
19 been ordered to digitize those documents, the microfiche  
20 anyway, prior to the spring of this past year, and we've  
21 spoken about the concern that Penn National had and why  
22 Penn National felt the need to have to appeal that order,  
23 which is on appeal right now.

24          THE COURT: Again, I'm not talking about  
25 appealability. I'm talking about whether you've got

1 the ability as a company to search your records and  
2 directly answer their discovery request about what kind  
3 of coverage you have. I don't care whether it's done  
4 by digitizing or whatnot. What was attempted to be done  
5 was to suggest the easiest way you could look again at  
6 these files. You did it by hand in 2010. Nobody's  
7 asking you to do it that awkward, old-fashioned way  
8 again, but what was suggested is you take a little bit  
9 more modern approach to how you might take those records  
10 and search them, and you're saying that your concern  
11 about the privacy of those records is preventing you  
12 from figuring out how you could search those records?

13 Is that what you're saying?

14 MR. YNTEMA: Not quite, Your Honor, but I think  
15 if -- if Your Honor understands me as saying that, I'm  
16 just trying to kind of spell out kind of where we are  
17 today and then you're asking me what is preventing  
18 Penn National from -- from digitizing the records --

19 THE COURT: I'm asking you what is preventing  
20 Penn National from using whatever methodology it  
21 wants to to try to look at all these microfiches and  
22 determine if there's other coverage. That is what  
23 Covil's been asking for months and months and months  
24 now and digitization was an attempt to more modernize  
25 how you would do it.

1           Now you've used that as a weapon to say oh, that's  
2   a terrible thing we've never been asked to do before?  
3   You picked your own method of laboriously going through  
4   those records, but it created a system that is very  
5   difficult to get into. You decided to do it that way.  
6   It would have been very simple for that index to have  
7   included one more piece of information, the name of the  
8   insured, but you decided in 2010 not to do that.

9           Now the request is being made to go back to those  
10   records and find out who's insured and the fact that  
11   digitization might be one way to do it is not the point.  
12   The point is you can do that, can you not, as a company?

13           MR. YNTEMA: The records can be digitized, Your  
14   Honor, yes.

15           THE COURT: No, sir. I'm not asking that question.  
16   That was simply a suggestion as to a method of making it  
17   easy to search those records, but you could figure out  
18   any way you want to. You have the records. You could  
19   search them and match up the name of the insured with  
20   the list of policies and expiration dates; could you  
21   not?

22           MR. YNTEMA: You can search the insured. At this  
23   point the only way without digitizing those documents  
24   is to manually go through each one of those.

25           THE COURT: Right. And you could do that; could

1     you not?

2           MR. YNTEMA:   It wouldn't be reasonable to do that.  
3     The --

4           THE COURT:   Well, you did it in -- you did it in  
5     2010 to develop a policy for destroying the documents,  
6     didn't you?

7           MR. YNTEMA:   In 2010, they recorded the policy  
8     numbers that had historically been recorded by Penn  
9     National long before 2010, but they were able to go  
10    through and look at the boxes or look at the microfiche  
11    and record the policy numbers, yes, ma'am.

12          THE COURT:   Well, they had to look at the individual  
13    policies to get that nonrenewal number. That wasn't on  
14    the outside of the box, the outside of the box had the  
15    numbers, but what your 30(b)(6) says is that in 2010 he  
16    developed a methodology -- he was trying to figure out  
17    how could he do something that would then relate to when  
18    to destroy the records and he came up with the policy  
19    number and the date of nonrenewal or expiration.

20          It would be very simple -- and that took about  
21    three months to six months or nine months or however  
22    much it is for one clerk to in their off hours with  
23    everything else they had to do to do that.

24          MR. YNTEMA:   I think there were many more people  
25    than just one though.

1 THE COURT: Well, whatever.

2 MR. YNTEMA: Sure.

3 THE COURT: But this is a discovery request where  
4 you're supposed to do what it takes to answer the  
5 discovery and it's about a central point in this  
6 coverage lawsuit. It's to find out what policies cover  
7 Covil and you've got the ability to go back to those  
8 boxes and add something to that index, which now contains  
9 the policy number and the expiration date, and that is  
10 the name of the insured. You can do that, can't you?

11 MR. YNTEMA: Potentially by way of digitizing the  
12 documents, yes.

13 THE COURT: But you could do it by hand.

14 MR. YNTEMA: By hand it would make months and months,  
15 but --

16 THE COURT: Well, it took you nine months before or  
17 six months or three. We've got a lot of different  
18 testimony about how long it took, but you could do it,  
19 correct?

20 MR. YNTEMA: Yeah, Penn National, I think, could  
21 do that. I mean, I think they recorded policy numbers.  
22 They can go back and go through manually each microfiche  
23 slide. It could take a while to do.

24 THE COURT: Right. And if they wanted some other  
25 more modern technical way to do it, they might be able

1 to do it that way, right?

2 MR. YNTEMA: Yes, Your Honor.

3 THE COURT: All right. So your request today is  
4 what?

5 They are asking that you produce some very specific  
6 stuff today.

7 MR. YNTEMA: And I'm happy to work with --

8 THE COURT: No, sir. It's not happy to work with.  
9 They are asking for some very specific information today  
10 in this hearing. That's why they moved to compel you.

11 MR. YNTEMA: They moved to compel our responses to  
12 the fourth request for production documents, which we  
13 hadn't responded to. It was our -- in our opinion that  
14 the matter was on appeal and that any issues with respect  
15 to documents and further discovery requests were held  
16 in abeyance until after a Rule 30(b)(6) deposition was  
17 conducted, which we even took the position up until  
18 recently when the Court had a status conference that  
19 all of that was on -- on a stay, but the Court found  
20 that there was a necessity for trial in December and  
21 so we allowed the Rule 30(b)(6) to take place of Brent  
22 Reifsnyder and of Scott Maier, which has still yet to  
23 be scheduled, and allow that to be proceed.

24 And we had -- and there's mention in -- with respect  
25 to the topics that -- or part of the Rule 30(b)(6) topics



1     that we did make objection to because we felt that they  
2     were duplicative, that they were -- that they -- that  
3     Penn National had already provided a Rule 30(b)(6) on  
4     those topics, but yet they were incorporated into this  
5     most current Rule 30(b)(6) notice as well.

6             We didn't file a motion for protection order, we  
7     didn't file a motion to quash those notices because that  
8     would have shut everything down. What we said is we're  
9     not gonna do that, but we're gonna say these are the  
10    topics that we can produce a designee or designees on  
11    and allow the depositions to go forward and allow a  
12    trial to go forward. We could have tried to say and  
13    argue that this is all on appeal, we're not gonna  
14    participate.

15            This is on appeal. It's our position it should be  
16    stayed and it's stayed up until this point. We didn't  
17    take depositions, we were trying to be cooperative,  
18    and so now we're progressing toward a trial. We've  
19    provided one designee. We've offered up another  
20    designee whose deposition's going to take place in a  
21    week or so and we've -- we've produced our experts and  
22    disclosed our experts and we're progressing to a trial  
23    in this case.

24            Now that can be discussed -- I have another topic,  
25    I think, by Ms. Patterson, and then we can see what

1 discovery in this trial looks like and what that entails.

2 THE COURT: All right, sir.

3 Your reply.

4 MR. NES: Yes, Your Honor.

5 I'd like to start where we started and that is  
6 spoliation and the --

7 THE COURT: Speak a little bit more directly into  
8 that or speak louder.

9 MR. NES: How is that? Does that work?

10 THE COURT: A little better. There you go.

11 MR. NES: How's that, Your Honor?

12 THE COURT: Perfect.

13 MR. NES: So let's start with -- what I'd like to  
14 do is walk through a couple of issues that I think the  
15 record is -- is incorrect at this point and correct that  
16 and then finally what it is that we are specifically  
17 asking for.

18 First, when we talk about the spoliation timeline,  
19 the Court correctly identified our concern is that as  
20 of June of 2018 Penn National knew there were asbestos  
21 cases being filed against Covil and that it issued  
22 Covil insurance policies. It did not yet know the  
23 universe of policies at issue, but it did not issue a  
24 litigation hold and that error is directly in front of  
25 this Court because as Mr. Yntema said, his witness --

1 Penn National's witness last week said I don't know why  
2 Covil's -- the '86 to '87, '87 to '88 policies exist  
3 today, they shouldn't, and that's exactly the problem  
4 that we face, is that if those policies were pulled from  
5 the records from the automatic destruction because the  
6 policy number was identified and then 2018 rolls around  
7 and any other Covil policy that we just didn't have a  
8 number for had been identified, they very well may have  
9 been pulled and destroyed, and there's no system that  
10 Penn National can show us that would have identified the  
11 policy, that they would have saved the policy, that they  
12 would have QC'd their checks to make sure that that  
13 policy wasn't destroyed.

14 So the last area that we can ask for to try to  
15 understand why it is that the documents were or were not  
16 destroyed in 2018 is this request. All documents and  
17 communications related to the process of identification,  
18 collection and disposal of insurance policies and  
19 policy-related documents pursuant to Penn National's  
20 document retention or purge policies.

21 In other words, if there are e-mails in 2018  
22 between Brent Reifsnnyder and his staff saying guys,  
23 here's the list for this year, here's the ones to go  
24 pull and destroy, that's a completely relevant document.  
25 That would show either Penn National's policy was being

1 followed and no Covil policies are on there, Penn  
2 National's policy wasn't being followed or Penn National's  
3 policy was being followed and there was a Covil policy,  
4 but they've refused to even give us those basic e-mails.

5 So, first and foremost, we are asking this Court to  
6 compel them to produce their correspondence to the extent  
7 it still exists related to the document destruction in  
8 2018, 2019, 2020 and 2021, and if the answer is we simply  
9 don't have those anymore because we didn't issue a  
10 litigation hold, then we want that answer, too, but we  
11 are -- we believe that with respect to topic -- Request  
12 Number 11 that's a narrow request and it's directly  
13 related to the spoliation issues that are going to be at  
14 issue four weeks from now. Number 1.

15 Number 2 is the fourth request for production of  
16 documents, and this was our most recent motion to compel,  
17 and on page 3 of our motion to compel we outline the  
18 topics that we requested in the fourth motion to compel  
19 and these topics are directly targeted at how their  
20 document retention policy works, how it itself is QC'd  
21 and the litigation holds, how the litigation holds are  
22 issued and QC'd, again, relevant to the issues that are  
23 gonna be tried in four weeks and very narrowly tailored.

24 Today we have not heard a single argument that  
25 these are irrelevant, that they're overly burdensome.

1 The only argument is a vague reference to these requests  
2 being issued after this Court's May 5th order, which  
3 they say is on appeal, but these requests do not relate  
4 to that order, therefore, they are not stayed and they  
5 are relevant to the issues looking back.

6 Finally, as this Court was inquiring of Mr. Yntema,  
7 we have claim files, basic claim files, from Mr. Wright,  
8 who is a claims handler at Penn National, for fourteen  
9 asbestos claims that they paid on. They have no argument  
10 that they're irrelevant, they have no argument that  
11 they're overly burdensome. They've, in fact, said now  
12 that they will produce it, but I want the record to be  
13 clear today at this hearing is the first time I've heard  
14 they will produce documents on December 1st.

15 This is what their footnote says in response to our  
16 motion to compel. The receiver's motion to compel also  
17 asks this Court to compel Penn National to supplement  
18 its production to Request Number 4 of the receiver's  
19 first set of requests for production by December 1st.  
20 That is what our request was. Their answer is Penn  
21 National is in the process of compiling the requested  
22 documents for production, which will include approximately  
23 61,000 pages and anticipate being able to comply with  
24 this request.

25 So even today when we've filed the motion and they

1 have no substantive response, they have not committed  
2 to producing the documents by December 1st. If that is  
3 the commitment that's being made, that's certainly what  
4 we've been asking for with the motion to compel. So  
5 those are the issues with respect to spoliation and the  
6 claims files.

7       There was lots of discussion about whether or not  
8 -- or the Court specifically asked Mr. Yntema what is  
9 preventing Penn National from doing the review that was  
10 ordered on May 5th. Just to be clear, the Court already  
11 ordered Penn National to digitalize all of their historic  
12 policies. It was based on a recommendation that Ellis  
13 and Winters made, not the receiver. Ellis and Winters  
14 made that recommendation, the Court adopted it and  
15 ordered that to be done May 5th. Confidentiality was  
16 addressed at that time. Confidentiality can easily be  
17 address by the receiver and the receiver's counsel  
18 signing confidentiality agreements.

19       The reason that this -- the reason that Penn  
20 National is not complying with the order is they have  
21 just said it's on appeal, we have no obligation to do  
22 anything with respect to the order. That is the only  
23 reason. It is not a technical reason, it is not a  
24 financial reason, it is not a manpower reason. It is  
25 simply their argument that it's on appeal, so we don't

1 have to do anything. And while we don't think that  
2 issue is correct, it is not the subject of our two  
3 motions to compel currently pending, nor is it an issue  
4 at trial.

5 The final issue I'd like to bring up is that  
6 opposing counsel says we had a deposition last week  
7 and Covil issued thirty-two topics with respect to the  
8 continued deposition of Penn National. They unilaterally  
9 said we will only put up a witness on fourteen -- I'm  
10 sorry, fifteen of your thirty-two topics.

11 Your Honor, because -- frankly because we have been  
12 in front of this Court on all of the motions to compel  
13 that we have, including the two that we're arguing about  
14 today, we simply chose not to burden the Court with one  
15 more motion to compel, but so the record is clear they  
16 simply unilaterally said we will not show up and answer  
17 questions with respect to seventeen of your thirty-two  
18 topics.

19 In response, we said okay, well, we're entitled  
20 to take the deposition of Mr. Wright, who is the claims  
21 handler. If you're not gonna put him up as a 30(b)(6),  
22 we're entitled to take him as an individual witness.  
23 In a letter, Mr. Yntema said we would have a response to  
24 that by November 11th. We still don't have deposition  
25 dates. We would like a deposition date for Mr. Wright

1 before December 1st so that we can adequately prepare for  
2 trial. He is listed as one of their fact witnesses. We  
3 certainly want that.

4 So, again, to recap, Your Honor, the main issues  
5 that we want are a motion to compel with respect to  
6 Request Number 11, that they have to search for  
7 responsive e-mails and communication on their document  
8 destruction, and we will narrow it from 2018 to the  
9 present.

10 Number 2, we want the documents that are in our  
11 fourth request for production to be produced, again,  
12 by December 1st. And then, finally, the claim files,  
13 which they've now agreed to.

14 And if the Court is inclined, we would like an  
15 order that Boyd Wright needs to at least have deposition  
16 dates provided because Mr. Yntema brought up that  
17 deposition issue and I think just so -- to clarify for  
18 everyone, it would be helpful if the Court notes a  
19 need for that.

20 Unless the Court has any other questions.

21 THE COURT: Thank you.

22 Mr. Yntema, I'm gonna come back one more time to  
23 you on each of these and see where we stand, and the  
24 first is the Request Number 11 for the e-mails and other  
25 correspondence that touches on the topic of destruction



1 of the -- the destruction policy, and that is from 2018  
2 to the present.

3 They now ask and they're trying to prevent spoliation  
4 and that's why they ask for it or address the issue of  
5 whether spoliation has taken place. So they're asking  
6 for those specific records and their contention is you  
7 have not responded to that one way or another.

8 What's the scoop?

9 MR. YNTEMA: Again, so Your Honor understands, it  
10 was our understanding that on appeal that the case was  
11 stayed. The --

12 THE COURT: Do you understand the appeal to stop  
13 all discovery?

14 MR. YNTEMA: Well, what I think Your Honor should  
15 know and I think that was -- was spelled out in our  
16 briefing, is that I had communicated with receiver's  
17 counsel, they had noticed two depositions or at least  
18 a 30(b)(6) of Penn National on various sundry topics  
19 early in the -- after the Court's May 5th order and also  
20 asked for Scott Maier's deposition individually, and in  
21 those e-mails that I think are a part of our papers to  
22 the Court for today's hearing, we specifically said we  
23 deem those depositions to be stayed until our appeal is  
24 had.

25 THE COURT: And so your answer on this Request

1 Number 11 is that it's stayed and that's the reason  
2 you're not gonna respond.

3 MR. YNTEMA: And then in August when the North  
4 Carolina Court of Appeals said no, we are dismissing  
5 this appeal and then we filed a motion en banc, but  
6 right after the notice -- right after the Court of  
7 Appeals spoke as to our appeal, we received a letter  
8 from Mr. Nes saying you must comply with our request for  
9 production of documents -- fourth request for production  
10 of documents immediately. We thereafter filed the --  
11 the motion for re-hearing en banc with the Court of  
12 Appeals; so, therefore, that the case is still currently  
13 on appeal.

14 And my memory serves me that I did mention that  
15 the -- the motion for rehearing en banc, at least I had  
16 mentioned to the receiver that we had filed it, and it  
17 was our impression that the deposition -- Rule 30(b)(6)  
18 depositions and the fourth request for production of  
19 documents was on stay during the appeal.

20 THE COURT: So then the answer directly again to my  
21 question on the first request they're making that Request  
22 Number 11 be answered, which is for correspondence,  
23 e-mails and otherwise relating to the destruction list,  
24 this is what's gonna be destroyed and so forth, you are  
25 saying that your ability or your response to that it is

1     stayed by your request for a re-hearing of the dismissal  
2     of your appeal before the Court of Appeals; is that  
3     correct?

4             MR. YNTEMA:   The fact that the case is currently  
5     on appeal, yes.

6             THE COURT:   All right.   The second is for the  
7     fourth request for production.   Their contention is that  
8     that is not stayed by the May 5th order, it's something  
9     separate and apart from that, and what is your response  
10    to that?

11            MR. YNTEMA:   It's appealed.   As far as leading up  
12    to today, that the appeal is in place and it's still  
13    pending on appeal.

14            THE COURT:   Specifically how does the appeal relate  
15    to the fourth request for production and the May 5th  
16    order that I issued?   Tell me what the relationship --  
17    you're appealing my May 5th order, correct?

18            MR. YNTEMA:   Correct.

19            THE COURT:   What in my May 5th order specifically  
20    is directed towards what they want in the fourth request  
21    for production?

22            MR. YNTEMA:   My understanding is that it goes to  
23    the document retention issues.

24            THE COURT:   Sir?

25            MR. YNTEMA:   My understanding is that the fourth

1 request for production goes to document retention issues.

2 THE COURT: Well, I mean, we aren't -- we aren't  
3 talking documentation in general. We're talking about  
4 specific things that were ordered in the May 5th order  
5 and what I am trying to get you to do is relate to  
6 something that was specifically ordered and compelled  
7 in that May 5th order.

8 MR. YNTEMA: It was our position and our  
9 understanding that -- that the stay applied to the  
10 fourth request of production documents that were served  
11 on Penn National prior to our appeal --

12 THE COURT: So anything that was served on Penn  
13 National is stayed whether it was specifically discussed  
14 in the May 5th order or not? Is that your contention?

15 MR. YNTEMA: We received no communications otherwise  
16 until August --

17 THE COURT: Well, I'm communicating with you about  
18 my order. That's what we're trying to deal with right  
19 now.

20 MR. YNTEMA: Certainly, Your Honor.

21 THE COURT: Would you agree with me that the fourth  
22 request for production is not directly discussed in the  
23 May 5th order?

24 MR. YNTEMA: I don't believe it is, Your Honor.

25 THE COURT: Sir?

1 MR. YNTEMA: I don't believe it is, Your Honor.

2 THE COURT: It isn't. It wasn't. And they are  
3 asking that you respond to that fourth request for  
4 production. It's not stayed by the -- my May 5th order.  
5 I mean, by the appeal of my May 5th order. The appeal  
6 relates specifically to that order.

7 MR. YNTEMA: Judge --

8 THE COURT: You're saying despite the fact that the  
9 order doesn't mention it, that your responsibility to  
10 reply and give them what they want in that fourth request  
11 for production is stayed because you're appealing my  
12 May 5th order; is that right?

13 MR. YNTEMA: And in addition to the Rule 30(b)(6)  
14 notices as well.

15 THE COURT: All right, sir.

16 And then with regard to the claim files for fourteen  
17 years, you're in the process and anticipate compliance.  
18 They have agreed to December the 1st here in this  
19 courtroom today. Of course, I'm going to be sure that's  
20 clear as a crystal ball that that is by consent that you  
21 have agreed to provide those files and they're gonna be  
22 provided on December the 1st, correct?

23 MR. YNTEMA: Correct. If not before.

24 THE COURT: Sir?

25 MR. YNTEMA: If not before.

1 THE COURT: All right, sir.

2 And then with respect to the deposition that was  
3 had last week, one of the things that arose from that  
4 was their request for a deposition date for Mr. Wright.

5 Are we gonna have a deposition date for Mr. Wright  
6 or do I have to order that as well?

7 MR. YNTEMA: I don't think Your Honor has to order  
8 that, and that may be something that fell through on --  
9 through my office. I wanted to get dates to Mr. Nes  
10 by November 11th, and no disrespect to Mr. Nes at all,  
11 I am working to get dates for Mr. Wright. I should  
12 have those. I'm actually going to be with Mr. Wright  
13 tomorrow, so I will get dates for Mr. Wright's deposition  
14 to Mr. Nes tomorrow at the latest.

15 THE COURT: All right. Now explain to me when you  
16 had that deposition last week you simply projected that  
17 of the thirty-two topics we are not going to respond  
18 except to fourteen or sixteen of them.

19 How is that justified in terms of the rules of  
20 discovery? How -- how can you just do that?

21 MR. YNTEMA: I was finding a way to address our  
22 concerns as to all of those topics. Our concerns --  
23 okay. So it was fifteen topics that -- that we agreed  
24 to provide two Penn National designees for deposition.

25 THE COURT: Well, they asked you for thirty-two.

1   How do you -- how do you just get to do that with --  
2   it's an agreed upon deposition. They have the ability  
3   to let you know what they're gonna examine on. That's,  
4   interestingly enough, not really specified in the rules  
5   as closely as you may think, but it is what most people  
6   do is they tell you exactly what they're gonna examine  
7   on so they don't have to go back and forth to the judge  
8   about the pertinence of what they examine on because a  
9   deposition as we know, a discovery deposition, is not  
10   governed by issues of relevancy or the like. It's if  
11   it will produce or lead to the production of relevant or  
12   admissible information.

13           So how -- what was your justification for just  
14   deciding that you weren't gonna respond to some of the  
15   thirty-two topics?

16           MR. YNTEMA: As far as those other topics, beyond  
17   the first fifteen, beyond those first fifteen we had  
18   written a lengthy letter to Mr. Nes stating our  
19   objections. I forget the date of the letter, but we  
20   stated our objections many weeks ago as to -- as to  
21   the Rule 30(b)(6) topics that we took issue with and  
22   we had a back and forth with Mr. Nes. You know, we  
23   had communications back and forth as far as written  
24   communications, and at that point we made a decision  
25   that we're not going to just simply file a motion to

1 quash or protective order and bring this before the  
2 Court, but to provide our designees on these particular  
3 topics and maintain and preserve objections to the  
4 remaining.

5 THE COURT: Well, if you have objections and they  
6 decide that they're not going to honor your objections,  
7 then what you have to do is to move the trial judge to  
8 decide whether to quash a portion of the questions that  
9 they propose to ask or not, but that was not done,  
10 correct?

11 MR. YNTEMA: We did not pursue a motion to quash  
12 or a protective order for the reasons I stated. I  
13 didn't -- if I threw a wrench in that, it would have  
14 delayed both of those depositions from proceeding on  
15 any topics, and I don't think that was -- I didn't think  
16 at the time that was necessary.

17 THE COURT: Do you think that's something you'd be  
18 permitted to do under the aegis of this appeal of my  
19 May 5th order just to kind of take it unto yourself  
20 and decide what discovery you're gonna answer and what  
21 you're not gonna answer in connection with a set date  
22 for a trial on December the 14th?

23 MR. YNTEMA: No.

24 THE COURT: All right, sir. Well, I want to be  
25 sure I understand the universe of what I'm gonna be



1 dealing with. I have moved heaven and earth to get a  
2 time to have this nonjury trial on December the 14th.  
3 I don't want to have to go through all of the headache  
4 of getting ready for something like that only to be told  
5 at the last minute that you have decided for whatever  
6 reason that you're not obligated to go forward with that  
7 trial, so I need to understand exactly what we're talking  
8 about here.

9 MR. YNTEMA: Okay. So are we talking about the  
10 jury/nonjury issue? I mean, is that --

11 THE COURT: We're talking about whatever it is  
12 that would prevent you from trying a nonjury matter  
13 involving a declaratory judgment action, which I have  
14 set for trial on December the 14th. What I have said  
15 about that is if there are other matters that do not  
16 involve a declaratory judgment involving the declaration  
17 with respect to the issues that are presented in that  
18 that deal with the policy and its coverage, which is  
19 very clear under our law is not a jury issue, I need  
20 to know if we're gonna at the last minute say hey, none  
21 of this can go forward because, guess what, it's all a  
22 jury issue.

23 I have tried to very carefully carve out matters  
24 for trial on December the 14th given the posture of all  
25 of the parties and the fact that none of this could go

1 forward if we get into the months of January through  
2 June of next year for the reasons that have been  
3 discussed in the hearings we've had previously, so I  
4 carved out the nonjury piece of this to be sure that at  
5 least that could go forward and the baseline issues of  
6 what the law is with respect to coverage and the like  
7 can be dealt with.

8 I don't want to be sandbagged on this by some at  
9 the last hey, none of this can go forward, so tell me  
10 now what's going on here.

11 MR. YNTEMA: And that was it. That was the intent  
12 of my letter to Your Honor that I wrote a few weeks ago  
13 and that you responded to -- kindly responded to, which  
14 I appreciate, and thanks to Ms. Poswal for fielding my  
15 questions and -- and allowing you to answer them.

16 So, yes, we do think there could be issues of fact  
17 for trial. What our understanding was before today the  
18 issues for trial were a spoliation issue and there  
19 was --

20 THE COURT: There isn't a cause of action for  
21 spoliation; you realize that? Spoliation is a matter  
22 dealt with in connection with the enforcement of civil  
23 discovery rules and spoliation is an issue that deals  
24 with that. It's not a cause of action in a complaint  
25 that's been filed in this matter that deals with, quote

1 unquote, spoliation as a separate cause of action.

2       There is an issue of spoliation that so far you-all  
3 have resisted by not producing anything that we can  
4 see that can explore the issue of whether any of the  
5 relevant company records have been destroyed or otherwise  
6 spoliated. So spoliation is a pre-trial issue. The  
7 issue that is before us on trial is the declaratory  
8 judgment matter, not spoliation.

9       MR. YNTEMA: In our papers we do cite that -- I  
10 mean, for the spoliation issue to arise -- you know,  
11 there are two policies that we produced. We've discussed  
12 that.

13       THE COURT: Yes, sir. And that's what we're gonna  
14 be -- on December the 14th we're gonna have a trial  
15 about those policies, what they cover and what they  
16 don't, and a declaration has been requested respecting  
17 those policies. Now this whole thing we've gotten into  
18 with all of these other policies, potential policies,  
19 out there is in aid of this declaration with respect  
20 to these policies and they are permitted to have a  
21 wide ranging discovery as long as it targets in on  
22 something that could potentially be an issue at trial.  
23 The -- what these policies mean is very definitely gonna  
24 be impacted by the things they've asked for in discovery,  
25 but the trial itself is gonna be a trial about those

1 policies.

2 MR. YNTEMA: Those two policies.

3 THE COURT: Yes, sir. That doesn't mean they're  
4 not gonna introduce evidence about what you -- what  
5 the company did with respect to issuance of policies,  
6 handling of policies, handling of claims and all that,  
7 those are gonna be -- and what experts say about what  
8 that language in the policies means, all that's gonna  
9 be explored in this, in an action which speaks to have  
10 the Court declare the law with respect to the meaning of  
11 these policies. That's not a jury issue.

12 MR. YNTEMA: Okay. So there's two components to  
13 this jury trial is my understanding.

14 THE COURT: Two components to what?

15 MR. YNTEMA: In this jury trial. There's one,  
16 spoliation.

17 THE COURT: There's no jury trial involved.

18 MR. YNTEMA: Well, there's two components to this  
19 trial. One is spoliation and the next is a coverage  
20 issue.

21 THE COURT: Well, spoliation is a request that the  
22 Court determine whether or not you have deliberately  
23 destroyed records of the company that relate to the  
24 coverage they seek to determine. This is a question  
25 of trying to discover what coverage Covil Corporation

1 has and one of the sources of that is the policies  
2 themselves, which I will be asked to construe, and the  
3 other is whether records that relate to the conduct of  
4 Pennsylvania National Insurance Company with respect to  
5 coverage of Covil in these asbestos suits, and one of  
6 the aspects that will determine its posture with respect  
7 to coverage of these disputes is that whether or not  
8 they have deliberately destroyed any records of  
9 Pennsylvania National Mutual Insurance Company in respect  
10 to its coverage of Covil.

11 MR. YNTEMA: And if -- if the Court, indeed, does  
12 find that there was destruction -- intentional destruction  
13 or destruction of Covil insurance policy documents, then  
14 there's an order that results to that as to the finding  
15 of spoliation, correct?

16 THE COURT: Yes, there might be. There might be.  
17 There might be some other relief requested. Now I'm not  
18 quite sure yet until the case is tried and I hear what  
19 is presented with respect to that issue, but spoliation,  
20 as I understand that term, is aimed at reviewing a  
21 company's practice with respect to its records and  
22 physical materials and so forth that should be available  
23 and not destroyed and available for a party that sues  
24 it saying that it has some liability to it because of  
25 these materials. In your case, insurance policies and

1 the like.

2 And one of the issues is gonna be in determining  
3 whether you have some liability to Covil is, first of  
4 all, what do the policies say. That's the biggest thing,  
5 which we've been trying to get and it's still like  
6 pulling teeth, and the second is whatever might be said  
7 about your responsibility if you have deliberately  
8 destroyed those policies or other documents and  
9 correspondence related to your coverage of Covil.

10 It's a real simple straightforward suit and  
11 spoliation, if you've engaged in that kind of misconduct  
12 in connection with this litigation, will result in a  
13 request for certain forms of relief with respect to  
14 your responsibility to Covil as an insurer.

15 MR. YNTEMA: And as far as those forms of relief,  
16 therein can lie a factual issue as far when -- the form  
17 of relief that is granted should the evidence show and  
18 Your Honor concludes that there's been a spoliation of  
19 documents, should the receiver, for example, ask the  
20 Court to say well, with respect to the spoliation of  
21 documents, it should be deemed that Penn National had  
22 insurance coverage from 1953 to 1992?

23 THE COURT: Sure. Right. They can ask that.

24 MR. YNTEMA: And then the type of coverage that  
25 existed from 1953 through 1992, then that is a finding

1 of fact to be found by a jury, what was the coverage.

2 THE COURT: Oh, no, no, no, no.

3 MR. YNTEMA: That is --

4 THE COURT: No, sir. That's not a finding of fact  
5 by a jury at all. It is within the rules of civil  
6 procedure that if you have engaged in certain misconduct  
7 in connection with the retention of your records and the  
8 discovery of your records -- I'm not talking about you,  
9 lawyers, I respect you tremendously, you would never  
10 engage in anything like that, but if it is determined  
11 that your company, the company you represent, has engaged  
12 in misconduct in connection with discovery and spoliation  
13 is one of those kinds of misconduct, then the law allows  
14 me and the rules of civil procedure allow me to make  
15 certain determinations about your responsibility based  
16 on your violation of the rules. It has nothing to do  
17 with some tort factual thing that a jury has to decide.  
18 It has nothing to do with that. It has to do with what  
19 may happen if you have violated the rules of discovery.

20 MR. YNTEMA: And usually that's a negative insur --  
21 negative inference to --

22 THE COURT: No, this can be all -- oh, gosh, it  
23 could be all kinds of things. It can be striking your  
24 pleading. A jury doesn't get to decide that. It can  
25 be deeming you're responsible because of your destruction

1 of records that might prove that or otherwise. That's  
2 not for the jury to decide. All of those issues are for  
3 a court to decide in aid of its enforcement of the rules  
4 of civil procedure.

5 And I know you have argued otherwise and tried to  
6 make an appealable issue out of even what's been decided  
7 so far and what is basically a discovery dispute, and I  
8 won't get into that because we'll see what happens with  
9 that, but I can tell you with respect to spoliation,  
10 and I've looked quite extensively at that since you've  
11 kind of suggested that that might be a jury question,  
12 that is not a jury question. That is the enforcement of  
13 the rules of civil procedure.

14 MR. YNTEMA: We disagree. I think there is a  
15 component to the spoliation issue.

16 THE COURT: Well, I would love -- I would love to  
17 see the case you might cite to me from this jurisdiction  
18 or else-wise that has held that. I don't find it.

19 MR. YNTEMA: We cited one case in our -- in our  
20 papers, and I can hand up the citation. And I can do  
21 some more research on the fact that --

22 THE COURT: I suggest you spend your time getting  
23 ready for this trial rather than trying to assert  
24 something that is clearly contrary to any law I know  
25 anything about, which is how the rules of civil procedure



1 are enforced. Penn National would do a lot better to sit  
2 down here and try to get some clarity on what policies  
3 they have and what they cover because that's what this  
4 suit's all about. It has nothing to do with any kind of  
5 jury trial or anything else. It has to do with locating  
6 policies that may provide coverage to a company who's  
7 been sued in many, many asbestos cases because you've  
8 got legacy policies potentially that cover a period of  
9 time when exposure occurred but arise only now when a  
10 diagnosis is made that then puts the claimant on notice  
11 that they have a claim, and that -- that's what the  
12 receiver is desperately attempting to do. This receiver  
13 is a defendant in these pieces of litigation and is  
14 trying to provide an adequate defense and in the process  
15 benefit you by holding down what might be rendered by  
16 way of a settlement or a judgment, but to do that the  
17 receiver must have accurate and full information from  
18 your files about your coverage and we have to narrow  
19 that. There's been so many different obstacles put in  
20 the way of that simple finding. The receiver has got  
21 to be assured that the company hasn't destroyed those  
22 records, and that's what the spoliation would be about.

23 MR. YNTEMA: I understand as far as Your Honor's  
24 order today is that -- that any request for a jury trial  
25 with respect to what's going to be tried beginning

1 December 12th or 14th, that there is no issue of fact  
2 for a jury?

3 THE COURT: I would have to see what you say. I  
4 have not yet seen a request for a jury trial, but if  
5 you're talking about a jury trial with respect to these  
6 declaration matters on December the 14th, I certainly  
7 need to see that because I -- in what is before me I  
8 do not see anything that requires anything other than  
9 action by the Court on what these -- what coverage there  
10 is and whether the company has hidden the ball and  
11 destroyed any records that might further eliminate the  
12 basic issue, which is what kind of coverage is there of  
13 the exposures that Covil is now facing.

14 MR. YNTEMA: And to the -- to the receiver's  
15 complaint for declaratory judgment and breach of  
16 contract, we had served our answer long ago and preserved  
17 our right to a jury trial on factual issues just for the  
18 record.

19 THE COURT: I know nothing about that until it  
20 comes to me. Right now what I've got is the declaration  
21 I'm asked to make.

22 I don't know. Has it gone? Now it's not working  
23 anymore.

24 MR. YNTEMA: I'm sorry, Your Honor.

25 THE COURT: That's all right. It's not your fault.

1 MR. YNTEMA: We were in the throes of it there, so.

2 THE COURT: Well, listen. No, it's not your fault  
3 at all.

4 MR. YNTEMA: I interrupted. I apologize. I think  
5 we were coming to an end here.

6 THE COURT: The sin is on both sides. So, please,  
7 don't apologize. You're doing a good job.

8 MR. YNTEMA: I think we were kind of tapering it  
9 down to an end. We can wait for your law clerk to return  
10 or --

11 THE COURT: Can you hear?

12 THE COURT REPORTER: Yes. I'm fine.

13 THE COURT: I think you can continue.

14 MR. YNTEMA: I think the final thing I was going  
15 to say to Your Honor is that we had preserved our right  
16 to a jury trial and that was the sense of my letter to  
17 the Court as of recent and that we continue as far as  
18 on behalf of Penn National to preserve our right to a  
19 jury trial on the factual issues to be tried to a jury  
20 in this case.

21 THE COURT: And what I simply tell you is this.  
22 You have asserted that you want to preserve your right  
23 to a jury trial. So far I have not been asked to rule  
24 on a specific contention about what you regard as a  
25 jury trial matter such that I could either grant it,

1 deny it or do anything with it. All I have been asked  
2 to do is mediate a very thorny discovery dispute and  
3 kind of the last refuge for Penn National has been to  
4 say somehow or another that its right to a jury trial  
5 impacts on what I don't know, impacts this discovery  
6 dispute, and I can't -- I'm not understanding that yet.

7 This discovery dispute is about finding these  
8 policies and whether or not any records of the companies,  
9 including the policies, have been destroyed. Otherwise  
10 known as spoliated. Those are the two things I've been  
11 asked to deal with, so I haven't been asked to deal with  
12 anything other than those things and I have not yet heard  
13 a specific argument that says that spoliation is a jury  
14 matter. It clearly is not.

15 MR. YNTEMA: And I have stated on behalf of Penn  
16 National our concerns as to why we think the spoliation  
17 issue could be a factual issue, both in our papers and --

18 THE COURT: But I can't deal on could. I've got  
19 to deal on is on the basis of some specific request with  
20 respect to that and so far I haven't received that.

21 MR. YNTEMA: Based on the issues that the Court  
22 understands today, the Court would deny our request for  
23 a jury trial?

24 THE COURT: I've not -- I haven't got a request  
25 for a jury trial yet. You simply wanted to preserve

1 your right to make one and so far I haven't heard what  
2 you are requesting that would involve a jury trial.  
3 The only thing you and I have discussed specifically is  
4 spoliation and there isn't any question in my mind but  
5 what -- that's not a request for a jury trial because  
6 spoliation is not a jury trial matter. But you have  
7 filed no papers with me to say hey, one of the things  
8 you've got to try is spoliation and I want a jury trial  
9 on that. Do you agree with that?

10 MR. YNTEMA: On the record today, I would ask for  
11 a jury trial to the extent there are factual issues as  
12 to the spoliation component for this case.

13 THE COURT: Well, you put that in the some -- the  
14 form of some sort of motion and let them respond to it,  
15 then I'll see where we're going, but I can tell you at  
16 the present time I don't have enough in front of me to  
17 justify any sort of consideration for a jury trial  
18 because all you've done is said what you've spoken here.

19 MR. YNTEMA: And there's a component of coverage as  
20 I had stated before. That --

21 THE COURT: Sir?

22 Mr. YNTEMA: There's a component of coverage that  
23 could be a factual issue as well.

24 THE COURT: No, sir. What you've raised -- what  
25 you've raised in coverage and the factual example

1     you've given is not something we're being asked to  
2     consider here. All we're being asked to consider here  
3     is whether there are policies that provide coverage to  
4     Covil for these cases. That's -- that's where we are  
5     on coverage. We know of two policies that I'm asked to  
6     take a look and construe and with respect to construing  
7     those particular policies, I know of nothing that I'm  
8     asked to do about that that involves something a jury  
9     could decide. That is a pure question of law based on  
10    the meaning of these policies. It's not -- the cases  
11    you cite about policy meaning have to do with factual  
12    situations that are not in any way related to what we're  
13    being asked to do today, which is basically to decide  
14    the basic matter of existence of coverage, and that's  
15    what's being asked here, but a jury doesn't get to  
16    decide that.

17           So, again, that's gonna have to be fleshed out much  
18    more specifically than just saying well, my last refuge  
19    I'm just gonna kind of throw in here, I'm requesting a  
20    jury trial. You're gonna have to get more specific  
21    than that for me to be able to have any inclination  
22    as to how I might rule. Based on what I understand  
23    about what's gonna be tried in front of me, I think  
24    I've explained. It's the policies and it's the issue  
25    of whether you have suppressed any other evidence such

1     that spoliation's been committed and if spoliation has  
2     been committed, then what do we do about it.

3             MR. YNTEMA:   Again, so I am a lawyer --

4             THE COURT:    Yes, sir.

5             MR. YNTEMA:   -- and to protect the record, we are  
6     requesting a jury trial to the extent -- based on factual  
7     issues in this case period.

8             THE COURT:    All right.   Well, I will have to have  
9     much more specificity about that in order to rule on  
10    that request is what I'm saying to you --

11            MR. YNTEMA:   Thank you.

12            THE COURT:    -- and so far I don't have anything  
13    that gives me enough of a clue about what you think the  
14    factual issues are in the case to be able to make that  
15    determination.   Based on what I now know about the case,  
16    the only issues in front of me are issues that emanate  
17    from an action that is a declaratory judgment action.

18            MR. YNTEMA:   I believe I can say thank you for  
19    your time and allowing me to express my concerns and  
20    hearing this on behalf of Penn National.

21            THE COURT:    I understand.   Thank you, sir.

22            All right.   Anything further?

23            MS. PATTERSON:  Your Honor?

24            THE COURT:    Yes, ma'am.

25            MS. PATTERSON:  May I?   This is Nancy Patterson on

1     behalf of the receiver. We just want to confirm that  
2     we are starting on the 14th. Is that --

3             THE COURT: Yes. I mean, I don't know anything  
4     that would give you any reason to --

5             MS. PATTERSON: Well --

6             THE COURT: Well, no. What we're gonna do is start  
7     on the -- didn't I say the 12th?

8             MS. PATTERSON: That's why I was asking, Your Honor.  
9     I know at one point the last time we met we said the 12th  
10    and --

11            THE COURT: Yeah, and that was really subject to  
12    what you-all were working out about what Mr. Smith's  
13    schedule was, but -- so what is the schedule?

14            MS. PATTERSON: We were operating under the  
15    assumption of -- that we would begin on the 12th.

16            THE COURT: The Monday, yes.

17            MS. PATTERSON: Yes.

18            THE COURT: And that's what I'm operating under.

19            MS. PATTERSON: Okay. So -- okay, the 12th.

20            THE COURT: The matter will start on Monday,  
21    December the 12th, here in Richland County.

22            MS. PATTERSON: Thank you, Your Honor.

23            THE COURT: Now the other thing is I would not  
24    dare get out of here without having some understanding  
25    about whether what I've said on the record is enough



1 or whether we need an order with respect to the matters  
2 that have been discussed here.

3 MR. PROTOPAPAS: I believe there's enough on the  
4 record, Your Honor, and we'll be seeing each other  
5 tomorrow and I'll get a copy of the transcript.

6 MR. YNTEMA: At this point, I mean, Penn National  
7 would prefer a formal order, but we can discuss that  
8 with Mr. Protopapas tomorrow.

9 THE COURT: All right. But let me know about  
10 that, you know. I mean, I am aware of the history of  
11 this matter and my bet is that either we're gonna have  
12 to get a big transcript up here and then they'll appeal  
13 it or they'll appeal it anyway, and I want to at least  
14 be sensible about it.

15 What I think ought to be done is just go on and get  
16 up a draft order very quickly. Let me see something  
17 tomorrow, if possible. I'm not inviting a whole bunch of  
18 back and forth on it, but if you-all think this record  
19 is enough, that's fine. I, frankly, think they're gonna  
20 appeal it. I'm not asking Mr. Yntema tell me that, but  
21 I would be very surprised if they don't attempt to do  
22 just what they've done here, which is to appeal this  
23 matter and hope that stays or delays it.

24 I can tell you I surely don't think these orders  
25 today are appealable orders, but let's see what happens.

1 I believe you need to draft an order, send it to me as  
2 quickly as you can, and Mr. Yntema needs to respond as  
3 quickly as he can. I would intend to have an order in  
4 place before Wednesday. I would prefer to have it  
5 tomorrow.

6 My schedule is a very tough one. I have got a  
7 National Law Enforcement conference. I've got to cut  
8 in the middle of it. It's my very last time there, so,  
9 you know, being honored in retirement from this National  
10 Law Enforcement Commission. Then I've got to leave that  
11 Thursday and go to give one of the speeches at Michelle  
12 Childs' swearing in in D.C. and come back to St. Louis  
13 to complete the rest of the CALEA conference, so my  
14 schedule is very, very full.

15 I will try to do everything I can, but I don't  
16 want to have to get back here and then be forced at  
17 some later date to get involved in an appeal and all  
18 that kind of stuff. I want to know what the heck's  
19 going on here.

20 MR. NES: The parties will have it before the end  
21 of the day tomorrow.

22 THE COURT: Okay. Very good. Thank you.

23 MR. PROTOPAPAS: Thank you, Your Honor.

24 MS. PATTERSON: Thank you, Your Honor.

25 THE COURT: Court will be in recess.

1 MR. YNTEMA: Thank you, Your Honor.

2 (Whereupon, the proceedings were concluded at

3 1:01 PM.)

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C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter  
for the Eleventh Judicial Circuit of the State of  
South Carolina, do hereby certify that the foregoing  
is a true, accurate and complete transcript of record  
of all the proceedings had and the evidence introduced  
in the hearing of the captioned case in Circuit Court  
on the 14th day of November, 2022, reported and  
transcribed by me to the best of my ability.

I do further certify that I am neither of kin,  
counsel, nor have an interest to any party hereto.

November 30, 2022

/s/ Stacy S. Johnson  
STACY S. JOHNSON  
CIRCUIT COURT REPORTER



## The Supreme Court of South Carolina

JEAN HOEFER TOAL  
CHIEF JUSTICE, RETIRED  
SENIOR ACTIVE JUDGE

1220 SENATE STREET (ZIP CODE 29201)  
P.O. BOX 12456  
COLUMBIA, S.C. 29211  
TELEPHONE (803) 734-1584  
FAX (803) 734-1047  
E-MAIL: jtoal@sccourts.org

RE: Covil v. Penn National; C.A. No.: 2020-CP-40-02098

December 8, 2022

Dear Counsel:

I have received from Kirby Shealy as counsel for Defendant Penn National its Notice of Appeal to the South Carolina Court of Appeals of my Order regarding Penn National's Motion to Confirm Jury Trial. My Order was electronically signed, emailed to all counsel and transmitted to Richland County's Electronic Filing System on December 6, 2022. It was marked electronically filed by Richland County on December 7, 2022 at 8:43 am.

My Order repeated my long-stated rulings that this matter is a nonjury declaratory judgment matter. It has been set for a nonjury trial in Richland County on December 12, 2022, beginning at 9:30 am. Defendant Penn National's Answer requested "a trial by jury on all issues so triable." The three Causes of Action pled by Plaintiff Covil against Penn National are all actions for Declaratory Judgements. These actions are not triable to a jury; they are requests for Judicial Declaration of complex questions of insurance coverage law. These declarations are also affected by ongoing disputes regarding discovery of Penn National insurance policies and alleged spoliation of insurance policies and records. These are not jury questions. Several times after the conduct by me of hearings in this case, Penn National has attempted to appeal my discovery rulings. Those appeals have been dismissed by the Court of Appeals and the Supreme Court as non-appealable.

Although I firmly believe that this Order is not appealable, this appeal operates as a temporary stay of the nonjury trial in this matter. Accordingly, I will postpone this trial until such time as this Court receives a Remittitur of this matter.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'Jean Hofer Toal', with a long horizontal flourish extending to the right.

Jean Hofer Toal  
Acting Circuit Court Judge



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

RECEIVED

Dec 14 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

Case No. 2020-CP-40-02098

---

Appellate Case No. 2022-001722

---

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

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance, Co.,

Appellant.

---

**PROOF OF SERVICE**

---

I certify that a true copy of the Motion to Dismiss and Expedite and Appendix in this case have been served on the following, this 14th day of December, 2022, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant Rule 262 of the South Carolina Appellate Court Rules and the May 6, 2022 Order of the South Carolina Supreme Court (Appellate Case No. 2020-000447).

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*(Signature page follows)*

Respectfully submitted,

s/Shanon N. Peake

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2530 Devine Street, Suite 1B

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ATTORNEYS FOR RESPONDENT

December 14, 2022.



**From:** [Shanon Peake](#)  
**To:** [dharris@goldbergsegalla.com](mailto:dharris@goldbergsegalla.com); [byntema@goldbergsegalla.com](mailto:byntema@goldbergsegalla.com); [aedavis@goldbergsegalla.com](mailto:aedavis@goldbergsegalla.com); [kirby.shealy@arlaw.com](mailto:kirby.shealy@arlaw.com)  
**Cc:** [Jon Robinson](#); [Nes, W. Brad](#); [Dot Faulkenberry](#); [Lindsay Valek](#)  
**Subject:** Appellate Case No. 2022-001722: Covil v. Penn National  
**Date:** Wednesday, December 14, 2022 2:10:00 PM  
**Attachments:** [Motion to Dismiss, 5.pdf](#)  
[POS - Mtn to Dismiss, 2.pdf](#)  
[Appendix, 2.pdf](#)

---

Good Afternoon,

Please find attached for service a copy of the Motion to Dismiss and Expedite and Appendix that we are filing with the Court of Appeals today.

Thank you,  
Shanon

**SMITH ROBINSON**  
Forward thinking. Results driven.  
Smith Robinson Holler DuBose and Morgan, LLC  
www.SmithRobinsonLaw.com

**Shanon Peake**  
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Dec 16 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

---

Case No. 2020-CP-40-02098

---

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

Respondent,

v.

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

Petitioner.

---

**PETITION FOR WRIT OF CERTIORARI**

---

David G. Harris II  
Brady A. Yntema  
David L. Brown  
GOLDBERG SEGALLA LLP  
701 Green Valley Road, Suite 310  
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### **CERTIFICATION OF COUNSEL**

Counsel for Petitioner Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) requests that the Supreme Court of South Carolina accept for review the May 5, 2022 order of the Circuit Court (Toal, J.) (the “Sanction Order”), an order of the Court of Appeals dated August 9, 2022, dismissing Penn National’s appeal (the “Dismissal Order”), and an order of the same court dated November 15, 2022, denying Penn National’s motion for rehearing.

The Circuit Court issued the Sanction Order as a direct and specific result of what the Circuit Court deemed “Penn National’s intransigence” (Appx., p. 13), awarding unprecedented relief and requiring Penn National to digitize from microfiche its entire historical repository of documents concerning commercial lines insurance, and to provide its adversary unrestricted and unfettered access to the digitized repository. The Circuit Court’s extreme relief further lacked any rational relationship to the apparent goal of the order—*i.e.*, to identify additional commercial general liability coverage for Covil—as not even a scintilla of evidence exists to even merely suggest that any other commercial general liability policies issued by Penn National to Covil exist in the first place. The microfiche records at issue contain approximately 18,000,000 pages of commercial lines policies, stored on approximately 300,000 microfiche cards, concerning more than 200,000 separate insurance policies issued to thousands of individuals and entities, none of which have any connection to Covil or this litigation. The Circuit Court further ordered Penn National to bear all financial costs of this punitive exercise, imposing an extraordinary financial burden and directly affecting Penn National’s property rights.

This matter presents special and important legal issues necessitating review by this Court, involving novel issues of law in the context of mass tort coverage litigation. First, if not immediately reviewed, the Circuit Court’s order will permit trial courts to unilaterally—and

retrospectively—determine how independently operating companies are permitted to maintain their business records and permit such trial courts to punish litigants if the historical manner in which their records are maintained does not meet an individual jurist’s standards, reshaping the discretionary authority of trial courts in South Carolina. Second, this matter involves the rights of thousands of Penn National’s insureds to which it issued insurance policies from approximately 1954-1991, and questions concerning the extent to which their private, confidential information can be ordered for disclosure in a case with which they have no factual connection or legal interest.

Penn National respectfully requests that this Court accept its Petition for Writ of Certiorari to review the Sanction Order, as well as the Dismissal Order of the Court of Appeals and its subsequent order denying Penn National’s request for rehearing. In the alternative, Penn National submits that the Court should remand the matter to the Court of Appeals for a ruling on the merits of Penn National’s appeal. Simply put, the punitive nature of the Sanction Order is readily apparent from its face, and the Court of Appeals’ Dismissal Order was in error. Consistent with long-standing South Carolina law, the Court of Appeals should have looked to the substance of the Sanction Order rather than merely the label given to the motions that produced it.

### **QUESTIONS PRESENTED FOR REVIEW**

1. Did the Circuit Court abuse its discretion when sanctioning Penn National by directing to image and digitize its entire microfiche repository of historic commercial lines policies – approximately 18,000,000 pages at a cost of at least \$500,000 – in the absence of any evidence that additional Covil commercial general liability policies exist in the first place?
2. Did the Circuit Court err in granting Covil unrestricted and unfettered access to Penn National’s entire microfiche repository of historic commercial lines policies, which includes information for thousands of individuals and entities that have no relationship to Covil or this litigation?
3. Did the Court of Appeals err in concluding the Sanction Order was interlocutory in nature and dismissing Penn National’s appeal without ruling on the merits?

## STATEMENT OF THE CASE

Covil Corporation (“Covil”), a South Carolina corporation formed in 1954, was in the business of selling, distributing, and installing insulation products, some of which allegedly contained asbestos. (Appx., pp. 25-26, ¶ 7) Covil effectively ceased operations in 1991, and its charter was thereafter administratively revoked. (*Id.*) Numerous lawsuits have been brought against Covil by individuals or their estates alleging injury from exposure to asbestos caused by Covil’s alleged distribution and/or installation of asbestos-containing products. (*Id.*)

In 2017, this Court appointed Retired Justice Jean Hoefer Toal as Chief Judge for Administrative Purposes over all asbestos litigation filed in the South Carolina state court system. In this role, Ret. Justice Toal has exercised jurisdiction over both liability lawsuits as well as related insurance coverage litigation. On November 2, 2018, on her own motion, Ret. Justice Toal appointed Peter D. Protopappas as Receiver for Covil to manage its affairs under South Carolina law. (Appx., pp. 37-39)

On or about May 29, 2018, and in connection with a pending motion to compel filed against Covil in an underlying asbestos exposure case, plaintiffs’ counsel served a third-party subpoena upon certain insurers, including Penn National, requesting copies of insurance policies issued to Covil from 1969 to 1995 (Appx., p. 357).<sup>1</sup> The subpoena attached as Exhibit C a spreadsheet created by Covil detailing by policy period the name of each insurer issuing a policy to Covil, together with the policy number and type of policy. (Appx., pp. 363-367) Importantly, Covil’s spreadsheet identified a specific commercial general liability insurer and specific commercial general liability policy number for every single consecutive annual policy period running from

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<sup>1</sup> The subpoena was issued in *Finch v. BASF Catalysts, LLC, et al.*, Civil Action No. 1:16-cv-1077, United States District Court for the Middle District of North Carolina.

March 31, 1969 through March 31, 1992, with no gaps in coverage. (Appx., pp. 363-367) Of the twenty-two (22) consecutive years of commercial general liability coverages identified by Covil itself, only two policies were issued by Penn National: Policy No. 515 50 28 53-7, for the policy period of March 31, 1986 to March 31, 1987 (“1986-87 Policy”); and Policy No. 515 50 28 53-8, for the subsequent policy period of March 31, 1987 to March 31, 1988 (“1987-88 Policy”) (collectively, the “Penn National Policies”) (Appx., p. 366) Pursuant to the subpoena, and because Penn National was provided with policy number references, Penn National searched its records, and located and promptly produced copies of the Penn National Policies using the policy numbers provided by Covil. Penn National also conducted an electronic search to see if there were any other commercial general liability policies that were issued either before its 1986-87 Policy or after its 1987-88 Policy, identifying none. (Appx., p. 290) Since June 2018, Covil has possessed complete copies of the Penn National Policies. (Appx., p. 368)

On April 27, 2020, nearly two years after the Penn National Policies were provided in response to the subpoena, Covil commenced the present action against Penn National. In its Complaint, Covil asks the Circuit Court to issue several declarations concerning the interpretation and application of terms in the Penn National Policies, but does not in any manner allege that any other commercial general liability policies were ever issued by Penn National to Covil. (Appx., pp. 26 at ¶ 8; 29 at ¶¶ 21, 23)

**1. *Penn National’s Document Repository.***

Penn National is a regional insurance company operating since 1919, issuing workers compensation, inland marine, property, commercial general liability, automobile liability, and excess insurance policies in eleven (11) states. (Appx., pp. 264-265, ¶ 18)

Decades before it was involved in any asbestos coverage litigation, Penn National created



a document retention system identifying its customer's historical policies by policy number. (Appx., p. 420) Under Penn National's established Document Retention Policy, all non-workers compensation policy documents must be retained for twenty-five (25) years from cancellation or non-renewal date. (Appx., p. 265, ¶ 19)

Initially, Penn National stored its historic insurance policies on microfiche cards. In 1992, Penn National implemented an electronic storage system, ImageRight, which was discontinued in 1995. Between 1995 and 2003, Penn National stored paper copies of its insurance policies, which are presently contained in 5,800 boxes located in an Iron Mountain facility in Pennsylvania. Between 2003 and 2005, Penn National stored its insurance policies in a hybrid of electronic and paper copies. Since 2005, all insurance policies issued by Penn National have been stored electronically. (Appx., pp. 264-265, ¶¶ 17-19)

Because its repository of non-electronic historic policies are stored by policy number, Penn National can readily search for and produce copies of a policy once it is provided with a policy number. If no policy number is provided, Penn National can conduct a search of its electronic underwriting records (for the time periods from 1992 to 1995, and 2003 to present) by entering an entity's name to determine if Penn National has any electronic record of a policy that was issued to that entity. (Appx., p. 256 at ¶ 8) Electronically stored policy information is organized in the system by the first, or primary, named insured shown on declarations pages of a policy. (*Id.*) Therefore, searches of the database will produce matches to the name searched, along with the insured's city and state, policy number, and type of coverage issued. Once the policy number is identified, Penn National can then search its repository of historic insurance policy documents to identify a copy of the policy. (Appx., pp. 256-257, ¶¶ 8-10)

**2. *Penn National's Document Search Efforts***

Throughout this litigation, and in the absence of any information to suggest that Penn National ever issued any additional commercial general liability policies to Covil in the first place, Penn National has engaged in extensive discovery relating to its document repository and has performed repeated searches for Covil-related policy documents. Leading up to the Sanction Order, Covil served Penn National with forty-eight (48) Interrogatories, seventy-six (76) Requests for Production of Documents, and twenty-six (26) Requests for Admissions. (Appx., pp. 51-91, 178-82, 190-210, and 247-253) Penn National responded to each and every one of Covil's demands, producing (at the time the Sanction Order was entered) in excess of 3,500 pages of Covil-related policy documents, extensive information detailing Penn National's document retention protocols and practices, and the maintenance of its physical documents by Iron Mountain. (Appx., 92-137, 138-177, 183-189, and 211-246)

**3. *Covil's Continued Fishing Expedition***

While Covil has never produced a policy number or any secondary evidence to suggest a single additional commercial general liability policy (other than the 1986-87 and 1987-88 Policies) was ever issued by Penn National to Covil, Covil nevertheless demanded that Penn National manually search its entire repository of historic policies to determine if any additional policies were issued to Covil, and if there are any policies under which Covil *could be* covered as an additional insured. (Appx., pp. 607-610) Penn National objected to performing a manual search as the same would be unduly burdensome without a policy number to guide the search. (Appx. pp. 611-624) Specifically, Penn National advised that it stores its historic policies on microfiche contained in 148 boxes—which include approximately 300,000 microfiche cards containing commercial lines policies for more than 200,000 insureds, each of which

comprises up to 60 images, resulting in approximately 18,000,000 pages of material—and in paper documents contained in 5,800 boxes stored at an Iron Mountain facility. (Appx., p. 268, ¶¶ 8-9; 653) Penn National established that a manual search of its entire historical document repository was unreasonable, would be all-consuming, and would take an inordinate amount of time.

Covil further demanded that Penn National search its historical document repository to find policies that Penn National may or may not have issued for 240 different “contractors” and 650 separate “facilities” under which Covil could, *theoretically*, qualify as an additional insured. (Appx., pp. 65-71) Covil made this request without any evidence to even suggest that Penn National issued policies to any of these 240 “contractors” or in relation to the 650 “facilities”, or that Covil itself had any factual or legal relationship with any of the “contractors” or “facilities”.

Notwithstanding the absence of a factual, legal, or rational relationship between Covil and these **890 separate and distinct entities**, Penn National searched its electronic system for information regarding the entities. After dedicating in excess of sixty-four (64) hours to this project, Penn National’s search generated a result of four (4) policies: an inland marine policy which did not provide general liability insurance coverage; a policy issued to an entity after Covil was no longer in existence and that had been purged pursuant to Penn National’s Document Retention Policy; and two additional general liability policies issued to other entities which did not provide coverage to Covil as an insured or additional insured. (Appx., pp. 255-259, ¶¶ 7-20) Internal Penn National communications concerning these policy-related documents were produced with Penn National’s responses to Covil’s discovery request, and Penn National confirmed that it would produce the policy documents subject to a protective order as the materials related to non-Covil entities with no relationship to this litigation. (Appx., p. 172)

Still not satisfied, Covil moved to compel Penn National to perform a manual search of

its historic files. After a hearing, the Circuit Court directed Covil's asbestos defense counsel, Ellis & Winters, LLP ("Ellis & Winters"), to conduct a review of Penn National's historic policy related documents to confirm whether there was a way to search Penn National's archived records for policy documents for a specific insured without a policy number. (Appx., p. 652) Three Ellis & Winters employees spent two days and thirty-two (32) hours sampling approximately 100 boxes of paper documents (Appx., pp. 690-706), and later, two Ellis & Winters employees spent another two days and twenty-one and seven tenth's (21.7) hours reviewing microfiche cards. (*Id.*) At the conclusion of its search, Ellis & Winters submitted a report to the Circuit Court, confirming that Penn National actually stored its historic policy documents by policy numbers, as Penn National had repeatedly represented. (Appx., pp. 652-656) With access to Penn National's entire historical document repository, Ellis & Winters was unable to find **any** additional commercial general liability policies that were issued to Covil, or under which Covil was an additional insured.<sup>2</sup> (*Id.*)

All told, by the time that the Sanction Order was entered, Penn National had responded to forty-eight (48) interrogatories, seventy-six (76) requests for production of documents, and twenty-six (26) requests for admission, all served in an effort to identify additional commercial general liability policies where no facts have been established to support even a reasonable inference that any such policies exist in the first place. In addition to the foregoing written responses, Covil took the deposition of Brent Reifsnnyder, Penn National Director of Administrative Services (Appx., pp.

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<sup>2</sup> The Ellis & Winters search was facilitated by a list of policy numbers provided by Covil, which were curiously not given to Penn National. Consequently, Ellis & Winters located three additional Covil-related policies because it possessed the corresponding policy numbers. (Appx., p. 654) The parties do not dispute that these three policies—an inland marine, a boiler machine, and a commercial automobile policy—are not applicable to and do not respond to Covil's asbestos liability. (*Id.*)

408-507), and conducted multiple Rule 30(b)(6) depositions of Penn National, for which Boyd Wright, Penn National's Senior Home Office Claims Examiner, served as Penn National's corporate designee.<sup>3</sup> (Appx., pp. 273-407, 508-606)

**4.     *The May 5 Sanction Order and Subsequent Appeal***

On April 11, 2022, the parties appeared before the Circuit Court to address Ellis & Winters' report and other pending motions. (Appx., pp. 657-675) As a result of the hearing, the Circuit Court issued the May 5 Sanction Order, which directed Penn National to: (1) image and digitize its entire microfiche repository of historic commercial lines insurance policies, and (2) provide Covil and its attorneys with unfettered access to this repository. In issuing its ruling, the Circuit Court explained that:

The Receiver and his outside counsel therefore must have full and unfettered access to every page of every insurance policy and policy-related document that Ellis & Winters and its selected vendor make available in the database. This will necessarily include reviewing records of other insureds' policies.

The Receiver will be entitled to review the policy records uploaded to the database to identify potentially responsive documents. The Receiver will be entitled to examine each and every policy to understand whether it is a policy that in any way, shape, or form covers Covil's asbestos responsibilities and liabilities. Because of Penn National's **intransigence**, the Court will not limit the Receiver's access to any of the information in the microfiche database. ...

(Appx., pp. 12-13) (emphasis added)

The "intransigence" referred to by the Court is Penn National's decision, made decades before its involvement in any asbestos coverage litigation, to store its historic insurance policies by policy number, Penn National's refusal to voluntarily comply with Covil's unreasonable demand that Penn National manually search in excess of 18,000,000 pages of historic insurance

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<sup>3</sup> In accordance with the Sanction Order, Covil took a third Rule 30(b)(6) deposition of Penn National's Associate General Counsel, Scott Maier.

policies for any policies issued to Covil, and Penn National's failure to voluntarily incur the enormous expense associated with imaging and digitizing its historic repository of insurance policy documents:

... This Court fully expects than an insurance company served with discovery requests from a receiver in this state, seeking the identification and production of insurance policies issued to the company as a named insured or which otherwise includes the company as a supplemental or additional insured, will search its entire repository of insurance policies and policy-related information for documents identifying the defunct company at issue. The Receiver need only provide the insurance company with the name of the defunct company for which it is seeking to marshal insurance assets. For the avoidance of doubt, this Court flatly rejects any assertion that an insurance company may refuse to search its repositories of insurance policies for responsive documents unless and until it is provided with a specific policy number.

\* \* \*

Despite this Court's prior orders, as of November 5, 2021, Penn National had not performed a complete manual search of its historic insurance policies contained on microfiche cards. Nor had it processed the microfiche cards so that the information could be searched electronically. ...

\* \* \*

... The Court finds that Penn National's conduct with respect to its searches for historic Covil insurance policies (as well as non-Covil Receivership policies) amounts to a total and complete refusal to comply with its discovery obligations. It could well have done exactly what Ellis & Winters has proposed here. Penn National could have selected a vendor, processed the information on its microfiche cards, and conducted a review. It did not. Instead, Penn National took the defiant stance that it could not search for historic policies on its microfiche cards without being provided with a policy number. ...

(Appx., pp. 7-8, 9, 11)

During the hearing, the Circuit Court made the following additional observations:

And your company has failed so completely at doing anything on its own to search these policies and determine the coverage, that I am going to allow an independent group to digitize these records. ...

They're going to be able to look at each and every policy to understand whether that is a policy that in any way, shape, or form covers Covil's responsibilities in this litigation because those are assets of Covil's.

\* \* \*

I don't want to preclude them from searching. If they want to look at each policy individually and look at it whether it says Covil on top of it or, you know,

Disney World. ...

But the intransigence of your client [Penn National] has reached a point where I'm now on my fourth motion to compel, so I'm not inclined to do anything to limit Protopapas as receiver's access to each and every policy that's in the microfiche database.

\* \* \*

**They [Penn National] are living with the consequence of the approach they decided to take with respect to maintaining records** that a covered insured ought to be able to obtain.

(Appx., pp. 668-669) (emphasis added)

During its investigation, Ellis & Winters determined it could take up to 45 minutes to print the images from a single microfiche card, meaning that it could take roughly **5,625 work weeks** to simply print the images from the 18,000,000 pages of commercial lines policies stored microfiche. (Appx., pp. 653, 656) Furthermore, Ellis & Winters found that the cost to image and digitize Penn National's microfiche repository of commercial lines policies would be between \$240,000 to \$960,000. (Appx., p. 656)

Based upon its dissatisfaction with Penn National's document retention methodology, Penn National's inability to locate further policy documents (in the absence of any information to suggest they existed to begin with), and Penn National not voluntarily incurring several hundred thousand dollars in vendor costs, the Circuit Court held that Penn National was "intransigent" and ordered Penn National to image and digitize its entire repository of history commercial lines policies and to provide counsel for the Receiver unfettered access to Penn National's document database. On May 26, 2022, the Circuit Court denied Penn National's Motion for Reconsideration of its May 5, 2022 Order.<sup>4</sup> (Appx., pp. 20-23)

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<sup>4</sup> The Circuit Court's order also directs Penn National to produce yet further documents, including internal "policy prefix code keys", information provided by Penn National to Ellis & Winters during its review of Penn National's microfiche, and all underwriting documents for all Receivership entities. The punitive nature of the Sanction Order is further underscored by

Penn National thereafter sought review of the Sanction Order and the May 26, 2022 Order by the Court of Appeals and the Supreme Court in its original jurisdiction. (Appx., 707-731) Penn National's petition for a writ of certiorari for this Court's review in its original jurisdiction was denied on August 23, 2022. (Appx., p. 868) Covil moved to dismiss Penn National's appeal to the Court of Appeals contending that the Sanction Order was interlocutory in nature (Appx., 732-748), ignoring the clear facts that the Sanction Order was punitive and imposed discovery sanctions upon Penn National in the form of unilateral responsibility for funding the Receiver's ongoing fishing expedition, in the absence of any facts to suggest the effort would result in relevant information. By order dated August 9, 2022, the Court of Appeals dismissed Penn National's appeal without determining the merits thereof (Appx., p. 866), and on November 15, 2022, denied Penn National's request for rehearing. (Appx., p. 904) Penn National now moves this Court to accept its Petition for Certiorari after the Court of Appeals' decision.

### **ARGUMENT IN SUPPORT OF PETITION**

#### **I. THE SANCTION ORDER INVOLVES NOVEL QUESTIONS OF LAW THAT NECESSITATE THIS COURT'S REVIEW.**

Rule 242(b)(1) provides the Supreme Court with the discretion to grant review of a lower court order "[w]here there are novel questions of law." It is respectfully submitted that the Circuit Court's May 5 Sanction Order raises such novel questions of law such that certiorari should be granted. It is likewise well settled that review of trial court orders is not constrained by how the order is styled, and that "an appellate court should look to the effect of an interlocutory

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the Circuit Court's directive that a copy of the order be sent to the South Carolina Department of Insurance. (Appx., pp. 13-14, 16-18) All of these orders were objected to and addressed by Penn National in its Motion for Reconsideration, and they are likewise included as issues that should be subject to review by this Court.



order to determine its appealability.” *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 147 (2015) (quoting *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011)).

The Circuit Court’s mandate for Penn National to image and digitize its entire historic microfiche repository of commercial lines insurance policies is an unprecedented sanction based upon nothing more than the Circuit Court’s displeasure with Penn National’s document retention protocols, developed decades prior to its involvement with long-tail asbestos exposure claims. (Appx., p. 420). There is no factual or legal justification for the imposition of such an onerous and expensive burden upon Penn National, particularly where no industry rule, insurance regulation, or established legal standard required Penn National to maintain its records in any particular fashion, and no information exists to suggest that this textbook fishing expedition will render any useful results.

Where the undisputed facts prove that Covil is not missing one single day of commercial general liability coverage from March 31, 1969 through March 31, 1992, and where Penn National’s extensive search efforts to date have yielded no information to even suggest that any other responsive policies ever existed, the punitive nature of the Sanction Order is clear. Underscoring the critical nature of this Court’s intervention, the Receiver is presently using the Sanction Order as authority to seek the imposition of similarly onerous, burdensome, and expensive changes to the operating protocols of other insurers in other asbestos-related matters.<sup>5</sup>

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<sup>5</sup> For example, in *Childers v. Davis Mechanical et al.*, Case No. 2021-CP-40-03484 (Richland County, SC), the Receiver has filed similar Motions to Compel seeking to require insurers to perform unreasonable searches of their historical policy documents. On May 16, 2022, the Receiver filed a Notice of Filing in the *Childers* action, placing the circuit court’s May 5, 2022 Order in the file and claiming that “this Order contains helpful guidance regarding this Court’s expectations regarding the administration of receiverships.” In that one case alone, the Receiver

The Circuit Court’s May 5 Sanction Order is an explicit effort to impose its own notions of appropriate record keeping upon entities doing business in South Carolina. The propriety of the Circuit Court’s Sanction Order—unprecedented in scope and imposing a remedy in the absence of harm—is a special and important issue of law worthy of this Court’s scrutiny. Simply put, trial courts should not be permitted to unilaterally mandate that companies conducting business in this State expend hundreds of thousands of dollars to revamp lawfully maintained information databases simply because a putative insured is unable to itself produce any evidence that an insurance policy is missing or unidentifiable.

In its Sanction Order, the Circuit Court justified the imposition of this extreme financial burden “as a result of Penn National’s intransigence.” (Appx., p. 10). This “intransigence,” however, amounts to nothing more than the facts that (1) Penn National has always stored its historic insurance policies by policy number, (2) it did not manually search millions of pages of paper documents or microfiche films for general liability coverage that may have been issued to Covil (where no reason exists to believe such policies were issued), and (3) it previously did not voluntarily image and digitize its repository of historic policies. The Circuit Court should not be permitted to punish Penn National for the manner in which it maintained its information databases simply because the Circuit Court dislikes the methodology.<sup>6</sup>

**A. There Is No Legal Requirement That Penn National Store Its Insurance Policies In Any Particular Manner**

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on behalf of various entities has filed seven (7) motions to compel since late 2021 seeking to impose unreasonable obligations on various insurers to search for policy documents.

<sup>6</sup> In the absence of any supporting evidence or testimony, during the hearing giving rise to the Sanction Order, Justice Toal erroneously speculated that Penn National’s intent in storing policy documents by policy number was to “make it much harder to find the policies.” (Appx. p. 666) However, the employee with Ellis & Winters charged with reviewing Penn National’s archived policy documents stated that the terminal digit system used by Penn National to store its policies is a common system that businesses use. (*Id.*)

At its core, the Circuit Court is punishing Penn National for the methodology employed to retain historic insurance policies. However, there is no federal or state statute or regulation, nor promulgated industry standard that requires how an insurance company should file and maintain historical policies of insurance. In the absence of a statute, regulation, or industry standard dictating a particular approach to this issue, there is no factual or legal basis for the Circuit Court to mandate that Penn National change its established practices, and particularly no basis to require Penn National to exclusively fund the endeavor. The Supreme Court of the United States addressed a similar question in *Oppenheimer Fund v. Sanders*, concluding:

In the context of a lawsuit in which the defendants deny all liability, the imposition on them of a threshold expense of \$16,000 to enable the plaintiffs to identify their own class hardly can be viewed as an insubstantial burden.

The panel dissent and the en banc majority suggested several additional reasons to justify the District Court's order, none of which we find persuasive. Both opinions suggest that the fact that part of these records are kept on computer tapes justifies imposing a greater burden on petitioners than might be imposed on a party whose records are kept in another form...

We do not think these reasons justify the order in this case. There is no indication or contention that these petitioners have acted in bad faith to conceal information from respondents. ... **Finally, the suggestion that petitioners should have used “different systems” to keep their records borders on the frivolous.**

437 U.S. 340, 362-63 (1978) (emphasis added).

In South Carolina, the legislature enacted The Insurance Law, S.C. Code Ann. §38-1-10, *et seq.* which governs many aspects of the insurance industry. For example, this law addresses the capital and surplus required of insurance companies (S.C. Code Ann. §§38-9-10, *et seq.*), the investment and investment practices of property and casualty companies (S.C. Code. Ann. §§ 38-12-410, *et seq.*), the length of time—five years—that losses and claims are to be kept by

insurers (S.C. Code Ann. §38-13-130),<sup>7</sup> and what constitutes improper claims practices (S.C. Code Ann. §38-59-20). However, The Insurance Law does not mandate, or even address, the methods by which insurance companies are legally permitted to store their historic insurance policies.

Penn National chose to store its historic insurance policies by policy number because policy numbers are unique and distinctive identifiers that are specifically associated with a particular insured, and insurance companies do not duplicate their policy numbers. This method avoids confusion associated with the significant potential for an insured's name, address, or location to be similar or even identical to that of another insured. As Mr. Wright testified in his deposition:

Insurance companies, and Penn National is no exception, issue policy numbers for a very specific reason. Name similarity, locations, and other things vary. Policy number is like a Social Security number. It's the identifier for that particular insured.

(Appx., p. 297) Because Penn National stores its historic policies by policy number, it can only reasonably search its microfiche or paper documents by policy number.

The Circuit Court has taken no measure to hide its displeasure with Penn National's methodology. As the Circuit Court announced in the Sanction Order:

For avoidance of doubt, this Court flatly rejects any assertion that an insurance company may refuse to search its repositories of insurance policies for responsive documents unless and until it is provided with a specific policy number.

(Appx., p. 8) The Circuit Court's statement further underscores the special importance of the legal issues raised by this Petition, as absent a statute, rule, or regulation establishing a standard for compliance, the Circuit Court should not be permitted to substitute its personal judgment as to how business records should be maintained for that of the independently operated company maintaining those records. It certainly should not be permitted to financially punish a company for failing to

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<sup>7</sup> Notably, pursuant to Penn National's document retention policy, the company retains documents for 25 years—*five times longer* than required under South Carolina law.

meet the Circuit Court's uncoded, personal preferences for searchability of records. However, that is precisely what the Circuit Court has done here.

**B. There Is No Evidence That Penn National Issued Any Additional Commercial General Liability Policies To Covil.**

While the Circuit Court's Sanction Order is on its face an abuse of discretion, the impropriety of the financial burden placed upon Penn National is rendered all the more irrational given that there is **no evidence**, in any form, that Penn National issued any general liability policy to Covil other than the 1986-87 Policy and the 1987-88 Policy. This is not a "lost policy" case, and no such claims were or ever have been asserted by Covil. The reason for this is simple: Covil has, at all times, possessed actual knowledge of its precise commercial general liability insurers, together with the specific policy numbers referable to each commercial general liability policy providing continuous, uninterrupted coverage from March 31, 1969 through March 31, 1992. (Appx., pp. 363-367)

Aside from knowing that it was not missing the identity of a single commercial general liability policy over the span of some twenty-two (22) consecutive years, Covil has not produced a shred of primary or secondary evidence to even remotely suggest that Penn National may have issued another general liability insurance policy to it at any point. See, *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968) (burden of proof on person seeking insurance benefits to prove coverage). Covil has not produced any business records, board meeting minutes, financial ledgers, premium invoices, receipts or cashed checks for paid premiums, quotes, binders, declaration pages, or certificates of insurance records from its brokers or agents showing the issuance of policies, excess or umbrella policies referencing scheduled underlying insurance, risk management records, or offered any testimony to establish even the possibility that Penn National issued additional commercial general liability policies to Covil. In stark contrast to

Penn National's documented good-faith efforts, there are no facts to even suggest that Covil used **any** reasonable means to search for secondary evidence within its own records or those of its agents.

Finally, the Sanction Order references the issue of whether Covil was an "additional insured" on commercial general liability policies issued by Penn National to other, non-party entities. For several reasons, this is a red herring. First, even if Penn National's historical document repository was imaged and digitized at enormous expense, the only means by which Covil could identify whether it qualified as an additional insured would be to first locate and identify trade contracts requiring other, non-party entities to name Covil as an additional insured, and to secondly engage in legal analysis to determine whether the terms and conditions of any such additional insured endorsements were triggered by the allegations asserted in each individual and specific underlying lawsuit. As the Court is well-aware, generally a business can only qualify as an additional insured on another entity's insurance policy if the policy contains an endorsement that broadens the definition of "Who Is An Insured" to include those with which the named insured has a contractual relationship requiring additional insurance. Further, those endorsements generally limit the applicability of such insurance to situations in which the additional insured's liability arises out of the named insured's work. See, *Dan Ryan Builders W.Va., LLC v. Main St. Am. Assur. Co.*, 452 F.Supp.3d 327, 332-33 (D.S.C. 2020). Because the determination of additional insured status will almost always require reference to other contracts and will necessarily involve applied legal analysis, it is **extremely improbable** that a manual search of Penn National's historic insurance policies would ever directly identify policies under which Covil qualified as an additional insured.

Secondly, and perhaps more critically, additional insured coverage is usually provided to

companies for whom the named insured is performing or has performed operations, such as general contractors qualifying for additional insured coverage under policies issued to a subcontractor. See, e.g., Capital City Real Estate, LLC v. Certain Underwriters at Lloyd's London, 788 F.3d 375, 377-78 (4th Cir. 2015); *Lendlease (US) Constr. Inc. v. National Fire Ins. Co.*, 2021 U.S. Dist. LEXIS 180377 (D.S.C. 2021). Here, it is undisputed that Covil's alleged asbestos liability arises from Covil's work, or products that Covil brought to facilities in which it performed operations. See, e.g., Finch v. Covil Corp., 388 F.Supp.3d 593, 600-01 (M.D.N.C. 2019). Because Covil was the vendor or subcontractor retained by others, it is **extremely unlikely** that Covil, as the subcontractor, would be entitled to additional insured coverage under policies issued to businesses that retained Covil to provide products or performed operations.

In sum, the documented facts in this case establish that there was no factual or legal justification for the extraordinary remedy of requiring Penn National to image and digitalize its entire historical microfiche document repository of commercial lines insurance policies at a cost to Penn National of hundreds of thousands of dollars. Because the directives of the Sanction Order were clearly punitive in nature, and because the Circuit Court lacked any reasonable justification for imposing such financial burdens upon Penn National, this Petition brings up special and important questions of law that warrant review by this Court.

**C. The Sanction Order Involves Exceptional Circumstances Warranting A Writ Of Certiorari.**

In writing for the Supreme Court of South Carolina in *Laffite v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009), Ret. Justice Toal noted that a writ of certiorari may be issued when exceptional circumstances exist and granted the petition for certiorari because the discovery order at issue in *Laffite* "involve[d] a novel question of law in a matter that has been the subject of numerous claims in state and federal courts. A decision by this Court at this time best serves

the interests of judicial economy by eliminating the numerous inevitable appeals raising this novel issue of significant public interest.” *Id.* at 471-472. As established, the issues raised by this Petition are novel questions of law that if left unaddressed, will soon be the subject of numerous claims in the state and federal courts of South Carolina. See, fn. 5, supra at p. 15. Because the Court’s intervention in this matter will determine whether insurers operating in South Carolina can be required to alter their established and otherwise legal document retention practices, and bear all associated costs therewith, based upon a Circuit Court’s individual preference for how document repositories should operate, addressing the issue now will inure to the benefit of the State’s judicial economy.

In *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009), this Court established the framework by which a court should review discovery orders for abusiveness and undue burden by expense. Specifically, this Court held that if the party from whom discovery is being sought shows a particularized harm which will be caused by allowing the discovery, the person seeking the discovery has the burden of proving that the discovery sought is both relevant and necessary. *Id.* at 578, 683 S.E.2d at 498. In this case, Penn National has clearly shown that requiring it to perform a manual review of its historic policies of insurance would cause an undue burden by expense. (Appx. pp. 268-269, ¶¶ 11-12; 468-70) Ellis & Winters advised that Penn National’s archived microfiche records contain more than 300,000 microfiche cards corresponding to commercial line policies, with each card containing up to 60 images, meaning that there are roughly 18,000,000 pages of commercial lines policies stored on microfiche cards. (Appx. pp. 653, 656) Ellis & Winters further found that it could take up to 45 minutes to print the images on a single microfiche card, meaning that it could take roughly **5,625 work weeks** to just print the images stored on microfiche for commercial line policies if a manual review of the archived policy



documents were to be undertaken. (*Id.*)

The cost to image and digitize Penn National's microfiche repository is extreme and disproportionate to both the alleged need for disclosure and the likelihood that this burdensome endeavor will yield useful information. Ellis & Winters has estimated that the cost to image and digitize Penn National's microfiche repository of historic commercial lines policies would be between \$240,000 to \$960,000; a cost ordered by the Circuit Court to be paid solely by Penn National.<sup>8</sup> (Appx., pp. 15, 656)

This Court's decision in *Hollman v. Woolfson* is instructive. In *Hollman*, this Court accepted a petition for writ of certiorari to review a discovery order that allowed one party to contact and interview the patients of the opposing party. In issuing the writ and vacating the circuit court's order, this Court held that the burden of showing that the requested discovery is necessary is on the party propounding the discovery request, and that the plaintiff failed to carry its evidentiary burden:

In determining whether information is necessary, the party seeking information must demonstrate with specificity exactly how the lack of information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat. The trial court must determine whether there are reasonable alternatives available to discover the information.

*Id.* at 580, 683 S.E.2d at 500 (quoting *Laffitte*, 381 S.C. at 476, 674 S.E.2d at 163). By failing to make specific findings as to how the lack of information would impair the plaintiff's case,

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<sup>8</sup> The Circuit Court went so far as to prohibit Penn National from even participating in the choice of vendor to image and digitize Penn National's microfiche repository. Therefore, Penn National has no control over the vendor selected, the cost incurred to image and digitize its repository (a cost which the circuit court has imposed on Penn National), the electronic system used, or whether such system is compatible with and can be supported by Penn National's existing computer system. (Appx. p. 15: "The Court also DIRECTS Ellis & Winters to use its professional judgment to solicit bids from two or more vendors with experience imaging microfiche, to select an appropriate vendor (the "selected vendor") to award the bid, and to supervise the selected vendor's imaging of the microfiche cards into a format that is in a searchable database.")

this Court held that the circuit court abused its discretion in ordering the discovery:

The circuit court committed an abuse of discretion in determining the interviews with the nonparty patients were necessary. Petitioners' treatment of other patients is not necessary to establish any element of respondents' causes of action. In fact, no information obtained in the interviews could establish whether petitioners breached the standard of care when treating respondents or committed fraud on respondents. As to the UTPA cause of action, the circuit court did not make a specific finding as to exactly how the lack of information obtained from the interviews would impair respondents' presentation of the merits of that cause of action or that there were no reasonable alternatives available to discover the information.

*Id.* at 581, 683 S.E.2d at 500.

Here, Covil failed to meet its burden of showing that a manual search of Penn National's historic insurance policies is relevant and necessary to prosecute its declaratory judgment claims in this case. In its order, the Circuit Court did not make specific findings as to how the failure to perform a manual search would impair Covil's case, nor could it. Covil's declaratory judgment action seeks a declaration on the interpretation of only two policies: *to wit*, the two Penn National Policies that Covil has possessed since, at the absolute latest, June 2019. Accordingly, whether or not Penn National ever issued other commercial general liability policies to Covil could not affect the prosecution of its declaratory judgment action in relation to the two Penn National Policies. Because the Circuit Court did not appropriately support its order with the requisite factual findings, it abused its discretion in ordering that Penn National image and digitize its entire historical microfiche document repository.

The directives of the Sanction Order are nothing more than a court-sanctioned fishing expedition, long been disapproved by this Court. This Court's holding in *Boykin v. Hermitage Cotton Mills*, 180 S.C. 364, 185 S.E. 863 (1936), where the circuit court ordered discovery of eleven years of corporate minutes, applies equally here:

If discovery were allowed to this extent, the petitioner would obtain a great mass

of confidential matter, wholly irrelevant to his cause of action. Private records of the Hermitage Cotton Mills, unrelated to the warehouse company, would be opened before him, with resultant damage to the appellant, and with no advantage to the petitioner in the preparation of his pleadings. We can see no reasonable justification for adopting a course which would inevitably result in a fishing expedition.

*Id.* at 379-80, 185 S.E. at 869.

This Court's decision in *Royster v. Unity Life Insurance Company*, 193 S.C. 468, 8 S.E.2d 875 (1940) is also controlling, and reflects a conflict between the Circuit Court's order and existing South Carolina law. In *Royster*, the plaintiffs sought discovery of the insurance company's books and records, which the circuit court ordered. This Court noted initially that the discovery order "has all the earmarks of a fishing expedition, an enterprise which this Court has time and again stated it does not favor." *Id.* at 472, 8 S.E.2d at 877. This Court then vacated the discovery order, holding:

The order appealed from requires the insurance company to produce before the Clerk of Court of Williamsburg County its books and records; - there to be examined and inspected by these five plaintiffs.

This Court is of the opinion that the order should be vacated. To subject the insurance company to such a far-reaching order on the record therein would be vexatious in the extreme. Matters of a confidential and private nature would almost certainly be disclosed to plaintiffs.

*Id.* at 473, 8 S.E.2d at 877.

Here, the Circuit Court has ordered substantially the same relief as was ordered in *Royster*; that Penn National be required to divulge the entirety of its historical document repository and allow its adversaries to have unrestricted access to these records. Like in *Royster*, matters of a private and confidential nature, specifically policy and policy-related documents, including underwriting materials issued to individuals, companies, or organizations who are not in any way involved in this case, would then be disclosed without any consent or knowledge by

these policyholders. The Sanction Order, like that in *Royster*, is “vexatious in the extreme.” Penn National respectfully requests that this Court accept its Petition for Writ of Certiorari to review and vacate the Circuit Court’s Sanction Order.

**D. The Sanction Order Affects Penn National’s Substantial Rights As Well As Those Of Its Insureds.**

The Sanction Order requires Penn National to incur hundreds of thousands of dollars in vendor costs, and to provide counsel for the Receiver with complete and unfettered access to Penn National’s entire historical repository of documents relating to commercial lines policies. (Appx., 12-15) This mandate directly affects Penn National’s property rights insofar as compliance therewith will divest Penn National of substantial sums of money, which it will never recover. Before Penn National is compelled to expend inordinate sums of money to revamp its entire document preservation system, it should be entitled to have the propriety of Sanction Order scrutinized by an appellate court.

Further, as the Circuit Court itself noted during the April 11, 2022 hearing that gave rise to the Sanction Order, the Receiver is “going to be able to look at each and every policy to understand whether that is a policy that in any way, shape, or form covers Covil’s responsibilities in this litigation...” (Appx., p. 668) The non-Covil related information contained in Penn National’s historical records relates to thousands of individuals and entities that have no factual or legal connection to this matter. More critically, the Receiver has no legal right to possess or acquire the information contained within non-Covil related historical records because that information has no possibility of being both relevant and necessary to the prosecution of Covil’s declaratory judgment action. *Hollman*, 384 S.C. at 578, 683 S.E.2d at 498. Once the Receiver is permitted to access this private information that has no bearing on this matter, the damage has been done and status quo cannot be restored. Accordingly, this Court’s intervention is therefore necessary.

## II. THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL

The Court of Appeals improperly dismissed Penn National's appeal as based upon "discovery orders" that "are not immediately appealable." (Appx., 866). The Court of Appeals failed to recognize the punitive directives of the Sanction Order, which impose significant sanctions and monetary penalties upon Penn National. As the Court of Appeals has often stated, the "narrow construction of section 14-3-330(2)(c) requires [it] to focus on the **effect** of the order, **not the label** given to the motion or to the order granting it." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) (emphasis added). The effect of the Sanction Order is clearly to punish Penn National for its "intransigence".

Accordingly, if certiorari is not granted, the matter should at a minimum be remanded to the Court of Appeals for a determination of Penn National's appeal on the merits. Simply put, it would be entirely inequitable for the extreme directives and disproportionate relief awarded by the Circuit Court to be shielded from appellate review by mere nomenclature.

## CONCLUSION

For the foregoing reasons, Penn National respectfully requests this Court to issue a writ of certiorari to review the Circuit Court's unprecedented May 5, 2022 Sanction Order. The Circuit Court imposed punitive relief simply because it disliked Penn National's methodology of maintaining historic insurance records, a conclusion that lacks any factual or legal justification. This matter therefore raises special and important novel issues of law, and presents the type of exceptional circumstances warranting review by the Supreme Court of South Carolina. Alternatively, Penn National requests that the Court remand this matter to the Court of Appeals for adjudication on the merits of Penn National's appeal.

RECEIVED

Dec 16 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

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Case No. 2020-CP-40-02098

---

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,

Petitioner.

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**PROOF OF SERVICE**

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I certify that a true copy of the Petition of Writ of Certiorari, Appendix Volume I, Appendix Volume II, Appendix Volume III and Appendix Volume IV have been served on the following, this 15<sup>th</sup> day of December, 2022, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to subsection (d)(1) of the South Carolina Supreme Court's November 15, 2022 Order. Pursuant to subsection (d)(3) of the South Carolina Supreme Court's Order, service on the attorneys admitted pro hac vice is accomplished by service on the associated South Carolina lawyer.

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*Attorneys for Petitioner Pennsylvania National  
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# The Supreme Court of South Carolina

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

v.

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

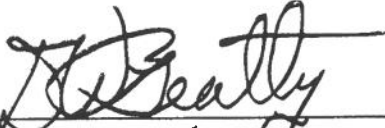
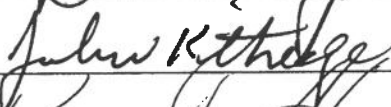
Appellate Case No. 2022-001764

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## ORDER

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Pennsylvania National Mutual Casualty Insurance Company (Penn National) has filed a petition for a writ of certiorari in the Court's original jurisdiction seeking review of the circuit court's discovery order and the court of appeals' dismissal of Penn National's notice of appeal of the same circuit court order. The petition is denied.

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

Columbia, South Carolina  
January 12, 2023



cc:

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The Honorable Jenny Abbott Kitchings

## The South Carolina Court of Appeals

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

v.

Pennsylvania National Mutual Casualty Insurance, Co.,  
Appellant.

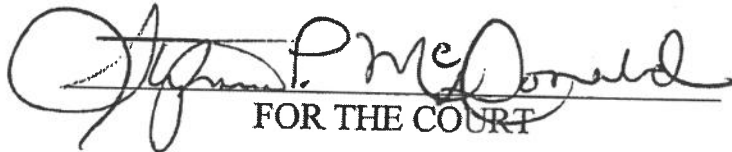
Appellate Case No. 2022-001722

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### ORDER

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After careful consideration, Respondent's motion to dismiss is granted.

  
FOR THE COURT

Columbia, South Carolina

**FILED**  
**Feb 08 2023**

cc:

Kirby Darr Shealy, III, Esquire  
Alexander Erwin Davis, Esquire  
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Frederick Newman Hanna, Jr., Esquire  
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William Bradley Nes, Esquire

**RECEIVED**  
**Feb 23 2023**  
**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

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

Case No. 2020-CP-40-02098

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Appellate Case No. 2022-001722

---

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

Respondent,

v.

Pennsylvania National Mutual  
Casualty Insurance Company,

Appellant.

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

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**APPELLANT'S PETITION FOR REHEARING AND  
SUGGESTION FOR REHEARING *EN BANC***

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## **INTRODUCTION**

The appeal in this case centers on whether the Circuit Court appropriately denied a party a right to a jury trial where (a) the party demanded a jury trial in its pleading, and (b) factual issues were set to be tried. Specifically, the Circuit Court entered an order denying Defendant/Appellant Pennsylvania National Mutual Casualty Insurance Company's ("Penn National") right to a jury trial of factual issues in this case. As required by decades of precedent from this Court and from the Supreme Court of South Carolina, Penn National immediately appealed this order so as to avoid any waiver of its right to a jury trial. Plaintiff/Respondent Covil Corporation, by and through its appointed Receiver, Peter D. Protopapas ("Covil"), moved to dismiss this appeal as being somehow "frivolous." In a one sentence order, a single judge from this Court granted Covil's motion to dismiss without any explanation.

Penn National petitions this Court for a rehearing of the motion to dismiss appeal on three grounds: (1) the dismissal of Penn National's appeal of the Circuit Court's order affecting the mode of trial directly conflicts with clear precedent from the Supreme Court requiring such appeals; (2) the dismissal was improper because there is no statutory authority or precedent from the appellate courts of this State that allows dismissal of an appeal in a civil case based on its alleged "frivolousness;" and (3) the dismissal creates new law that allows one party to nullify the other party's right to a jury trial by demanding a non-jury trial in declaratory judgment actions where factual issues are in dispute. The dismissal of Penn National's appeal was premature and wholly unfounded. Penn National respectfully requests that this Court accept its petition, vacate the order dismissing this appeal, and allow this appeal to proceed to a consideration of its merits.



**I. The Dismissal Of The Present Appeal Conflicts With The Supreme Court's Declaration That Orders Affecting The Mode Of Trial Must Be Immediately Appealed.**

The Supreme Court of South Carolina has clearly and unequivocally established that orders affecting the mode of trial must be appealed immediately and a party's failure to do so waives that party's right to a jury trial.

This Court has held that orders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14-3-330(2) (1977) and must, therefore, be appealed immediately. Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue. Here, Client's failure to immediately appeal the order designating this case as a non-jury matter bars his current appeal of that issue.

*Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) (internal citations omitted).

*See also, Fulmer v. Cain*, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008); *Foggie v.*

*CSX Transp., Inc.*, 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993); *Creed v. Stokes*, 285 S.C. 542, 542-43, 331 S.E.2d 351, 352 (1985); *Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 389-90 (Ct. App. 2004). *See also*, Jean Hoefer Toal, et al., *Appellate Practice in South Carolina*, 156 (3<sup>rd</sup> ed. 2016) ("The purpose of permitting immediate appeal in these cases is to preserve a party's constitutional right to a trial by jury which would otherwise be lost.").

In the present case, Penn National demanded a jury trial in its Answer consistent with the requirements of the South Carolina Rules of Civil Procedure. (App., p. 30). During a status conference, Covil requested a non-jury trial on its claims against Penn National. (App., p. 39). In response to this request for a non-jury trial, Penn National sent a letter to the Circuit Court requesting that its right to a jury trial be honored and preserved (App., p. 57), which the Circuit Court agreed to do (App. p. 58). When the Circuit Court subsequently refused to set this case for a jury trial, Penn National filed a Motion to Confirm Jury Trial Demand on December 2, 2022.

(App., pp. 44-59). The Circuit Court then entered an order on December 7, 2022, denying Penn National's right to a jury trial on the issues in this case and instead ordered that these issues be "scheduled for a non-jury trial." (App., p. 4-5).

In accordance with this State's jurisprudence, Penn National was required to, and did, immediately appeal the order entered by the Circuit Court that denied Penn National's right to a jury trial of the factual issues in this case. The Court of Appeals' dismissal of this mandatory appeal, without any explanation, is directly in conflict with the Supreme Court's mandate and decades of precedent. Therefore, Penn National respectfully requests that this Court accept its petition for rehearing and its suggestion for a rehearing *en banc*, vacate the dismissal, and allow this appeal to proceed for a consideration on the merits.

**II. The Dismissal Of The Present Appeal Is Improper Because It Is Based Solely On Respondent's Unfounded Argument That The Appeal Is Frivolous.**

The appellate courts of South Carolina have consistently enforced a party's right to appeal, oftentimes liberally construing statutory provisions to ensure that the right to appeal is preserved. *See, Haughton v. Order of United Commercial Travelers*, 108 S.C. 73, 74-75, 93 S.E. 393, 393-94 (1917) ("Our decisions show that this Court is very reluctant to dismiss appeals on technical grounds. Therefore, we have construed the statutes and rules of Court liberally in favor of the right to appeal."); *O'Rourke v. Atlantic Paint Co.*, 91 S.C. 399, 403, 74 S.E. 930, 931 (1912) ("The Court should give a liberal construction to the Constitution and statutes, in favor of the right to appeal.").

Dismissal of an appeal in a civil case has generally only been allowed in two instances: (1) when the appellate court does not have jurisdiction over the appeal because of failure to adhere to appellate rules regarding timely filing of an appeal or because the appeal is interlocutory; and (2) when the appeal is moot. *See, e.g., S.C. Coastal Conservation League v.*

*Dominion Energy S.C., Inc.*, 432 S.C. 217, 223-24, 851 S.E.2d 699, 702 (2020) (affirming dismissal of appeal on mootness grounds); *Wachesaw Plantation E. Cmty. Servs. Ass’n v. Alexander*, 414 S.C. 355, 360, 778 S.E.2d 898, 901 (2015) (finding that issuance of deed did not moot the appeal of a foreclosure sale and remanding case to Court of Appeals for decision on merits); *Fields v. Regional Med. Ctr.*, 363 S.C. 19, 26-29, 609 S.E.2d 506, 509-11 (2005) (considering and ultimately denying respondent’s motion to dismiss appeal on jurisdictional grounds); *Byrd v. Irmo High School*, 321 S.C. 426, 430-32, 468 S.E.2d 861, 863-64 (1996) (denying motion to dismiss appeal on mootness grounds based on exception to doctrine); *Wallace v. Interamerican Trust Co.*, 264 S.C. 563, 569, 144 S.E.2d 813, 816 (1965) (granting motion to dismiss appeal of discovery order as being interlocutory); *Deal v. Deal*, 85 S.C. 262, 264, 67 S.E. 241, 242 (1910) (granting motion to dismiss appeal because order was interlocutory); *Atkins v. Wilson*, 417 S.C. 3, 18, 788 S.E.2d 228, 236 (Ct. App. 2016) (denying motion to dismiss appeal on jurisdictional grounds because appellant timely filed notice of appeal); *Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC*, 413 S.C. 642, 646, 776 S.E.2d 575, 577 (Ct. App. 2015) (granting motion to dismiss appeal because court did not have jurisdiction based on untimely filing of notice of appeal).

Neither basis for the dismissal of an appeal exists in the present case. This Court clearly has jurisdiction to consider the issues on appeal. Penn National timely filed its Notice of Appeal. In fact, Penn National filed its Notice of Appeal on the same day that the Circuit Court entered its order denying Penn National’s right to a jury trial in this case. (App. pp. 4-5: Order entered 12/7/2022; Notice of Appeal filed 12/7/2022). Additionally, the order on appeal is one affecting the mode of trial, and is therefore immediately appealable. *Lester*, 327 S.C. at 266, 491 S.E.2d at 241. The issue on appeal, whether Penn National has a right to a jury trial of the factual issues in

this case, has also not been rendered moot by any subsequent actions. Indeed, Covil did not cite either of these reasons in its motion to dismiss Penn National’s appeal. Therefore, no basis exists for this Court’s summary dismissal.

Instead, Covil based its motion to dismiss solely on its characterization of Penn National’s appeal as “frivolous.”<sup>1</sup> Even if this characterization were accurate—which it is not—this is clearly not a basis upon which to dismiss an appeal in a civil case, particularly one affecting a constitutional right. *See, e.g., Fishburne v. Minott*, 72 S.C. 567, 569, 52 S.E. 648, 648 (1905) (refusing to “entertain such a motion” which sought to strike case “on the ground that the same is frivolous and vexatious”). Indeed, Covil did not cite to any case law in its motion to dismiss where this Court has granted a motion to dismiss an appeal on the grounds of frivolousness.<sup>2</sup>

The Order from this Court granting Covil’s motion to dismiss is contrary to and directly conflicts with the Supreme Court’s decision in *Sumter Hardwood Co. v. Fitchette*, 133 S.C. 149, 130 S.E. 881 (1925). In *Sumter*, upon motion by the plaintiff, the circuit court referred the action to a master for determination of all issues. The defendant immediately appealed this decision and the plaintiff moved to dismiss the appeal. The Supreme Court began its analysis by reference to the “well-settled” canon that “if an order deprives a party of the mode of trial which the law allows him, it is appealable.” *Id.* at 151, 130 S.E. at 882. The Supreme Court then found

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<sup>1</sup> In its motion to dismiss, Covil also consistently (without citation or other support) refers to the present appeal as Penn National’s “third” appeal in this case. This is wholly false and improperly attempts to both dissuade this Court from considering the merits of this appeal and inappropriately bias this Court against Penn National. In truth, Penn National has filed **ONE** other appeal in this case. The previous appeal was from a discovery order dated May 5, 2022, in which the Circuit Court ordered Penn National to digitize its entire historical repository of insurance policies (approximately 18 million pages of documents) and allow Covil, its Receiver and its attorneys full and unfettered access to same. (See, Appellate Case No. 2022-000761).

<sup>2</sup> Indeed, the case law from South Carolina appellate courts is clear: assertions of frivolousness can only be considered in dismissals of appeals in criminal cases and only after counsel has filed an *Anders* brief and the court has made a full examination of the record on its own. *See, e.g., State v. McKennedy*, 348 S.C. 270, 279, 559 S.E.2d 850, 855 (2002).

that the circuit court improperly referred the case to a master as defendant was allowed to have the factual issues in the case decided by a jury. Therefore, the Supreme Court concluded:

The judgment of this Court is that the motion of the plaintiff to dismiss the appeal of the defendant be refused, that the order of reference be reversed, and that the case be remanded to the Circuit Court without prejudice to a motion by the plaintiff to amend its complaint if so advised.

*Id.* at 155-56, 130 S.E. at 884.

Similarly, in the present case, this appeal is appropriately in front of this Court. It is clear and without question that this Court has jurisdiction over the appeal of the Circuit Court's denial of Penn National's jury trial demand. It is similarly beyond doubt that the issue on appeal has not been rendered moot due to any subsequent actions. Therefore, this Court should have "refused" Covil's motion to dismiss this appeal, as directed by the *Sumter Hardwood* Court, and instead should have allowed the merits of this appeal to be fully considered by this Court.

**III. This Court's Dismissal Of Penn National's Appeal Creates New Law That Would Allow One Party To Nullify Another Party's Right To A Jury Trial By Merely Demanding A Non-Jury Trial In A Declaratory Judgment Action.**

The present appeal is from an order directing that this case be scheduled for a non-jury trial. Covil argued in its motion to dismiss appeal that the present case is one that merely seeks an interpretation of insurance policy language, which is not subject to a jury trial. However, Covil's actions in this case belie its assertions to this Court. First, at no time did Covil affirmatively state in its motion to dismiss that there were, in fact, no factual issues in this case.<sup>3</sup> In truth, Covil could not so state. If Covil believed that there were no material issues of

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<sup>3</sup> Instead, Covil argued that Penn National did not identify any factual issues that justified a jury trial. (Mot., p. 8; Reply, p. 2). That is clearly untrue. Both parties filed Proposed Findings of Fact and Conclusions of Law in this case, consonant with the trial court's instructions. Covil conveniently did not provide these documents to this Court with its Motion to Dismiss Appeal. These documents, however, were submitted by Penn National for this Court's consideration when ruling on Covil's Motion to Dismiss Appeal. (Supp. App., pp. 1-94).

genuine fact, Covil should and would have moved for summary judgment. *See*, Rule 56(c), SCRCPP. However, Covil did not do so. Instead, Covil specifically requested a trial. (App., p. 1).

Second, in requesting a non-jury trial, Covil proposed a pretrial order (which was subsequently adopted by the Circuit Court without alteration) that required the parties to submit proposed findings of fact and conclusions of law, lists of trial exhibits, lists of witnesses to include expert witnesses, and motions in limine. (App., pp. 1-3). If indeed Covil believed that there were no factual issues to be tried, Covil would not have requested a trial on the issues in the case with witnesses and exhibits.

Finally, and significantly, Covil actually filed with the Circuit Court “Receiver for Covil Corporation’s Proposed Findings of Fact and Conclusions of Law.” This document contained thirty-one (31) pages of what Covil requested as “PROPOSED FINDINGS OF FACT.” (Supp. App., pp. 1-35). These proposed factual findings include: whether Penn National issued policies of insurance in addition to the two policies which were stipulated to by Penn National; whether and when injuries occurred in fourteen asbestos liability cases asserted against Covil; if such a duty existed, when Penn National’s duty to preserve its historic policies was triggered; whether Penn National “destroyed” policies potentially applicable to Covil’s asbestos liability with culpable intent; the propriety of Penn National’s business decision to store its historic policies by policy number; the underwriting intent in issuing policies to Covil; and the adequacy of Penn National’s search for additional policies. (*Id.*). To suggest in its Motion to Dismiss Appeal that Penn National is not entitled to a jury trial because this case is merely about the interpretation of insurance policy language is disingenuous and clearly contradicts filings actually made by Covil in this case.<sup>4</sup>

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<sup>4</sup> Covil is also judicially estopped from taking this position in its Motion to Dismiss Appeal because it is inconsistent with the position Covil has taken in requesting a non-jury trial and filing its proposed findings of fact.

In its Reply in support of its Motion to Dismiss, Covil attempts to obfuscate the fact that it has previously taken the position that there are factual issues in this case by demanding that this Court strike Penn National's filing of the parties' Proposed Findings of Fact and Conclusions of Law. There is no basis for this argument. Prior to the issuance of the order in this case, the Circuit Court was well aware that: (1) Covil did not move for summary judgment, but rather requested a non-jury trial in this case; (2) the parties were required to file their respective list of exhibits and witnesses for trial; and (3) the parties were required to file their respective proposed findings of fact and conclusions of law. The scheduling order providing deadlines for these submissions was entered by the Circuit Court on September 16, 2022. (App., p. 1-4). Indeed, the parties filed their respective proposed findings of fact and conclusions of law on December 5, 2022, prior to the issuance of the Circuit Court's order denying Penn National's right to a jury trial in this case on December 6, 2022. (Supp. App., pp. 1-94). Clearly, prior to issuing its order, the Circuit Court understood the nature of the matter before it, including that the parties contended that there were factual issues to be determined that required the presentation of witness testimony and exhibits at a trial.

It is axiomatic that a party is entitled to a jury trial even as to claims asserted under the Uniform Declaratory Judgment Act. S.C. Code Ann. § 15-53-90 ("When a proceeding under this chapter 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 in the court in which the proceeding is pending. All existing rights to jury trials are hereby preserved."). *See also, Leggette v. Smith*, 226 S.C. 403, 416, 85 S.E.2d 576, 582 (1955) ("And, irrespective of

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*See, Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) ("Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. The purpose of the doctrine is to ensure the integrity of the judicial process ...") (internal citations omitted).

this provision of the statute, it is clear that the right of jury trial in what is essentially an action at law may not be denied a litigant merely because his adversary has asked that the controversy be determined under the declaratory procedure.”) (internal quotations and citations omitted).

This Court and the Supreme Court have held that parties are entitled to jury trials in declaratory judgment actions concerning insurance coverage. *See, State Farm Mut. Auto. Ins. Co. v. Pennsylvania Nat’l Mut. Cas. Ins. Co.*, 263 S.C. 391, 394-95, 210 S.E.2d 613, 615 (1974) (upholding on appeal jury responses to special interrogatories in declaratory judgment action regarding coverage under a motor vehicle policy); *Government Employees Ins. Co. v. Mackey*, 260 S.C. 306, 316, 195 S.E.2d 830, 834 (1973) (“The issues of fact in this [declaratory judgment action brought by insurer] were properly submitted to the jury with a full and correct charge by the trial judge.”); *St. Paul Fire & Marine Ins. Co. v. American Ins. Co.*, 251 S.C. 56, 61, 159 S.E.2d 921, 923 (1968) (holding that issues of fact in insurance coverage action were properly determined by a jury); *Anders v. S.C. Farm Bureau Mut. Ins. Co.*, 307 S.C. 371, 375, 415 S.E.2d 406, 409 (Ct. App. 1992) (reversing the grant of summary judgment for plaintiff because there existed genuine issues of material fact to be determined by a jury); *State Farm Mut. Auto. Ins. Co. v. Turner*, 303 S.C. 99, 100, 399 S.E.2d 22, 22 (Ct. App. 1990) (affirming submission of issues to a jury in declaratory judgment action brought by insurer).

By summarily dismissing Penn National’s appeal of the Circuit Court’s order referring this case for a non-jury trial and not addressing the merits of this appeal, this Court effectively created new law<sup>5</sup> which sanctions the ability of one party to nullify another party’s right to a jury trial in declaratory judgment actions even where factual issues are in dispute. In effect,

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<sup>5</sup> Only the Supreme Court can create new law. The Court of Appeals is bound to follow existing precedent. S.C. Const. art. V, § 9; *State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) (“[I]t is incumbent upon the court of appeals to apply [the Supreme Court’s] precedent.”).



this Court has declared that there is no right to a jury trial in declaratory judgment actions. That is not the law in South Carolina. Therefore, the dismissal of Penn National's appeal of the order requiring the factual issues in this case to be determined by a judge instead of a jury should be vacated. Instead, the merits of the appeal should be considered by this Court after full briefing of the issues and a careful analysis of the full record in this case.

**IV. The Issue Of Whether Penn National Engaged In Spoliation Of Evidence Is Also A Fact Issue That Must Be Decided By A Jury.**

In the order on appeal, the Circuit Court ruled that both the factual issues regarding coverage and the factual issues regarding whether or not Penn National engaged in spoliation of evidence in this case were to be tried without a jury. Covil has taken the position in its motion to dismiss appeal that the factual issues of whether Penn National actually engaged in spoliation of evidence should be decided by the judge and not a jury. Covil did not cite to any case law from South Carolina for this proposition, instead relying on case law from one other jurisdiction, Texas. (Mot., p. 9).

The South Carolina appellate courts have not determined what a party must prove in order to show that another party spoliated evidence, necessitating a sanction. Federal courts, however, have held that a party seeking sanctions regarding spoliation must establish three elements:

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

*Hawkins v. College of Charleston*, 2013 U.S. Dist. LEXIS 162714, \*5 (4<sup>th</sup> Cir. 2013).

This standard has actually been adopted by the circuit courts in this State. *See, Hopper v. Air & Liquid Sys. Corp.*, 2019 S.C. C.P. LEXIS 5488, Case No. 2019-CP-00076 (S.C. Com. Pl. Order dated Oct. 31, 2019).

Under the standard adopted by South Carolina federal courts, in order for a party to meet its burden of showing spoliation of evidence, that party has to show whether the evidence actually existed, the opposing party's duty to preserve such evidence, and the opposing party's culpable state of mind. These are all factual findings that are within the purview of a jury. *See, Harleysville Group Ins. v. Heritage Cmty, Inc.*, 420 S.C. 321, 346, 803 S.E.2d 288, 302 (2017) ("These questions of the insured's intent are factual in nature."); *Shenandoah Life Ins. Co. v. Smallwood*, 402 S.C. 29, 32, 737 S.E.2d 857, 858 (Ct. App. 2013) (reversing directed verdict and finding that insured's intent was a factual issue that should have been decided by a jury). *See also, Evans v. Quintiles Transnational Corp.*, 2015 U.S. Dist. LEXIS 171750, \*13-14 (D.S.C. 2015) (holding that on spoliation issues a jury was to resolve "any credibility questions and make a determination, first, as to whether the alleged computer file even existed on Plaintiff's computer, whether and when Quintiles should have reasonably known that the evidence may be relevant to anticipated litigations, and, if so, whether Quintiles willfully lost or destroyed the file.").

Although South Carolina appellate courts have not expressly adopted the federal standard regarding spoliation of evidence, this Court and the Supreme Court have allowed evidence regarding spoliation to go to the jury. *See, Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990) (holding that a jury should be allowed to hear evidence regarding spoliation and make a determination regarding what effect

such evidence had in the case); *Welsh v. Gibbons*, 211 S.C. 516, 46 S.E.2d 147 (1948) (holding that it was proper for a jury to hear evidence regarding the unavailability of evidence and whether to draw an adverse inference); *Gathers v. South Carolina Elec. & Gas Co.*, 427 S.E.2d 687, 689 (Ct. App. 1993) (affirming the trial court's decision to submit evidence of the loss or destruction of evidence to the jury).

The right to a jury trial on issues regarding whether a party engaged in spoliation of evidence must not be ignored by this Court. Instead, this Court should take this opportunity to provide clear guidance regarding how issues of spoliation of evidence are to be determined in this jurisdiction.

### **CONCLUSION**

A single judge summarily and without explanation dismissed Penn National's appeal of an order by the Circuit Court that denied Penn National's constitutional right to a jury trial of the factual issues in this case. This dismissal, however, is contrary to the well-established precedent mandating that a party immediately appeal the denial of a jury trial or risk waiving its constitutional right to a jury trial. Furthermore, this dismissal was not based on this Court's lack of jurisdiction over the appeal or because the factual predicate of the appeal was somehow moot. Instead, the dismissal appeared to be based on the Respondent's bald assertion that the appeal was somehow "frivolous." Frivolousness has never before been used by this Court as a justification to dismiss an appeal outright without consideration of its merits. Allowing to stand a swift dismissal of Penn National's appeal of the order denying its right to a jury trial is contrary to South Carolina law and will create a new rule that parties in declaratory judgment actions are no longer entitled to a jury trial of factual issues. Clearly, this Court did not intend for such a cavalier quashing of a party's fundamental and substantial right to a jury trial. Accordingly,

Penn National respectfully petitions this Court to rehear the motion to dismiss, with a suggestion of an *en banc* rehearing, to vacate the dismissal of its appeal and allow the parties to proceed with the full briefing of the issues on appeal.

February 23, 2023.

/s/ Kirby D. Shealy III

Kirby D. Shealy III

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*Attorneys for Appellant Pennsylvania National  
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**RECEIVED**  
**Feb 23 2023**  
**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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

Case No. 2020-CP-40-02098

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Appellate Case No. 2022-001722

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

Respondent,

v.

Pennsylvania National Mutual  
Casualty Insurance Company,

Appellant.

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**PROOF OF SERVICE**

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I certify that a true copy of Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc* has been served on the following, this 23<sup>rd</sup> day of February, 2023, by emailing a copy to each attorney listed below using their primary email address listed using their AIS E-mail address pursuant to Rule 262 of the South Carolina Appellate Court Rules:

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February 23, 2023

Via Electronic Mail: [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)

The Honorable Jenny Abbott Kitchings  
Clerk of Court, Court of Appeals

**Kirby D. Shealy III**  
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RE: **Petition for Rehearing**  
Covil Corporation, by and through its duly appointed Receiver Peter D.  
Protopapas, *Respondent* v. Pennsylvania National Mutual Casualty Insurance Co.,  
*Appellant*.  
Case No. 2020-CP-40-002098  
Appellate Case No. 2022-001722

Dear Mrs. Kitchings:

I have enclosed for filing the Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc*. I am simultaneously serving a copy of the Petition on the attorneys for Respondent as set forth in the Proof of Service.

Thank you for your assistance with this matter.

Sincerely,

*s/Kirby D. Shealy III*  
Kirby D. Shealy III

**RECEIVED**

**Feb 23 2023**

**SC Court of Appeals**

KDS/jas

Enclosure

*cc: via Electronic mail w/encl.*  
Jescelyn Tillman Spitz, Esq.  
G. Murrell Smith, Jr., Esq.  
Jonathan M. Robinson, Esq.  
Shanon N. Peake, Esq.  
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*cc: via electronic mail only w/encl.*  
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## The South Carolina Court of Appeals

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

v.

Pennsylvania National Mutual Casualty Insurance, Co.,  
Appellant.

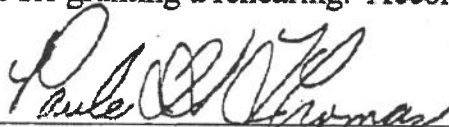
Appellate Case No. 2022-001722

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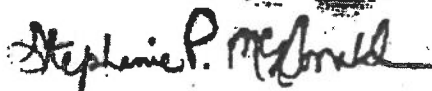
### ORDER

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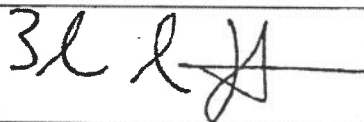
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

  
Paul D. Protopapas

J.

  
Stephanie P. McDonald

J.

  
3rd Justice

J.

Columbia, South Carolina

cc:

Kirby Darr Shealy, III, Esquire  
Alexander Erwin Davis, Esquire  
David Grant Harris, II, Esquire

**FILED**  
**Jun 06 2023**



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## The South Carolina Court of Appeals

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June 30, 2023

The Honorable Jeanette W. McBride  
PO Box 2766  
Columbia SC 29202-2766

### REMITTITUR

Re: Covil Corporation v. Pennsylvania National Mutual Casualty Insurance  
Company  
Lower Court Case No. 2020CP4002098  
Appellate Case No. 2022-000761

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Jenny A. Kitchings".

CLERK

Enclosure

cc: David Grant Harris, II, Esquire  
Brady Allen Yntema, Esq, Esquire

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Shanon N. Peake, Esquire

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

Case No. 2020-CP-40-02098  
Appellate Case No. 2022-001722

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

v.

Pennsylvania National Mutual Casualty Insurance Co. is the .....Appellant.

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**PETITION FOR WRIT OF CERTIORARI**

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*Attorneys for Appellant Pennsylvania National  
Mutual Causal Insurance Company*

### **CERTIFICATION OF COUNSEL**

Counsel for Petitioner Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) certifies the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 6, 2023.

### **QUESTIONS PRESENTED FOR REVIEW**

1. Whether the Court of Appeals erred when it dismissed outright Penn National’s appeal of the circuit court’s order denying Penn National’s jury trial demand when this Court has consistently held that such orders are immediately appealable.
2. Whether the Court of Appeals erred when it dismissed Penn National’s appeal of the circuit court’s order denying Penn National’s jury trial demand when such dismissal was not because of lack of jurisdiction or mootness, the only two bases that this Court has recognized as justifying an outright dismissal of an appeal.
3. Whether the Court of Appeals erred when it dismissed Penn National’s appeal of the circuit court’s order denying Penn National’s jury trial demand when such dismissal creates new law that allows one party to nullify another party’s right to a jury trial in declaratory judgment actions.
4. Whether the Court of Appeals erred when it dismissed Penn National’s appeal of the circuit court’s order denying Penn National’s jury trial demand, thus determining that the issue of whether Penn National engaged in spoliation was not a factual issue to be determined by a jury.

### **STATEMENT OF THE CASE**

On April 27, 2020, Covil Corporation, by and through its duly appointed Receiver Peter D. Protopapas (“Covil”), filed a Complaint for Declaratory Judgment and Breach of Contract against Penn National, Sam J. Crain & Co., Inc. and South Carolina Property and Casualty Insurance Guaranty Association. In the Complaint, Covil alleged that “claims and lawsuits,” unidentified by name or case number, have been filed against Covil alleging liability resulting from asbestos exposure caused by Covil’s products. (Appx. pp. A031-A032, ¶7). Covil alleged that Penn National issued policies of general liability insurance to Covil for two policy periods:

(1) March 31, 1986 to March 31, 1987; and (2) March 31, 1987 to March 31, 1988, and that Penn National has breached these policies. (*Id.*, ¶¶ 8-9). Specifically, the Complaint states:

9. Penn National has failed fully to acknowledge or accept its insuring obligations under the Penn National Policies, has reserved its rights, failed to acknowledge or respond to [the] tender of covered Covil Asbestos Suits, and otherwise breached its contract of insurance.

(*Id.*).

In the Complaint, Covil asserted three claims against Penn National: (1) declaratory judgment regarding compensation to be paid to the Receiver for Covil in defending unidentified “Covil Asbestos Suits;” (*Id.*, p. A0034, ¶¶ 14-19); (2) declaratory judgment that all policies issued by Penn National are the property of the Receiver of Covil; (*Id.*, p. A0035, ¶¶ 20-22); and (3) declaratory judgment regarding the terms of the Penn National policies, trigger of coverage, allocation, Penn National’s defense and indemnity obligations, number of occurrences, coverage for the Covil Asbestos Suits and the effect of exclusions (*Id.*, pp. A0035-A0037, ¶¶ 23-26).

On June 1, 2020, Penn National filed its Answer. In its Answer, Penn National responded to the allegations contained in the Complaint and raised a number of defenses. (Appx., pp. A045-A054). Significantly, Penn National requested a jury trial consistent with the requirements of Rule 38(b) of the South Carolina Rules of Civil Procedure:

WHEREFORE, Penn National respectfully prays the Court as follows:

\* \* \*

4. For a trial by jury on all issues so triable; and

(*Id.*, p. A0052).

The parties engaged in discovery. On May 5, 2022, the circuit court entered an order requiring Penn National to incur the considerable expense to digitize its entire historical repository of insurance policies (approximately 18 million pages of documents) and to allow Covil, its

Receiver and their attorneys to have full and unfettered access to the created database. Because of the punitive nature of the order and the fact that the order affected a substantial right of Penn National that would be irrevocably lost absent immediate review, Penn National appealed the order. No other appeal has been filed by Penn National in this case until the present mandatory appeal.

While the order mandating digitization of Penn National's historic policies remained on appeal and other discovery matters were unresolved (*see*, Appx., pp. A0059-A0060, listing outstanding discovery issues), Covil filed a Status Report with the circuit court on September 6, 2022 that, for the first time, demanded a trial:

The Receiver requests an evidentiary hearing regarding Penn National's spoliation of evidence in order for the Court to make factual findings regarding the scope of the harm to Covil and to fashion appropriate remedies to address that harm. The Receiver also asks for a non-jury trial on Covil's declaratory relief against Penn National concerning Penn National's obligations to Covil under Policy Nos. 515 50 28 53 7 and 515 50 28 53 8.

(*Id.*, p. A0061). (*See also*, Appx., p. A0094 [Transcript from 9/8/2022 status conference]: Counsel for Penn National: "Your Honor, yesterday was the first time that I had seen a suggestion of a December trial date ...").

On November 7, 2022, Penn National sent a letter to Ret. Chief Justice Toal, the presiding judge, confirming that Penn National demanded a jury trial in this case and requesting that its right to such a trial be preserved:

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. ... 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 spoliation and coverage issues.

(Appx., p. A0079). The next day, on November 8, 2022, Zitel Poswal, judicial law clerk for Ret.

Chief Justice Toal, sent an email to Penn National's counsel indicating that the court recognized that Penn National had requested a trial by jury and had not waived its right to a jury trial in this case:

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.

(Appx., p. A0080).

Despite these representations, no order was placed on the record regarding Penn National's right to a jury trial in this case. Instead, a scheduling order was entered setting the trial date for December 12 or 14, 2022, and establishing other deadlines in advance of trial, including:

- Submission of proposed Findings of Fact/Conclusions of Law: seven (7) days prior to trial;
- Submission of trial exhibits: twenty-one (21) days prior to trial;
- Submission of list of trial witnesses, including expert witnesses: twenty-one (21) days prior to trial;
- Submission of deposition designations: seven (7) days prior to trial; and
- Filing of motions in limine: fourteen (14) days prior to trial.

(Appx., pp. A0023-A0025). The scheduling order was silent on whether the trial would be by jury or non-jury. (*Id.*).

Because the scheduling order did not confirm that the scheduled trial would be by jury, Penn National filed a Motion to Confirm Jury Trial Demand on December 2, 2022. (Appx., pp. A0066-A0081). The parties continued to comply with the Scheduling Order, and on December 5,



2022, the parties filed their respective Findings of Fact and Conclusions of Law. (Appx., pp. A0239-A0310 [Covil's FOF/COL]; pp. A0311-A0332 [Penn National's FOF/COL]).

On December 7, 2022, an Order was entered denying Penn National's right to a jury trial of the issues in this case. (Appx., pp. A0026-A0028). On the same day, Penn National filed a notice of appeal from this order (Appx. pp. A0001-A0009).

Seven (7) days after Penn National filed its notice of appeal of the order affecting its mode of trial, Covil filed a Motion to Dismiss and Expedite (Appx. pp. A0010-A0020). The Court of Appeals granted Covil's motion to dismiss Penn National's appeal in a one sentence order dated February 8, 2023, and signed by Judge Stephanie P. McDonald (Appx. p. A0333). Penn National filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on February 23, 2023, requesting that the Court of Appeals not dismiss its appeal outright but consider the appeal on its merits (Appx. pp. A0334-A0353). Penn National's Petition was denied by order dated June 6, 2023, and signed by Judge Stephanie P. McDonald, Judge Paula H. Thomas, and Judge Blake Hewitt (Appx. pp. A0354-A0357). Penn National now petitions this Court for a writ of certiorari to address its constitutionally guaranteed right to a jury trial in this case.

### **SUMMARY OF ARGUMENT**

It is well-established in South Carolina that orders affecting the mode of trial must be immediately appealed. This rule is based on the principle that trial by jury is a fundamental and substantial right guaranteed by the South Carolina Constitution and the laws and rules of this State. Any order affecting such a substantial right is therefore immediately appealable. In this case, the circuit court entered an order in which it denied Penn National's right to a jury trial. As required by decades of precedent from this Court and from the Court of Appeals, Penn National immediately appealed this order so as to avoid any waiver of its right to a jury trial. Covil moved

straightaway to dismiss this appeal as being somehow “frivolous.” In a one sentence order, a single judge from the Court of Appeals granted Covil’s motion to dismiss without any explanation. On Penn National’s Petition for Rehearing, this same judge, along with two colleagues, denied Penn National’s request that this appeal be heard on its merits.

Penn National petitions this Court for a writ of certiorari on four grounds: (1) the Court of Appeals’ dismissal of Penn National’s appeal of the circuit court’s order affecting the mode of trial directly involves substantial constitutional issues and conflicts with clear precedent from this Court requiring such appeals; (2) the Court of Appeals’ dismissal was improper because there is no statutory authority or precedent from the appellate courts of this State that allows dismissal of an appeal in a civil case based on its alleged “frivolousness;” (3) the dismissal affects substantial constitutional issues by essentially creating new law that allows one party to nullify the other party’s right to a jury trial by simply demanding a non-jury trial in declaratory judgment actions where factual issues are in dispute; and (4) the issue of whether a party is entitled to have a jury decide factual issues regarding spoliation is a novel question of law previously not addressed by any appellate court in South Carolina. The dismissal of Penn National’s appeal by the Court of Appeals was premature and wholly unfounded. Penn National respectfully requests that this Court accept its petition, issue a writ of certiorari to have these issues addressed, vacate the Court of Appeals’ dismissal, and require the Court of Appeals to address Penn National’s appeal on its merits.

#### **ARGUMENT IN SUPPORT OF PETITION**

- 1. The Court Of Appeals’ Dismissal Of The Present Appeal Conflicts With The Supreme Court’s Declaration That Orders Affecting The Mode Of Trial Must Be Immediately Appealed.**

This Court has clearly and unequivocally established that orders affecting the mode of trial must be appealed immediately and a party's failure to do so results in a waiver of that party's right to a jury trial.

This Court has held that orders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14-3-330(2) (1977) and must, therefore, be appealed immediately. Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue. Here, Client's failure to immediately appeal the order designating this case as a non-jury matter bars his current appeal of that issue.

*Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) (internal citations omitted). *See also, Fulmer v. Cain*, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008); *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993); *Creed v. Stokes*, 285 S.C. 542, 542-43, 331 S.E.2d 351, 352 (1985); *Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 389-90 (Ct. App. 2004). *See also, Jean Hoefer Toal, et al., Appellate Practice in South Carolina*, 156 (3<sup>rd</sup> ed. 2016) ("The purpose of permitting immediate appeal in these cases is to preserve a party's constitutional right to a trial by jury which would otherwise be lost.").

In the present case, Penn National demanded a jury trial in its Answer consistent with the requirements of Rule 38(b) of the South Carolina Rules of Civil Procedure. (Appx., p. A0052). During a status conference, Covil requested a non-jury trial on its claims against Penn National. (Appx., p. A0061). In response to this request for a non-jury trial, Penn National sent a letter to the circuit court requesting that its right to a jury trial be honored and preserved (Appx., p. A0079), which the circuit court agreed to do (Appx. p. A0080). When the circuit court subsequently refused to set this case for a jury trial, Penn National filed a Motion to Confirm Jury Trial Demand on December 2, 2022. (Appx., pp. A0066-A0081). The circuit court then entered an order on December 7, 2022, denying Penn National's right to a jury trial on the issues in this case and instead ordered that these issues be "scheduled for a non-jury trial." (Appx., pp. A0026-A0028).

In accordance with this State's jurisprudence, Penn National was required to, and did, immediately appeal the order entered by the circuit court that denied Penn National's right to a jury trial of the factual issues in this case. The purpose behind requiring an immediate appeal of the denial of the right to a jury trial is to ensure that such a significant right is preserved. *See*, S.C. Const. art. I, § 14 ("The right of trial by jury shall be preserved inviolate."). *See also*, Rule 38(a), SCRCP ("The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate.").

The Court of Appeals' dismissal of this mandatory appeal, without any explanation, violates Penn National's constitutional right to a jury trial and is directly in conflict with this Court's mandate and decades of precedent. Therefore, Penn National respectfully requests that this Court grant its petition for certiorari to review whether the Court of Appeals erred in dismissing Penn National's appeal of an order denying its right to a jury trial without any review of the merits of the appeal.

**2. The Court Of Appeals' Dismissal Of Penn National's Appeal Based Solely On Respondent's Unfounded Argument That The Appeal Is Frivolous Is In Conflict With Prior Decisions Of This Court.**

This Court has consistently enforced a party's right to appeal, oftentimes liberally construing statutory provisions to ensure that the right to appeal is preserved. *See, Haughton v. Order of United Commercial Travelers*, 108 S.C. 73, 74-75, 93 S.E. 393, 393-94 (1917) ("Our decisions show that this Court is very reluctant to dismiss appeals on technical grounds. Therefore, we have construed the statutes and rules of Court liberally in favor of the right to appeal."); *O'Rourke v. Atlantic Paint Co.*, 91 S.C. 399, 403, 74 S.E. 930, 931 (1912) ("The Court should give a liberal construction to the Constitution and statutes, in favor of the right to appeal.").

Dismissal of an appeal in a civil case has generally only been allowed in two instances: (1) when the appellate court does not have jurisdiction over the appeal because of the appellant's failure to adhere to appellate rules regarding timely filing of an appeal or because the appeal is interlocutory; and (2) when the appeal is moot. *See, e.g., S.C. Coastal Conservation League v. Dominion Energy S.C., Inc.*, 432 S.C. 217, 223-24, 851 S.E.2d 699, 702 (2020) (affirming dismissal of appeal on mootness grounds); *Wachesaw Plantation E. Cmty. Servs. Ass'n v. Alexander*, 414 S.C. 355, 360, 778 S.E.2d 898, 901 (2015) (finding that the issuance of a deed did not moot the appeal of a foreclosure sale and remanding case to Court of Appeals for decision on merits); *Fields v. Regional Med. Ctr.*, 363 S.C. 19, 26-29, 609 S.E.2d 506, 509-11 (2005) (considering and ultimately denying respondent's motion to dismiss appeal on jurisdictional grounds); *Byrd v. Irmo High School*, 321 S.C. 426, 430-32, 468 S.E.2d 861, 863-64 (1996) (denying motion to dismiss appeal on mootness grounds based on exception to doctrine for cases evading review); *Wallace v. Interamerican Trust Co.*, 264 S.C. 563, 569, 144 S.E.2d 813, 816 (1965) (granting motion to dismiss appeal of discovery order as being interlocutory); *Deal v. Deal*, 85 S.C. 262, 264, 67 S.E. 241, 242 (1910) (granting motion to dismiss appeal because order was interlocutory); *Atkins v. Wilson*, 417 S.C. 3, 18, 788 S.E.2d 228, 236 (Ct. App. 2016) (denying motion to dismiss appeal on jurisdictional grounds because appellant timely filed notice of appeal); *Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC*, 413 S.C. 642, 646, 776 S.E.2d 575, 577 (Ct. App. 2015) (granting motion to dismiss appeal because court did not have jurisdiction based on untimely filing of notice of appeal).

Neither basis for the dismissal of an appeal exists in the present case. The Court of Appeals clearly has jurisdiction to consider the issues on appeal. Penn National timely filed its Notice of Appeal. In fact, Penn National filed its Notice of Appeal on the same day that the circuit court

entered its order denying Penn National's right to a jury trial in this case. (Appx. pp. A0026-A0028; Appx. pp. A0005-A0007; Appx. pp. A001-A009). Additionally, the order on appeal is one affecting the mode of trial and is therefore immediately appealable. *Lester*, 327 S.C. at 266, 491 S.E.2d at 241. The issue on appeal, whether Penn National has a right to a jury trial of the factual issues in this case, has also not been rendered moot by any subsequent actions. Indeed, Covil did not cite either of these reasons in its motion to dismiss Penn National's appeal. The Court of Appeals' summary dismissal of Penn National's appeal is contrary to this Court's previous articulation of the circumstances justifying immediate dismissal of an appeal.

Covil based its motion to dismiss solely on its characterization of Penn National's appeal of the order denying its right to a jury trial as being somehow "frivolous." However, frivolousness is clearly not a basis upon which to dismiss an appeal in a civil case, particularly one affecting a constitutional right. *See, e.g., Fishburne v. Minott*, 72 S.C. 567, 569, 52 S.E. 648, 648 (1905) (refusing to "entertain such a motion" which sought to strike case "on the ground that the same is frivolous and vexatious"). Indeed, neither this Court nor the Court of Appeals has ever granted a motion to dismiss an appeal in a civil matter on the grounds of frivolousness.<sup>1</sup>

The Order from the Court of Appeals granting Covil's motion to dismiss is contrary to and directly conflicts with this Court's decision in *Sumter Hardwood Co. v. Fitchette*, 133 S.C. 149, 130 S.E. 881 (1925). In *Sumter*, upon motion by the plaintiff, the circuit court referred the action to a master for determination of all issues. The defendant immediately appealed this decision and the plaintiff moved to dismiss the appeal. This Court began its analysis by reference to the "well-

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<sup>1</sup> Indeed, the case law from South Carolina appellate courts is clear: assertions of frivolousness can only be considered in dismissals of appeals in criminal cases and only after counsel has filed an *Anders* brief and the court has made a full examination of the record on its own. *See, e.g., State v. McKennedy*, 348 S.C. 270, 279, 559 S.E.2d 850, 855 (2002).

settled” canon that “if an order deprives a party of the mode of trial which the law allows him, it is appealable.” *Id.* at 151, 130 S.E. at 882. This Court then found that the circuit court improperly referred the case to a master, as the defendant was allowed to have the factual issues in the case decided by a jury. Therefore, this Court concluded:

The judgment of this Court is that the motion of the plaintiff to dismiss the appeal of the defendant be refused, that the order of reference be reversed, and that the case be remanded to the Circuit Court without prejudice to a motion by the plaintiff to amend its complaint if so advised.

*Id.* at 155-56, 130 S.E. at 884.

Similarly, in the present case, this appeal was appropriately before the Court of Appeals. It is clear and without question that the Court of Appeals has jurisdiction over the appeal of the circuit court’s denial of Penn National’s jury trial demand. It is similarly beyond doubt that the issue on appeal has not been rendered moot due to any subsequent actions. Therefore, the Court of Appeals should have denied Covil’s motion to dismiss this appeal, as directed by the *Sumter Hardwood* Court. Instead, the Court of Appeals should have enforced Penn National’s right to have its appeal decided on the merits, after a full review of the record and consideration of the arguments of counsel. The Court of Appeals’ summary dismissal of Penn National’s appeal was both unjustified and contrary to years of precedent from this Court.

**3. The Court Of Appeals’ Dismissal Of Penn National’s Appeal Creates New Law That Would Allow One Party To Nullify Another’s Party’s Right To A Jury Trial By Merely Demanding A Non-Jury Trial In A Declaratory Judgment Action.**

Covil’s motion to dismiss Penn National’s appeal was based solely on Covil’s assertion that there is no right to a jury trial of a declaratory judgment action addressing coverage under a policy of insurance. This is not, and never has been, the law in South Carolina. However, by summarily dismissing Penn National’s appeal, without any review of the merits of the appeal, the

Court of Appeals has now ratified the circuit court's actions in stripping Penn National of its right to a jury trial solely because the opposing party requested a bench trial of the factual issues.

It is axiomatic that a party is entitled to a jury trial even as to claims asserted under the Uniform Declaratory Judgment Act. S.C. Code Ann. § 15-53-90 ("When a proceeding under this chapter 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 in the court in which the proceeding is pending. All existing rights to jury trials are hereby preserved."). *See also, Leggette v. Smith*, 226 S.C. 403, 416, 85 S.E.2d 576, 582 (1955) ("And, irrespective of this provision of the statute, it is clear that the right of jury trial in what is essentially an action at law may not be denied a litigant merely because his adversary has asked that the controversy be determined under the declaratory procedure.") (internal quotations and citations omitted).

This Court and the Court of Appeals have previously held that parties are entitled to jury trials in declaratory judgment actions concerning insurance coverage. *See, State Farm Mut. Auto. Ins. Co. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 263 S.C. 391, 394-95, 210 S.E.2d 613, 615 (1974) (upholding on appeal jury responses to special interrogatories in declaratory judgment action regarding coverage under a motor vehicle policy); *Government Employees Ins. Co. v. Mackey*, 260 S.C. 306, 316, 195 S.E.2d 830, 834 (1973) ("The issues of fact in this [declaratory judgment action brought by insurer] were properly submitted to the jury with a full and correct charge by the trial judge."); *St. Paul Fire & Marine Ins. Co. v. American Ins. Co.*, 251 S.C. 56, 61, 159 S.E.2d 921, 923 (1968) (holding that issues of fact in insurance coverage action were properly determined by a jury); *Anders v. S.C. Farm Bureau Mut. Ins. Co.*, 307 S.C. 371, 375, 415 S.E.2d 406, 409 (Ct. App. 1992) (reversing the grant of summary judgment for plaintiff because there existed genuine issues of material fact to be determined by a jury); *State Farm Mut. Auto. Ins. Co.*



*v. Turner*, 303 S.C. 99, 100, 399 S.E.2d 22, 22 (Ct. App. 1990) (affirming submission of issues to a jury in declaratory judgment action brought by insurer).

Similarly, in this case, Penn National is entitled to have the factual issues decided by a jury. In its motion to dismiss, Covil argued for the first time that no factual issues actually exist in this case because this case is a declaratory judgment action regarding coverage under Penn National's policies of insurance, and therefore a jury trial is not necessary. This is simply not true. Covil's actions, prior to its filing of its motion to dismiss in this case, belie its arguments to the Court of Appeals.

First, if Covil believed that there were no genuine issues of material fact, Covil should have moved for summary judgment. *See*, Rule 56(c), SCRPC. Covil did not do so. Instead, Covil specifically requested a trial, acknowledging that there are genuine issues of material fact that need to be determined at a trial. (Appx., p. A0023).

Second, in requesting a non-jury trial, Covil proposed a pretrial order (which was subsequently adopted by the circuit court without alteration) that required the parties to submit proposed findings of fact and conclusions of law, lists of trial exhibits, lists of witnesses to include expert witnesses, and motions in limine. (Appx., pp. A0023-A0025). Again, if Covil indeed believed that there were no factual issues to be tried, Covil would not have requested a trial on the issues in the case with witnesses and exhibits.

Finally, and most significantly, Covil actually filed with the circuit court "Receiver for Covil Corporation's Proposed Findings of Fact and Conclusions of Law." This document contained thirty-one (31) pages of what Covil requested as "PROPOSED FINDINGS OF FACT." (Appx., pp. A0239-A0273). These proposed factual findings include: whether Penn National issued policies of insurance in addition to the two policies which were stipulated to by Penn

National; whether and when injuries occurred in fourteen asbestos liability cases asserted against Covil; whether any duty to preserve historic policies was triggered; whether Penn National “destroyed” policies potentially applicable to Covil’s asbestos liability with culpable intent; the propriety of Penn National’s business decision to store its historic policies by policy number; the underwriting intent in issuing policies to Covil; and the adequacy of Penn National’s search for additional policies. (*Id.*).

In its litigation of this case, Covil has taken the position that there are disputed factual issues that must be decided in a trial, albeit a bench trial dictated by Covil. However, when Penn National appealed the denial of its right to a jury trial in this case, Covil pivoted and has now argued to the Court of Appeals that these issues are not subject to a jury trial at all, even though Covil never moved, at any time, to have the circuit court make rulings as a matter of law. Covil should have been judicially estopped from taking this position in its motion to dismiss appeal because it is inconsistent with the position Covil has taken in requesting a non-jury trial and filing its proposed findings of fact. *See, Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) (“Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. The purpose of the doctrine is to ensure the integrity of the judicial process ...”) (internal citations omitted).

By summarily dismissing Penn National’s appeal of the circuit court’s order referring this case for a non-jury trial and not addressing the merits of this appeal, the Court of Appeals has now effectively created new law<sup>2</sup> which sanctions the ability of one party to nullify another party’s right

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<sup>2</sup> Only this Court can create new law. The Court of Appeals is bound to follow existing precedent. S.C. Const. art. V, § 9; *State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) (“[I]t is incumbent upon the court of appeals to apply [the Supreme Court’s] precedent.”).

to a jury trial in declaratory judgment actions, even where factual issues are in dispute. In effect, the Court of Appeals has declared that there is no right to a jury trial in declaratory judgment actions. That is not the law in South Carolina and is contrary to this Court's precedent. Therefore, this Court should grant Penn National's petition for writ of certiorari, vacate the dismissal of Penn National's appeal of the order requiring the factual issues in this case to be determined by a judge instead of a jury, and allow the merits of the appeal to be considered by the Court of Appeals after full briefing of the issues and a careful analysis of the full record in this case.

**4. The Court Of Appeals Implicitly Decided A Novel Question Of Law When It Dismissed An Appeal Of An Order Denying A Jury Trial On Issues Of Spoliation.**

In the order on appeal, the circuit court ruled that both the factual issues regarding coverage and the factual issues regarding whether or not Penn National engaged in spoliation of evidence in this case were to be tried without a jury. Covil has taken the position in its motion to dismiss appeal that the factual issues of whether Penn National actually engaged in spoliation of evidence should be decided by the judge and not a jury. Covil did not cite to any case law from South Carolina for this proposition.

Neither this Court nor the Court of Appeals have determined what a party must prove in order to show that another party spoliated evidence, necessitating a sanction. Federal courts, however, have held that a party seeking sanctions regarding spoliation must establish three elements:

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

*Hawkins v. College of Charleston*, 2013 U.S. Dist. LEXIS 162714, \*5 (4<sup>th</sup> Cir. 2013). This standard has actually been adopted by the circuit courts in this State. *See, Hopper v. Air & Liquid Sys. Corp.*, 2019 S.C. C.P. LEXIS 5488, Case No. 2019-CP-00076 (S.C. Com. Pl. Order dated Oct. 31, 2019).

Under the standard adopted by South Carolina federal courts, in order for a party to meet its burden of showing spoliation of evidence, that party has to show whether the evidence actually existed, the opposing party's duty to preserve such evidence, and the opposing party's culpable state of mind. These are all factual findings that are within the purview of a jury. *See, Harleysville Group Ins. v. Heritage Cmty, Inc.*, 420 S.C. 321, 346, 803 S.E.2d 288, 302 (2017) ("These questions of the insured's intent are factual in nature."); *Shenandoah Life Ins. Co. v. Smallwood*, 402 S.C. 29, 32, 737 S.E.2d 857, 858 (Ct. App. 2013) (reversing directed verdict and finding that insured's intent was a factual issue that should have been decided by a jury). *See also, Evans v. Quintiles Transnational Corp.*, 2015 U.S. Dist. LEXIS 171750, \*13-14 (D.S.C. 2015) (holding that on the issue of spoliation, a jury was to resolve "any credibility questions and make a determination, first, as to whether the alleged computer file even existed on Plaintiff's computer, whether and when Quintiles should have reasonably known that the evidence may be relevant to anticipated litigations, and, if so, whether Quintiles willfully lost or destroyed the file.").

Although South Carolina appellate courts have not addressed the federal standard regarding spoliation of evidence, this Court and the Court of Appeals have allowed evidence regarding spoliation to go to the jury. *See, e.g., Welsh v. Gibbons*, 211 S.C. 516, 46 S.E.2d 147 (1948) (holding that it was proper for a jury to hear evidence regarding the unavailability of evidence and whether to draw an adverse inference); *Gathers v. South Carolina Elec. & Gas Co.*, 427 S.E.2d

687, 689 (Ct. App. 1993) (affirming the trial court's decision to submit evidence of the loss or destruction of evidence to the jury).

This Court's decision in *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990) is illustrative. The *Kershaw* case arose out of the remediation of asbestos tiles in Kershaw County schools. Prior to filing the products liability action against United States Gypsum Company, an asbestos manufacturer, the circuit court issued an order that the School Board was to notify all potential asbestos manufacturers prior to its removal of asbestos from the school. There was one school, however, where the School Board failed to notify Gypsum of the removal of the asbestos tiles prior to its doing so. Gypsum requested the court to dismiss all claims arising from the removal of asbestos from that school. The trial court denied this motion, finding that an adverse inference jury instruction would be provided instead. *Id.* at 393-94, 396 S.E.2d at 371. This Court upheld the trial court's decision:

Gypsum moved for judgment in its favor on the claims related to Camden High School because Kershaw had violated Judge Smith's order by removing asbestos prior to Gypsum's inspection. The trial judge refused this motion, but did include a jury instruction on the destruction of evidence. The trial court permitted Kershaw to explain the circumstances surrounding its failure to notify Gypsum and instructed the jury that when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party.

We believe the trial court's decision was proper under the fact of this case.

*Id.* at 394, 396 S.E.2d at 372. This Court agreed that the jury should be allowed to hear the evidence regarding spoliation and make a determination regarding what effect such evidence had in the case. *Id.* at 395, 396 S.E.2d at 372.

As this Court recognized in *Kershaw*, the issue of spoliation necessarily presents factual issues that are disputed between the parties: one party presents evidence that the other party knew

that it had a duty to preserve evidence and with such knowledge, deliberately destroyed such evidence; and the other party presents evidence that it had no knowledge of its duty to preserve evidence or that its destruction of such evidence was inadvertent or negligent. The resolution of these disputed issues should be within the purview of a jury, and not decided by a trial judge. Similarly, in the present case, the parties should be allowed to present their respective evidence regarding spoliation to a jury for its determination regarding whether spoliation actually occurred and what effect any such spoliation should have.

Covil acknowledged that there are factual disputes regarding the issue of spoliation because Covil requested that its evidence be presented and determined at the trial. Penn National requested a jury trial on factual findings, including any factual findings of spoliation. The circuit court denied Penn National's right to a jury trial of these issues. Penn National's appeal of this order is proper and should have been considered on its merits by the Court of Appeals.

This issue, whether a right to a jury trial exists on issues regarding whether a party engaged in spoliation of evidence, is an issue of first impression and should be appropriately reviewed and decided by the appellate courts of this State. Instead, the Court of Appeals dismissed Penn National's appeal without any consideration of this significant issue. This Court should grant Penn National's petition and allow certiorari to allow the appellate courts the opportunity to provide clear guidance regarding how issues of spoliation of evidence are to be determined in this jurisdiction.

### **CONCLUSION**

Penn National demanded a jury trial in this case appropriately and within the dictates of South Carolina law and the rights guaranteed it by the South Carolina Constitution. When the circuit court denied its constitutional right to a jury trial by ordering that the issues in this case

would be tried non-jury, Penn National had the absolute and unequivocal right to appeal this order. Despite the clear law from this Court that Penn National is required to appeal this order immediately or be deemed to have waived its right to a jury trial, Covil moved to dismiss this appeal, which motion was summarily granted by the Court of Appeals. However, the merits of this appeal should not be decided summarily and on an expedited basis on a motion to dismiss. Instead, the Court of Appeals should have taken a full and fair opportunity to consider the merits and make its determinations after considering the briefing and fully developed arguments of the parties. This is especially true where, as here, Penn National's constitutional right to a jury trial is at stake.

Penn National respectfully petitions this Court for a writ of certiorari because the Court of Appeals' dismissal of its appeal is contrary to the well-established precedent mandating that a party immediately appeal the denial of a jury trial or risk waiving its constitutional right to a jury trial. Furthermore, this dismissal by the Court of Appeals was not based on the Court's lack of jurisdiction over the appeal or because the factual predicate of the appeal was somehow moot. Instead, the Court of Appeals' dismissal appeared to be based on Covil's bald assertion that the appeal was somehow "frivolous." Frivolousness has never before been used by the appellate courts in this State as a justification to dismiss an appeal outright without consideration of its merits. Allowing a swift dismissal of Penn National's appeal of the order denying its right to a jury trial to stand is contrary to South Carolina law and will create a new rule that parties in declaratory judgment actions are no longer entitled to a jury trial of factual issues. Clearly, such a cavalier quashing of a party's fundamental and substantial right to a jury trial should not be affirmed or ratified by this Court. Finally, a party's right to have factual issues of spoliation be decided by a jury is an issue of first impression that should not be summarily dismissed.

Accordingly, Penn National respectfully requests that this Court grant its Petition for Writ of Certiorari to review the decision of the Court of Appeals.

Respectfully submitted,

s/Kirby D. Shealy III

Kirby D. Shealy III

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*Attorneys for Appellant Pennsylvania National  
Mutual Causal Insurance Company*

July 6, 2023.



THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

Case No. 2020-CP-40-02098  
Appellate Case No. 2022-001722

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

v.

Pennsylvania National Mutual Casualty Insurance Co. is the .....Appellant.

---

**PROOF OF SERVICE**

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I certify that on July 6, 2023, I caused to have served a true copy of the **Petition for Writ of Certiorari and Appendix** by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to Rule 262 of the South Carolina Appellate Court Rules and the May 6, 2022 Order of the South Carolina Supreme Court (2022-000447):

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s/ Kirby D. Shealy III  
Kirby D. Shealy III  
*Counsel for Appellant*

# The Supreme Court of South Carolina

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

v.

Pennsylvania National Mutual Casualty Insurance, Co.,  
Petitioner.

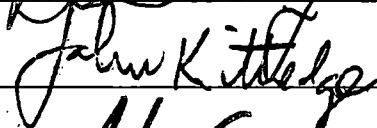
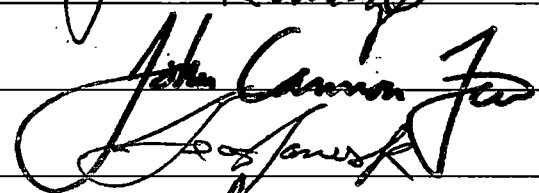
Appellate Case No. 2023-001079

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## ORDER

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Petitioner seeks a writ of certiorari to review the court of appeals order dismissing its appeal. *Covil Corp. v. Penn. Nat'l Mut. Cas. Ins. Co.*, S.C. Ct. App. dated Feb. 8, 2023. Respondent opposes the petition and asks the Court to expedite consideration of the petition. Respondent's motion to expedite is granted, and Petitioner's petition for a writ of certiorari is denied.

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

Columbia, South Carolina  
November 7, 2023

cc:

G. Murrell Smith, Jr., Esquire  
Jonathan M. Robinson, Esquire

Shanon N. Peake, Esquire  
Austin Tyler Reed, Esquire  
Benjamin Hunter Limbaugh, Esquire  
Frederick Newman Hanna, Jr., Esquire  
Peter Demos Protopapas, Esquire  
William Bradley Nes, Esquire  
Kirby Darr Shealy, III, Esquire  
Alexander Erwin Davis, Esquire  
David Grant Harris, II, Esquire  
The Honorable Jenny Abbot Kitchings



## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

CATHERINE S. HARRISON  
CHIEF DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29211  
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January 19, 2024

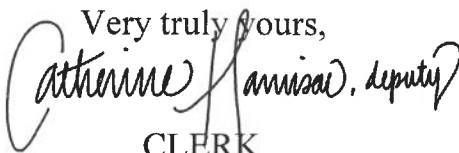
The Honorable Jeanette W. McBride  
PO Box 2766  
Columbia SC 29202-2766

### REMITTITUR

Re: Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Co.  
Lower Court Case No. 2020CP4002098  
Appellate Case No. 2022-001722

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,  
  
CLERK

Enclosure

cc: Kirby Darr Shealy, III, Esquire  
Alexander Erwin Davis, Esquire  
David Grant Harris, II, Esquire  
G. Murrell Smith, Jr., Esquire  
Jonathan M. Robinson, Esquire  
Shanon N. Peake, Esquire

Austin Tyler Reed, Esquire  
Benjamin Hunter Limbaugh, Esquire  
Frederick Newman Hanna, Jr., Esquire  
Peter Demos Protopapas, Esquire  
William Bradley Nes, Esquire

IN THE COURT OF COMMON PLEAS  
FOR THE STATE OF SOUTH CAROLINA  
RICHLAND COUNTY

MOTION HEARING

COVIL CORPORATION, BY AND THROUGH ITS DULY  
APPOINTED RECEIVER PETER D. PROTOPAPAS,

Plaintiff,

vs. CASE NO. 2020-CP-40-02098

PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE  
COMPANY; SAM J. CRAIN & CO., INC.; AND SOUTH  
CAROLINA PROPERTY AND CASUALTY INSURANCE  
GUARANTY ASSOCIATION,

Defendants.

---

BEFORE: HONORABLE JEAN HOEFER TOAL

DATE: JANUARY 11, 2022

TIME: 12:03 P.M.

LOCATION: RICHLAND COUNTY COURTHOUSE  
COLUMBIA, SC

REPORTED BY: RUTH MOTT, RPR, CRR  
CLARK BOLEN  
P.O. BOX 12189  
CHARLESTON, SC 29422  
843-762-6294  
WWW.CLARKBOLEN.COM

1    A P P E A R A N C E S

2

3    ON BEHALF OF PLAINTIFF:

4

RIKARD & PROTOPAPAS

5

BY: PETER D. PROTOPAPAS

BY: BRIAN M. BARNWELL

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2110 North Beltline Boulevard  
Columbia, SC 29204

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MORGAN LEWIS

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BY: W. BRAD NES

1111 Pennsylvania Avenue, NW  
Washington, DC 20004-2541

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10    ON BEHALF OF DEFENDANT:

GOLDBERG SEGALLA

11

BY: BRADY YNTEMA

BY: DAVID G. HARRIS

12

800 Green Valley Road  
Suite 302

13

Greensboro, NC 27408

14

15

- - -

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1                   THE COURT: This is in the matter  
2 of Covil Corporation, through its duly appointed  
3 receiver, Peter Protopapas, against Pennsylvania  
4 National Mutual Insurance Company, Sam J. Crain  
5 and Company, Inc., and South Carolina Property  
6 and Casualty Insurance Guaranty Association,  
7 defendants. This is civil action  
8 2020-CP-40-02098. This is receiver Covil's  
9 notice of motion and motion for protective order.

10                   All right. Who will speak for  
11 Covil?

12                   MR. NES: Brad Nes, Your Honor:

13                   THE COURT: All right.

14                   MR. NES: I'll use the podium here.

15                   THE COURT: Yes, please.

16                   MR. NES: Actually, as a matter of  
17 housekeeping, there are actually several motions.

18                   THE COURT: You're going to have to  
19 speak up. Everybody else may be able to hear  
20 you, but I can't.

21                   MR. NES: Sorry, Your Honor. There  
22 are several motions. We can take them one at a  
23 time, or we can address them all at once, however  
24 you'd like. There's a motion for protective  
25 order, there's a motion for discovery order on



1 costs of policy search, and I can tell you right  
2 now that that motion has been resolved, so we do  
3 not need to argue that. When counsel for Penn  
4 National gets up, he can explain the terms of  
5 that.

6 THE COURT: That was the issue of  
7 paying Ellis Winters?

8 MR. NES: Correct.

9 THE COURT: All right.

10 MR. NES: And then there are two  
11 sets of motions to quash subpoenas that have been  
12 filed by Penn National. The issues relate to  
13 each other, so we can address them separately or  
14 together, however the Court prefers.

15 THE COURT: All right. This is as  
16 to the Covil receivership, and what you're  
17 proposing is that you go down the list of all  
18 Covil motions, and then Penn National can respond  
19 after you're done.

20 MR. NES: Correct, Your Honor.

21 THE COURT: Because we've also got  
22 Great Barrier, Southern Insulation and Star Davis  
23 and J & L Insulation, correct?

24 MR. NES: Correct, and my  
25 co-counsel, Mr. Barnwell, will argue that motion.

1                   THE COURT: All right. You may  
2 proceed.

3                   MR. NES: Thank you, Your Honor.  
4 Brad Nes for the receiver for Covil Corporation.  
5 As this Court is aware, we were before the Court  
6 in October of 2021 on the third motion to compel  
7 that Covil had filed. At that hearing this Court  
8 ordered Penn National to begin a search of its  
9 policies, its historic policies, not by policy  
10 number but by other means, and it brought in  
11 Ellis & Winters to do that. As part of that  
12 process there was a call on November 19, 2021.  
13 That call included counsel for Penn National,  
14 counsel for the receiver, and Ellis & Winters.  
15 And a Mr. Brent Reifsnyder, who is a document  
16 custodian at Penn National, revealed during that  
17 call that Penn National had no document  
18 litigation hold related to any of the Covil  
19 litigation and that it was also continuing to  
20 destroy or purge historic insurance policies as  
21 part of its automatic document purge procedures.  
22 We immediately lodged an objection on the phone,  
23 and that day the receiver served deposition  
24 notices and document requests related to this  
25 purge of documents.

1                   What we have asked for in the  
2 motion for protective order as well as in serving  
3 the deposition notices is first for an order from  
4 the Court that Penn National must suspend all  
5 automatic destruction policies that apply to  
6 historic policies or that apply to policy related  
7 information. They have now demonstrated, after  
8 three years of various litigation, that they did  
9 not issue the proper litigation holds. We want  
10 the Court to essentially order that that be in  
11 place.

12                  Second, because we now have  
13 information that there has been spoliation, we  
14 want discovery with respect to the scope of that  
15 spoliation. We served a nine topic deposition  
16 notice. None of those topics have been covered  
17 in any previous depositions, and they're very  
18 narrowly tailored to understand what exactly was  
19 being destroyed and when.

20                  By way of background, the first  
21 subpoenas that went to Penn National related to  
22 anything Covil related was in 2018.

23                  THE COURT: Now, those were the  
24 ones in Judge Eagles' case.

25                  MR. NES: That's correct, that was

1 in Judge Eagles' case but by the asbestos  
2 claimants.

3 THE COURT: Right.

4 MR. NES: Then in Judge Eagles'  
5 court the receiver itself in 2019 served  
6 discovery asking for insurance policies. There  
7 was argument from Penn National that it was under  
8 no obligation to serve a document hold notice as  
9 of 2018, but there cannot be any argument with  
10 respect to the Covil receivership requests in  
11 Judge Eagles' court in 2019 because those  
12 requests asked for all policies where Covil was  
13 an insured. And in response to that discovery in  
14 2019 Penn National's response was, we can't  
15 search all of our historic insurance files for  
16 this information because of the additional  
17 insured issue.

18 THE COURT: Because of what?

19 MR. NES: The additional insured  
20 issue, and I will read specifically what their  
21 response says. Their response was, quote, Penn  
22 National does not maintain its records in a way  
23 that would provide a reasonable method of  
24 searching for policies under which Covil is a  
25 named -- is named as an additional insured or

1 qualifies as an additional insured, thus Penn  
2 National has no method of identifying all  
3 documents that are responsive to this request.

4 This is the 2019 discovery  
5 response, and it's critical because in this  
6 discovery response Penn National is saying, we  
7 know there is a request for additional insured  
8 information. We know we have historic insurance  
9 policies in our files, but we have no method to  
10 search those. So at that point at a minimum a  
11 litigation hold should have been sent out that  
12 said, no historic insurance policies can be  
13 destroyed unless they're reviewed for  
14 responsiveness. That never happened. As a  
15 result a purge was conducted in 2019.

16 THE COURT: Well, let's stop right  
17 there for a minute. In 2019 Covil produced an  
18 insurance policy, and it was an insurance policy  
19 for, what, '87-'88 or something like that?

20 MR. NES: That's correct, Your  
21 Honor.

22 THE COURT: All right. And as it  
23 turns out, surprise, surprise, it was a per  
24 occurrence policy.

25 MR. NES: Correct, Your Honor.

1                   THE COURT:   How did it go about  
2   finding that policy?

3                   MR. NES:   That policy was located  
4   because the asbestos claimants had a policy  
5   number, and as we've gone over time and time  
6   again with Penn National, if you have a policy  
7   number, they'll go get it in their files; but if  
8   you don't give them a policy number, they're not  
9   going to do anything.   And so here in that policy  
10   that you're referencing, Your Honor, it actually  
11   had Covil not only as a named insured but as an  
12   additional insured.

13                  THE COURT:   That's correct.   I've  
14   read the policy many times.

15                  MR. NES:   Correct, Your Honor.   So  
16   if that policy -- we did not have the policy  
17   number or the asbestos claimant did not have the  
18   policy number, that would still be sitting in  
19   their files because there's no mechanism at Penn  
20   National other than the policy number,  
21   apparently.   But what's important then is that  
22   knowing that they are not able to track policy  
23   information unless they actually look at the  
24   policy because they only track policy number, if  
25   they're going to start destroying historic

1 insurance policies, at a minimum they need to be  
2 able to review those policies to say is Covil an  
3 additional insured or not, and it's unfathomable  
4 that they would destroy policies in 2019 and 2020  
5 without even looking at them to determine whether  
6 Covil was listed.

7 THE COURT: Now, let's plumb for a  
8 minute exactly what was destroyed because they  
9 say, oh, we didn't destroy anything, or anything  
10 that's pertinent to this. You know, they've got  
11 several different ways of saying it. You say  
12 that in this November phone call you learned for  
13 the first time that they were still destroying  
14 policies. Tell me exactly what happened there so  
15 I can understand the difference between what Penn  
16 National's saying and what you all are saying  
17 about what was actually destroyed.

18 MR. NES: Yes, Your Honor. Penn  
19 National's trying to move the goalpost. I'll  
20 explain sort of soup to nuts. So starting at the  
21 beginning, Penn National receives our document  
22 requests, and they don't put any preservation  
23 hold in place. But they do have a policy,  
24 apparently, that they destroy historic policies  
25 on an annual basis. So throughout the year they

1 get information for whatever their policy  
2 indicates that they are going to destroy these  
3 documents, they collect them, and at the end of a  
4 calendar year or the very beginning of the next  
5 calendar year they go ahead and destroy those  
6 documents.

7 THE COURT: I want to understand  
8 exactly what information -- are they destroying  
9 certain years worth of information? I mean, they  
10 say everything is on policy numbers, and it may  
11 be '19-'18 is in there, and then sequentially  
12 they haven't explained how that would work. How  
13 do we really know exactly what it is they are  
14 destroying?

15 MR. NES: Here's what we know and  
16 here's what we want to find out: We know that in  
17 deposition testimony and on this call they say  
18 that on an annual basis they destroy actual  
19 insurance policies. What we do not know is who  
20 was the insured on those policies, what the years  
21 were, whether those were general liability  
22 policies or Workers' Comp policies. That's  
23 precisely why we served a document request as  
24 well as a deposition notice, to find out that  
25 precise information.



1                   We also do not know what their  
2 document purge policy is because they've refused  
3 to produce it to us. That's a motion to compel  
4 that's currently pending but is not ripe yet.

5                   This is part of the discovery that  
6 we're seeking right now, Your Honor, which is we  
7 know at a high level that actual historic  
8 insurance policies were destroyed in 2019 and  
9 2020. So now we get to 2021.

10                  THE COURT: But we don't know what  
11 in 2019 and 2020 was destroyed.

12                  MR. NES: We don't know precisely  
13 what was destroyed, correct, Your Honor.

14                  THE COURT: Well, I mean, we don't  
15 know whether they reached back by policy number  
16 or just grabbed some random policy. What is it  
17 they have this annual destruction, what is the  
18 measure of that, or what is the designation of  
19 what's to be destroyed annually?

20                  MR. NES: That's precisely what  
21 we're seeking discovery on, and they've moved to  
22 quash that.

23                  THE COURT: They have not given you  
24 any information about that.

25                  MR. NES: Correct.

1 THE COURT: They have a policy, but  
2 you don't know how it applies.

3 MR. NES: That's exactly right.

4 THE COURT: All right.

5 MR. NES: So then we get to 2021,  
6 and we file our first motion to compel in January  
7 of 2021. Then there's another motion and hearing  
8 in June of 2021 and then the final motion hearing  
9 in October of 2021. When we got on the call in  
10 November of 2021, they had collected all of the  
11 policies throughout 2021 that they were ready to  
12 destroy, and Mr. Reifsnyder, essentially just in  
13 passing, mentioned that they had collected these  
14 documents that they were going to purge, and so  
15 of course I jumped in and asked, well, is anyone  
16 reviewing these policies before they're  
17 destroyed, or do you have any type of litigation  
18 hold; and he said, no. If I hadn't been on that  
19 call, we now would have an entire extra year of  
20 policies that were destroyed. Now, again, we  
21 don't know what those policies were, we don't  
22 know how they were determined --

23 THE COURT: After you all objected,  
24 did they say, oh, okay, we're not going to  
25 destroy them?

1                   MR. NES: Correct, Your Honor. So  
2 for the 2021 set they have --

3                   THE COURT: 2021 purge, after you  
4 all interposed an objection, they said, okay,  
5 we'll hold off on that.

6                   MR. NES: That's exactly right,  
7 Your Honor, but what we do not know is for 2019  
8 and for 2020 what was actually destroyed. And we  
9 know that, again, there was no litigation hold in  
10 place. In fact, the only semblance of a  
11 litigation hold that was sent was in I believe it  
12 was December 17th, almost a month after I sent  
13 the deposition notices, where an inhouse lawyer  
14 at Penn National pulled together very quickly a  
15 litigation hold to Mr. Reifsnyder, the gentleman  
16 who was going to be destroying documents, and  
17 said essentially, pursuant to our policies, don't  
18 destroy these documents; but that's the  
19 litigation hold that should have been in 2018 or  
20 at minimum in 2019 and 2020.

21                   THE COURT: And that inhouse  
22 lawyer's litigation hold was as pertains to all  
23 purging or just what?

24                   MR. NES: It was with respect to  
25 the purging of historic insurance policies in

1     their paper archives with Mr. Reifsnyder.

2                     So we now, having learned that  
3     information, we immediately filed with this court  
4     a motion for protective order asking for an order  
5     that all historic insurance policies or policy  
6     related information, whether that's in electronic  
7     format or paper format, not be destroyed pending  
8     Ellis & Winters completion of their review of  
9     historic insurance policies.

10                    In opposition Penn National raises  
11     several arguments. First they argue, well,  
12     you're not required to preserve every single  
13     document in a company when you get litigation,  
14     and that of course is not our argument. Our  
15     argument is they needed to preserve the policies  
16     and the policy related information. Second they  
17     say, well, Covil's already taken a bunch of  
18     depositions. We shouldn't be put to the burden  
19     of taking these depositions again. But, Your  
20     Honor, we have not taken depositions on any of  
21     these topics, and this is not and should not be a  
22     difficult deposition. I'm thinking an hour or  
23     two at the most. So it's not a burden issue.

24                    And then finally, with respect to  
25     the depositions being conducted as soon as

1 possible, just as a preview, what we've asked the  
2 Court in a motion that isn't quite ripe yet is  
3 for an evidentiary hearing, once we've conducted  
4 and fulfilled all of the discovery, so that we  
5 can come before the Court and produce the  
6 documents, produce witnesses, and understand  
7 truly the scope of potential spoliation and any  
8 potential remedies that might be available.

9                   So unless the Court has any other  
10 questions, those are the issues with respect to  
11 the Covil motions, and my co-counsel,  
12 Mr. Barnwell, can address very briefly the very  
13 similar issues with respect to the other  
14 receivership actions.

15                   THE COURT: And the others are also  
16 directed toward Penn National?

17                   MR. NES: Yes, Your Honor.

18                   THE COURT: Great Barrier,  
19 Southern, Star Davis and J & L, and it's going to  
20 be one person that's going to touch all of those?

21                   MR. NES: Yes, Your Honor, and it's  
22 all related.

23                   THE COURT: In the interest of  
24 economic presentation then, gentlemen for Penn  
25 National, I'm going to let Mr. Barnwell make

1 whatever presentation he has, then you'll have  
2 the whole picture in front of you.

3 MR. YNTEMA: Thank you, Your Honor.

4 THE COURT: Very well. All right.  
5 Mr. Barnwell.

6 MR. BARNWELL: Your Honor, Brian  
7 Barnwell here on behalf of the receiver for  
8 Southern Insulation, Great Barrier, Star Davis  
9 and J & L.

10 Your Honor, I incorporate  
11 everything Mr. Nes said. These are different  
12 receiverships, but after seeing the conduct that  
13 happened in Covil with Penn National we issued  
14 identical deposition requests and document  
15 requests to coincide with Covil, do one  
16 deposition for all receiverships to reduce any  
17 burden on Penn National and everyone else  
18 involved. I assume they're going to have one  
19 policy for lit hold and document retention  
20 companywide that will apply to these  
21 receiverships, so we would like to just do one  
22 deposition. The only additional questions for  
23 these other receiverships will be to confirm that  
24 what you said at Covil is the same policy you had  
25 in place for the other receiverships.

1                   So I just want to let you know the  
2 issues are the same. If they have any specific  
3 arguments to these receiverships, I'll address  
4 them after they raise them. Barring any  
5 questions from the Court that's all I have.

6                   THE COURT: All right. No  
7 questions.

8                   MR. BARNWELL: Thank you, Your  
9 Honor.

10                  THE COURT: All right. Now we turn  
11 to Penn National. Who will present for Penn  
12 National?

13                  MR. YNTEMA: Your Honor, if I may,  
14 my name is Brady Yntema. I represent Penn  
15 National Insurance in this case. I'm appearing  
16 with my partner, David Harris, who is licensed in  
17 South Carolina, and I appear under his pro hac  
18 vice appearance.

19                  Your Honor, as Mr. Nes had pointed  
20 out, just a housekeeping matter, as far as the  
21 discovery motion for costs of Ellis & Winters  
22 charges, I think that arises out of a  
23 misinterpretation of really what was going on  
24 between communications between Penn National and  
25 Ellis & Winters. Ellis & Winters had charged for

1 their time on a defense file that was also  
2 charged to Travelers because Penn National and  
3 Travelers are participating in defense of  
4 underlying asbestos cases, and so there was some  
5 concern as to we don't need to charge  
6 Ellis & Winters time for document review on a  
7 defense file, but rather it should be charged in  
8 some other manner as far as another file is  
9 concerned. That has been cleared up. Penn  
10 National is incurring those charges, and I think  
11 that the semantics of setting up a separate file  
12 outside of asbestos defense for Covil has been  
13 cleared up.

14 THE COURT: All right.

15 MR. YNTEMA: Going to the motion  
16 for protective order, just to be clear, Your  
17 Honor, at this point Penn National is essentially  
18 doing everything that the motion for protective  
19 order has requested; but I would like to bring,  
20 Your Honor, to the point as to how we got here  
21 today. Just to be clear, with respect to the  
22 case that I'm standing here in and presenting to  
23 the Court on, there's a question as to what is  
24 the subject of this litigation. There's nothing  
25 better to look at but the complaint in this case,



1 and I have a copy of it. It's of record, but I  
2 can hand up to the Court a copy of the complaint  
3 at this time.

4 THE COURT: All right.

5 MR. YNTEMA: Again, as far as the  
6 complaint that's been filed in this case, I would  
7 just direct the attention to the Court, because I  
8 know we're limited on time, to paragraph 8 first.  
9 You'll see that the allegations of this complaint  
10 are seeking coverage declarations as to  
11 particular policies that have been previously  
12 produced by Penn National. Those policies are  
13 listed in paragraph 8 as specifically Penn  
14 National issued primary general liability  
15 coverage policies, and it lists out the policy  
16 numbers and the years those policies were  
17 produced with an annual \$1 million combined  
18 single limit per occurrence as alleged by the  
19 complaint.

20 If you look to paragraph 9 of that  
21 complaint, it claims that Penn National has  
22 failed fully to acknowledge or accept its  
23 insuring obligations under the Penn National  
24 policies, Penn National policies being referenced  
25 as the two policies that have been previously

1 produced.

2 Then briefly, Your Honor, going to  
3 page 7 of the complaint, there's a second cause  
4 of action for declaratory judgment. It says,  
5 upon information and belief Covil purchased  
6 insurance policies from Penn National during the  
7 period of 1986 to 1987 and 1987 to 1988. And  
8 under the third cause of action, again just  
9 briefly, Your Honor, it just points out the  
10 receiver seeks a declaration as to coverage under  
11 those policies.

12 So why does the receiver allege  
13 only those policies with respect to this action?  
14 Previously in this case or in prior cases, mainly  
15 the Middle District in North Carolina, which I'll  
16 get into in just a minute, but in Judge Eagles  
17 Court there were policy charges that were  
18 presented to the Court at one of the first, I  
19 believe, administrative sessions that our firm  
20 participated in because Penn National was  
21 third-partied in in December of -- or November of  
22 2019 into that Middle District of North Carolina  
23 case by Sentry Insurance, which you may recall  
24 was part of the whole Finch action.

25 THE COURT: I well recall.

1                   MR. YNTEMA: I'm sure you do. And  
2 in that case, and I can provide counsel with the  
3 policy charts, that were shown at that time in  
4 2019, if I may. Thank you, Your Honor.

5                   THE COURT: Thank you.

6                   MR. YNTEMA: If you'd take a look  
7 at the policy charts, there are no missing  
8 policies here. In a lot of cases when insurance  
9 coverage is at issue over an extended period of  
10 time, there are oftentimes contentions of missing  
11 policies, where are the missing policies. When  
12 Penn National first became involved with respect  
13 to the Covil insurance coverage disputes, the  
14 coverage scheme and the coverage chart had  
15 already been filled in with Penn National's  
16 policies at the very end, those two policies  
17 being the two policies that are at issue in the  
18 case that's pending before the Court. So there's  
19 no -- there's no policies here where they're  
20 alleging that Penn may have fallen into a missing  
21 policy portion prior to its 1986 policy.

22                   THE COURT: You're arguing that if  
23 somebody else had coverage, it's not possible for  
24 Penn National to have coverage?

25                   MR. YNTEMA: Well, based on this

1 policy chart, there are no missing policies.  
2 There's nowhere in here where a Penn National  
3 policy could fall into a missing block.

4 THE COURT: I really don't --  
5 you're going to have to explain again exactly the  
6 point you're making. These policy charts were  
7 prepared by?

8 MR. YNTEMA: Receiver's counsel.  
9 It was submitted to the Court by receiver's  
10 counsel, Your Honor.

11 THE COURT: Right. And so what's  
12 your point?

13 MR. YNTEMA: I think the point I'm  
14 making at this stage is to show the Court that as  
15 far as the issue as to Covil policies, policies  
16 that were issued to Covil, minus additional  
17 insured policies, outside of the additional  
18 insured context, all policies have been answered  
19 for for Covil. If Covil is a primary insured  
20 under these policies, all policies have been  
21 accounted for as of 2019.

22 THE COURT: Well, let me just ask  
23 you something out of curiosity.

24 MR. YNTEMA: Sure.

25 THE COURT: The contention is that

1 you can only identify by policy number, and is  
2 that how you got both of these policies, that the  
3 insured had the policy number?

4 MR. YNTEMA: I can speak as to when  
5 Penn National -- I'm not sure as to when the  
6 receiver had information that Penn National  
7 provided Covil with insurance, but as to Penn  
8 National --

9 THE COURT: I'm asking what your  
10 client did to produce the policies.

11 MR. YNTEMA: Sure. In 2018 they  
12 did receive a subpoena. Penn National was not  
13 involved in any Covil litigation, had not been  
14 tendered a Covil claim, asbestos claim.

15 THE COURT: Right.

16 MR. YNTEMA: They received a  
17 subpoena, I think it was from Ms. McVey's firm,  
18 pursuant to an order by the Middle District of  
19 North Carolina. That subpoena, which is part of  
20 our reply which I can hand up to the Court as  
21 well, but that subpoena had a chart on it, and it  
22 was issued to a number of different carriers.  
23 And in that chart it had policy numbers as to --  
24 for, I think, a majority of the carriers and  
25 included Penn National. And so Penn National got

1 the subpoena, had the policy numbers for the 1986  
2 through 1988 policy. They went and found that  
3 policy. It was preserved, and they produced it  
4 in response to the subpoena. Thereafter there  
5 was no objection, there was no questions as to  
6 any other insurance coverage that Covil may have  
7 under Penn National's policy until after a  
8 third-party complaint was filed against Penn  
9 National to bring them into the Middle District  
10 of North Carolina case which regarded the Finch  
11 matter. I hope that answers your question, and I  
12 can proceed.

13 THE COURT: Proceed.

14 MR. YNTEMA: Now, I'll just begin  
15 where I left off is in that Middle District of  
16 North Carolina action discovery was served on  
17 Penn National, and in that discovery -- it was  
18 very lengthy discovery -- there was some  
19 question, a long list of policies, even including  
20 Workers' Comp policies and other things of that  
21 nature that Penn National had; and Penn National  
22 responded and said, we have no way of finding,  
23 essentially, an additional insured policy,  
24 period.

25 So litigation was had. Discovery

1 responses were served. Again, at that point no  
2 objection was made. Nothing was questioned as  
3 far as Penn National's production of only its two  
4 policies it had previously found when the policy  
5 was provided. Middle District of North Carolina  
6 case continues. Penn National entered an  
7 appearance, I believe again, in November of 2019  
8 or maybe a little earlier, and then they were --  
9 they, by stipulation of receiver's counsel, were  
10 dismissed from the Finch matter, and by that  
11 stipulation the stipulation read that they would  
12 not pursue any further coverage action with  
13 respect to Penn National in the Finch case.

14               So Penn National was dismissed from  
15 that action and then later the action that we're  
16 currently -- is currently pending before the  
17 court, Covil versus Penn National, was filed.  
18 And again showing the Court the complaint, the  
19 complaint alleges the two policies that they seek  
20 coverage under. So and that occurred in 2020.  
21 Again discovery was issued in 2020 in which Penn  
22 National has responded to, and the additional  
23 insured question was also questioned as far as  
24 what policy -- additional insured policies Penn  
25 National has, and we said we cannot provide any

1 additional insured documents with the information  
2 that we had.

3 And at that point fast forward to  
4 2019, December of 2019. We heard nothing from  
5 the receiver as far as any additional insurance  
6 policies, any other policies that may be in  
7 existence until we receive a subpoena with a rule  
8 30(b)(6) notice for Penn National's deposition  
9 and that they produce certain documents in  
10 December of -- December of 2020, I apologize.  
11 Thank you.

12 So fast forward to January of 2021.  
13 Penn National does submit itself to a rule  
14 30(b)(6) deposition where at the first time it  
15 was asked questions at a deposition about their  
16 search for additional insured policies in 2021.  
17 Thereafter, after the deposition was conducted, a  
18 motion to compel was filed with the Court. We  
19 came to that hearing in February of 2021. The  
20 only issue at hand at that hearing was additional  
21 insured, what has Penn National done to look for  
22 additional insured policies. At that point the  
23 decision was made by the Court and I think by  
24 counsel that Penn National should be provided at  
25 that point with a list of entities, meaning



1 contractors and facilities, that may have  
2 provided Covil with an additional insured status  
3 under their coverage.

4 That discovery we responded to and  
5 we responded to the fact that these names without  
6 more do not provide us with enough information to  
7 be able to sufficiently respond and search our  
8 policy documents. Then that's where this issue  
9 came up with respect to Penn National only being  
10 able to search its archived paper policy related  
11 documents in microfiche by policy number only.

12 Now fast forward to October, the  
13 last hearing that we had on this issue as far as  
14 Penn National's ability to search its policy  
15 documents, and then Ellis & Winters was ordered  
16 to come in and participate in a document review,  
17 which we've complied with and are currently  
18 cooperating with Ellis & Winters which I provided  
19 the Court --

20 THE COURT: Well, you got  
21 sidetracked with this thing about whether you  
22 were going to pay them or not. They went up  
23 there in December for two days and it wasn't  
24 nearly long enough to take a representative  
25 sample and start looking at them, right?

1                   MR. YNTEMA: We provided them with  
2 all the boxes that they requested.

3                   THE COURT: About 200 of them,  
4 wasn't it?

5                   MR. YNTEMA: Yes, there was quite a  
6 few, so they had allotted essentially two days to  
7 get an understanding of what the boxes contained,  
8 and they also were able to go down and look at  
9 the microfiche that we had but didn't have time  
10 to get into the microfiche and actually view the  
11 microfiche, but they currently know how they're  
12 stored. And so we're coordinating another visit  
13 by Ellis & Winters as we speak. The date has yet  
14 to be determined.

15                  THE COURT: What's the situation  
16 with respect to document retention and document  
17 destruction?

18                  MR. YNTEMA: Sure. And again,  
19 going back, the additional insured issue first  
20 came up --

21                  THE COURT: Well, go back to the  
22 beginning. The beginning was in Judge Eagles  
23 Court when Judge Eagles was trying to figure out  
24 coverage and was hitting a blank wall and finally  
25 issued an order that dealt with information from

1 a bunch of insurance companies about potential  
2 coverage of Covil, right?

3 MR. YNTEMA: Yes, Your Honor.

4 THE COURT: And Penn National was  
5 one such company that was subpoenaed, correct?

6 MR. YNTEMA: Penn National was one  
7 such company that was subpoenaed, yes.

8 THE COURT: And at that point we're  
9 talking about direct coverage to Covil, right?

10 MR. YNTEMA: Direct coverage to  
11 Covil, yes.

12 THE COURT: Why was not a  
13 litigation hold put on every -- however you could  
14 do it? If policy numbers was all you had, why  
15 didn't you just hold off on destroying any  
16 insurance policies, historic insurance policies,  
17 when you had an order from a federal judge saying  
18 that you needed to produce something.

19 MR. YNTEMA: That order and a  
20 subpoena that was received was as to just two  
21 policies. At that time in 2018 I don't believe  
22 it would have been reasonable for us to put in  
23 and suspend our entire document retention policy  
24 in Penn National's business, when we received a  
25 subpoena in which at the very minimum Covil isn't

1 even --

2 THE COURT: You say it would have  
3 been unreasonable to do it because you were  
4 relying on them and what they gave you as  
5 insurance policies. There came a point in time  
6 when they were asking for material for which they  
7 did not have policy numbers, correct?

8 MR. YNTEMA: They were asking for  
9 policy information as to Covil as a primary  
10 insured and then also as potentially an  
11 additional insured.

12 THE COURT: Right.

13 MR. YNTEMA: And we responded we  
14 have no way of searching that.

15 THE COURT: Well, you don't have  
16 any way of searching whether they're primary  
17 according to you; it's just policy numbers. Is  
18 that right or wrong?

19 MR. YNTEMA: It is by policy number  
20 as far as our historic policies.

21 THE COURT: Don't answer in the  
22 affirmative it is by policy number. I want to  
23 know whether Penn National has the ability to do  
24 any search by name of insured of its general  
25 liability policies that we're talking about.

1                   MR. YNTEMA: Yes, Your Honor, and  
2 that's the exercise we're going through now with  
3 Ellis & Winters.

4                   THE COURT: You're not answering my  
5 question, Brady. I hope you -- maybe I'm not  
6 making myself perfectly clear.

7                   MR. YNTEMA: I apologize.

8                   THE COURT: You are going through  
9 an exercise now based on representation made to  
10 me in Court this fall that you only can do it by  
11 policy numbers, and I finally got fed up with  
12 that and said, look, get some lawyers that you  
13 can rely upon, either lawyers you appointed to  
14 represent Covil or the Goldberg firm, lawyers  
15 that are directly representing Penn National, and  
16 put the lawyers on there as lawyers to go through  
17 this material and see if they can find some  
18 information about this. What I want to know is  
19 whether Penn National has some ability to, by  
20 name of insured, search its records.

21                   MR. YNTEMA: Yes. And that's been  
22 put forth to the Court in prior affidavits.  
23 There's a two-level search that they can conduct.  
24 They can initially go in and do an electronic  
25 search to see if what they've saved through their

1 ImageRight system, which was only enacted in  
2 early 2000s, contains that particular named  
3 insured.

4 THE COURT: That isn't microfiche  
5 or something like that; it's more electronic  
6 means of searching.

7 MR. YNTEMA: The microfiche and  
8 paper policy document boxes is only by policy  
9 number.

10 THE COURT: What is this way of  
11 searching by name of insured. Explain that to me  
12 again.

13 MR. YNTEMA: Yes. Again, this has  
14 been presented to the Court by affidavit, that if  
15 a named insured is presented to Penn National,  
16 they can enter a named insured -- that name into  
17 a database, and it will come back with a name.  
18 If that name is in their database, it will put  
19 forth the name, it will put forth a policy  
20 number, it will put forth all of that  
21 information, but it only goes back to a specific  
22 date.

23 THE COURT: And it only goes back  
24 to what?

25 MR. YNTEMA: I believe the early

1 2000s.

2 THE COURT: All right. When you  
3 got involved in this dispute where additional  
4 insured information was being asked for and  
5 that's when you started with this business of we  
6 can only search for a policy number, did you put  
7 a litigation hold at that time on the documents  
8 that you had stored, particularly those prior to  
9 the year 2000 where you say you don't have a  
10 direct means of making a data search?

11 MR. YNTEMA: In 2021 there were  
12 no -- when this issue came to a head and Penn  
13 National was subjected to a 30(b)(6) deposition  
14 and a motion to compel was then argued before the  
15 Court as to the issue of additional insureds, no  
16 policies were being -- paper document policies or  
17 microfiche were being destroyed in 2021. The way  
18 Penn National --

19 THE COURT: How about in 2020?

20 MR. YNTEMA: We cannot speak to the  
21 fact as to whether any policies were destroyed in  
22 2020.

23 THE COURT: Say again.

24 MR. YNTEMA: We cannot speak to the  
25 fact as to whether policies were indeed destroyed

1 in 2020.

2 THE COURT: Why can't you? You  
3 haven't asked the client?

4 MR. YNTEMA: Yes, I have, and their  
5 policy is this: Their policy is that at the  
6 beginning of every year that the records  
7 custodian receives a -- well, at the beginning of  
8 every year there's a list that the records  
9 custodian will refer to that will tell him, under  
10 the document retention policy, after 25 years, as  
11 far as liability policies are concerned, after 25  
12 years after cancellation or nonrenewal these  
13 policies can be purged. Now, the purging process  
14 is a lengthy process. Penn National collects the  
15 boxes from Iron Mountain, collects microfiche --

16 THE COURT: So the boxes are  
17 labeled in something more than just policy  
18 numbers. They're labeled in terms of years, they  
19 would have to be, in order to say that 25 years,  
20 prior to 25 years we're going to destroy them.  
21 Am I right about that?

22 MR. YNTEMA: The policy numbers are  
23 provided to Mr. Reifsnyder by policy -- by  
24 cancellation date or nonrenewal date, 25 years  
25 thereafter.



1 THE COURT: So you've got a list  
2 that says by what in every year is issued and  
3 canceled and policy numbers?

4 MR. YNTEMA: By policy number,  
5 nonrenewal date, cancellation date.

6 THE COURT: Well, why in the heck  
7 haven't you given that to them so we can start  
8 getting some sense about this situation instead  
9 of just destroying them? Are you destroying on  
10 the basis of that?

11 MR. YNTEMA: We are not, on the  
12 basis of the list --

13 THE COURT: Going back 25 years. I  
14 mean, now we're in a thing where you've got some  
15 ability to look at these boxes that it was  
16 represented to me there are these boxes at Iron  
17 Mountain and these other places, and all they  
18 have on is policy numbers.

19 MR. YNTEMA: It is true. That's  
20 the way you search for the policy is by policy  
21 number.

22 THE COURT: But there must be some  
23 other key that tells you, hey, in this year we  
24 issued policy numbers X, Y, 1, 2, 3, 4, and the  
25 next year we issued 5, 6 and 7. I mean, if

1 you've been able to identify by 25 years or  
2 older, is there some key that shows you what  
3 policy numbers would be represented by 25 years  
4 or more?

5 MR. YNTEMA: A key. No, I don't  
6 think there is a key.

7 THE COURT: Please don't play word  
8 games with me. I am very, very unhappy about the  
9 teeth pulling I've had to do on this thing. I  
10 want to understand. You've represented to me in  
11 this hearing today, you started to tell me a  
12 little something about their document destruction  
13 situation, and you said that what this  
14 Mr. Reifsnyder -- or whatever his name is -- says  
15 is that each year he gets a list of policies and  
16 nonrenewals that are more than 25 years old.

17 MR. YNTEMA: Yes, Your Honor.

18 THE COURT: Am I reciting what you  
19 told me correctly?

20 MR. YNTEMA: Yes. He references a  
21 list of --

22 THE COURT: How is that list  
23 generated? What's the database or the foundation  
24 for that list?

25 MR. YNTEMA: The database and how

1 that list is generated is by cancellation date  
2 and nonrenewal date is my understanding.

3 THE COURT: So there's a list  
4 somewhere of policy numbers and when they were  
5 canceled and when they were not renewed.

6 MR. YNTEMA: Right. And we are  
7 currently working to get Ellis & Winters that  
8 information. They've asked for the same  
9 information, and we are working to try to get  
10 that information to Ellis & Winters as well.

11 THE COURT: Because it's got to  
12 have something more than just policy number and  
13 nonrenewal. It's got to have a date on it so you  
14 know it's 25 years old or older, correct?

15 MR. YNTEMA: I think that would be  
16 the cancellation and nonrenewal date.

17 THE COURT: Right. So somewhere  
18 there's something that marries up the policy  
19 number with cancellation and nonrenewal, right?

20 MR. YNTEMA: Yes and that's -- yes.

21 THE COURT: And that document  
22 doesn't also indicate anything else about the  
23 insured or the name or anything else?

24 MR. YNTEMA: Not that I'm aware of  
25 at this point, Your Honor, no. Not the list that

1 Brent Reifsnyder gets for the --

2 THE COURT: I'm not talking about  
3 what he gets. We're doing weasel words again.  
4 Is there a list anyplace in Penn National that  
5 takes these policy numbers and nonrenewal or  
6 cancellation dates, that piece of data, and  
7 marries it up with a name of an insured?

8 MR. YNTEMA: And that is currently  
9 being requested to see if there is any way that I  
10 can produce that to -- for us, but at this point  
11 we do not have that as far as that request, and  
12 we're trying to work with Ellis & Winters, and  
13 we're trying to get that information to them if  
14 it does indeed exist, so I can't stand here to  
15 the Court and answer that question in an  
16 affirmative way.

17 THE COURT: That is going to be a  
18 high priority for me for you to be able to answer  
19 that question, and I'm not fussing with you, Mr.  
20 Yntema. All right. You are a person of sterling  
21 reputation, and what you represent to me I take  
22 without reservation. But your company has got to  
23 be more forthcoming than they are being. It's  
24 time to put this to an end and not have to pull  
25 teeth like we're pulling them now.

1                   MR. YNTEMA: I understand, Your  
2 Honor. And again, as far as my activity with  
3 Ellis & Winters and what we've been doing in the  
4 past two months, we've been highly cooperative  
5 and I don't think there's --

6                   THE COURT: Well, both of you's  
7 firms are charged with making this search, and  
8 that is by my order previously after we went  
9 round and round the mulberry bush and finally it  
10 was determined that trusted advisors, A, that had  
11 been hired to represent Covil, or, B, that had  
12 been hired to represent Penn National, those two  
13 groups of lawyers would be the trusted  
14 intermediaries who would get this matter brought  
15 to earth once and for all. Your company needs to  
16 understand that they can't hide the ball from you  
17 all.

18                   MR. YNTEMA: I understand, Your  
19 Honor, and we are pushing forward over the course  
20 of the past two months. We've been pushing  
21 forward on that endeavor.

22                   THE COURT: Now let's go back to  
23 what started this line of inquiry.

24                   MR. YNTEMA: Certainly.

25                   THE COURT: And that is document

1 retention/destruction policies. I hope you're  
2 going to be able to tell me that that whole  
3 policy -- not what just Mr. Brent whatever his  
4 name is is charged, but the companywide policy in  
5 general with respect to insurance policies is  
6 that you're going to put a halt to any of this  
7 destruction until we get this matter straightened  
8 out.

9 MR. YNTEMA: As Mr. Nes is well  
10 aware, receiver's counsel is well aware, we have  
11 put a litigation hold notice in place and I  
12 provided it to counsel. And what I would like  
13 for the Court to understand is that in 2021 the  
14 way Penn National processes -- and that's kind of  
15 where we left off before we digressed -- the way  
16 Penn National processes their policy purge is it  
17 takes course over a year. So they pull boxes,  
18 pull documents --

19 THE COURT: Well, they need to quit  
20 pulling boxes for destruction right now and  
21 concentrate on pulling information about what's  
22 in those boxes.

23 MR. YNTEMA: And we have been doing  
24 that since the Court's order in October.

25 THE COURT: Okay.

1 MR. YNTEMA: And again --

2 THE COURT: And, you know, one  
3 other thing that needs to be understood about  
4 this, this policy document here (indicating)  
5 related to the Finch case.

6 MR. YNTEMA: Sure.

7 THE COURT: We've got a whole lot  
8 more cases that we're dealing with now, and it  
9 shouldn't take the nuclear bomb of the verdict  
10 that was rendered in the Finch case to have  
11 people understand that policy information for  
12 possible coverage for these old legacy policies  
13 with regard to asbestos claims needs to be looked  
14 at and dealt with, and particularly when the  
15 insurance company is sued directly about these  
16 matters, as the receiver has done. And  
17 receiver's not doing that to make your life  
18 miserable. The only asset that some of these  
19 defunct corporations have for potential claims  
20 that involve exposure that took place years ago  
21 but discovery that doesn't happen until very  
22 recently -- which is kind of the way mesothelioma  
23 claims operate -- means that for these defunct  
24 corporations that's their only asset is their  
25 potential insurance coverage, and that is what

1 this receiver is -- this receiver is not trying  
2 to be unreasonable or ask just to be asking. The  
3 receiver is charged by the Court and by the  
4 statutes of South Carolina with marshalling the  
5 assets of these defunct corporations in aid of  
6 paying claims against the corporation. And many  
7 of these policies, particularly the legacy  
8 policies, were the old per occurrence policies,  
9 rather than the more common in this day and age  
10 claims made policies. But whether the policy is  
11 an old per occurrence policy or the more recent  
12 ones are claims made policies, each set of  
13 approaches has possible relevance to the claims  
14 that are now being made, and that is why the  
15 requests are being made and I'm having to get so  
16 down in the minutia of discovery.

17 MR. YNTEMA: Thank you, Your Honor.  
18 I do understand that, and I do appreciate that.  
19 Again, I'll try to kind of shore up my argument,  
20 is that in 2021 after the additional insured  
21 issue came to a head and Your Honor ordered that  
22 receiver's counsel at a minimum provide us with a  
23 list of facilities and contractors, then at that  
24 point we'd been provided with a list, but then we  
25 again communicated the concern that we had in



1     trying to search our records for those  
2     contractors' facilities.

3                     Now, we did do an electronic search  
4     by name only and we did, by way of responses to  
5     subpoena and subsequent discovery responses,  
6     state what we had been able to generate as far as  
7     our electronic search, and then by affidavit  
8     said -- and we got a policy number, presented  
9     that to Mr. Reifsnyder as the document custodian.  
10    He pulled whatever policy documents he had with  
11    respect to those policy numbers, and I've  
12    communicated that by prior discovery responses,  
13    what we were able to find. It could have been by  
14    name similarity. As you might understand,  
15    Johnson Insulation may be -- you know, we may  
16    have insured a Johnson Insulation, but it could  
17    be just simply a name similarity issue.

18                    THE COURT: Well, those are subsets  
19    of what I'm talking about, but when Reifsnyder to  
20    begin with says it's all numbers, if I don't have  
21    a number I can't do a thing, and then it turns  
22    out that development of document discarding and  
23    destruction has much more specific things  
24    attached to it about the years in play and the  
25    numbers in play and perhaps the insureds in play,

1 his answers to begin with were kind of, I made a  
2 five-minute search and blew it off. I hope we're  
3 beyond that now.

4 MR. YNTEMA: I believe we are, and  
5 again, as far as what I've represented to the  
6 Court, my understanding in 2021 that no documents  
7 have been destroyed after this additional insured  
8 issue came to a head. Now, as far as Covil as a  
9 primary insured, I think that's been addressed.  
10 I think that this action and the two policies  
11 that are at issue, we've -- that's part of the  
12 allegations. Those are in play. Those have been  
13 preserved. All Covil documents that we have been  
14 able to find have been preserved.

15 So with that said, that brings us  
16 to the point where what has Penn National's cycle  
17 been. Well, at the end of the year or at the  
18 beginning of -- at the end of 2021 or at the  
19 beginning of 2022 all the documents in microfiche  
20 that would be condensed for ultimate destruction  
21 are due to be destroyed because they only call  
22 the company on one occasion; they don't call it  
23 on multiple occasions throughout the year. And  
24 so at that point with your Court's order we  
25 delineated the fact that Penn National had not

1 destroyed any policy documents or anything of  
2 that nature that Ellis & Winters would be  
3 reviewing or anything of that nature, and then we  
4 put a litigation hold moving forward beginning  
5 December 17th so we could bridge into this year  
6 with everything in current status quo moving  
7 forward into 2022 while Ellis & Winters conducts  
8 its search and then thereafter.

9           As to the documentation retention  
10 policy at Penn National, Brent Reifsnyder's  
11 affidavit which was filed with this Court  
12 confirmed many months ago the 25-year period of  
13 document retention for liability policies, so  
14 we've been -- we have presented that to the  
15 court. The only issue that we have in producing  
16 the document retention policy is that it not only  
17 concerns commercial lines or liability policies,  
18 it also concerns administrative documents, audit  
19 documents, a number of other documents that have  
20 nothing to do with insurance coverage, per se; so  
21 that was our concern by just simply producing our  
22 entire document retention policy. We asked --  
23 and I heard this morning that you had to hear  
24 about a potential protective order being entered,  
25 but we asked that a confidentiality agreement and

1 protective order be entered if we do indeed have  
2 to produce the document retention policy. We're  
3 happy to do so and were happy to do so even as  
4 early as June of 2021 when it was requested, but  
5 at that time we simply responded and I responded  
6 by way of letter as well and provided a proposed  
7 protective order of confidentiality agreement  
8 and, quite frankly, got no response to that  
9 until, as of recent, their concern about the  
10 document retention policy. And I think that  
11 might be the subject for their motion to compel  
12 which isn't ripe for hearing today.

13 But if you look at the 2018 date,  
14 and I'm trying to wrap this up, and I'm sorry for  
15 jumping around, but as of the 2018 date when Penn  
16 National received the subpoena, if we had put a  
17 litigation hold letter in place, 25 years prior  
18 to 2018 would have encompassed 1993 moving  
19 forward, so the document retention policy only  
20 applied to -- I mean, 25 years ago would have  
21 only -- it would have been 1993, moving forward;  
22 so it would have stopped us from purging those  
23 documents that by policy we would be destroying  
24 and purging.

25 THE COURT: Well, it's a miracle

1 you found the Covil policy then if that's the  
2 case. How did you find it? If what you're  
3 trying to tell me is that as of 2018 you had 25  
4 years in place, then how in the heck was it you  
5 retained the Covil policy which was issued in the  
6 '80s?

7 MR. YNTEMA: I expected that  
8 question, and it's something I've asked myself  
9 and I've asked my client and that's the  
10 question -- it should have been destroyed  
11 pursuant to our document retention policy.

12 THE COURT: Which does call into  
13 question what has been represented about the true  
14 nature of the document retention policy, and  
15 since nobody's seen it, all we can do is go on  
16 what your clients are telling you, but what  
17 they've produced is at odds with it.

18 MR. YNTEMA: As far as how the  
19 Covil policy existed, we produced it, and it was  
20 found; and standing here with the Court today,  
21 that's all I can answer as to that. I cannot  
22 tell the Court exactly why or how that may have  
23 been in existence at the time.

24 THE COURT: Well, you're going to  
25 need to find somebody that can tell us. It's

1 going to be somebody within Penn National who can  
2 answer that question and it needs to be answered.

3 MR. YNTEMA: And I think it will  
4 have to be some -- I understand, Your Honor.

5 THE COURT: I don't know who it's  
6 going to be or what group of people it's going to  
7 be, but the Court needs an answer to that, and so  
8 does Ellis & Winters and your law firm.

9 MR. YNTEMA: Certainly.

10 THE COURT: It's not acceptable to  
11 have two firms that have been engaged by Penn  
12 National not know the answer to that question  
13 because it is at complete odds with the whole  
14 representation that's been made about this  
15 document retention policy.

16 MR. YNTEMA: Yes, it is. I  
17 understand.

18 So again I bring that to the  
19 Court's attention today as far as what the  
20 document retention policy is and that the Covil  
21 policy was a policy in the late '80s that was  
22 outside of that 25 year span but was in existence  
23 when we first searched by way of policy number in  
24 2018, and it was produced.

25 So moving forward, that's what

1   transpires and takes us to today, the current  
2   status of where we are with respect to Penn  
3   National's status of the policy, paper policy  
4   documents, the microfiche and the like. As far  
5   as what transpired over December, we have since  
6   received approximately 21 subpoenas relating to  
7   various what I believe to be defunct insurance --  
8   I mean, insulation companies that the receiver I  
9   think had been appointed to, but as far as a more  
10   pressing issue that's before the Court today is  
11   Penn National's motion to quash several subpoenas  
12   and rule 26 -- several subpoenas and deposition  
13   notices for Penn National's deposition relating  
14   to Great Barrier, Southern Insulation, Star Davis  
15   and J & L Insulation.

16                   None of these -- Penn National has  
17   received -- they haven't received any tender of  
18   any claim against Great Barrier, Southern  
19   Insulation, Star Davis and J & L Insulation. I'm  
20   not sure that the receiver has any information  
21   that could even relate Penn National to any of  
22   these entities, but yet they want to take Penn  
23   National's deposition what I assume to be on our  
24   litigation hold as to these entities. We've been  
25   provided with no information as to why the

1 receiver may think that Penn National insured  
2 them. Penn National has conducted a search and  
3 responded previously to a subpoena that was  
4 received for Great Barrier, I believe Southern  
5 Insulation, Star Davis and J & L Insulation, and  
6 we responded to that subpoena many, many months  
7 ago -- most of these were in 2021, I believe one  
8 of them was in 2020 -- telling them of our  
9 search, the search that was conducted, and  
10 responded, and then there was no objection and no  
11 follow-up from anyone for the receiver with  
12 respect to our response.

13 THE COURT: Did you find any  
14 policies on any of those?

15 MR. YNTEMA: We did not find any  
16 policies on any of those entities.

17 The last issue is as to -- and I  
18 think Mr. Nes has already addressed this. I  
19 don't think Mr. Barnwell's going to address this  
20 concern. I think Mr. Barnwell's concern was as  
21 to Great Barrier, Southern Insulation, Star Davis  
22 and J & L Insulation.

23 THE COURT: Right.

24 MR. YNTEMA: As far as the other  
25 Rule 30(b)(6) that Mr. Nes had referenced as to



1 Covil, again, at this point Covil -- as to Penn  
2 National. At this point Penn National has --  
3 Mr. Wright with Penn National has been deposed  
4 twice by way of Rule 30(b)(6), Mr. Reifsnyder has  
5 been deposed once as to a Rule 30(b)(6), and now  
6 this is as to a litigation hold of Penn National,  
7 which that question has already been answered.  
8 At this point Penn National -- you know, me as  
9 counsel with Penn National would like to proceed  
10 with coordinating with Ellis & Winters their  
11 investigation, their search, rather than having  
12 to respond to all these subpoenas, all of these  
13 deposition requests, and things of that nature.

14 But as of this point we have  
15 provided counsel with the current litigation hold  
16 notices in place and provided them with -- and  
17 they understand that our document retention  
18 policy, as I have represented to the Court, we'd  
19 be happy to produce with a confidentiality  
20 agreement protective order. So with that I don't  
21 feel -- I have to say it's my opinion, in my  
22 opinion a Rule 30(b)(6) deposition of Penn  
23 National at this point is unnecessary under  
24 litigation hold notice and procedures. It's  
25 already been represented to the Court as of

1 leading from 2018 all the way up to today's date.

2 THE COURT: All right, sir.

3 MR. YNTEMA: Okay. Any further  
4 questions, Your Honor?

5 THE COURT: No, sir.

6 MR. YNTEMA: Thank you very much  
7 for your time.

8 THE COURT: All right. Mr. Nes.

9 MR. NES: Yes, Your Honor.

10 THE COURT: Any reply?

11 MR. NES: Yes, Your Honor. There's  
12 just a few points I'd like to hit, Your Honor.

13 Brad Nes for the receiver Covil Corporation.

14 First to bring it back to the beginning, the

15 receiver is asking for two things. We want a

16 protective order so that the company can no

17 longer purge or delete documents based on an

18 automatic deletion policy without reviewing Covil

19 documents first or reviewing the documents to

20 determine whether they're Covil related. That is

21 narrowly tailored to both the electronic

22 documents related to historic insurance policies

23 as well as the hard copy documents.

24 Counsel for Penn National mentioned  
25 that an email was transmitted to us where an

1 inhouse counsel sent an email to one individual  
2 within all of Penn National, Brent Reifsnyder,  
3 saying don't participate in the annual purge of  
4 documents, but I have no -- because we haven't  
5 done the discovery yet, I have no way of knowing  
6 whether that's a sufficient litigation hold.

7 That's why we're asking for the protective order  
8 so that they do not institute either automatic  
9 electronic or automatic paper deletion without  
10 reviewing them for Covil documents first.

11                   Second, with respect to the  
12 depositions, this Court has learned more about  
13 the way in which Penn National has used its  
14 document retention hold policies in the last 20  
15 minutes than we've learned in three years. This  
16 is why it is important that we take a narrowly  
17 tailored deposition. The topics that we listed  
18 in our deposition notice relate not only to the  
19 litigation hold but also the processes and  
20 procedures used to review policies before they're  
21 destroyed. So, for example, topic number three,  
22 all automatic routine or otherwise systematic  
23 destruction or purging of your insurance policies  
24 which have taken place since June of 2018; number  
25 six, identification of all insurance policies

1 Penn National destroyed since June of 2018.  
2 There was a lot of discussion about what policies  
3 they destroyed in 2019, what policies they  
4 destroyed in 2021, how did they select those  
5 policies, why didn't they review those policies  
6 before they destroyed them. We don't have the  
7 answers to any of that.

8                   And in response to some of those  
9 questions counsel for Penn National pointed to  
10 this coverage chart, and as the Court properly  
11 pointed out, this coverage chart in no way  
12 represents Penn National's discovery obligations  
13 in this case. All this chart represents is, at  
14 the time it was created, the known primary and  
15 excess coverage of named insureds. As you can  
16 even see in the period between 54 and 66 there's  
17 no excess coverage identified. It's not listed  
18 as a missing policy, but there's just no  
19 information about this.

20                   Also importantly, that was in the  
21 North Carolina federal action. In December of  
22 the North Carolina -- December of 2019 in the  
23 federal action --

24                   THE COURT: Wait a minute, sorry.  
25                   (Brief pause.)

1 THE COURT: Thank you.

2 MR. NES: So one of the arguments  
3 that Penn National made, when you asked them  
4 whether or not there was a litigation hold in  
5 place for 2019 -- you destroyed documents in  
6 2019, did you have a litigation hold in place,  
7 and if not, why not. And the answer for the  
8 first time we've heard is that, well, there was  
9 no question that anybody was looking for Penn  
10 National policies, so why would we have to have a  
11 litigation hold in place. It just wasn't an  
12 issue. And the evidence that he showed for that  
13 was this coverage chart. He said, look, there  
14 was no missing policies, so we had no reason to  
15 put a litigation hold in place in 2019 leading  
16 into 2020.

17 But their own discovery responses  
18 undercut that very argument. Exhibit 5 of Tab E,  
19 which is our response to their motion to quash,  
20 is their interrogatory responses in December of  
21 2019, December 18, 2019. And the very first  
22 interrogatory was, identify all insurance  
23 policies you issued to Covil. Doesn't say all  
24 primary coverage, doesn't say all that's  
25 identified on the coverage chart. It says all

1 policies. What's Penn National's response to  
2 that? It doesn't point to a coverage chart. It  
3 doesn't say we don't have to respond because you  
4 have everything. Their response is, Penn  
5 National does not maintain its records in a way  
6 that would provide a reasonable method of  
7 searching for policies under which Covil is named  
8 as an additional insured or qualifies as an  
9 additional insured. So as of December 18, 2019,  
10 they knew Covil's looking for policies where  
11 they're not just the named insured but the  
12 additional insured. And yet, at the end of 2019  
13 and the beginning of 2020, they went ahead and  
14 did a policy purge anyway. They did a policy  
15 purge without a litigation hold, and they did it  
16 without instructing anyone, presumably, to look  
17 for those policies, and there's been no defense  
18 to that.

19 THE COURT: Let me just stop you  
20 right there because that is something that has  
21 not been answered directly; still hasn't been  
22 answered directly after all this back and forth.  
23 You assume that because Reifsnyder says, we purge  
24 every year either right at the end in December or  
25 carry over to January the first two months of the

1 year, but nobody has ever nailed down that they  
2 actually purge their policies.

3 MR. NES: That's correct. That's  
4 why we have to have depositions.

5 THE COURT: So we still don't know  
6 that. We need to know very directly what the  
7 answer to some of these questions are, but we  
8 don't know that. So, you know, the argument,  
9 well, despite what they knew they went on and  
10 purged, I would be astounded if there isn't  
11 something within -- they may not be telling their  
12 lawyers exactly what they do, but I would be  
13 astounded, with all this litigation swirling  
14 around and with what they were facing in the  
15 Finch case, I would be astounded if they  
16 destroyed all the policies. But you don't know  
17 the answer to that, and I don't know the answer  
18 to that, but it needs to be known. Because you  
19 can say one thing about document retention  
20 policies, but if those document retention  
21 policies were really in place and you went back  
22 25 years, how did Covil's policies from 1987 and  
23 1988 -- how were they located? I think one of  
24 the things that needs to be found out is what  
25 exactly was the process for locating -- you say

1 it was by number. They're supposed to be purged,  
2 but they weren't. How specifically was the  
3 policy located, and who did it, and who located  
4 it.

5                   You may continue.

6                   MR. NES: There was also an  
7 argument that in this particular matter there was  
8 no need for a litigation hold going into 2020  
9 because the complaint only addressed particular  
10 policies, but paragraph 22 of the complaint in  
11 the current action says, plaintiff seeks a  
12 judicial declaration that all policies -- it's  
13 referring to all policies. So, again, the idea  
14 that with all this litigation going on that Penn  
15 National in some way wasn't aware that Covil was  
16 seeking all policies is not a legitimate  
17 argument.

18                   So for those reasons what we would  
19 ask, as I reiterate, is an order from the Court  
20 that they cannot destroy documents on an  
21 automatic purge, either electronically or hard  
22 copy, without reviewing for Covil first; and,  
23 two, that their motion to quash be denied so that  
24 we can pursue the depositions with respect to the  
25 nine topics that we listed, which are not



1 repeating old topics, that are all based on  
2 information that we currently need to know to  
3 understand the scope and ramifications of this  
4 document hold issue. At the conclusion of that  
5 discovery, we would request the evidentiary  
6 hearing to determine what, if anything, needs to  
7 come out of that result.

8 THE COURT: Let me ask you this:  
9 Right now we're still chasing down this issue of  
10 what can be found out about the actual policies  
11 that were issued that are pertinent to receiver's  
12 activities, both the arguments you make with the  
13 Covil case and the arguments Mr. Barnwell makes  
14 with regard to the other four receiverships that  
15 he's mentioned.

16 MR. NES: Yes.

17 THE COURT: Mr. Yntema makes the  
18 argument, why do the depositions until we find  
19 out something about this records issue. What's  
20 your response to that?

21 MR. NES: I think there are two  
22 separate issues with respect to Covil and then  
23 with respect to the other receiverships.

24 THE COURT: All right. Help me out  
25 with that.

1                   MR. NES: So with respect to the  
2 Covil litigation, we need to understand both  
3 issues, which is, we need to understand the scope  
4 of their document destruction policies and how  
5 they actually operate those, but then also how  
6 did they operate them specifically in 2018, 2019  
7 and 2020. So the very issues that you brought  
8 up, in Mr. Reifsnyder's declaration he references  
9 in general they destroy documents on an annual  
10 basis, and we know there was no document hold in  
11 place. So we do need to understand in deposition  
12 both what was their policy, how did they  
13 implement it, and is there any record of what  
14 they actually destroyed.

15                  THE COURT: Well, what I'm trying  
16 to probe is this: The first thing that is needed  
17 is there apparently are documents that one would  
18 not think they had based on the initial responses  
19 to requests with respect to their documents and  
20 their policies. Now we are more on a directed  
21 track with respect to the documents, and we've  
22 got two law firms whose reputation and honor are  
23 on the line to look and see what is in all these  
24 documents that have been retained and what they  
25 contain. You're going to go back and plow the

1 same ground with two people you've already  
2 deposed, Reifsnyder and Wright, and my bet is  
3 those are the ones that are going to be offered  
4 one more time on this subject. Does it make  
5 sense to do the one before you do the other?

6 I mean, I don't see any point in  
7 getting another half answer and then later  
8 discovery indicates there are other documents  
9 that you weren't told of. And I don't know  
10 whether there's some other cog in this machine  
11 besides these two gentlemen that could provide  
12 more clarity and they have been kind of tasked  
13 with one little isolated piece of this thing. I  
14 just don't understand that. So what I'm wanting  
15 is some kind of clear direction from you as to  
16 what it is you all want before I decide what you  
17 reasonably ought to have.

18 MR. NES: We reasonably should  
19 have, in terms of documents, we need to have  
20 their policy so that we can analyze that. We  
21 need to understand, as the Court has pointed out,  
22 why is it that -- how is it that documents are  
23 selected to go into that purge list. Then we  
24 need to understand what documents were actually  
25 destroyed in 2018, 2019 and 2020. As the Court

1 points out, if there were no documents destroyed,  
2 for whatever reason, there's not much of an issue  
3 with respect to that. So we need to understand  
4 that.

5                   The only way I know to do that is  
6 either by serving an interrogatory or asking  
7 deposition questions. We have not deposed either  
8 Mr. Reifsnyder or Mr. Wright on any of these  
9 particular issues because we assumed, as most  
10 companies in America, that they would have put a  
11 litigation hold in place and that they were  
12 reviewing documents before they destroyed them.  
13 So now we have new ground that we need to go in  
14 and ask about.

15                   That's different than what Penn  
16 National and Ellis & Winters are doing now. What  
17 they're doing now is understanding what still  
18 exists, how can we narrow this to make it an  
19 easier review, and then once we narrow it,  
20 actually conduct a review. As you'll recall,  
21 when we were here in October of last year, the  
22 whole point was they were going to --  
23 Ellis & Winters was going to look under the hood  
24 and decide if there was a way to narrow this and  
25 then report back to you. They've already

1 reported twice, and there's been no proposal  
2 about how to narrow it. It may be that the  
3 result is they have to just go review everything  
4 because there's not a way to narrow it. But  
5 that's a separate issue looking forward than us  
6 looking back to understand why were policies  
7 destroyed, what was destroyed, and what's the  
8 ramifications of that.

9 THE COURT: Well, so the bottom  
10 line is, if you have a protective order that says  
11 no purge, and you have the motion to quash  
12 denied, then what else are you seeking now that  
13 more specifically addresses the issues we just  
14 talked about?

15 MR. NES: I understand. At this  
16 point we're not seeking any further relief. We  
17 did file a motion for an evidentiary hearing. So  
18 the way we envision this was we would complete  
19 the document and deposition testimony to  
20 understand those very issues and then have a  
21 hearing with the Court to make factual findings  
22 about whether there actually was spoliation; and  
23 if so, what remedies would be available but at  
24 this motions hearing --

25 THE COURT: Well, spoliation is yet

1 a different level of things. I, frankly, think  
2 it's very premature to get into claims about  
3 spoliation when we don't understand now exactly  
4 what documents there are and how they're  
5 maintained and how they're accessed. So I'm not  
6 making any assumptions about that because I don't  
7 still think we know exactly how document  
8 retention and destruction works. I don't think  
9 their attorneys do either, from what I can tell.

10 MR. NES: And I think that's our  
11 position, Your Honor, is that we're just looking  
12 for discovery at this point, but we have a good  
13 faith basis to pursue this discovery.

14 THE COURT: What do you envision as  
15 the time frame for all of this if I give you a  
16 protective order with respect to purging for  
17 Covil and deny their motion to quash?

18 MR. NES: With respect to the  
19 denial of the motion to quash, we would look to  
20 schedule the depositions as soon as possible with  
21 opposing counsel so it's --

22 THE COURT: Which depositions?

23 MR. NES: The 30(b)(6) deposition,  
24 which is currently the motion --

25 THE COURT: That means you would

1 plow the ground again with Reifsnyder and Wright?

2 MR. NES: We may depose them, but  
3 we're not plowing old ground because we need  
4 answers to all the questions this Court has  
5 already brought up, which is were there policies  
6 destroyed in 2018, 2019, 2020, how were --

7 THE COURT: They're going to answer  
8 it just like they've answered it before. I'm  
9 trying to figure out some structure of this thing  
10 that first gets at what documents they have  
11 before we have one more round and then you come  
12 back and say they're still not telling us  
13 everything.

14 MR. NES: We could serve a document  
15 request, Your Honor, and in addition to that we  
16 could serve an interrogatory request to clarify  
17 some of these issues, and then at the end of that  
18 it will probably narrow what we'll need to ask at  
19 deposition.

20 THE COURT: I think that would make  
21 more sense. What I'd like to do is put the  
22 motion to quash on hold, not deny it yet, just  
23 keep it on hold, and first let's concentrate on  
24 the no purge, what's really in the documents,  
25 what can the firms discover from them, and use

1 interrogatories to narrow the focus of what  
2 you're trying to do so that they don't have to --  
3 I don't want them to come back six months later  
4 and say we never could get to this because we  
5 were so busy trying to defend these multiple  
6 depositions of Wright and Reifsnyder that we  
7 can't ever get to the documents. I'd like to see  
8 a big push towards getting the information that  
9 is needed and then deal with the re-deposing of  
10 two guys that have already deposed before and I  
11 agree have not been zeroed in on what we're  
12 talking about now.

13 MR. NES: Yes, Your Honor. That  
14 makes a lot of sense. We can certainly structure  
15 it like that.

16 THE COURT: Here what I'm going to  
17 do: I'd like you to prepare an order that deals  
18 with the protective order, the no purging. All  
19 right. Get that to your opposing counsel within  
20 ten days. I will reserve judgment on the motion  
21 to quash right now. If I had to act on it right  
22 now, I of course would deny the motion to quash,  
23 but I don't think it makes any sense to go  
24 forward with those depositions, so I would like a  
25 hold put on re-deposing the two, Wright and



1 Reifsnyder, until we try to get some kind of  
2 clarity about these documents.

3 MR. NES: Understood, Your Honor.

4 THE COURT: And I will tell you  
5 what I'll do, draw up an order that deals with  
6 both of those, send it to your two opposing  
7 counsel, let them take a look at it. You all  
8 doctor around with it on what the hold on  
9 depositions would look like or what it would say.  
10 I don't want it to be any kind of open-ended or  
11 indefinite thing. But what I would like to do is  
12 proceed in an orderly way to see whether we can,  
13 in light of the all the cross currents and  
14 conflicting information there is about these  
15 documents and what's in them, let's get these two  
16 law firms and you all deeply involved in finding  
17 out what the answer to that is. Then we can come  
18 back and see.

19 And, quite honestly, you know, it  
20 doesn't do any good to depose them in Covil and  
21 then have to come right back and do it in these  
22 other receiverships. That's not fair to them and  
23 I don't think promotes the ends of justice. They  
24 know a lot about Covil and what you claim is the  
25 responsibility there, but they don't know about

1 Star Davis and some of the rest of these. I  
2 think that needs to be fleshed out more before we  
3 decide how these discovery depositions,  
4 30(b)(6)'s that receiver wants to take, how they  
5 would be staged and how they would work out and  
6 what would be the breadth and depth of them.

7 And I turn to you, Brady. Does  
8 that make some sense to you?

9 MR. YNTEMA: Yes. I understand  
10 what you're saying.

11 THE COURT: I know that you all are  
12 opposing counsel in a lot of ways, but can you  
13 collaborate a little bit on this so we can get  
14 some kind of system to what we're doing now?

15 MR. YNTEMA: I'm open to  
16 collaborate, yes.

17 MR. NES: Great.

18 THE COURT: Good.

19 MR. NES: Yes, Your Honor.

20 THE COURT: How about you hatch up  
21 something, Mr. Nes, and send it to them within  
22 ten days, then you all try to reply to them in  
23 five; and in the meantime perhaps you all can  
24 come to some agreement that I won't have to be  
25 involved, and that would be highly satisfactory.

1 And particularly in light of the fact that -- and  
2 the hold on 30(b)(6)'s isn't open-ended, but what  
3 I would envision is that a series of  
4 interrogatories would be propounded first, and  
5 then we'd move back into the 30(b)(6) phase of  
6 this thing. So you all contemplate those tasks  
7 and see how we can stage this in a way that seems  
8 reasonable.

9 MR. NES: Yes, Your Honor.

10 MR. YNTEMA: Yes, Your Honor.

11 THE COURT: Everybody understand  
12 where they are, more or less?

13 MR. NES: Yes.

14 THE COURT: Maya, do you have  
15 anything else that I'm missing?

16 Oh, yeah, the notices of  
17 dissolution. Guys, where are those things?

18 MR. PROTOPAPAS: Your Honor, Peter  
19 Protopapas, receiver for Covil Corporation. Your  
20 Honor, there is a continuing dispute between  
21 everybody on an agreed dissolution. I'm going to  
22 withdraw my request, with permission of the  
23 Court, to allow everyone to get face to face.

24 THE COURT: That's much better. I  
25 just don't like -- I never have matters under

1     advisement that last a good long time, and I want  
2     to be able to take this off of matters of  
3     advisement if you're not asking for it at the  
4     time.

5                     MR. PROTOPAPAS: I'm withdrawing  
6     the request, Your Honor.

7                     THE COURT: Very good.

8                     MR. PROTOPAPAS: Thank you, Your  
9     Honor.

10                    THE COURT: Anything else for the  
11    good of the cause?

12                    MR. PROTOPAPAS: None for the  
13    receivership, Your Honor.

14                    THE COURT: Mr. Yntema?

15                    MR. YNTEMA: Just to clarify, just  
16    to be clear, is that the motions to quash are as  
17    to the Covil Rule 30(b)(6) for Penn National and  
18    then also all the other receivership cases, those  
19    are all -- motions to quash are all being held in  
20    abeyance.

21                    THE COURT: Say again?

22                    MR. YNTEMA: Penn National's  
23    motions to quash as to the Rule 30(b)(6) issued  
24    on behalf of Covil and the receivership cases,  
25    the other receivership cases like Great Barrier

1 and J & L Insulation, all of those motions to  
2 quash are being held in abeyance.

3 THE COURT: Are stayed, yes. All  
4 of them are stayed pending the march we're going  
5 to make through trying to deal with documents and  
6 specified interrogatories. Then we'll know what  
7 we want to do with the 30(b)(6)'s.

8 MR. YNTEMA: Thank you, Your Honor.

9 THE COURT: And my guess would  
10 be -- my hope would be that the content would be  
11 refined rather considerably, depending on what is  
12 produced in this document and interrogatory  
13 exercise, so that the final outlines of what the  
14 30(b)(6) would ask for may be a little different  
15 from the way they appear right now. And any  
16 motions you might have to quash or otherwise  
17 could address the reality of where they are then  
18 rather than now. That's why I say let's put it  
19 on hold, let's stay court action on them, and the  
20 30(b)(6)'s themselves are stayed while we go  
21 through this other exercise.

22 MR. YNTEMA: I appreciate that,  
23 Your Honor.

24 THE COURT: So the stay is a stay  
25 of my making any ruling and a stay on them

1 pursuing it. Does that answer what you were  
2 trying to get at it?

3 MR. YNTEMA: It does, Your Honor.  
4 Thank you.

5 THE COURT: Mr. Nes?

6 MR. NES: Yes. Sorry, Your Honor,  
7 one other issue. I'm not sure that we actually  
8 have a ruling on our motion for protective order.

9 THE COURT: Sir?

10 MR. NES: We have a motion for  
11 protective order in place.

12 THE COURT: Your motion for the  
13 protective order is granted.

14 MR. NES: And so we'll just --

15 THE COURT: You'll do an order that  
16 you'll send to him granting that, no question  
17 about it.

18 MR. NES: Understood. Okay.

19 THE COURT: And then the rest of  
20 it, which is the hold or stay on the 30(b)(6)'s  
21 pending the Ellis & Winters and Goldberg efforts  
22 at identifying more precisely what's in the  
23 repositories, etc., and the propounding the  
24 interrogatories and then the resuming  
25 depositions. But, yes, the sine qua non of it

1 all is no more purging at all right now. So  
2 that's the protective order, yes. That's in  
3 place. And in return for that we're going to try  
4 in an orderly way march through how we look at  
5 the existence or nonexistence or whatever of  
6 these records and then depose based on that. Am  
7 I making sense?

8 MR. YNTEMA: Yes, yes, yes, thank  
9 you.

10 MR. NES: Thank you, Your Honor.

11 THE COURT: Okay. All right. This  
12 hearing is adjourned.

13 (Hearing concluded at 1:32 p.m.)

14 - - -

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CERTIFICATE OF REPORTER

I, Ruth Mott, Registered Professional Reporter, Certified Realtime Reporter, and Notary Public for the State of South Carolina, do hereby certify that the witness in the foregoing hearing was by me duly sworn to testify to the truth, the whole truth and nothing but the truth in the within-entitled cause; that said hearing was taken at the time and location therein stated; that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed by computer-aided transcription, that the foregoing is a full, complete and true record of the testimony of the witness and of all objections made at the time of the examination; and that the witness was given an opportunity to read and correct said deposition and to subscribe the same.

Should the signature of the witness not be affixed to the deposition, the witness shall not have availed himself of the opportunity to sign or the signature has been waived.

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 on January 17, 2022 at Moncks Corner, Berkeley County, South Carolina.

Ruth Mott,  
Registered Professional Reporter  
Certified Realtime Reporter  
and Notary Public  
My Commission expires  
February 23, 2025



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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

COVIL CORPORATION, BY AND  
THROUGH ITS DULY APPOINTED  
RECEIVER PETER D. PROTOPAPAS,

Plaintiff,

vs.

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

PENNSYLVANIA NATIONAL MUTUAL  
CASUALTY INSURANCE CO.;  
SAM J. CRAIN & CO., INC;  
AND SOUTH CAROLINA PROPERTY  
AND CASUALTY INSURANCE GUARANTY  
ASSOCIATION,

Defendants.

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MOTIONS HEARING  
BEFORE THE HONORABLE  
CHIEF JUSTICE (RET.) JEAN TOAL

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DATE TAKEN: Monday, April 11, 2022

TIME START: 2:57 p.m.

TIME END: 4:14 p.m.

LOCATION: Richland County Judicial Center  
1701 Main Street  
Columbia, South Carolina

REPORTED BY: SHERI L. BYERS  
Registered Professional Reporter  
EVERYWORD, INC.  
P.O. Box 1459  
Columbia, South Carolina 29202  
803.212.0012

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I N D E X

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E X H I B I T S

(None were proffered.)

- 4586 -  
Motions Hearing

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| <p style="text-align: right;">Page 4</p> <p>1                   - - -</p> <p>2                   P R O C E E D I N G S</p> <p>3                   - - -</p> <p>4           THE COURT: All right. Ladies and</p> <p>5 gentlemen, this afternoon we have various</p> <p>6 matters involving the receivership of Covil</p> <p>7 Corporation in connection with the litigation</p> <p>8 styled Covil against Penn National,</p> <p>9 2020-CP-40-02098.</p> <p>10          I have before me five status reports from</p> <p>11 Ellis &amp; Winters and various motions from Covil</p> <p>12 and from Penn National pertaining to the Covil</p> <p>13 receivership.</p> <p>14          So I will begin by asking you,</p> <p>15 Mr. Protopapas, to set the stage.</p> <p>16          Let me say this just for the record. When</p> <p>17 you speak, Counsel, always unmask and use the</p> <p>18 microphone, that way I can hear you and the</p> <p>19 court reporter can, as well as those in</p> <p>20 attendance not presenting today.</p> <p>21          And if there's nothing else, preliminary to</p> <p>22 put on the record, Mr. Protopapas, I turn to</p> <p>23 you.</p> <p>24          MR. PROTOPAPAS: Thank you, Your Honor.</p> <p>25          Peter Protopapas for Covil. Your Honor, I</p>                                                                                                | <p style="text-align: right;">Page 6</p> <p>1          Your Honor, is we have asked a very fair</p> <p>2 question in our declaratory judgment action.</p> <p>3          For this Court to declare rights and</p> <p>4 responsibility between those two policies, and</p> <p>5 we have asked a discovery request for all of our</p> <p>6 insurance policies which are the subject of this</p> <p>7 litigation. And we have come back and forth.</p> <p>8          I will not rehash that history, but I will</p> <p>9 say that in November of 2021, this Court issued</p> <p>10 an order, and Ellis &amp; Winters has been appointed</p> <p>11 to investigate and to come up with</p> <p>12 recommendation as to how Covil can receive its</p> <p>13 policies for this Court to declare the rights</p> <p>14 and responsibilities between Penn National and</p> <p>15 Covil Corporation.</p> <p>16          And, Your Honor, at a high level, Ellis &amp;</p> <p>17 Winters has identified four categories of</p> <p>18 documents at Penn.</p> <p>19          THE COURT: Before you go that specifically</p> <p>20 into the matters with Penn National, let me</p> <p>21 place upon the record a few things preliminary</p> <p>22 to this.</p> <p>23          Mr. Protopapas was appointed as the</p> <p>24 receiver for Covil Corporation. A corporation</p> <p>25 which had let its charter lapse from the state</p>                                                                                        |
| <p style="text-align: right;">Page 5</p> <p>1          will say when the Court takes its break and is</p> <p>2 ready, Robert Bonds, my law clerk, is here with</p> <p>3 a truck --</p> <p>4          THE COURT: Excellent.</p> <p>5          MR. PROTOPAPAS: -- and is ready to help.</p> <p>6          THE COURT: Wonderful.</p> <p>7          MR. PROTOPAPAS: Your Honor, at a high</p> <p>8 level there are three general issues before the</p> <p>9 Court. The Ellis &amp; Winters reports, motions to</p> <p>10 compel and motions to quash your protective</p> <p>11 order and a motion regarding confidentiality.</p> <p>12          We felt -- both Penn National and Covil</p> <p>13 felt best to begin with the Ellis &amp; Winters</p> <p>14 reports and ask the Court -- you may remember,</p> <p>15 this case originally was filed as one of two</p> <p>16 Penn cases. The first one the Court ruled and</p> <p>17 has gone up on appeal.</p> <p>18          This is the second one, the larger, more</p> <p>19 comprehensive lawsuit, seeking a declaratory</p> <p>20 judgment on all of Covil's policies filed in</p> <p>21 April of 2020, removed to federal court,</p> <p>22 remanded one year ago.</p> <p>23          And since we've been remanded, we've been</p> <p>24 back and forth before this Court on various</p> <p>25 discovery issues which, from my perspective,</p> | <p style="text-align: right;">Page 7</p> <p>1          of South Carolina's corporation at a certain</p> <p>2 point in time, and a corporation which was</p> <p>3 engaged in the business of selling and sometimes</p> <p>4 selling and installing thermal insulation and</p> <p>5 other types of insulation made with asbestos in</p> <p>6 the state of South Carolina and in other places</p> <p>7 in the Southeast for a good many years beginning</p> <p>8 in the '60s and ending in the '90s.</p> <p>9          This corporation was sued in many asbestos</p> <p>10 cases, and I manage the asbestos docket at the</p> <p>11 appointment of the chief justice.</p> <p>12          I began to have a regular situation occur</p> <p>13 that Covil Corporation would not respond to</p> <p>14 requests for information and would be compelled</p> <p>15 and would not respond to the request to compel.</p> <p>16          And, ultimately, I struck Covil's pleadings</p> <p>17 in a certain case as a sanction for its failure</p> <p>18 to respond to proper discovery motions after</p> <p>19 many motions to compel and motions to sanctions.</p> <p>20          It then developed that Covil had for years</p> <p>21 been effectively managed by the attorneys for</p> <p>22 the insurance companies that insured Covil's</p> <p>23 claims and that the approach was to not</p> <p>24 participate in discovery, to rather accept the</p> <p>25 pleadings and then engage in a course of conduct</p> |



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| <p align="right">Page 8</p> <p>1 of waiting until the last moment and then<br/>2 settling the cases at a nuisance value.<br/>3 So the question arose in my mind, if that's<br/>4 so, where are these insurance companies and what<br/>5 kind of policies cover these matters?<br/>6 It developed that the policies that cover<br/>7 these matters are old, legacy policies issued at<br/>8 a time when commercial general liability<br/>9 policies were industry-wide, issued to cover per<br/>10 occurrence liability. That is to say, liability<br/>11 which had allegedly been incurred during the<br/>12 time period for which the policy was issued.<br/>13 Later, the whole industry went to a<br/>14 claims-made basis for coverage in which the<br/>15 coverage -- liability coverage covers only<br/>16 claims made during the year or years for which<br/>17 the policies are issued.<br/>18 And one of the reasons that was done is<br/>19 because of occurrences which occur exposure-wise<br/>20 at one stage but involved a condition or disease<br/>21 which may be latent for many, many years.<br/>22 That is the case with the disease called<br/>23 mesothelioma, and it is the contraction of<br/>24 mesothelioma that forms the primary basis of<br/>25 most of the cases in the asbestos docket that I</p> | <p align="right">Page 10</p> <p>1 insurance companies, of which I am aware, and<br/>2 perhaps more.<br/>3 Those companies went through a long period<br/>4 of disclosure and then negotiation finally<br/>5 resulting in approval by the Court of settlement<br/>6 proposals that funded the Qualified Settlement<br/>7 Fund which is available for future claims<br/>8 against Covil for liability for asbestos-related<br/>9 diseases in the manner that I have previously<br/>10 described.<br/>11 Penn National is now the company with which<br/>12 we are dealing. And Penn National first came to<br/>13 the Court's attention in connection with the<br/>14 Finch case, which was a case tried in the United<br/>15 States District Court in North Carolina<br/>16 resulting in a 32-plus million dollar verdict.<br/>17 Much concern and litigation ensued, concern<br/>18 expressed by the United States District Court<br/>19 judge that tried the case, and litigation<br/>20 regarding failure to cooperate and failure to<br/>21 disclose coverage by the various insurance<br/>22 companies involved.<br/>23 It was during that period of time that Penn<br/>24 National came to this Court's attention.<br/>25 Certain policies were found during that time,</p> |
| <p align="right">Page 9</p> <p>1 have been managing for the last few years.<br/>2 Because exposure may lay dormant for many<br/>3 years and then only be discovered 20, 30, and<br/>4 sometimes 40 years later, the coverage would be<br/>5 coverage from these old what the industry calls<br/>6 "legacy policies." And the practice was to try<br/>7 to be as minimally responsible in discovery as<br/>8 possible so as to avoid responsibility for these<br/>9 policies' participation in mediation of these<br/>10 cases and the like.<br/>11 When I saw that that was the situation<br/>12 involved with Covil Corporation, I appointed a<br/>13 receiver to manage Covil's assets. And the only<br/>14 asset Covil had at that time and has to this day<br/>15 is its old legacy insurance coverage for its<br/>16 liabilities during the time it was an active<br/>17 asbestos insulation company.<br/>18 Covil, under the guidance of its receiver,<br/>19 has now looked into coverage from many different<br/>20 insurance companies to see what kind of coverage<br/>21 it's had on a primary basis, an excess basis, or<br/>22 the like.<br/>23 To that end, a Qualified Settlement Fund<br/>24 has now been created, and it has been funded by<br/>25 the proceeds of settlement with at least six</p>             | <p align="right">Page 11</p> <p>1 and I want to explore that again today to<br/>2 understand just how that was done.<br/>3 But Covil, through its receiver, tendered<br/>4 to Penn National the defense of various claims<br/>5 that are being made against it. And it is in<br/>6 that connection that Covil began to request<br/>7 information from Penn National about its<br/>8 policies.<br/>9 Penn National has taken the position that<br/>10 it is unable to access any possible liability<br/>11 coverage for Covil or anyone else which it may<br/>12 have insured in the past unless it has a policy<br/>13 number.<br/>14 It then developed that Penn National has<br/>15 stored a good deal of material, microfiche in<br/>16 some respects and paper in some respects, in a<br/>17 storage facility or facilities.<br/>18 But that -- its claim was that it could<br/>19 not -- the material is so voluminous that it<br/>20 could not access it unless policy numbers were<br/>21 had.<br/>22 Covil, to begin with, asked a series of<br/>23 questions by means of discovery. No material<br/>24 was forthcoming and we have now gone through<br/>25 several hearings on motions to compel relating</p>                                                           |

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| <p align="right">Page 12</p> <p>1 to the ability to look at these repository</p> <p>2 policies to discover whether any of them relate</p> <p>3 to Covil or to other receiverships which have</p> <p>4 been established in this state, of which</p> <p>5 Mr. Protopapas is the receiver, that involve a</p> <p>6 similar fact pattern of the defunct company</p> <p>7 really being run by its insurer-appointed</p> <p>8 attorneys but not responding to requests for</p> <p>9 information about policy coverage.</p> <p>10 And that is where we find ourselves now.</p> <p>11 After several hearings about this matter Ellis &amp;</p> <p>12 Winter, a law firm, was appointed to engage to</p> <p>13 search these records in the various repository</p> <p>14 facilities of Penn National, sample them, and</p> <p>15 devise some methodology for trying to discover</p> <p>16 who the insured were on these various policies</p> <p>17 and who the insured were on excess policies and</p> <p>18 the like.</p> <p>19 And what has uniformly been the response of</p> <p>20 Penn National has been it's too impossible, it's</p> <p>21 too voluminous, and we can't do it.</p> <p>22 Ellis &amp; Winters has now made certain</p> <p>23 recommendations as to how these materials might</p> <p>24 be organized.</p> <p>25 That is where we stand today. And that</p> | <p align="right">Page 14</p> <p>1 MR. PROTOPAPAS: That's probably much</p> <p>2 better.</p> <p>3 THE COURT: I think that would be better.</p> <p>4 MR. PROTOPAPAS: Thank you, Your Honor.</p> <p>5 But the pre-1992 policies, which is the</p> <p>6 time frame that we are concerned with, are all</p> <p>7 on microfiche.</p> <p>8 I have brought with me, Your Honor, Brian</p> <p>9 Flatley, who is from Ellis &amp; Winters' IT group,</p> <p>10 and Ashley Brathwaite who is with Ellis &amp;</p> <p>11 Winters. They are available to answer any</p> <p>12 questions the Court has about the reports.</p> <p>13 Would you like me to bring Mr. Flatley up</p> <p>14 to give an overview of these four</p> <p>15 recommendations?</p> <p>16 THE COURT: Absolutely. Ms. Brathwaite and</p> <p>17 Mr. --</p> <p>18 MR. PROTOPAPAS: Flatley, F-L-A-T- --</p> <p>19 MR. FLATLEY: -- -L-E-Y.</p> <p>20 MR. PROTOPAPAS: -- -L-E-Y.</p> <p>21 THE COURT: All right.</p> <p>22 MR. FLATLEY: Good afternoon, Your Honor.</p> <p>23 I'm happy to answer any questions you have.</p> <p>24 THE COURT: Let's get the interim reports.</p> <p>25 MR. FLATLEY: I understand it's 1E,</p>                                                                                                                                                                                         |
| <p align="right">Page 13</p> <p>1 this hearing is now being conducted after many</p> <p>2 reports of Ellis Winter on where we stand and</p> <p>3 what should be done to try to get this policy</p> <p>4 information available to the court.</p> <p>5 MR. PROTOPAPAS: Very briefly, Your Honor.</p> <p>6 Microfiche files are the files for the pre-1992</p> <p>7 insurance policies. From 1992 to 1995, those</p> <p>8 insurance policies are scanned images. From</p> <p>9 1995 to 2002, they are paper. And from 2002 on,</p> <p>10 those policies are electronic.</p> <p>11 I am concerned with the pre-1992 policies</p> <p>12 that are on microfiche as those are the legacy</p> <p>13 policies that are generally not claims made and</p> <p>14 generally do not have asbestos.</p> <p>15 THE COURT: I am not hearing your</p> <p>16 microphone well.</p> <p>17 Are you hearing it, Madam Court Reporter?</p> <p>18 THE COURT REPORTER: It could be better.</p> <p>19 THE COURT: Is the light indicating that</p> <p>20 it's on?</p> <p>21 MR. PROTOPAPAS: It's on. I just have to</p> <p>22 be better at using it.</p> <p>23 THE COURT: I'm wondering, Mr. Protopapas,</p> <p>24 would it help if it were on the podium and the</p> <p>25 stalk bended down to you?</p>                                                                                        | <p align="right">Page 15</p> <p>1 Your Honor.</p> <p>2 THE COURT: The report that is kind of</p> <p>3 bottom line to me, unless you tell me there's</p> <p>4 more, is the report of March 22nd.</p> <p>5 MR. FLATLEY: Yes, Your Honor.</p> <p>6 THE COURT: Yes. March 22nd is the report</p> <p>7 I'm looking at right now. That's the one that</p> <p>8 contains the four options that we're looking at.</p> <p>9 And, frankly, I spent years in litigation,</p> <p>10 way before the days of digitization and the</p> <p>11 kinds of easy ability technologically to create</p> <p>12 searchable databases, Excel spreadsheets and the</p> <p>13 like, to deal with voluminous matters.</p> <p>14 When I was still in litigation in</p> <p>15 warehouses the size of which couldn't be</p> <p>16 comprehended on things like the wide-scale</p> <p>17 multidistrict beer wholesalers litigation and a</p> <p>18 good many personal injury cases, including Otis</p> <p>19 Elevators' huge repository, when I had an</p> <p>20 elevator defect case, and the Amtrak derailment</p> <p>21 cases I was involved in that involved records</p> <p>22 from the axle refinishing plant in New Haven.</p> <p>23 And all those involved enormous paper records.</p> <p>24 And we didn't think anything of sitting</p> <p>25 down a week or two at a time as lawyers with a</p> |

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**Motions Hearing**

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| <p>1 document note and sort them or put Bates numbers</p> <p>2 on them or anything and going through them and</p> <p>3 getting them in shape to have some</p> <p>4 understanding.</p> <p>5 I realize this Iron Mountain facility has</p> <p>6 some several hundreds of boxes of these</p> <p>7 microfiche and 300,000 microfiche cards. But I</p> <p>8 am -- that is not an impossible mountain to</p> <p>9 climb in my humble opinion.</p> <p>10 MR. FLATLEY: Your Honor --</p> <p>11 THE COURT: I know that you engaged two</p> <p>12 vendors to give you preliminary estimates</p> <p>13 between 240,000 and \$960,000 to -- not including</p> <p>14 cost for hosting storage and scanned records and</p> <p>15 a searchable database are costs related to</p> <p>16 review the records. Well, be that as it may.</p> <p>17 It takes a lot more to try a case than it</p> <p>18 did, you know, 35 or 40 years ago when I was</p> <p>19 trying cases. But the volume is something that</p> <p>20 I'm familiar with.</p> <p>21 So what I want to understand is how hard it</p> <p>22 would be to go on and engaging one of these</p> <p>23 firms, and instead of spending the hundreds and</p> <p>24 thousands of dollars that are being spent right</p> <p>25 now resisting any kind of digitization or</p> | <p>1 that photograph image. Wouldn't that be so?</p> <p>2 MR. FLATLEY: To an extent, Your Honor.</p> <p>3 The one point I would make about that is a</p> <p>4 single microfiche card has up to 60 images on</p> <p>5 it. So you have one option which is to have a</p> <p>6 microfiche reader. Which you would have to go</p> <p>7 through and look image by image. That would be</p> <p>8 probably impractical.</p> <p>9 THE COURT: It would be, but you've got</p> <p>10 many other devices that can take a thing that's</p> <p>11 got a whole bunch of stuff crammed to it, expand</p> <p>12 it, and then photograph it, and then move</p> <p>13 forward to searchability.</p> <p>14 MR. FLATLEY: That's exactly right, Your</p> <p>15 Honor. So the recommendation we've made is to</p> <p>16 engage a vendor that would do that, that has the</p> <p>17 ability to scan microfiche cards and get them</p> <p>18 into an image format. And then from that point,</p> <p>19 we make it into a searchable unit of records.</p> <p>20 THE COURT: Now, place upon the record how</p> <p>21 Ellis &amp; Winters was appointed and who Ellis &amp;</p> <p>22 Winters is being paid by.</p> <p>23 MR. FLATLEY: I will defer that to</p> <p>24 Ms. Brathwaite.</p> <p>25 THE COURT: Ms. Brathwaite, welcome. Good</p> |
| Page 17                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | Page 19                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| <p>1 searchability database to go on and do that and</p> <p>2 be done with it.</p> <p>3 MR. FLATLEY: Yes.</p> <p>4 THE COURT: How about -- talk to me about</p> <p>5 that. You've sampled some of this stuff? You</p> <p>6 looked at some of that stuff? I've looked a</p> <p>7 little microcosm of it. This is not rocket</p> <p>8 science.</p> <p>9 MR. FLATLEY: Yes, Your Honor. It's fairly</p> <p>10 typical discovery from that perspective.</p> <p>11 One clarification I make, the universe of</p> <p>12 records that would be relevant to Covil are all</p> <p>13 within the microfiche that are stored at Penn</p> <p>14 National.</p> <p>15 THE COURT: Yeah, I think that's right</p> <p>16 there -- I mean, microfiche is a quaint, ancient</p> <p>17 photographed form that can be -- you've already</p> <p>18 done one thing that age towards digitization</p> <p>19 because, as we know, digitization doesn't mean</p> <p>20 reprinting from scratch. It can be taking an</p> <p>21 image, and we do that on our home computers all</p> <p>22 the time. I don't see how difficult that would</p> <p>23 be.</p> <p>24 And then you would search for the terms</p> <p>25 like "Covil" and other things. Right off of</p>                                                                         | <p>1 to see you again.</p> <p>2 MS. BRATHWAITE: Thank you. Thank you for</p> <p>3 having us, Your Honor.</p> <p>4 THE COURT: And I'd like to say to each of</p> <p>5 you, this is quite a herculean effort and gets</p> <p>6 right at the things that I needed to have gotten</p> <p>7 to by an independent group of good lawyers who</p> <p>8 can look at records.</p> <p>9 So thank you very much.</p> <p>10 MS. BRATHWAITE: Thank you, Your Honor.</p> <p>11 All credit goes to Brian. He's the one with</p> <p>12 certifications here.</p> <p>13 We have been engaged, pursuant to the</p> <p>14 Court's order, and all of our invoices so far</p> <p>15 have been submitted to Penn National directly.</p> <p>16 And those have not been paid as of today.</p> <p>17 THE COURT: All right. And what is the</p> <p>18 total amount of your invoices to date? You</p> <p>19 don't need to be on the dime. Roughly.</p> <p>20 MS. BRATHWAITE: 67,000, Your Honor.</p> <p>21 THE COURT: All right. And do you have</p> <p>22 other vendors, or does that include all of the</p> <p>23 costs?</p> <p>24 MS. BRATHWAITE: No, that's it. That's</p> <p>25 just for our team and the work that's been</p>                                                                                                            |

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**Motions Hearing**

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| <p align="right">Page 20</p> <p>1 performed. And then Brian has connected with</p> <p>2 the individual vendors to give you those quotes.</p> <p>3 THE COURT: I got you. Understood. I</p> <p>4 would find right now that that is extremely</p> <p>5 reasonable for the task that was performed.</p> <p>6 MS. BRATHWAITE: Thank you, Your Honor.</p> <p>7 THE COURT: All right. Mr. Protopapas,</p> <p>8 anything that you would like to ask these folks</p> <p>9 before we proceed with the hearing?</p> <p>10 And, of course, Mr. Yntema, I will turn to</p> <p>11 you next for any things you would like to ask</p> <p>12 before we go into the actual hearing on the</p> <p>13 motions.</p> <p>14 Yes, sir.</p> <p>15 MR. PROTOPAPAS: Nothing further,</p> <p>16 Your Honor, other than I do believe that for the</p> <p>17 15 receiverships, that it is not an expensive</p> <p>18 price to pay to have the searches done to fill</p> <p>19 in the insurance gaps which exist in every</p> <p>20 single receivership, including Covil.</p> <p>21 THE COURT: Very good.</p> <p>22 And, Mr. Yntema, do you have some questions</p> <p>23 you would like to ask at this time?</p> <p>24 And Mr. Yntema, you may unmask and use that</p> <p>25 microphone right there, if you would, please,</p> | <p align="right">Page 22</p> <p>1 directive, and I will do that.</p> <p>2 MR. YNTEMA: Okay. Next is I know</p> <p>3 Mr. Flatley -- I'm not sure how much he had to</p> <p>4 prepare this. I know by talking with Ashley, I</p> <p>5 think she relied on Mr. Flatley a great deal in</p> <p>6 preparing the report that's been handed up to</p> <p>7 the Court.</p> <p>8 There are other options here, and I think</p> <p>9 Mr. Flatley -- I would ask him to just explain</p> <p>10 to the Court, and you can do so better than I,</p> <p>11 as to the different alternatives and if you had</p> <p>12 a recommendation as to the one that would best</p> <p>13 serve the purpose here.</p> <p>14 I gathered from your report, I haven't</p> <p>15 talked to you, I don't believe, after the report</p> <p>16 was submitted, that the final option is, I</p> <p>17 guess, kind of all encompassing. Scan every</p> <p>18 microfiche.</p> <p>19 But there are other alternatives that are</p> <p>20 less costly and may serve the same purpose or</p> <p>21 even more efficiently serve a purpose. If you</p> <p>22 could tell the Court what those options are and</p> <p>23 kind of get more of an explanation for myself</p> <p>24 and for the Court as well.</p> <p>25 Thank you.</p>                                                               |
| <p align="right">Page 21</p> <p>1 sir.</p> <p>2 MR. YNTEMA: Certainly, Your Honor. Thank</p> <p>3 you very much.</p> <p>4 THE COURT: Good to see you again.</p> <p>5 MR. YNTEMA: I'm appearing here with my</p> <p>6 partner here, David Harris.</p> <p>7 THE COURT: Mr. Harris, welcome again.</p> <p>8 MR. YNTEMA: Your Honor, again, it's a</p> <p>9 pleasure to see you. I know it's under</p> <p>10 circumstances neither one of us like to be here</p> <p>11 on motions to compel and things of that nature.</p> <p>12 THE COURT: By the way, let's always keep</p> <p>13 in mind, you are both lawyers of high standing</p> <p>14 and highest regard by me. We are talking about</p> <p>15 conduct of clients, and you represent them</p> <p>16 fiercely and to the best of your ability. But I</p> <p>17 hold you in no less esteem than I would if I</p> <p>18 agreed with everything your clients have done.</p> <p>19 So no worries along those lines.</p> <p>20 MR. YNTEMA: I appreciate that, Your Honor.</p> <p>21 As far as Ms. Brathwaite's fee, I tell you</p> <p>22 that those personally have been submitted to my</p> <p>23 client by me thus far. I'm happy to circle back</p> <p>24 and --</p> <p>25 THE COURT: I can handle that with a</p>                               | <p align="right">Page 23</p> <p>1 MR. FLATLEY: Your Honor, the way I would</p> <p>2 describe it is we treat this as any discovery</p> <p>3 exercise. When we have a universe of records,</p> <p>4 we look for intelligent ways to reduce that</p> <p>5 universe that are reasonable and intentional.</p> <p>6 So we try to understand the policy numbers</p> <p>7 and the way they're constructed to see if there</p> <p>8 are ways that would tell us about the types of</p> <p>9 policies so that if certain types of policies</p> <p>10 were not relevant, that they could be excluded</p> <p>11 from the scanning.</p> <p>12 THE COURT: Like marine or automobile or</p> <p>13 something of that nature and rather focus on</p> <p>14 commercial -- commercial general liability,</p> <p>15 excess and matters of that type.</p> <p>16 MR. FLATLEY: That's right, Your Honor,</p> <p>17 exactly.</p> <p>18 We noticed in one of the hearings when we</p> <p>19 reviewed the record that one of your suggestions</p> <p>20 was to try to bracket dates around the Covil</p> <p>21 policy to try to hone in. And so we tried very</p> <p>22 hard to try to find ways to identify dates to</p> <p>23 policies that were in the microfiche.</p> <p>24 There wasn't a lot of great, reliable</p> <p>25 information about that, but we did find some</p> |

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| <p style="text-align: right;">Page 24</p> <p>1 ways to associate certain policies with certain</p> <p>2 canceled on renew dates. So in a sense, just</p> <p>3 another way to find a sliver of likely relevant</p> <p>4 policies using dates as a parameter.</p> <p>5 It would not be as exhaustive or as</p> <p>6 comprehensive, but it would be more likely</p> <p>7 relevant to types of policies that the Court may</p> <p>8 be interested in.</p> <p>9 THE COURT: Of course, relevant versus</p> <p>10 nonrelevant is one way to try to move out the</p> <p>11 policies that are not important, but they say</p> <p>12 that the only thing they've got to start the</p> <p>13 inquiry is that policy number.</p> <p>14 All right. You have three other options</p> <p>15 other than digitizing everything.</p> <p>16 MR. FLATLEY: Yes, Your Honor.</p> <p>17 THE COURT: But until you digitize</p> <p>18 everything, you can't really separate out all of</p> <p>19 the irrelevant stuff from the relevant stuff,</p> <p>20 can you?</p> <p>21 MR. FLATLEY: Well, for example, in option</p> <p>22 3, Your Honor, what we learned about the policy</p> <p>23 numbers and the way they're constructed, they</p> <p>24 typically have a numeric or an alpha prefix that</p> <p>25 indicates the type of policy. So it may be --</p> | <p style="text-align: right;">Page 26</p> <p>1 time that all the Finch flack was taking place.</p> <p>2 And they say that those policies were able to be</p> <p>3 gotten by Penn National out of its repository</p> <p>4 because they had policy numbers.</p> <p>5 Do you know who got the policy numbers?</p> <p>6 MR. FLATLEY: Yes, Your Honor, I believe I</p> <p>7 do. And my recollection is from Mr. Boyd</p> <p>8 Wright's affidavit, that he identified searching</p> <p>9 on the underwriting side, he had an electronic</p> <p>10 system. So he was able to run Covil's name</p> <p>11 within that system, and I believe he identified</p> <p>12 two or three policy numbers.</p> <p>13 And then they went back to the records side</p> <p>14 and asked them to search for those policy</p> <p>15 numbers in the records. And if my recollection</p> <p>16 is correct, I believe that's how those were</p> <p>17 identified.</p> <p>18 THE COURT: So, again, there was even yet</p> <p>19 another layer of information that was able to be</p> <p>20 accessed even in the present status of these</p> <p>21 microfiche policies, which was an underwriting</p> <p>22 side, presumably created by the agents with whom</p> <p>23 they dealt in selling these policies and</p> <p>24 whatever else went into creating their</p> <p>25 underwriting database, which did identify</p> |
| <p style="text-align: right;">Page 25</p> <p>1 have an AU prefix, which would identify it as an</p> <p>2 auto policy, or a WC prefix that would identify</p> <p>3 it as a workers' comp policy.</p> <p>4 THE COURT: So there is more than simply</p> <p>5 the policy number that can be looked at. Is</p> <p>6 there a prefix for the type policies we would</p> <p>7 want to look at -- commercial general liability,</p> <p>8 and other matters pertaining thereto?</p> <p>9 MR. FLATLEY: Yes, I believe there are,</p> <p>10 Your Honor.</p> <p>11 THE COURT: What is the prefix?</p> <p>12 MR. FLATLEY: At minimum there's prefix CL</p> <p>13 and GL. There are also some numeric prefixes</p> <p>14 that -- I won't try to remember those off the</p> <p>15 top of my head.</p> <p>16 THE COURT: Sure.</p> <p>17 MR. FLATLEY: There are identifiable ways</p> <p>18 to tie them to a specific type of policy.</p> <p>19 THE COURT: Do you know, as you sit here</p> <p>20 today, how the first -- not the other policies</p> <p>21 that were discovered Covil's name on them, the</p> <p>22 marine and the auto, that kind of, but -- you</p> <p>23 know, there came a point when three policies</p> <p>24 were identified as possible Covil coverage</p> <p>25 policies for Penn National. It was during the</p>               | <p style="text-align: right;">Page 27</p> <p>1 underwriting associations by name of insured.</p> <p>2 Am I right?</p> <p>3 MR. FLATLEY: Yes, I think that's correct,</p> <p>4 Your Honor. But I'm certainly not an expert on</p> <p>5 how all that works.</p> <p>6 THE COURT: Okay. Any other questions</p> <p>7 then, or any other comments by you? I think the</p> <p>8 overall questions that's being asked by Penn</p> <p>9 National is are there some other ways?</p> <p>10 And you've identified one, which would be</p> <p>11 image commercial line policies and microfiche</p> <p>12 cards eliminating certain cards solely by policy</p> <p>13 prefix. That could be done, could it not?</p> <p>14 MR. FLATLEY: Yes, Your Honor, it could.</p> <p>15 THE COURT: Do you have any way to estimate</p> <p>16 how many you would then be putting in a</p> <p>17 searchable database of -- let's say there are</p> <p>18 300,000 microfiche cards and let's say that you</p> <p>19 are going to eliminate cards that correspond to</p> <p>20 nonresponsive policy types such as commercial</p> <p>21 auto, inland marine, business owner, fidelity</p> <p>22 bond, surety bond, commercial fire, workers'</p> <p>23 comp, and personal umbrella.</p> <p>24 If you were to eliminate those simply using</p> <p>25 the numeric and letter prefix, how many</p>                            |

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| <p style="text-align: right;">Page 28</p> <p>1 microfiche cards would you end up with, or do</p> <p>2 you have any way of estimating that?</p> <p>3 MR. FLATLEY: I don't believe we have a</p> <p>4 very reliable way of estimating that. It would</p> <p>5 be speculation entirely.</p> <p>6 THE COURT: Well, let's speculate for a</p> <p>7 moment. Would it be as much as a third that</p> <p>8 would fall in the category I just read out?</p> <p>9 MR. FLATLEY: I would think it would be at</p> <p>10 least a third.</p> <p>11 THE COURT: At least a third. Do you think</p> <p>12 it could be at least a half?</p> <p>13 MR. FLATLEY: I think it's quite possible.</p> <p>14 THE COURT: And beyond that, you couldn't</p> <p>15 speculate?</p> <p>16 MR. FLATLEY: Yes, Your Honor.</p> <p>17 THE COURT: So let's say it's a half. That</p> <p>18 would be 150,000 microfiche to digitize.</p> <p>19 MR. FLATLEY: Yes.</p> <p>20 THE COURT: Would you just cut in half what</p> <p>21 you're talking about in terms of -- the range is</p> <p>22 a big range, I mean, when you're starting at 250</p> <p>23 and you end up at 950.</p> <p>24 MR. FLATLEY: Your Honor, we got two</p> <p>25 estimates. One was for approximately 85 cents</p>                                                                                                                             | <p style="text-align: right;">Page 30</p> <p>1 terminal digit system. It creates a situation</p> <p>2 where the policy --</p> <p>3 THE COURT: They file by what?</p> <p>4 MR. FLATLEY: It's called a terminal digit</p> <p>5 system. So they have an approximately eight- or</p> <p>6 nine-digit policy number.</p> <p>7 THE COURT: Yeah.</p> <p>8 MR. FLATLEY: And they're filed not by the</p> <p>9 numbers on the left but by the numbers on the</p> <p>10 right.</p> <p>11 THE COURT: Oh my, my, my. Why was that</p> <p>12 done?</p> <p>13 MR. FLATLEY: Your Honor, I can't speak to</p> <p>14 that.</p> <p>15 THE COURT: I can have some speculation as</p> <p>16 to why that's done. It would make it much</p> <p>17 harder to find the policies.</p> <p>18 MR. FLATLEY: I can't speak to that. It</p> <p>19 would only be from my speculation about that.</p> <p>20 What it does do is it evenly distributes</p> <p>21 the policies amongst the universe of documents.</p> <p>22 So you can't go in and just grab -- here are all</p> <p>23 auto ones in a row and pull those out.</p> <p>24 THE COURT: Exactly. You've mixed them</p> <p>25 altogether because you're just using those</p> |
| <p style="text-align: right;">Page 29</p> <p>1 to a dollar per card; the other estimate was \$4</p> <p>2 per card.</p> <p>3 THE COURT: So somewhere in between the two</p> <p>4 of those is where you're probably going to meet.</p> <p>5 MR. FLATLEY: More than likely, Your Honor.</p> <p>6 THE COURT: Okay. And certainly if you did</p> <p>7 that, you would have established a methodology</p> <p>8 with regard to that group of cards. And there</p> <p>9 would be nothing to, in the future, prohibit the</p> <p>10 Court, if we make sure that these microfiches</p> <p>11 are not destroyed or maintained, if that didn't</p> <p>12 yield every piece of information that was</p> <p>13 thought to be pertinent to these inquiries,</p> <p>14 there would be nothing to prevent going back to</p> <p>15 the other ones.</p> <p>16 MR. FLATLEY: Correct, Your Honor. It</p> <p>17 would only need to be done once.</p> <p>18 THE COURT: And I take it that the first</p> <p>19 cut, which is to eliminate the ones by policy</p> <p>20 prefix, would take a little bit of imaging and</p> <p>21 expansion or something just to see those numbers</p> <p>22 in a readable format. Am I right?</p> <p>23 MR. FLATLEY: The way I -- yes, Your Honor.</p> <p>24 The way I would describe it is that essentially</p> <p>25 the filing system, you may have heard of the</p> | <p style="text-align: right;">Page 31</p> <p>1 back-end numbers. How did a front-end number</p> <p>2 come into it then?</p> <p>3 MR. FLATLEY: Part of how they put the</p> <p>4 policy prefix on as identifier.</p> <p>5 THE COURT: So they put prefix on. They</p> <p>6 eliminate about half the numbers on the policy</p> <p>7 and take the back-end numbers and that's what</p> <p>8 they show?</p> <p>9 MR. FLATLEY: Here's what I would say about</p> <p>10 the terminal digit thing. From what I've read</p> <p>11 about it and learning about it, is it is not an</p> <p>12 uncommon system that folks use. It has</p> <p>13 advantages and disadvantages. How it relates to</p> <p>14 anything that is specific to the matter here, I</p> <p>15 would speculate about.</p> <p>16 THE COURT: Okay. All right. That's the</p> <p>17 question I have at the moment.</p> <p>18 Are there any questions anybody else has?</p> <p>19 MR. PROTOPAPAS: None from the receiver.</p> <p>20 THE COURT: Mr. Yntema?</p> <p>21 MR. YNTEMA: I don't believe so,</p> <p>22 Your Honor.</p> <p>23 Thank you very much, Mr. Flatley.</p> <p>24 THE COURT: Thank you. You may take your</p> <p>25 seats.</p>  |

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| <p align="right">Page 32</p> <p>1 Please don't go anyplace. Stay with us.</p> <p>2 All right. Mr. Protopapas.</p> <p>3 MR. PROTOPAPAS: Your Honor, we would ask</p> <p>4 that the Court order the digitization of the</p> <p>5 commercial general liability and general</p> <p>6 liability policies that exist on microfiche at</p> <p>7 the Penn National database pursuant to</p> <p>8 Mr. Flatley's recommendation. I would ask that</p> <p>9 they begin that process as soon as possible.</p> <p>10 THE COURT: All right. So you're saying --</p> <p>11 translated into the Ellis &amp; Winters report,</p> <p>12 you're saying take option number 3?</p> <p>13 MR. PROTOPAPAS: Yes, Your Honor. And if</p> <p>14 we have to go back, we have to go back. But</p> <p>15 we'll be here with option 3.</p> <p>16 THE COURT: Now, is there any need at this</p> <p>17 moment to pass any further orders protecting the</p> <p>18 integrity of all the microfiche?</p> <p>19 MR. PROTOPAPAS: At this stage, Mr. Yntema</p> <p>20 and his client have stated that no microfiche</p> <p>21 will be destroyed and have not been destroyed</p> <p>22 for a period of time.</p> <p>23 THE COURT: I take it if Mr. Yntema says</p> <p>24 that that's what's going to happen, that's</p> <p>25 what's going to happen. I take him at his word,</p>                                                     | <p align="right">Page 34</p> <p>1 Ellis &amp; Winters and its vendor to achieve that,</p> <p>2 and that methodology would be shared with both</p> <p>3 the receiver and with Penn National.</p> <p>4 We will talk in a moment about</p> <p>5 confidentiality of records, but I would not</p> <p>6 require that Ellis &amp; Winter receive the approval</p> <p>7 of either the receiver or Penn National, but I</p> <p>8 would have them advise each of you as to what is</p> <p>9 to be done. And then if there is concern on the</p> <p>10 part of the receiver, on the part of Penn</p> <p>11 National, that could be addressed to the Court</p> <p>12 if needs be.</p> <p>13 I wouldn't put that on the basis that the</p> <p>14 two of you have to get together and agree on the</p> <p>15 vendors methodology, but if either side had</p> <p>16 problems with the methodology, I would allow you</p> <p>17 to approach the Court about that before the</p> <p>18 matter began. But I want it done on a very</p> <p>19 timely basis as well.</p> <p>20 But that is the proposal that's made, and I</p> <p>21 now turn to you, Penn National, to have your</p> <p>22 reaction to that.</p> <p>23 MR. YNTEMA: Thank you again, Your Honor.</p> <p>24 First and foremost, I think you said we</p> <p>25 would be turning to the confidential nature of</p> |
| <p align="right">Page 33</p> <p>1 and I have no discomfort about that at all.</p> <p>2 MR. PROTOPAPAS: Neither to do I,</p> <p>3 Your Honor.</p> <p>4 THE COURT: All right. Now, let us talk a</p> <p>5 little bit about expenses. I would -- my</p> <p>6 approach would be to pass an order requiring</p> <p>7 that Ellis &amp; Winter be paid now for the services</p> <p>8 they have rendered so far, and that a regular</p> <p>9 system of advising the receiver and the Court of</p> <p>10 expenses as they go along be developed. And</p> <p>11 that Ellis &amp; Winter would be handling this.</p> <p>12 So I would expect Ellis &amp; Winter to arrive</p> <p>13 at a more specified bid, award the bid, and</p> <p>14 advise all of us, including attorneys for Penn</p> <p>15 National, and bill incremental billing for the</p> <p>16 work that's being done.</p> <p>17 And to continue to specify with their</p> <p>18 vendor -- and I'm talking about Ellis &amp; Winters</p> <p>19 now, continue to specify the exact methodology</p> <p>20 that will be used and what will be done to try</p> <p>21 to pull out the commercial general liability and</p> <p>22 commercial liability policies and digitize them</p> <p>23 or -- and I'm using that in a generic way -- in</p> <p>24 order to make the policies searchable. A</p> <p>25 methodology would be developed between</p> | <p align="right">Page 35</p> <p>1 these documents.</p> <p>2 THE COURT: Well, that's a motion we're</p> <p>3 going to hear in a minute. You've made several</p> <p>4 motions about sealing and matters of that type,</p> <p>5 so we'll will get to those in a minute. Right</p> <p>6 now we're just talking about how to get into</p> <p>7 these records.</p> <p>8 MR. YNTEMA: Right. I interpreted what</p> <p>9 Your Honor had said was the confidentiality of</p> <p>10 the policy documents. The confidentiality</p> <p>11 motions --</p> <p>12 THE COURT: I'm talking about exactly what</p> <p>13 you talked about in some of your responsive</p> <p>14 pleadings which is the concern about the</p> <p>15 confidentiality of the policies.</p> <p>16 MR. YNTEMA: Yes. Again, I just want to</p> <p>17 make sure we're on the same page, that -- on my</p> <p>18 client's behalf, there would need to be some</p> <p>19 sort of confidentiality order or agreement in</p> <p>20 place to keep a lot of these policies</p> <p>21 confidential to Penn National and to a vendor</p> <p>22 who is handling these policies.</p> <p>23 THE COURT: We're going to talk about --</p> <p>24 you've got a motion in that regard that I'm</p> <p>25 going to hear today.</p>                                                                                     |

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| <p align="right">Page 36</p> <p>1 MR. YNTEMA: I think our motion primarily</p> <p>2 goes to the document retention policy of Penn</p> <p>3 National, the litigation hold policy of Penn</p> <p>4 National, and then some spreadsheets that</p> <p>5 actually list a lot of policy numbers that that</p> <p>6 motion was directed to.</p> <p>7 My concern is, and what would be a concern</p> <p>8 on my client's part as well and their insureds,</p> <p>9 is that overarching a confidentiality-type order</p> <p>10 that Your Honor might consider to be in place</p> <p>11 during -- when anything is being digitized,</p> <p>12 being handled by vendors and anything of that</p> <p>13 nature. And that when it is digitized, that</p> <p>14 that system is confidential to Penn National.</p> <p>15 Again, there's hundreds of thousands of</p> <p>16 policies in the microfiche that would be</p> <p>17 exposed, and, again, that would be important to</p> <p>18 keep those policies confidential.</p> <p>19 THE COURT: All right. You know, that</p> <p>20 sounds so reasonable on its face, but when</p> <p>21 discovery is done and a person asking for the</p> <p>22 discovery has court-ordered discovery, they go</p> <p>23 to the most confidential records in the world,</p> <p>24 another company's records of its business, and</p> <p>25 they look through those up one side and down the</p> | <p align="right">Page 38</p> <p>1 going to see those records, all of them.</p> <p>2 Now, certainly we can devise some</p> <p>3 confidentiality orders in terms of what</p> <p>4 Mr. Protopapas does with the knowledge he gains.</p> <p>5 That's reasonable. But if you think for one</p> <p>6 minute that I'm going to order these records</p> <p>7 digitized but only you can see them, that's not</p> <p>8 going to happen.</p> <p>9 MR. YNTEMA: They would be open to being</p> <p>10 searched by way of search terms. I would assume</p> <p>11 that would be the case.</p> <p>12 THE COURT: They would be open to being</p> <p>13 looked at, individually touched, felt, each one</p> <p>14 of them looked at. They would be able to be</p> <p>15 looked at for everything.</p> <p>16 There's been such a failure to look at your</p> <p>17 own records and produce what has been asked for</p> <p>18 that -- and it turns out there are other search</p> <p>19 devices within your own company, such as the</p> <p>20 underwriting piece of it, that could have looked</p> <p>21 at these policies.</p> <p>22 And your company has failed so completely</p> <p>23 at doing anything on its own to search these</p> <p>24 policies and determine the coverage, that I am</p> <p>25 going to allow an independent group to digitize</p>                                                                                                   |
| <p align="right">Page 37</p> <p>1 other.</p> <p>2 So these records would never be in the</p> <p>3 hands of the people who are digitizing these</p> <p>4 records, confidential to Penn National,</p> <p>5 excluding the receiver, I would never do that.</p> <p>6 They're the ones asking for these documents.</p> <p>7 And I have determined several times before</p> <p>8 in this series of hearings that they are</p> <p>9 untitled to this information. And that means</p> <p>10 that they search through records of other</p> <p>11 people's policies as well as your policies to</p> <p>12 see which policies are cold.</p> <p>13 And why do they get to do that? Because</p> <p>14 your company absolutely refused to put its foot</p> <p>15 down to doing anything, to doing this by itself.</p> <p>16 You could have well done exactly what Ellis &amp;</p> <p>17 Winter has done. You could have looked at all</p> <p>18 these -- instead of just taking the flat stance,</p> <p>19 we can't search except for the policy number,</p> <p>20 which itself turns out not to be so, and then</p> <p>21 follow that up with and we're not going to do</p> <p>22 anything else and we're not going to give a</p> <p>23 corporate representative who can say anything</p> <p>24 about it, you've now forced me to allow your</p> <p>25 opponent to examine your records. And he's</p>                         | <p align="right">Page 39</p> <p>1 these records. And I do that because it's the</p> <p>2 only way they can then really be looked at with</p> <p>3 the numbering system you have and all the rest</p> <p>4 of it to see whether there's principal coverage</p> <p>5 by means of named insured, whether there's</p> <p>6 excess coverage and all the rest of it. It's a</p> <p>7 lot more they have to look at it than simply</p> <p>8 running the name Covil through it.</p> <p>9 They're going to be able to look at each</p> <p>10 and every policy to understand whether that is a</p> <p>11 policy that in any way, shape, or form covers</p> <p>12 Covil's responsibilities in this litigation</p> <p>13 because those are assets of Covil's. And they</p> <p>14 tried to get their assets disclosed through</p> <p>15 normal means and that has not worked.</p> <p>16 MR. YNTEMA: My understanding is the</p> <p>17 purpose -- maybe I should ask Mr. Flatley this.</p> <p>18 The purpose of digitizing the microfiche is so</p> <p>19 they can be searchable and it's searchable by --</p> <p>20 THE COURT: I don't want to preclude them</p> <p>21 from searching. If they want to look at each</p> <p>22 policy individually and look at it whether it</p> <p>23 says Covil on the top of it or, you know, Disney</p> <p>24 World. They're going to look at each policy to</p> <p>25 see if it has any kind of rider, any kind of</p> |



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| <p align="right">Page 40</p> <p>1 provision, any kind of other thing that might</p> <p>2 possibly offer Covil coverage.</p> <p>3 MR. YNTEMA: And "they" being the</p> <p>4 receiver's attorneys?</p> <p>5 THE COURT: Yes, absolutely. Ellis &amp;</p> <p>6 Winters is not going to be charged with</p> <p>7 searching all of these policies to get the</p> <p>8 information. They are the vehicle to get the</p> <p>9 policies in a form where they can all be looked</p> <p>10 at.</p> <p>11 Then the receiver, who is the requesting</p> <p>12 party of this information, is going to look at</p> <p>13 them. I will exceed to the request of</p> <p>14 confidentiality to the extent that I set up some</p> <p>15 kind of guardrails on where they look at them</p> <p>16 and so forth. But I'm not putting any</p> <p>17 limitations on how they search. No, sir. That</p> <p>18 Rubicon has been crossed.</p> <p>19 MR. YNTEMA: Okay. I just want a</p> <p>20 clarification, Your Honor. I do appreciate your</p> <p>21 patience with me.</p> <p>22 THE COURT: Yes, sir. I'm not trying to be</p> <p>23 inpatient with you at all.</p> <p>24 MR. YNTEMA: Sure.</p> <p>25 THE COURT: But I think your company needs</p>                                                                                                                                                                                   | <p align="right">Page 42</p> <p>1 MR. YNTEMA: I appreciate that.</p> <p>2 THE COURT: But the concept of the receiver</p> <p>3 is still going to have to rely on you all to go</p> <p>4 through the recently digitized materials and</p> <p>5 then decide whichever really do cover Covil, I'm</p> <p>6 not going to allow that because I am not</p> <p>7 confident of your internal procedures. Not</p> <p>8 yours as attorney, but Penn National's and the</p> <p>9 people it's put in charge of this thing.</p> <p>10 They're approach to handling this material</p> <p>11 has not been reliable in the face of reasonable,</p> <p>12 in my view, discovery requests. And the reason</p> <p>13 that the discovery requests have ballooned is</p> <p>14 because you wouldn't answer the initial ones</p> <p>15 correctly and, therefore, they had to try to</p> <p>16 drive at it a whole bunch of different ways to</p> <p>17 try to figure out who would have had charge of</p> <p>18 enough information to put these policies down.</p> <p>19 They are living with the consequence of the</p> <p>20 approach they decided to take with respect to</p> <p>21 maintaining records that a covered insured ought</p> <p>22 to be able to obtain.</p> <p>23 MR. YNTEMA: Thank you for that,</p> <p>24 Your Honor. I appreciate just the</p> <p>25 clarification, and that's exactly what I needed.</p>                 |
| <p align="right">Page 41</p> <p>1 to understand -- and you will ask for everything</p> <p>2 that you think would possibly be something I</p> <p>3 would grant to limit how these matters are dealt</p> <p>4 with. But the intransigence of your client has</p> <p>5 reached a point when I'm now on my fourth motion</p> <p>6 to compel, so I'm not inclined to do anything to</p> <p>7 limit Protopapas as receiver's access to every</p> <p>8 policy that's in the microfiche database.</p> <p>9 And the one thing that I've done, we can</p> <p>10 probably cut out them looking at about half of</p> <p>11 them, is to say that that designation on the</p> <p>12 front end, nobody told us about and I've not</p> <p>13 known until just now, can be used to cull out</p> <p>14 what may be as much as half of those policies.</p> <p>15 But the remaining, there's not going to be any</p> <p>16 other culling that Penn National's in charge of.</p> <p>17 MR. YNTEMA: Yes. And when I go back to</p> <p>18 report to my client as far as what the Court's</p> <p>19 order is today, whatever that might be, the</p> <p>20 guardrails that the Court just mentioned, I</p> <p>21 would need to explain, okay, these will be the</p> <p>22 guardrails.</p> <p>23 THE COURT: The guardrails are going to be</p> <p>24 the confidentiality with which they must be</p> <p>25 treated by the receiver.</p> | <p align="right">Page 43</p> <p>1 THE COURT: I will assure you, this will be</p> <p>2 put in the form of an order that will cover all</p> <p>3 of this and will be shared with you before it's</p> <p>4 finally signed and this kind of thing. We're</p> <p>5 just dealing here right at this moment as we</p> <p>6 speak with the first thing, which is how to</p> <p>7 digitize these records. I'm using the term</p> <p>8 again generally. How to automate, if you want</p> <p>9 to say it that way. And how to make searchable</p> <p>10 these records. That's the first thing.</p> <p>11 The second thing is what you and I have</p> <p>12 gotten into a dialogue about now which is who</p> <p>13 can have access no these materials? And I think</p> <p>14 I've explained to you that Ellis &amp; Winter will</p> <p>15 facilitate the -- not only the ability to</p> <p>16 digitize these records, but they will continue</p> <p>17 to be available particularly because of</p> <p>18 Mr. Flatley's deep knowledge of how to digitize.</p> <p>19 I will continue to have them available to</p> <p>20 all sides to help figure out how to search these</p> <p>21 records for the information that is needed to</p> <p>22 provide Covil with knowledge about its assets.</p> <p>23 Insurance will cover the liabilities it is</p> <p>24 responding to.</p> <p>25 So I think we need to talk about that in a</p> |

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| <p align="right">Page 44</p> <p>1 little bit more detail, and I'll go back to</p> <p>2 Mr. Protopapas to begin that discussion. But</p> <p>3 the initial thing he's asked for is for compel</p> <p>4 production and disclosure under a system in</p> <p>5 which all -- in which the records will be</p> <p>6 digitized and searchable pursuant to what is</p> <p>7 called option 3 in the March 22nd letter of</p> <p>8 Ellis &amp; Winter to me in the form of a report.</p> <p>9 MR. YNTEMA: Thank you, Your Honor.</p> <p>10 THE COURT: I hope I have made the first</p> <p>11 part clear, Mr. Protopapas.</p> <p>12 MR. PROTOPAPAS: It is clear, Your Honor.</p> <p>13 Number 6 on the agenda was in reference to</p> <p>14 other receiverships. I would ask that we do one</p> <p>15 proposed order in the Covil-Penn case allowing</p> <p>16 me as receiver to search.</p> <p>17 THE COURT: I agree. Now let's talk about</p> <p>18 confidentiality and related motion to seal.</p> <p>19 MR. PROTOPAPAS: Your Honor, briefly, I</p> <p>20 believe that parties have gone to the habit of</p> <p>21 overdesignating confidential information making</p> <p>22 it difficult on clerks, courts, and litigants.</p> <p>23 And what has concerned me as receiver is</p> <p>24 that in a case Mr. Yntema is not involved in,</p> <p>25 Penn National filed this document to structure</p> | <p align="right">Page 46</p> <p>1 are for this Court to determine who they go to</p> <p>2 and not anyone else.</p> <p>3 And, three, the non-Covil nonreceivership</p> <p>4 policies that are in this database that we're</p> <p>5 creating, I am committed to the Court I will</p> <p>6 keep confidential.</p> <p>7 THE COURT: So just reviewing for a minute,</p> <p>8 Mr. Protopapas, with respect confidentiality,</p> <p>9 your contention is document retention policy, no</p> <p>10 confidentiality. They waived that when they</p> <p>11 filed it in a public forum on the federal</p> <p>12 court's automated pleadings docket, PACER, the</p> <p>13 exact document retention policy they now contend</p> <p>14 with you is confidential?</p> <p>15 MR. PROTOPAPAS: Correct.</p> <p>16 THE COURT: All right. Then the second is</p> <p>17 Covil's policies. And those Covil policies,</p> <p>18 that is, policies that you cull out of it and</p> <p>19 that you determine are policies of insurance</p> <p>20 that pertain directly or indirectly to Covil.</p> <p>21 Those are confidential except to the extent you</p> <p>22 need to disclose them in mediation or any other</p> <p>23 court-supervised activity including litigation</p> <p>24 before the Court?</p> <p>25 MR. PROTOPAPAS: That's correct,</p> |
| <p align="right">Page 45</p> <p>1 policy -- this document retention policy in a</p> <p>2 federal court on PACER. Yet when I received</p> <p>3 that document and other similar versions of that</p> <p>4 document, I am now required to place them under</p> <p>5 seal, hand-deliver one to you, put a blank one</p> <p>6 into the court record. It becomes unmanageable,</p> <p>7 and it's an overdesignation of confidentiality.</p> <p>8 Certainly as to the second concern, the</p> <p>9 concern Mr. Yntema raised about what will I do</p> <p>10 with the database of Penn National commercial</p> <p>11 general liability policies? That is</p> <p>12 confidential, not to be shared, absent notice to</p> <p>13 him and the Court that someone has subpoenaed me</p> <p>14 for something to that effect. I'm certainly</p> <p>15 well aware of keeping their documents like that</p> <p>16 confidential.</p> <p>17 The policies that belong to the</p> <p>18 receiverships are mine and this Court's to</p> <p>19 determine who we give them to, but the others</p> <p>20 are not.</p> <p>21 So the big picture, Your Honor, are</p> <p>22 confidentiality. I do not believe the document</p> <p>23 retention policy is confidential especially if</p> <p>24 it's been filed in a federal court.</p> <p>25 Two, the Covil and receivership policies</p>                              | <p align="right">Page 47</p> <p>1 Your Honor. Other insurers ask for them,</p> <p>2 plaintiffs ask for them, and it's fair discovery</p> <p>3 in this state to give them. And I do with the</p> <p>4 understanding it maintains the confidentiality</p> <p>5 with them.</p> <p>6 THE COURT: Right. And then the third is</p> <p>7 non-Covil material completely confidential.</p> <p>8 MR. PROTOPAPAS: Yes, Your Honor.</p> <p>9 THE COURT: All right.</p> <p>10 MR. PROTOPAPAS: This goes to the other</p> <p>11 receiverships as well. So J&amp;L Insulation, Starr</p> <p>12 Davis, if it's a receivership policy for any</p> <p>13 receivership, it's to the direction of the</p> <p>14 Court. If it's a nonreceivership policy for</p> <p>15 Disney World and has Covil as an additional</p> <p>16 insured, which we'll now be able to find, then</p> <p>17 the additional insured is fair game in our</p> <p>18 discovery. But if Covil is not mentioned or any</p> <p>19 receivership is not mentioned, it's simply a</p> <p>20 Disney policy, that's confidential and I will</p> <p>21 not do anything with it.</p> <p>22 THE COURT: Very good.</p> <p>23 Now, Mr. Yntema, I now turn to you for your</p> <p>24 reaction to the document retention issues and</p> <p>25 proposal of Mr. Protopapas.</p>             |

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| <p style="text-align: right;">Page 48</p> <p>1 MR. YNTEMA: Thank you, Your Honor.</p> <p>2 There have been several subpoenas that have</p> <p>3 been served on Penn National. They were served</p> <p>4 at the end of December, I think into early</p> <p>5 January. I think they count maybe 14. Those</p> <p>6 list contractors and facilities. Hundreds of</p> <p>7 them.</p> <p>8 My client has done a search. As you know,</p> <p>9 they can only search by policy number. I think</p> <p>10 that's been confirmed by Ellis &amp; Winter report</p> <p>11 as to the archived paper policy and microfiche</p> <p>12 documents. They conducted an electronic search</p> <p>13 at this time and searched for the potential</p> <p>14 names. They've done that, and they've come up</p> <p>15 with nothing.</p> <p>16 So I want to say that these other</p> <p>17 contractors and facilities, if somehow the</p> <p>18 microfiche is digitized and that policy -- the</p> <p>19 policy comes up for that contractor or for that</p> <p>20 facility, then that should be held confidential</p> <p>21 to the receiver as well.</p> <p>22 I don't know if that was solidified or</p> <p>23 confirmed by what the receiver has stated, but I</p> <p>24 just wanted to make clear that that would be our</p> <p>25 request as well.</p> | <p style="text-align: right;">Page 50</p> <p>1 MR. YNTEMA: Okay. Thank you, Your Honor.</p> <p>2 THE COURT: All right. Mr. Protopapas?</p> <p>3 MR. YNTEMA: I think there was one other</p> <p>4 item that was covered by Mr. Protopapas.</p> <p>5 THE COURT: Sure. Sure.</p> <p>6 MR. YNTEMA: I apologize. Was the</p> <p>7 confidential nature of the document retention.</p> <p>8 THE COURT: Yeah. The document retention</p> <p>9 policy, explain to me, you all filed this thing</p> <p>10 in federal court in its completely unredacted</p> <p>11 form?</p> <p>12 MR. YNTEMA: It was a version.</p> <p>13 THE COURT: What's that?</p> <p>14 MR. YNTEMA: It was a version of one of</p> <p>15 Penn National's --</p> <p>16 THE COURT: I don't see how you can keep</p> <p>17 confidential any of them. If you filed one</p> <p>18 version -- was it the latest version or what</p> <p>19 version was it?</p> <p>20 MR. YNTEMA: I believe it was one of the</p> <p>21 earlier versions. I can't say for sure standing</p> <p>22 here today.</p> <p>23 But the request was is that the document</p> <p>24 retention policies and the litigation hold</p> <p>25 policy be kept confidential. It does contain a</p>                                                                                                                                    |
| <p style="text-align: right;">Page 49</p> <p>1 And then the receiver has already stated</p> <p>2 that any non-Covil or nonreceivership insureds</p> <p>3 will be kept confidential.</p> <p>4 THE COURT: Right. I understand. I do not</p> <p>5 think you and Mr. Protopapas are at</p> <p>6 cross-purposes in what you have recited his</p> <p>7 request to be.</p> <p>8 I understand that with respect to the</p> <p>9 documents that either show them as a direct</p> <p>10 insured or additional insured or their</p> <p>11 contractors being direct insured or additional</p> <p>12 insured, that to the extent that can now be</p> <p>13 gleaned from these automated documents, they</p> <p>14 will be for Covil and for other receivership</p> <p>15 companies for which Mr. Protopapas is</p> <p>16 responsible, shall remain confidential unless</p> <p>17 some court process is used to try to obtain that</p> <p>18 information and that can then be dealt with in</p> <p>19 due course.</p> <p>20 I understand with respect to policies that</p> <p>21 are not in any way connected directly or</p> <p>22 indirectly to this receivership, they're</p> <p>23 completely confidential. So that's what I</p> <p>24 understand the protection Mr. Protopapas is</p> <p>25 making to me.</p>                                | <p style="text-align: right;">Page 51</p> <p>1 lot of internal Penn National documents that</p> <p>2 are, quite frankly, unrelated to any insurance</p> <p>3 policy documents even.</p> <p>4 They go to holding, say,</p> <p>5 administrative-type documents that are held by</p> <p>6 Penn National and a lot of their --</p> <p>7 THE COURT: I agree with you completely.</p> <p>8 The one that they filed in federal court, I've</p> <p>9 only seen that one. It's got a whole lot of</p> <p>10 things in it. Just as you described. No</p> <p>11 difference from that and the updated additional</p> <p>12 ones. I hadn't seen them, of course, but yet it</p> <p>13 covers a variety of things. And it was not</p> <p>14 redacted in one way, shape, or form.</p> <p>15 MR. YNTEMA: Again, this is -- I want to</p> <p>16 make that request that there was one version.</p> <p>17 These are several versions that by the</p> <p>18 receiver's own counsel agreed to keep by way of</p> <p>19 confidentiality agreement. They received it, I</p> <p>20 produced it based on their agreement.</p> <p>21 And then the next several days after that,</p> <p>22 I get a request that, oh, and they file a</p> <p>23 request to the court to publish, and it</p> <p>24 shouldn't be kept confidential.</p> <p>25 So I produced those documents on an</p> |

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| <p align="right">Page 52</p> <p>1 agreement with other counsel that now they come<br/>2 to court and say, "No, no, no. We want to have<br/>3 these" --</p> <p>4 THE COURT: Well, they're asking for a<br/>5 court order removing that confidentiality, as I<br/>6 understand it. They're entitled to do that.<br/>7 But I simply do not understand, based on your<br/>8 own conduct, how you can be harmed by that<br/>9 because you've already filed in federal court<br/>10 unredacted something that is only an earlier<br/>11 version of what you do now. But it disclosed<br/>12 plenty of internal information about the company<br/>13 that you now seek to hold confidential. I don't<br/>14 see how you do that.</p> <p>15 MR. YNTEMA: I can tell Your Honor is<br/>16 inclined to grant the receiver's motion.</p> <p>17 THE COURT: Yes, I am.</p> <p>18 MR. YNTEMA: And I'll tell you, Your Honor,<br/>19 we'll scan in our papers as we submit them to<br/>20 the Court. Thank you.</p> <p>21 THE COURT: Understood.</p> <p>22 Mr. Protopapas, I would grant that part of<br/>23 the motion. And, again, from -- if there's some<br/>24 very specific issue about the material that I<br/>25 need to look at, I, of course, can do that.</p> | <p align="right">Page 54</p> <p>1 retention destruction policy has been utilized<br/>2 by them.</p> <p>3 We had multiple representations, and we<br/>4 have asked for some discovery on it from Penn,<br/>5 which they have resisted.</p> <p>6 We are seeking a 30(b)(6) deposition to<br/>7 better understand in 2018 and 2019 what portions<br/>8 of the microfiche have been destroyed. There is<br/>9 an affidavit from a member of Penn National<br/>10 saying that no microfiche were destroyed in 2018<br/>11 and 2019. And if that's the case, so be it, but<br/>12 it would violate their document destruction<br/>13 policy for that to be true.</p> <p>14 Paper documents have been destroyed.</p> <p>15 THE COURT: Well, there's a simple answer<br/>16 to all of that. Just take a 30(b)(6) deposition<br/>17 and clear up that confusion.</p> <p>18 MR. PROTOPAPAS: That's what -- Your Honor,<br/>19 that's what we're asking for and that's the last<br/>20 issue.</p> <p>21 THE COURT: Yeah. I mean, you've got a<br/>22 document retention. You've got -- something was<br/>23 filed, affidavit or statement by Penn National<br/>24 that none has been destroyed in 2018 and 2019.<br/>25 Then you've got a document retention policy that</p> |
| <p align="right">Page 53</p> <p>1 MR. PROTOPAPAS: I will work with<br/>2 Mr. Yntema if there is something there I've<br/>3 missed.</p> <p>4 THE COURT: Yes. You all see what you can<br/>5 do to begin with.</p> <p>6 MR. PROTOPAPAS: Yes, Your Honor. That<br/>7 leaves one matter left for the Court, and then<br/>8 we'll be done for the day. From the receiver's<br/>9 perspective, there's one matter left. I'm<br/>10 sorry, go ahead.</p> <p>11 MR. YNTEMA: I'm sorry, Mr. Protopapas. I<br/>12 apologize.</p> <p>13 There was one other item in the motion to<br/>14 keep the documents confidential. It's on number<br/>15 3. I think there was a -- I think it was a<br/>16 spreadsheet that was produced that had a number<br/>17 of policy numbers on it, and we had asked that<br/>18 that be kept confidential. I don't think that<br/>19 is an issue.</p> <p>20 MR. PROTOPAPAS: We agree.</p> <p>21 MR. YNTEMA: Thank you.</p> <p>22 THE COURT: All right.</p> <p>23 MR. PROTOPAPAS: Your Honor, lastly, there<br/>24 has been a great deal of confusion from the<br/>25 receivership side as to how the document</p>                                                                                                                    | <p align="right">Page 55</p> <p>1 says otherwise.</p> <p>2 And then you've got some of this stuff,<br/>3 well, it was queued up for destruction but then<br/>4 it wasn't until the next year and so forth and<br/>5 so on. And we know that there was not a<br/>6 litigation hold.</p> <p>7 So the best way to sort all that out in<br/>8 terms of are things that actually have been<br/>9 destroyed is to take a 30(b)(6) deposition. And<br/>10 you noticed it, and they've asked to quash it.<br/>11 And I declined to quash it. So that means it<br/>12 needs to go on and take place.</p> <p>13 MR. YNTEMA: Your Honor, if I might.</p> <p>14 Your Honor, to the extent that it's been<br/>15 represented to the Court there's an affidavit by<br/>16 a Penn National employee that documents were not<br/>17 being destroyed in 2018 and 2019. I've looked<br/>18 back just briefly trying to refresh my<br/>19 recollection as to the affidavits that have been<br/>20 filed with the Court. I do not see reference to<br/>21 that.</p> <p>22 THE COURT: It's a writing of some sort<br/>23 because it's been filed in connection with some<br/>24 piece of this thing.</p> <p>25 Mr. Protopapas, what is it? There's a</p>                               |

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**Motions Hearing**

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| <p align="right">Page 56</p> <p>1 writing that -- by someone at Penn National that<br/>2 addresses this issue.</p> <p>3 Am I right, Mr. Protopapas?</p> <p>4 MR. PROTOPAPAS: You're correct. It's not<br/>5 the affidavit of Mr. Lloyd Wright, but I believe<br/>6 in the affidavit of the other gentleman.</p> <p>7 THE COURT: I've seen the actual written<br/>8 page that talks about destruction in 2018 and<br/>9 2019.</p> <p>10 MR. PROTOPAPAS: My understanding was the<br/>11 reason we didn't need to take the deposition was<br/>12 because nothing was destroyed in 2018 and 2019,<br/>13 but -- as far as microfiche are concerned, but<br/>14 that paper policies may have been.</p> <p>15 But this is yet another reason why -- I<br/>16 mean, this is the confusion we're dealing with<br/>17 is that I am unsure if in 2018, 2019, and 2020<br/>18 if CGL and GL policies were destroyed by Penn<br/>19 National arguably will be before this Court<br/>20 pretrial asking for a spoliation order to that<br/>21 extent depending on what is found by<br/>22 Ellis &amp; Winters.</p> <p>23 THE COURT: And you briefed the potential<br/>24 spoliation issue, and I say the best way to --<br/>25 the first step we have to take is was there any</p> | <p align="right">Page 58</p> <p>1 THE COURT: And there's a good reasons for<br/>2 that, but we're dancing around something that is<br/>3 important. If you read policies, you would<br/>4 think that everything pre-1992 had been<br/>5 destroyed. It turns out that did not happen.<br/>6 They weren't destroyed.</p> <p>7 But then along came this terrifying period<br/>8 of time in 2018 and 2019 when the Finch<br/>9 litigation was at its height, and this Court was<br/>10 beginning to inquire into assets of Covil<br/>11 insurance policies and the like.</p> <p>12 And in that period, there's some<br/>13 information that this material might have been<br/>14 in a purge situation. And all they want to do<br/>15 is find out, hey, it would be one thing if you<br/>16 had gone ahead with what your policy said you<br/>17 could do. It would be quite another thing if<br/>18 you wait until this issue of whether you had<br/>19 coverage for what was a huge claim and a huge<br/>20 liability based on a verdict against Covil and<br/>21 at that point said, well, we said we were going<br/>22 to destroy that stuff before, now we know that<br/>23 they want it, but, gosh, we could use our old<br/>24 policy to destroy it. They want to know if that<br/>25 happened.</p> |
| <p align="right">Page 57</p> <p>1 spoliation? And I don't know that yet, you<br/>2 don't know either. We've got a policy at<br/>3 variance with this writing that I'm sure I read.</p> <p>4 MR. PROTOPAPAS: Your Honor, on page 6 of<br/>5 Defendant Penn National's Response in Opposition<br/>6 of Plaintiff's Third Motion to Compel, I quote,<br/>7 "Furthermore, Penn National commercial line<br/>8 policies dated prior to 1992 were contained on<br/>9 microfiche which were not part of the annual<br/>10 purge process in place at Penn National in 2018<br/>11 and beyond."</p> <p>12 THE COURT: That's exactly what I'm<br/>13 referring to.</p> <p>14 MR. YNTEMA: Pre-1992 policies and predated<br/>15 1992. That's the way I heard that, correct?<br/>16 1992 and before.</p> <p>17 MR. PROTOPAPAS: Yes.</p> <p>18 MR. YNTEMA: Okay.</p> <p>19 MR. PROTOPAPAS: 1992 and before policies,<br/>20 there's a document purge -- document purge<br/>21 policy that said they should have been<br/>22 destroyed. They're saying they were not<br/>23 destroyed, that some paper was destroyed. We<br/>24 would like the deposition to clarify it rather<br/>25 than relying solely on affidavits.</p>                                                         | <p align="right">Page 59</p> <p>1 It may not have happened. I don't make any<br/>2 determination about that one way or another.<br/>3 But that would be spoliation classic if that is<br/>4 what happened. And they want to know that. And<br/>5 that is one of the things that I'm going to<br/>6 allow them to find out.</p> <p>7 MR. YNTEMA: Yes, Your Honor. I guess the<br/>8 last item is -- I need to be clear. The Court<br/>9 has addressed Ellis &amp; Winters' fee that<br/>10 Ms. Brathwaite brought to the Court's attention<br/>11 today.</p> <p>12 THE COURT: Right.</p> <p>13 MR. YNTEMA: Also, I need clarification on<br/>14 the record as to the Court order as to who will<br/>15 incur the expense of the digitization.</p> <p>16 THE COURT: Penn National will incur that<br/>17 expense.</p> <p>18 And that should be a part of the order,<br/>19 Mr. Protopapas.</p> <p>20 I think when I was outlining how this would<br/>21 step forward, I think I made that clear, but you<br/>22 are very right to ask for a direct clarification<br/>23 of that.</p> <p>24 My concept is that the current outstandings<br/>25 of Ellis &amp; Winters will be paid immediately.</p>                                                                                                       |

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**Motions Hearing**

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| <p align="right">Page 60</p> <p>1 That Ellis &amp; Winters will get various quotes and</p> <p>2 make a decision as to which company can do the</p> <p>3 best job and can do the job quickly and which</p> <p>4 company is reasonable in the scope of what they</p> <p>5 intend to do and will submit that information to</p> <p>6 all of you.</p> <p>7 That Ellis &amp; Winter will then engage the</p> <p>8 company. And that they can do under the</p> <p>9 directives I put forward when I designated</p> <p>10 Ellis &amp; Winter. If there's anything further</p> <p>11 than that, I would authorize them to go on and</p> <p>12 engage the firm. They would then send invoices</p> <p>13 to Penn National to pay for this work on a</p> <p>14 periodic basis, and Penn National would be</p> <p>15 directed to pay them. So that's how it would</p> <p>16 work.</p> <p>17 We think just wild variation based on the</p> <p>18 two bids they got, one was 85 cents a</p> <p>19 microfiche, and the other was several dollars a</p> <p>20 microfiche, that you're talking about maybe 250-</p> <p>21 to 950- to digitize everything.</p> <p>22 We think that about half of it may be able</p> <p>23 to be eliminated by the key on the front end.</p> <p>24 If that is so, you're talking about 150,000</p> <p>25 microfiche, and they would -- Ellis &amp; Winters</p> | <p align="right">Page 62</p> <p>1 will be sent to Penn National, meaning I will be</p> <p>2 receiving those invoices?</p> <p>3 THE COURT: Oh, absolutely. My guess is</p> <p>4 they will go through you as the attorney. They</p> <p>5 won't go directly to your client. They will go</p> <p>6 through you.</p> <p>7 MR. YNTEMA: I would appreciate that.</p> <p>8 Thank you.</p> <p>9 THE COURT: That way you've got everything</p> <p>10 on the front end. No. I think any kind of</p> <p>11 directive to Penn National goes through</p> <p>12 Mr. Yntema as the lawyer. And that way you've</p> <p>13 the full ability to say -- call up and say,</p> <p>14 "Hey, this is outside of everything she</p> <p>15 ordered," and so forth. No. You will be the</p> <p>16 gatekeeper for Penn National's receiver for</p> <p>17 directives and information and invoices.</p> <p>18 MR. YNTEMA: Okay. I'm just making sure</p> <p>19 that all my items have been covered.</p> <p>20 THE COURT: I understand.</p> <p>21 MR. YNTEMA: I think that's it, Your Honor.</p> <p>22 I appreciate your time.</p> <p>23 THE COURT: Yes, sir.</p> <p>24 What else, Mr. Protopapas?</p> <p>25 MR. PROTOPAPAS: Nothing else, Your Honor,</p>                                                                                                        |
| <p align="right">Page 61</p> <p>1 would look more specifically at exactly what was</p> <p>2 going to be done, how it was going to be done,</p> <p>3 and how the searchability would be established,</p> <p>4 and start getting that work done. Get periodic</p> <p>5 invoices and send them to Penn National, and I</p> <p>6 will direct that Penn National pay those</p> <p>7 invoices.</p> <p>8 And, frankly, I'm doing Penn National a big</p> <p>9 favor as I see it. I know you don't agree.</p> <p>10 They might not either.</p> <p>11 MR. YNTEMA: It will be an interesting call</p> <p>12 I make in just a little while.</p> <p>13 THE COURT: It would eliminate Iron</p> <p>14 Mountain. That might be worth something to</p> <p>15 them.</p> <p>16 MR. YNTEMA: Another point is</p> <p>17 Ellis &amp; Winters' fee. I do not believe I have</p> <p>18 their current fee. I know there was travel that</p> <p>19 was incurred after that.</p> <p>20 THE COURT: Ms. Brathwaite will and</p> <p>21 Mr. Flatley will attend to that updating as soon</p> <p>22 as their feet hit the office.</p> <p>23 MR. YNTEMA: And I assume that it will be</p> <p>24 sent to Penn National, meaning the vendor's</p> <p>25 invoices, and Ms. Brathwaite's fee, as well,</p>                                                                                                      | <p align="right">Page 63</p> <p>1 other than to have Mr. Bonds help remove some of</p> <p>2 the clutter of your office.</p> <p>3 THE COURT: Excellent. As I explained to</p> <p>4 attorneys for all, I'm getting Mr. Protopapas to</p> <p>5 help me get some of this huge volume of material</p> <p>6 that's been filed, notes and everything else,</p> <p>7 and get it shredded and out of my hair. So</p> <p>8 we're going to do that.</p> <p>9 MR. HARRIS: Your Honor, real briefly.</p> <p>10 David Harris for Penn National.</p> <p>11 THE COURT: Mr. Harris.</p> <p>12 MR. HARRIS: We also had a Motion to Seal</p> <p>13 that was listed in conjunction with motion for</p> <p>14 confidentiality designation.</p> <p>15 The Motion to Seal references an exhibit</p> <p>16 that has some documents that you have now said</p> <p>17 are not entitled to protection as well as a</p> <p>18 spreadsheet that you have said will be entitled</p> <p>19 to protection. So I just wanted to alert the</p> <p>20 Court we're going to --</p> <p>21 THE COURT: Sure. I expect Mr. Protopapas</p> <p>22 to get with you and be sure that the spreadsheet</p> <p>23 and the other things that should not be in the</p> <p>24 public domain are not the public domain but</p> <p>25 rather under seal. I anticipate you all will</p> |

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**Motions Hearing**

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| <div>Page 64</div> <div>1 get to the specifics of those, Mr. Harris.</div> <div>2 But, Mr. Protopapas, please attend to</div> <div>3 Mr. Harris' concerns in that regard.</div> <div>4 Of course, nothing is going to be done</div> <div>5 until this order gets -- you may not agree with</div> <div>6 what I rule, of course, but I want you to be</div> <div>7 satisfied that the order fairly reflects what I</div> <div>8 have ruled. And then and only then will it be</div> <div>9 signed and filed.</div> <div>10 MR. YNTEMA: Thank you, Your Honor.</div> <div>11 MR. PROTOPAPAS: Thank you, Your Honor.</div> <div>12 THE COURT: All right. Anything else to</div> <div>13 come before the Court?</div> <div>14 All right. This hearing is adjourned.</div> <div>15 - - -</div> <div>16 (The hearing concluded at 4:14 p.m.)</div> <div>17 - - -</div> <div>18</div> <div>19</div> <div>20</div> <div>21</div> <div>22</div> <div>23</div> <div>24</div> <div>25</div> |  |
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CERTIFICATE OF REPORTER

I, Sheri L. Byers, Registered  
Professional Reporter and Notary Public of the State  
of South Carolina at Large, do hereby certify:

That the foregoing proceedings were  
taken before me on the date and at the time mentioned  
on page 1 and the proceedings were recorded  
stenographically by me and were thereafter transcribed  
under my direction; that the foregoing transcript as  
typed is a true, accurate and complete record of the  
proceedings to the best of my ability.

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 April, 2021,  
at Lexington, Lexington County, South Carolina.

---

Sheri L. Byers,  
Registered Professional Reporter,  
Notary Public  
State of South Carolina at Large  
My Commission expires:  
October 30, 2023



Covil Corporation,  
Plaintiff,  
vs.  
Pennsylvania National,  
et al.,  
Defendants.

Columbia, South Carolina

The Honorable Jean Hoefer Toal, Judge

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Jonathan M. Robinson, Esquire  
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Brady A. Yntema, Esquire (via Webex)  
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Circuit Court Reporter

I N D E X

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NO EXHIBITS INTRODUCED.

1 THE COURT: All right, court will come to order. This  
2 is the matter of Covil, C-o-v-i-l, Covil Corporation  
3 against Pennsylvania National and others. This is  
4 2020-CP-40-02098. In the courtroom we have Mr. Protopapas  
5 for Covil; he is the receiver and a lawyer for Covil. We  
6 have Brad Nes and Murrell Smith from Morgan, Lewis, Bockius  
7 as counsel for the receiver. Mr. Brady Yntema from  
8 Goldberg and Segalla is Penn National's principal attorney.  
9 Mr. Yntema is attending via WebEx. He is ill with COVID,  
10 and we are deeply appreciative of his being willing to  
11 attend the hearing in this format. And Mr. David Harris is  
12 also here virtually.

13 Are you not, Mr. Harris? I see you.

14 And Mr. Harris is also with Goldberg and Segalla and  
15 is representing Penn National.

16 All right, Mr. Protopapas, you may proceed.

17 MR. PROTOPAPAS: Thank you, Your Honor. We'd like to  
18 give you a procedural status of the Covil-Penn matter. As  
19 the court's aware, this is the second Covil-Penn case. The  
20 first Covil-Penn case dealt with a coverage issue over 50  
21 or so thousand dollars for the Rollins case. That's  
22 currently -- Court of Appeals has affirmed. There's a  
23 petition for cert pending, and that case is working its way  
24 to ultimate conclusion.

25 *Covil v. Penn* two is the case we're here about today.

As the court recalls, there had been extensive discovery practice and motions practice in that matter that ultimately led to an order of this court in May of -- April of 2022 that Penn National, we argue, took an interrogatory appeal from. That appeal was to the South Carolina Court of Appeals. We moved to dismiss; Penn National opposed it, and the Court of Appeals granted the motion to dismiss in August. Penn National has moved to reconsider that order; we, of course, have opposed it at the Court of Appeals. On a parallel path, Penn National filed a petition for *certiorari* to the South Carolina Supreme Court. That petition was denied by the South Carolina Supreme Court as well as in August.

It seemed appropriate that with our 2020 civil action number that we give the court an update as to where we stand and advise the court of where we believe the best path forward is. Your Honor is intimately familiar with Covil and the two legacy liability insurance policies that Penn National issued and admits to issuing for '86 to '87 and for 1987 to 1988. We believe those legacy liability policies are ripe for adjudication by this court as to the obligations that Penn National has to Covil to defend and to indemnify Covil for asbestos liability claims.

We believe, Your Honor, that that issue can be resolved in a nonjury trial as the court's schedule would

1 allow. It is a straight-up declaratory judgment on two  
2 insurance policies. Our research has indicated that that  
3 is a proper nonjury matter for this court.

4 We have three experts that would testify at trial. We  
5 don't believe it would take more than half to  
6 three-quarters of a day for us to put our case up. We  
7 don't believe that the rebuttal or response would be more  
8 than a day, and we could have the case finished in two  
9 nonjury days. And the pace this court operates, it could  
10 well be one day.

11 And so we feel thirty exhibits at most from the  
12 plaintiff's side. We think that what, what the court has  
13 done in the past, which is preliminary findings of fact  
14 with exhibits presented to the court in advance, then  
15 trial, the testimony, a presentation of the testimony, and  
16 a streamlined process. The court is educated on all these  
17 issues, and then that issue will end.

18 There is discovery that's still outstanding. As the  
19 receiver, Your Honor, I don't believe it's in the best  
20 interests of Covil to delay this trial and these policies  
21 to allow the six to nine-month process that Ellis Winters  
22 would need to comb through the microfiche that Penn  
23 National has if the motion to reconsider is ultimately  
24 denied by the Court of Appeals.

25 So, the heart of that appeal, Your Honor, is the Ellis

1 and Winters project which has been stalled since the court  
2 issued its order. So, nothing -- Ellis Winters has not had  
3 an opportunity to begin that process simply because of this  
4 appeal, and from the perspective of the receivership, we  
5 need this insurance policy to be as responsive as it can  
6 be.

7 Now, Penn National disagrees with us and the meaning  
8 of those policies, disagrees on the scope of the erosion or  
9 aggregate limits and all those traditional legacy liability  
10 issues. But what we would ask the court is allow Ellis and  
11 Winters at the appropriate moment to move forward with  
12 enforcement of that discovery order. Allow us to take our  
13 deposition of Penn National, allow them to depose our  
14 experts, and let's set this thing for a nonjury trial and  
15 put to bed a big chunk, perhaps the last, the last Covil  
16 coverage action, I believe, that is pending in federal or  
17 state court.

18 And it is a 2020 action, Your Honor, and I do  
19 apologize it's taken us this long to get here. I don't  
20 like having cases that are two years old before this court,  
21 but we'll be ready at trial to try those two policies and  
22 the spoliation issues surrounding those policies on the  
23 document destruction. We can be ready as soon as December,  
24 and that would...

25 THE COURT: Why is there a motion still pending for

1 reconsideration in light of the Supreme Court's denial of  
2 *certiorari*?

3 MR. PROTOPAPAS: It's a motion for an *en banc*  
4 decision, Your Honor, and we believe that will be -- we  
5 were hoping that would be denied in relatively quick order,  
6 but it deals only with this one discovery issue that Ellis  
7 and Winters is ---

8 THE COURT: I am very, very familiar with what it  
9 deals with, and I am very unhappy that we are still talking  
10 about sixty to ninety days or longer than that to do this  
11 discovery. I know what was said when the firms talked  
12 about this. These documents are stored at Iron Mountain, a  
13 national manager of paper records and digitized records for  
14 governments and private corporations all over America.  
15 It's not going to take them that kind of time to digitize  
16 these records and make them searchable. That's what  
17 they're in the business of doing. So, that piece of it is  
18 something I don't understand.

19 MR. PROTOPAPAS: Your Honor, we, we don't disagree  
20 with the court. We put our trust into Ellis and Winters,  
21 who, my understanding, has stopped all activity until the  
22 appeal is concluded, feeling that it would be inappropriate  
23 for them to proceed forward until that appeal is finally  
24 completed.

25 THE COURT: Have they been paid?

1 MR. PROTOPAPAS: I apologize, Your Honor. I have not  
2 asked. I, I ---

3 THE COURT: Let me turn to Mr. Yntema.

4 MR. YNTEMA: Your Honor, I apologize. You're breaking  
5 up on me a little bit, but I did hear that ---

6 THE COURT: I'm not hearing -- whoa, whoa, whoa. Wait  
7 a minute. I'm not hearing you.

8 (A PAUSE.)

9 THE COURT: Mr. Yntema, I'm going to come up here  
10 where I can see and hear you a little bit better. I'm at a  
11 podium right here.

12 First of all, tell me why appellate activity is still  
13 being pursued here in light of the fact that the Supreme  
14 Court denied *certiorari*.

15 MR. YNTEMA: Your Honor, the Supreme Court denied  
16 *certiorari* in its original jurisdiction. That's what we  
17 petitioned the Supreme Court to review. The Court of  
18 Appeals motion of the receiver did, in fact, dismiss the  
19 appeal. We've asked for a petition for rehearing *en banc*;  
20 that's currently pending. There was -- I won't go on in  
21 detail about the briefing, but the core issue was whether  
22 it was indeed a discovery order or essentially was a order  
23 holding Penn National in contempt or as a sanction order  
24 enforcing an order that had Penn National conducting a  
25 search at its sole expense by way of a third party, and



1 then allowing the microfiche to be digitized and be used at  
2 the receiver's sole expense. That was the main issue with  
3 respect to as to whether it was an interlocutory appeal or  
4 not.

5 THE COURT: Let me stop you there, Mr. Yntema. Those  
6 issues, you are raising these issues of whether it's a  
7 discovery or a sanctions order before the Court of Appeals  
8 now?

9 MR. YNTEMA: Yes, Your Honor, we have.

10 THE COURT: Well, you did not raise those issues in  
11 front of me. So, how in the world are you going to ask an  
12 appellate court to review trial court orders if you haven't  
13 asked the trial court to make any determinations about  
14 that?

15 MR. YNTEMA: I think in our motion for reconsideration  
16 we did address that issue at, at trial court level, and  
17 Your Honor denied our motion for reconsideration, which I  
18 appreciate and I understand.

19 THE COURT: Well, I won't spend a great deal of time  
20 debating it, but I certainly will go back and look at it.  
21 It strikes me that it's simply a delaying tactic, and I'm  
22 frustrated about that, to be honest with you. But  
23 hopefully that will be resolved fairly shortly when the  
24 Court of Appeals tells us whether it wants to continue with  
25 the case or whether it's going to dismiss the *en banc*

1 request. I guess we'll just have to wait on that.

2 Has Ellis and Winters been paid?

3 MR. YNTEMA: Your Honor, we did make a payment to  
4 them, I believe, in the spring after their first phase of  
5 searching through the insurance repository for Penn  
6 National was complete and after the reporting to the court  
7 was complete. They were paid in full. I'm not sure if  
8 they have incurred any other expenses since that time.  
9 I'm, I'm, I'm not sure if they have since if was mainly  
10 motion practice thereafter, and then an appeal was taken.  
11 So, I don't think there has been any conduct or expenses  
12 incurred by Ellis and Winters since that time, nor have I  
13 been notified of that.

14 THE COURT: Okay. All right.

15 (A PAUSE.)

16 MR. SMITH: Chief Justice, Murrell -- for the record,  
17 Murrell Smith for Covil. One issue we got is that, is that  
18 the experts are not going to be available on December 5th  
19 for us, and more importantly for me -- I hope to  
20 participate in this case. As you know, we have an  
21 organizational session after the election.

22 THE COURT: Oh, yeah.

23 MR. SMITH: And so it's going to be on December 6th  
24 and 7th. So, if we could try this case on the 12th, Your  
25 Honor, that would be great if you would -- could do that.

1 This is a nonjury case. Hopefully, Court Administration or  
2 if you got that December block carrying over -- but we  
3 would request December 12th would probably be the best time  
4 for us, and we could have our experts ready also.

5 And then, you know, Your Honor, I will -- if we have  
6 to try the case in the new year, I'll skip session, but  
7 it's a little difficult for me now for me to skip session  
8 where ---

9 THE COURT: No, you're the chief presiding officer, so  
10 you can't.

11 MR. SMITH: Yes, ma'am. That's, that's my concern is  
12 I have to turn it over to Mr. Pope, and you know how Mr.  
13 Pope can mess things up.

14 THE COURT: No comment.

15 MR. SMITH: Thank you.

16 THE COURT: All right, hang on for a minute. Let me  
17 go back.

18 MR. YNTEMA: I wonder if I may? I'm not sure if it's  
19 appropriate for me to ---

20 THE COURT: Yes, sir, say again?

21 MR. YNTEMA: Yes. Your Honor, yesterday was the first  
22 time that I had seen a suggestion of a December trial date  
23 and a suggestion that the receiver had three experts that  
24 have yet to be disclosed to us. I certainly haven't had an  
25 opportunity to check with any experts that we may have or

1 with respect to their availability during the December  
2 timeframe. So, I just wanted to put that out there for  
3 Your, for Your Honor's consideration.

4 I don't know. I know Mr. Smith may have some  
5 conflicts early on next year, and -- but as far as a trial  
6 date in, in, in 2023, we are certainly willing to consider  
7 that as well.

8 THE COURT: Well, I'm not inclined to wait until June  
9 of 2023 to try this matter, this nonjury matter; I'm not  
10 going to do that. I'm going to go back here and look at  
11 December just for a minute, but what you're asking is, in  
12 fact, to not have it tried until they get out of session  
13 next year. I'm not going to do that.

14 They've been ready to proceed on this thing and tried  
15 to get through the discovery and all this kind of thing,  
16 and it's been a foot dragging operation by Penn National  
17 the whole time and I just can't -- well, I'm not going to  
18 allow that to continue. Let me look at my calendar a  
19 minute.

20 (A PAUSE.)

21 THE COURT: What I'm going to do is this. I'm going  
22 to set this case for December the 14th -- that is a  
23 Wednesday -- with the thought that it would take no more  
24 than three days to try because I've got four cases in that  
25 December block. They're all in Charleston, and I can't

1 tell about these cases. We settled the one I thought we  
2 had there; that was disposed and now we've got these  
3 others, but one of them is a 2018 case. So, you know,  
4 unless it settles, that's probably the one that we would  
5 deal with, and it could be tried in a week, in which case I  
6 could move the thing up.

7 (A PAUSE.)

8 THE COURT: I'm going to tentatively say the 12th and  
9 as you all know, I'm going to meet with the Asbestos  
10 Steering Committee next Monday, and let me see what I can  
11 find out about this December term, but I'm going to  
12 tentatively set it for Monday here. So, we'll see if we  
13 can get a spot to lay our head, and it would be nonjury.  
14 So, if we had to go to one of those family court  
15 courtrooms, we could do it. And as I say, that's tentative  
16 right now. I will finalize that next Monday after I meet  
17 with the asbestos people, if that's okay.

18 MR. PROTOPAPAS: Thank you, Your Honor.

19 THE COURT: Okay. What else do we need first of all  
20 from you, Mr. Protopapas, or from Mr. Smith by way of this  
21 matter?

22 MR. PROTOPAPAS: Nothing further, Your Honor.

23 THE COURT: All right. Are there ---

24 MR. YNTEMA: Your Honor.

25 THE COURT: I'm get to you in a minute. I'm not

1 leaving you out. Don't worry, Mr. Yntema. You'll have  
2 plenty of chances.

3 Do we need any kind of pretrial hearing on any of this  
4 stuff? Probably so.

5 MR. PROTOPAPAS: I believe, Your Honor, thirty days in  
6 advance a pretrial, and we can propose with Mr. Yntema a  
7 schedule for proposed order, findings of fact, conclusions  
8 of law, and an exhibit list, and a trial schedule.

9 THE COURT: All right, the 24th is Thanksgiving. All  
10 right, all right, let's have a pretrial hearing on November  
11 the 18th; that's the previous Friday from Thanksgiving.  
12 So, we would have November the 18th for a pretrial hearing  
13 on all outstanding motions, and then we would have the  
14 trial on December the 12th.

15 Now I will turn to you, Mr. Yntema.

16 MR. YNTEMA: Yes. Thank you, Your Honor. Brady  
17 Yntema from Penn National. I, I -- you broke up on me.  
18 Now I, I hear you clearly now, and you have stated that  
19 you're looking at December 12th tentatively, and you were  
20 talking as though maybe the December 14th date may be the  
21 most likely for you. Is that right?

22 THE COURT: What's that?

23 MR. YNTEMA: You had broken up on me a little bit and  
24 I apologize, but it seems, it seems that you've, you've set  
25 the trial, tried to set the trial for December 12th and --

1 but you had, you had discussed potentially actual start  
2 date of that trial being in the middle of the week of  
3 December 14th. Is that correct?

4 THE COURT: Yes, and what I was trying to say is the  
5 second week of the Charleston term, that I've got asbestos  
6 cases then, but I don't know that I could say it's for more  
7 than a week. Are you saying the 14th works better for you  
8 than the 12th?

9 MR. YNTEMA: I can't speak to either right now. I  
10 haven't had that opportunity to speak to any of my folks.  
11 I just want to get an understanding from the court what  
12 your -- what the court is inclined as far as the dates. It  
13 sounds like you're setting it for December 12th tentatively  
14 but likely it may go on December 14th?

15 THE COURT: That's correct. I'm going to let you know  
16 for sure about that after I meet this coming Monday with my  
17 Asbestos Steering Committee. This is a group of plaintiff  
18 and defendants' bar that we try to work out the blocks for  
19 the whole year, and I can find out then from the people  
20 that are involved in that December block of four cases what  
21 realistically I can expect out of those, and then I can let  
22 you know about that week in December.

23 MR. YNTEMA: I appreciate that, and then, and then we  
24 have, just to be clear, November 18th is what you were  
25 inclined to have a -- schedule a pretrial conference?

1 THE COURT: Yeah. That would be on November the 18th.  
2 That's a Friday.

3 MR. YNTEMA: Yes, Your Honor, thank you, and then the  
4 last thing I think I understood -- I just want to make sure  
5 I'm clear -- is that I guess Mr. Nes will be contacting me  
6 or Mr. Protopapas will be contacting me to discuss the, the  
7 -- a scheduling order that we could have proposed to the  
8 court to -- for this case leading up to the pretrial  
9 conference.

10 THE COURT: Sure, sure, sure. You and Mr. Protopapas,  
11 Mr. Smith, and all the rest of the folks involved in this  
12 case will a full opportunity to see if you can get together  
13 and decide what an agenda is going to look like for this  
14 thing.

15 MR. YNTEMA: Appreciate that, and I guess just for  
16 other conversation is that I know Mr. Protopapas and I and,  
17 and the receivers' counsel have had some conversations  
18 about potential settlement options and things of that  
19 nature, and I, I would be inclined to continue to work  
20 toward that endeavor. I didn't know if the court would be  
21 amenable to having some sort of potential mediation  
22 deadline incorporated into the pretrial -- into the, into  
23 the, I guess, scheduling order.

24 THE COURT: Well, talk with them about how that would  
25 work. I am always amenable to things that encourage



1 settlement, as you know. So, and lord knows if there's a  
2 case where that ought to be done, it's this one. So, this  
3 doesn't exclude that at all.

4 Anything further?

5 MR. PROTOPAPAS: No, ma'am.

6 THE COURT: All right, I close the proceedings. Thank  
7 you very much so all.

8 --- END OF TRANSCRIPT OF RECORD ---

**CERTIFICATE**

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED  
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH  
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO  
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE  
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE  
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING  
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE  
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON  
THE 8TH DAY OF SEPTEMBER, 2022.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,  
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/s/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

NOVEMBER 6TH, 2022

1 State of South Carolina ) Court of General Sessions  
2 County of Richland ) Fifth Judicial Circuit  
3  
4 Covil Corporation, by and ) Transcript of Record  
through its duly appointed )  
5 Receiver, Peter D. Protopapas, )  
6 )  
Plaintiff, )  
7 vs. ) 2020-CP-40-02098  
8 Pennsylvania National Mutual )  
Casualty Insurance Company, )  
9 et al., )  
10 \_\_\_\_\_ Defendant. \_\_\_\_\_)

11  
12 November 14, 2022  
Columbia, South Carolina

13  
14 B E F O R E:

15 The Honorable Jean H. Toal, Judge

16 A P P E A R A N C E S:

17 W. Brad Nes, Esquire  
18 Nancy L. Patterson, Esquire  
19 Peter D. Protopapas, Esquire  
On behalf of Covil Corporation

20 Brady A. Yntema, Esquire  
21 Alexander E. Davis, Esquire  
On behalf of Pennsylvania National Mutual Casualty  
Insurance Company

22

23 Reported by: Stacy S. Johnson, RPR  
24 Circuit Court Reporter

25

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E X H I B I T S

\*\*NO EXHIBITS WERE INTRODUCED\*\*

1           (The following proceedings were held November 14,  
2   2022, beginning at 10:21 AM.)

3           THE COURT: All right. The next matter is Covil  
4   Corporation, by and through its appointed receiver,  
5   Peter Protopapas, against Penn Mutual -- Penn National  
6   Mutual Casualty Insurance company. This is  
7   2020-CP-40-02098.

8           To be heard today is Covil's motion to compel  
9   Penn National. This is one in a series of motions to  
10  compel.

11          Mr. Protopapas is present along with his attorneys  
12  and Mr. Yntema is present along with his colleague,  
13  Mr. Davis.

14          MR. DAVIS: Yes, Your Honor.

15          THE COURT: And I'm ready to proceed.

16          Now let me say a few things on the front end just  
17  to be sure I clarify my communications at the beginning  
18  of this hearing.

19          Mr. Yntema sent me something while I was on the  
20  road with class reunions and family gatherings and all  
21  that kind of thing, concerned about waiving things by  
22  attending this hearing, I assume, and so I sent back  
23  the response to Mr. Yntema saying that his attendance  
24  at this hearing would not in any way waive anything.

25          I want to be sure that you understand that that

1 doesn't mean I ruled on all these other claims of waiver  
2 and so forth, but they're still out there. All I've done  
3 so far is to try to bring some closure to this bitterly  
4 fought issue of discovery.

5       So what I simply said was his principal in the  
6 insurance company does not need to be present at this  
7 hearing today and that his appearance here would not  
8 waive any claims he has about the responsibility of  
9 Penn National in this matter or any other arguments  
10 that would have to do with what this appearance means.

11       I can't really understand why that would have been  
12 of concern. This is a normal case that has been much  
13 complicated by this discovery dispute, but the case  
14 itself is a very straightforward matter and in that  
15 connection the plaintiff has sought for a good long  
16 time now, well over a year, maybe two years, to discover  
17 certain insurance policies and we're still at square  
18 zero on that matter.

19       So that's kind of where we are as I see it at the  
20 beginning of this hearing.

21       Mr. Protopapas, who speaks for you?

22       MR. PROTOPAPAS: Your Honor, Peter Protopapas,  
23 receiver for Covil. Brad Nes will be on my behalf on  
24 the motions to compel. Nancy Patterson will be dealing  
25 with the proposed trial schedule. We're currently set

1 for December -- or the week of December 12th for a  
2 nonjury trial regarding the coverage dispute between  
3 Covil and Penn. The parties are robustly engaged in  
4 discovery. We are mediating tomorrow. We have findings  
5 of fact, conclusions of law coming due, as well as any  
6 other appropriate pre-trial motions and activity.

7 So for purposes of today, Your Honor, I spoke with  
8 Mr. Yntema and we have the motions to compel issue and  
9 then we'd like to discuss with you the proposed trial  
10 schedule and the jury/nonjury issue that Mr. Yntema and  
11 his client has presented, and with that, Your Honor,  
12 I'll turn it over to Mr. Nes.

13 MR. NES: Thank you, Your Honor.

14 Brad Nes for the receiver for Covil Corporation.  
15 We have two motions to compel currently pending or two  
16 separate motions to compel, and I believe a brief history  
17 of how we got here would be helpful before we get to the  
18 actual substance of the motions.

19 In terms of the timeline, the Finch plaintiffs and  
20 the -- the lawyers for the Finch plaintiffs originally  
21 served Penn National with a subpoena in June of 2018  
22 asking for all of their liability policies. Then in  
23 2019 --

24 THE COURT: Stop right there.

25 MR. NES: Sure.

1           THE COURT: All right. Covil served a subpoena on  
2 Penn National June of 2018 asking for?

3           MR. NES: It was actually in June of 2018. It was  
4 the asbestos plaintiffs in Finch that served a subpoena  
5 directly on Penn National. It was not Covil yet that  
6 served that subpoena. They had come across -- the  
7 plaintiffs in Finch had come across policy numbers and  
8 two of those policy numbers were a 1986-1987 general  
9 liability policy and a 1987-1988 general liability policy.

10          So they served a subpoena on Penn National asking  
11 for those particular policies, as well as any liability  
12 policies that were issued to or covering Covil between  
13 1965 and, I believe, 1995.

14          THE COURT: All right. Now at that point the  
15 relationship between Covil and Penn National was that  
16 Covil was a defendant in a Federal court action in North  
17 Carolina brought by the Finch family against Covil for  
18 liability in connection with the development by Finch  
19 of mesothelioma?

20          MR. NES: That's correct, Your Honor.

21          THE COURT: Had that case been brought to verdict  
22 when this subpoena was filed?

23          MR. NES: It had not, Your Honor.

24          THE COURT: All right. So this is -- this is a  
25 pre-trial motion by the Finches against Penn National,



1     which they allege is one of its insurers for this  
2     particular suit in North Carolina, right?

3             MR. NES:   That's correct.   They were searching for  
4     all of the available coverage.

5             THE COURT:   Okay.   And so what happened?

6             MR. NES:   Then we skip to 2019.   There's the  
7     coverage action in North Carolina.

8             THE COURT:   Well, I mean, what happened with the  
9     subpoena?

10            MR. NES:   In response to the subpoena, Penn  
11     National did a very narrow search.   They looked for  
12     those particular policies numbers that the Finch  
13     plaintiffs provided and they produced certain parts of  
14     those policies to the Finch plaintiffs, but they did no  
15     further search because the argument that they developed  
16     in June of 2018, which is their argument to this day,  
17     is that unless you give us a specific policy number,  
18     there's nothing else we're going to do to search for  
19     the policy.

20            THE COURT:   And just out of curiosity, where did  
21     Finch get the policy numbers?

22            MR. NES:   I believe those policy numbers were  
23     in documents that were produced during the underlying  
24     asbestos litigation.   I don't recall exactly what  
25     document the policy number came from.

1           THE COURT:   Were they record -- what I'm trying  
2   to find out is whether Penn National had supplied those  
3   in the past.   I know there was -- at some point in that  
4   litigation the Federal judge involved in hearing the  
5   matter said I want -- there was a squabble about what  
6   kind of coverage existed and the Federal judge said  
7   bring forth the policies.

8           MR. NES:   It was not Penn National that brought  
9   forth any evidence of the coverage.

10          THE COURT:   I got you.

11          MR. NES:   Then we jump to 2019 and there's the  
12   coverage action in North Carolina and in the coverage  
13   action in North Carolina, a carrier, I believe it was  
14   Hartford, sent document requests to Penn National and  
15   similarly to the --

16          THE COURT:   Stop there.   This coverage action in  
17   North Carolina, was it in North Carolina Federal court  
18   or state court?

19          MR. NES:   It was in North Carolina Federal court,  
20   Your Honor, on the heels of --

21          THE COURT:   Was it the same -- same judge that  
22   had dealt with the Finch matter?

23          MR. NES:   Yes, Your Honor.

24          THE COURT:   It was, wasn't it?

25          MR. NES:   That's exactly right.   So on the heels

1 of the jury verdict in Finch, Zurich files a coverage  
2 action against Covil and the other defendants.

3 THE COURT: Right. The Finch verdict at that point  
4 had been rendered, 34 million dollars, and now the  
5 coverage action is brought and who brings that coverage  
6 action?

7 MR. NES: Zurich, Your Honor. Zurich Insurance  
8 Company.

9 THE COURT: Zurich, right. And it brings the  
10 action against who?

11 MR. NES: It brings the action against Covil and  
12 several carriers. I don't believe Penn National was  
13 among the original defendants in that coverage action.

14 THE COURT: But The Hartford was one of those  
15 names?

16 MR. NES: Yes. That's correct.

17 THE COURT: And The Hartford then tried to subpoena  
18 policies from Penn National, right?

19 MR. NES: That's right. They served discovery  
20 requests to Penn National in that coverage litigation.

21 THE COURT: And what happened then?

22 MR. NES: In response to Penn National -- in  
23 response to that discovery request, for the first time  
24 Penn National provided a very interesting response.  
25 They object to the scope of the request asking for all

1 policies, but interestingly they say we cannot search  
2 for all available policies that may be responsive  
3 because we can only search by policy number. That's  
4 the gist of what their response is.

5 So as of 2019 they are getting requests for all  
6 of the policies that may be covering Covil, but their  
7 response is we can't search our historic records which  
8 may have responsive documents because we can only search  
9 by policy number.

10 THE COURT: All right.

11 MR. NES: Then in 2021 we have this action or the  
12 early iteration of this action and the current action.

13 THE COURT: And this action was commenced in 2020?

14 MR. NES: That's correct, Your Honor.

15 THE COURT: And this action is an action brought  
16 by Covil against Penn National and others seeking  
17 coverage?

18 MR. NES: That's correct, Your Honor.

19 THE COURT: Coverage for what?

20 MR. NES: We are seeking coverage for declarations  
21 specifically as to how the current policies that are  
22 known, the 1986-1987 general liability policy, respond  
23 to asbestos cases, and then discovery of any other  
24 policies that may have been issued other than the two  
25 known policies.

1           THE COURT:   So the action that was brought in  
2   2020 by Covil against Penn National and others was a  
3   declaratory judgment action specifying that it sought  
4   a declaration as to the coverage of the known policies  
5   and to explore through discovery, obtain other policies,  
6   and seeking declarations as to the coverage of those  
7   policies on Covil's responsibility for mesothelioma  
8   claims, right?

9           MR. NES:   That's absolutely correct, Your Honor.

10          THE COURT:   All right.

11          All right.   And that was 2020 when that started?

12          MR. NES:   That's right.

13          THE COURT:   What then happened?

14          MR. NES:   We served discovery.   The same basic  
15   discovery that the Finch plaintiffs served and that  
16   was served in the North Carolina Federal coverage  
17   action asking for all policies that cover Covil either  
18   as a named insured or an additional or supplemental  
19   insured and the response back was exactly the same,  
20   it was cut and pasted, which is unless you provide us  
21   a policy number we can't search our historic records  
22   because the system was designed so that you could only  
23   search by policy number.

24          THE COURT:   Stop there for a moment.   The first  
25   time we get into a discussion with Penn National about

1 its coverage, it's in connection with the Finch case,  
2 and then ultimately what happens with Finch, the big  
3 verdict is entered in the Federal courts of North  
4 Carolina. A coverage action is brought with respect to  
5 Finch here in South Carolina in state court and that is  
6 the matter I hear and that involves Penn National and?

7 MR. NES: This current case? I'm sorry. I lost  
8 the --

9 THE COURT: This current case --

10 MR. NES: Yes.

11 THE COURT: -- is a case that involves coverage  
12 for Finch as well as?

13 MR. NES: Oh, I'm sorry, Your Honor. This case  
14 does not involve Finch. The current case that you have  
15 does not involve Finch.

16 THE COURT: Right. So what happened with -- with  
17 the Finch case in terms of their coverage?

18 MR. NES: So they made the argument that there pol  
19 -- the two known policies, the 1986 and 1987 policies,  
20 had an exclusion that would have preempted them from  
21 having to provide coverage for Finch --

22 THE COURT: Right.

23 MR. NES: -- and that was accepted at the time and,  
24 therefore, they were not asked to participate in the  
25 specific Finch case.

1           THE COURT: And that was accepted by what, the  
2 Federal court of North Carolina?

3           MR. NES: It was accepted by the parties because  
4 the exclusion had to do with a products exclusion and  
5 so here --

6           THE COURT: Okay. So this is -- in connection  
7 with the settlement, they resolved their differences  
8 in which the subpoena to Penn National was filed, they  
9 were resolved by settlement?

10          MR. NES: That's right. So it was ultimately  
11 determined that the claim -- the specific claim that  
12 was brought in Finch would not be covered by the  
13 two specific policies that Penn National provided,  
14 therefore, there was no further either discovery or  
15 motions practice with respect to Penn National.

16          THE COURT: And the policies that were provided by  
17 Penn National in the Finch case, were they commercial  
18 general liability policies?

19          MR. NES: They were, Your Honor.

20          THE COURT: All right. And they had exclusion  
21 for what?

22          MR. NES: They had -- both policies have forms  
23 contained in the documents that were produced that  
24 have an exclusion for completed operations and product  
25 claims.

1 THE COURT: Well, do the --

2 MR. PROTOPAPAS: Just to clarify on the Finch  
3 settlement portion, Your Honor, due to the actions of  
4 USF&G and due to the actions of Zurich, I didn't feel  
5 it appropriate to even push the issue even further with  
6 Penn National, which had not been put on notice of the  
7 Finch case on day one, and had proceeded for years  
8 without Penn National even knowing it was going on.

9 THE COURT: That's what I -- that's what I was  
10 getting to.

11 MR. PROTOPAPAS: I decided to stay away -- as  
12 receiver, I made a decision to focus on what I  
13 considered the wrongful actors.

14 THE COURT: The Covil case was tendered to -- for  
15 defense to USF&G and some others?

16 MR. PROTOPAPAS: Zurich.

17 THE COURT: Zurich. And then later on Zurich  
18 tried to look and see whether it was possible to get  
19 some contributions from other insurers. Penn National  
20 took the position yes, it had commercial general  
21 liability coverage, but it had an exclusion. Of course,  
22 that depends on what the nature of the lawsuit is. If  
23 the nature of the lawsuit involves things a CGL policy  
24 would normally cover, like per occurrence exposure,  
25 then that's a different situation from what was being



1     litigated with Penn National in connection with the  
2     Finch case.  Am I right?

3             MR. NES:  That's correct, Your Honor.  So the  
4     scope, for example, of the declarations we seek in this  
5     case are -- relate to operations claims.

6             THE COURT:  Right.

7             MR. NES:  There was no operations claim in the  
8     Finch case.

9             THE COURT:  Got you.  Okay.

10            All right.  Continue.

11            MR. NES:  And to be clear, with respect to the  
12     exclusions, we do not necessarily accept that one of  
13     the two exclusions is actually part of the 1986 --

14            THE COURT:  It hasn't been litigated.

15            MR. NES:  Exactly.

16            THE COURT:  It hasn't been raised or litigated.  
17     That is the gist of what Mr. Protopapas was trying to  
18     project.  Penn National, as ultimately developed, has a  
19     policy that might relate to the matters -- it certainly  
20     relates to Covil and the question is whether it related  
21     to Finch and Mr. Protopapas, on behalf of Covil, who  
22     -- for whom these policies are assets, made the decision  
23     to settle the Finch case with the involvement of the --  
24     of other insurers, but not Penn National, and one of  
25     the reasonings behind that is they didn't know about

1 Penn National to begin with having tendered -- when  
2 Finch was first being considered.

3 Of course, some of that had to do with how Covil  
4 was represented at that time well before the receiver  
5 got involved. The situation changed dramatically when  
6 a receiver, who was representing Covil and not its  
7 insurers, got involved. Am I right?

8 MR. NES: That is correct, Your Honor.

9 THE COURT: All right.

10 MR. NES: So we're now in 2020. This current  
11 action in this court is filed and when discovery begins  
12 the same discovery is served. We want all policies that  
13 cover Covil either as a named insured or supplemental  
14 or additional insured and the response back is the same,  
15 which is the system is designed so that you can only  
16 search by policy number.

17 And as this Court will recall, we had many hearings  
18 as to how we could lighten the load for Penn National to  
19 try to search their facilities so that they could produce  
20 these policies and the response back time and time again  
21 was simply if you don't give us a policy number, we're  
22 not gonna search our historic records.

23 That culminated in an order in November of '21 in  
24 which the Court directed Covil's outside asbestos  
25 underlying counsel, Ellis and Winters, to examine the

1 documents in Penn National's historic warehouses and  
2 offsite at Iron Mountain and to come and report to the  
3 Court as to how these policies could be identified, and  
4 Ellis and Winters reported back in March of 2022. That  
5 followed a hearing in which these issues were discussed  
6 and one of their recommendations was to digitalize a  
7 certain percentage of those historic records and then  
8 once those historic records were digitalize, the receiver  
9 would be able to search for responsive documents in their  
10 possession.

11 THE COURT: Now stop right there.

12 All right. It develops -- we didn't know until  
13 Ellis and Winters got involved what the physical nature  
14 of the records in Iron Mountain was; isn't that correct?

15 MR. NES: That's correct. There was a -- there was  
16 a distinction between documents that were on historic  
17 microfiche, there were certain paper documents that  
18 were at Iron Mountain. It was very confusing as to how  
19 those policies were stored. There was a discussion  
20 about a terminal digit system and that was essentially  
21 the assignment that Ellis and Winters was given and  
22 throughout the -- between November and March is when  
23 they were able to identify and understand how it is  
24 that Penn National keeps those records.

25 THE COURT: And how it is they keep their records,

1 as I understand it, is that there are microfiche that  
2 contain all -- the universe of all the policies that  
3 you are trying to seek?

4 MR. NES: That's gonna --

5 THE COURT: They're all on microfiche, right?

6 MR. NES: That is what it currently appears. Part  
7 of the discovery that we've sought is to confirm that,  
8 which we still don't have formal discovery responses  
9 that would confirm that, but as we know right now the  
10 policies that would -- that you would expect to have,  
11 general liability policies covering Covil, are '92 or  
12 prior, and they've made the representation that all of  
13 those policies are, yes, on microfiche.

14 THE COURT: All right. And those microfiche are  
15 at Iron Mountain?

16 MR. NES: No, those are actually at Penn National's  
17 headquarters in a file room.

18 THE COURT: So just stopping there for a moment,  
19 why were we led around the mulberry bush for years about  
20 Iron Mountain when it turns out that these -- the records  
21 that we are -- that contain the material that has been  
22 requested many, many times in discovery is in Penn  
23 National's headquarters on microfiche? How did that  
24 happen?

25 MR. NES: That's an answer that I think,

1 respectfully, opposing counsel's gonna have to answer  
2 because we still don't have a -- what we think is a  
3 sufficient answer for that and part of what we want  
4 with the upcoming hearing both on spoliation and  
5 discovery sanctions is for the Court to take the broad  
6 view of how discovery has unfolded in this case and  
7 answer questions just as that.

8 THE COURT: But this whole squabble is a squabble  
9 about getting a copy of the insured's policy, right?

10 MR. NES: That's correct.

11 THE COURT: It's not any kind of big, huge,  
12 complicated electronic discovery thing or a trade  
13 secret thing or anything like that. These are policies  
14 of insurance that were issued covering Covil --

15 MR. NES: That's correct.

16 THE COURT: -- and that is what you are seeking?

17 MR. NES: Yes, Your Honor.

18 THE COURT: And turns out that the -- that all of  
19 those policies for the period of time you want, which  
20 is '92 and prior, are on microfiche at Penn National's  
21 headquarters?

22 MR. NES: Yes, Your Honor.

23 THE COURT: All right.

24 Now Ellis and Winters is the insurer's counsel?

25 MR. NES: No, Your Honor. That -- that is Covil's

1 underlying asbestos counsel.

2 THE COURT: Covil's underlying asbestos counsel.

3 All right. Now has -- and Covil's underlying --  
4 they are Covil's underlying defense counsel?

5 MR. NES: Yes.

6 THE COURT: And they are -- their contention is  
7 we are defending Covil and in that connection we are  
8 bringing a DJ action to find out about these policies?

9 MR. NES: No, Your Honor. To clarify Ellis and  
10 Winters' role, when we got to November of last year and  
11 Penn National kept telling you that if you don't have a  
12 policy number, we can't do anything, the Court decided  
13 an alternative path. Because Ellis and Winters is  
14 familiar with Covil as underlying defense counsel and  
15 because they have an independent obligation when they  
16 are asked for responsive insurance policies to produce  
17 those in the underlying litigation, the Court felt they  
18 were best positioned to review Penn National's archives  
19 to determine how could we as underlying asbestos counsel,  
20 who had to produce the same policies, how would we search  
21 through Penn National's records, and by doing interviews  
22 with the main individuals and custodians at Penn National  
23 is when they finally clarified what was offsite at Iron  
24 Mountain and what was contained on the microfiche and  
25 their suggestion to the Court in a March 22nd report was

1 take these microfiche, have them digitalize and then  
2 search those once they're in digital format.

3 THE COURT: Now so that's what happens in March of  
4 2020. Ellis and Winters makes the report. Then what  
5 happened?

6 MR. NES: Then this Court has a hearing in April  
7 which leads to a May 5th discovery order and then this  
8 Court does three important things. First, it orders  
9 exactly the relief that the receiver requested, which  
10 is -- or excuse me -- that Ellis and Winters recommended  
11 in their report, which was the microfiche would be  
12 processed and digitalized. Number two, that their motion  
13 to quash the deposition would be denied. And then the  
14 Court held in abeyance our other motion to compel on the  
15 theory that we should take the deposition first. If we  
16 can get the information that we want from the deposition,  
17 then the other motions are essentially not needed, and  
18 then we'll move on. The Court asked us to report back  
19 after we took our deposition as to whether or not the  
20 motions to compel would be needed.

21 We took the beginning of that motion -- excuse me  
22 -- the beginning of that deposition of Penn National on  
23 spoliation last week and having learned what we learned  
24 in that deposition, there are certain issues specifically  
25 in the prior motion this Court held in abeyance that we

1 believe are now ripe for ruling.

2 THE COURT: All right.

3 MR. NES: And I think in terms of the timeline,  
4 there are two other issues that I think are important.  
5 The first is that the May 5th order is still on appeal,  
6 and that has a bit of a convoluted history where Penn  
7 National appealed -- I'm sorry.

8 THE COURT: Well, pre-trial discovery matters are  
9 not appealable matters and the Court of Appeals has  
10 dismissed the appeal for that reason.

11 MR. NES: That's right, Your Honor. So the Court  
12 of Appeals dismissed it, the Supreme Court dismissed a  
13 direct appeal they made simultaneously. They have now  
14 filed a motion for reconsideration back in the Court of  
15 Appeals, which has not been ruled on yet.

16 THE COURT: Right.

17 All right. Of course, the rules say that a Court  
18 may continue to move forward with things that are not  
19 affected by appeal and if this thing is not an appealable  
20 matter, then why should the Court be delayed from looking  
21 at this motion to compel and moving forward?

22 MR. NES: We don't believe it should be. And  
23 there's also a separate reason, which is the May 5th  
24 order is forward looking. It says you've got your box  
25 of -- boxes of microfiche, how are we going to deal with



1     searching through those, but the May 5th order is looking  
2     forward. The discovery we're looking for has to do with  
3     spoliation, which we haven't even talked that. The  
4     spoliation piece has a similar time band.

5           THE COURT: Let me just stop you for a minute  
6     before we get to spoliation, all right? We now know  
7     from Ellis and Winters that there are several boxes of  
8     microfiche that are in the headquarters of Penn National  
9     and they contain the policies for the years we're talking  
10    about?

11          MR. NES: Yes, Your Honor. I believe it's --

12          THE COURT: General liability policies.

13          MR. NES: I believe it's 154 boxes.

14          THE COURT: All right. And has there been any  
15    attention given to how long a period of time that  
16    would take? I mean, we are now in an age where you can  
17    speak into a device and your voice can immediately be  
18    translated into language and we are in an era now of  
19    digitalization where things can be digitized very, very  
20    quickly and translated into a readable form and then  
21    searched to search for particular terms within those  
22    documents, and that technology is changing and has been  
23    changing even since 2020 when this dispute -- discovery  
24    dispute first arose. We're now in 2022 and digitization  
25    continues to be a very, very expansive situation.

1           Have you got any notion of what it would take to  
2           just go on and digitize these things?

3           MR. NES: Yes, Your Honor. I believe that Ellis  
4           and Winters said that it would be a rolling process,  
5           but it would take anywhere from three to nine months  
6           depending on the technology that was available,  
7           et cetera.

8           So they have not actually had vendors come in to  
9           make the specific bids because Penn National has taken  
10          the position that now that this is on appeal they don't  
11          have to do anything to enforce that order.

12          THE COURT: Okay.

13          MR. NES: As I mentioned though, that's forward  
14          looking, and the discovery that we're looking for right  
15          now is backwards looking because we have to look at that  
16          timeline again, which starts in 2018.

17          Throughout the course of this litigation, we  
18          discovered that Penn National did not issue a litigation  
19          hold in this case. We also discovered that they have a  
20          process in which an automatic destruction takes place at  
21          the end of or beginning of the next calendar year where  
22          they destroy historic insurance policies.

23          We learned this because of the Court's November  
24          order getting Ellis and Winters involved. The very  
25          first call with Ellis and Winters, opposing counsel, a

1 gentleman named Brent Reifsnyder, who's Penn National's  
2 director of administration, and myself, they were  
3 discussing how it was that we would go about examining  
4 the microfiche, and Mr. Reifsnyder mentioned almost in  
5 passing that the annual policy purge was coming, so we  
6 inquired well --

7 THE COURT: This was in November of 2021?

8 MR. NES: This is November of 2021.

9 So we immediately inquired on that call do you  
10 have a litigation hold in place and are you searching  
11 for the documents that you destroy on an annual basis  
12 for any reference to Covil, and the answer was no.

13 So that day we hang up the phone and we immediately  
14 issue a document request and a deposition notice. That  
15 discovery that we learned following November 2021 is  
16 this. First, that in 2018, 2019 and 2020, Penn National  
17 had their automatic purge policy where they destroyed  
18 historic general liability occurrence policies. Number  
19 two, that in all of those calendar years, 2018, 2019  
20 and 2020, they did not issue a litigation hold, and in  
21 each of those three calendar years they did not search  
22 for any of their insurances policies to determine whether  
23 Covil was a named insured or an additional insured.

24 Moreover, they did not keep a record of what they  
25 were destroying. So today they cannot tell us what

1 specific policies were destroyed in 2018, 2019 and 2020.  
2 They did not stop their annual purge until December 17th  
3 of 2021.

4 THE COURT: Now wait a minute. They purged in  
5 2018, 2019 and 2020, and what's the nature of the purge?  
6 What's the universe that they're purging each of those  
7 years?

8 MR. NES: So what they do is they take throughout  
9 the course of a calendar year and they pull documents  
10 that they believe are outside of their document  
11 destruction range. They --

12 THE COURT: And what -- what is the -- what I'm  
13 trying to figure out is if they've got some kind of  
14 timeline they follow, are we gonna take a hunk of the  
15 records from 2005 to 2006 and we're gonna destroy them  
16 if ten years is their window of destruction or twenty  
17 years or whatever it is? What's the detail on that?

18 MR. NES: So now you've hit what this motion is  
19 about. So their story is well, we only pull them if  
20 it hits twenty-five years from the date of nonrenewal,  
21 and it's automatic. Once you hit twenty-five years from  
22 nonrenewal, then you show up on a list, we then pull it  
23 during the calendar year and destroy it at the end of  
24 the year.

25 THE COURT: Well, how do they determine that a

1 particular group of records are in that twenty-five  
2 years from nonrenewal?

3 MR. NES: Penn National created a system in 2010  
4 called the 2K10 system.

5 THE COURT: What?

6 MR. NES: It's called a 2K10 document management  
7 system and this -- this brings to a head why we're in  
8 the situation we are. This is what Mr. Reifsnyder  
9 actually testified to last week for the first time.

10 In 2010, as the director of administration for  
11 Penn National's historic policies, one of his jobs was  
12 to figure out how he was going to keep the records, and  
13 what he decided to do was take all of these indexing  
14 and put it into a data system so it would be easily  
15 searchable.

16 THE COURT: What kind of things?

17 MR. NES: He took all of the historic policies that  
18 were on microfiche and he wanted to create a system so  
19 that they could search for those policies digitally so  
20 that they didn't have to manually --

21 THE COURT: So you're saying he had all of the  
22 microfiches, the same ones we're talking about that we  
23 want to digitize and search for Covil and he had them  
24 and he says they could only be searched by policy number,  
25 right?

1           MR. NES:   That's right.

2           THE COURT:   So he digitized now to search for some  
3 other term?

4           MR. NES:   What he did is he took information from  
5 those microfiche that he took the policy numbers --

6           THE COURT:   Well, how -- how did he do that? Did  
7 he look at each policy?

8           MR. NES:   That -- that is what is -- apparently  
9 that is the testimony. He had --

10          THE COURT:   So in 2010 they took the microfiche  
11 and looked at each policy to determine which ones were  
12 twenty-five years non-renewed or --

13          MR. NES:   No, Your Honor. What they did was they  
14 took all of the microfiche and they just had essentially  
15 a clerk look for policy numbers and collate a policy  
16 number into the system so that if I then later wanted  
17 to say I have this particular policy number somebody  
18 gave me, I could put it into a computer system and it  
19 would tell me what box it was in. That was the system --

20          THE COURT:   Do we know how long it took that person  
21 to do that?

22          MR. NES:   We do not, Your Honor, but what we do  
23 know is that at the time that was being done they made  
24 a conscious choice not to look at those policies for  
25 insured name or additional insurance status, so.

1           THE COURT: But they did go through each one of  
2           them and select a particular piece of information and  
3           you're telling me now in 2022 they can't do a little  
4           better job if they went back through those microfiches  
5           and tried to pull out information on each policy --  
6           they pulled out it by a manual look it sounds like.

7           MR. NES: That's correct, Your Honor.

8           THE COURT: And they did it in 2010 and presumably  
9           there is some information about how long it took them  
10          to do that, right?

11          MR. NES: That's correct, Your Honor, and they --  
12          they have not provided that.

13          THE COURT: And you've asked them for that and  
14          they have not provided it?

15          MR. NES: That's correct.

16          THE COURT: Okay. So they went through each  
17          policy at that time and decided they were gonna pick  
18          out policy numbers and pieces that would be separately  
19          maintained?

20          MR. NES: That's right.

21          THE COURT: And then they did a search of  
22          microfiches to find that policy number?

23          MR. NES: That's right. And --

24          THE COURT: Now you're asking them with modern  
25          technology at our beck and call to go back through

1     them and look at each of those things again and digitize  
2     more than that, right?

3             MR. NES:   That's precisely correct.

4             THE COURT:   Okay.

5             MR. NES:   So what we also learned during these --  
6     both the written discovery and the depositions is that  
7     during the course of this litigation Mr. Reifsnyder  
8     would print out a copy of all of the policies they were  
9     gonna destroy in that calendar year and then he had a  
10    staff of five individuals --

11            THE COURT:   Print out a copy of the actual policy  
12    itself?

13            MR. NES:   No, a list of all the policies to be  
14    destroyed.

15            THE COURT:   A list of the numbers?

16            MR. NES:   That's right.

17            THE COURT:   So just print out the numbers?

18            MR. NES:   That's exactly right.

19            THE COURT:   How did they know what date those  
20    numbers referred to?  They obviously pulled out  
21    something more than just the policy number, right?

22            MR. NES:   So the other information that is  
23    contained in this 2K10 system is the date of nonrenewal,  
24    so the computer system can easily calculate, for example,  
25    a policy is non-renewed in 1995, twenty-five years



1 later it is X date, so in the beginning of the calendar  
2 year Mr. Reifsnyder can go to his computer and say I  
3 want to pull all of the documents that have been  
4 non-renewed in the last twenty-five years and then print  
5 that list out, leaves it outside of his office and a  
6 staff of five individuals at their leisure consult this  
7 list and throughout the course of the year pull those  
8 policies by hand, and that includes pulling microfiche.  
9 So microfiche was actually destroyed in 2018, 2019 and  
10 2020.

11 THE COURT: And have you determined the mic --  
12 which years of policy -- of nonrenewal were involved in  
13 the destruction?

14 MR. NES: No. That's the key problem because the  
15 story we get is that look, we -- we only pull it if  
16 it's twenty-five year later to the day, but we know that  
17 can't be the full story because Covil's policies exist.  
18 So if you have an '86 and an '87 policy, at some point  
19 that should have run up on the twenty-five year mark.

20 THE COURT: I mean, 2010, twenty-five years before  
21 is 1985.

22 MR. NES: Right. So what we have now is we get  
23 into the QC process. How is it that the staff when  
24 they go to pull those assets of companies, which are  
25 worth millions of dollars, what's the QC process, and

1 the answer was virtually nothing. Once those staff  
2 members, who are not full-time document custodians,  
3 once these staff members who have a huge portfolio of  
4 issues, they're dealing with real estate, they're  
5 dealing with leases, on their spare time, they look at  
6 this list, they go to the microfiche, they pull it out  
7 or they order documents from Iron Mountain, and in that  
8 process --

9 THE COURT: Why do they destroy them at all if  
10 the universe is just a bunch of case full boxes with  
11 the microfiche in them?

12 MR. NES: That is -- that would be consistent with  
13 their document retention policy that they would destroy  
14 even occurrence-based policies after twenty-five years.  
15 That is the policy of the company that clearly is not  
16 always followed.

17 So one of the problems we have though, and that  
18 relates directly to the request that we're moving to  
19 compel, is the request is Request Number 11. All  
20 documents and communications related to the process of  
21 identification, collection and disposal of insurance  
22 policies and policy-related documents pursuant to  
23 Penn National's document retention and purge policies  
24 and practices, and we narrowed that range for purposes  
25 of our motion to compel from 2010 to the present.

1           And the purpose for that is the story, again, that  
2   we've been told is that there are or there were at some  
3   time a spreadsheet that would identify what was actually  
4   destroyed. Not recreating it today to try to assume  
5   what we did two, three, four, years ago, but the actual  
6   spreadsheets that were used. They -- clearly the hard  
7   copies were not maintained, so what we want is for the  
8   e-mails of Mr. Reifsnyder and the five individuals that  
9   he mentioned during his deposition to be searched to  
10   see if they can pull the e-mail to determine what was  
11   actually destroyed.

12           I am skeptical that that exists because of the  
13   nature of how these documents were pulled and destroyed,  
14   but to the extent that they do exist, that would be  
15   probative for getting a report.

16           The second category of documents we asked for,  
17   there are, I believe, seventeen separate requests, but  
18   they essentially boil down to inquiries about the  
19   document retention policy itself.

20           As I said a minute ago, they have a real problem  
21   that their document retention policy calls for the  
22   destruction of documents twenty-five years after  
23   nonrenewal. We know that that process is not consistent  
24   because the Covil policies currently exist. So in -- the  
25   actual document retention policy calls for information I

1 think would be helpful. It calls for a random review of  
2 documents as Step 7, it calls for a scheduled review in  
3 addition to the random review to determine whether the  
4 document retention policy is being used correctly.  
5 Everyone who receives a litigation hold notice, for  
6 example, is supposed to send an acknowledgment that they  
7 received the litigation hold.

8         These are all parts of the policies and procedures  
9 that they would produce, so we asked them to produce  
10 those documents to clarify how the document retention  
11 policy actually works and with respect to the litigation  
12 holds who received those and did they acknowledge they  
13 received them, and for that set of discovery we have  
14 been given a -- clearly a wall.

15         THE COURT: All right. Now let me see if I  
16 understand this. They say they have a policy that they  
17 have not produced for you yet that talks about how a  
18 litigation hold is handled?

19         MR. NES: There are two policies; one of which  
20 they have produced, one of which they have not produced.

21         THE COURT: All right. What did they produce?

22         MR. NES: They produced a sheet that was essentially  
23 what the employee was supposed to do if they received a  
24 litigation hold and that includes collecting all the  
25 relevant documents, sending an acknowledgement letter,

1     having a call with the in-house counsel to determine  
2     where their responsive documents are.

3           THE COURT:   Now these are just clerical people,  
4     right?

5           MR. NES:    That's right.

6           THE COURT:   All right.   And who would they receive  
7     the litigation hold from?

8           MR. NES:    So there's a gentleman named Scott Maier,  
9     who's an in-house lawyer at Penn National.   He's the one  
10    who on December 17th sent the one and only litigation  
11    hold that we're aware of in this case and he only sent  
12    it to one person as far as we know, a gentleman named  
13    Brent Reifsnyder, but we have no acknowledgment e-mail  
14    or paper record as to how Mr. Reifsnyder responded to  
15    that.

16           And as we've said before, the e-mails, for example,  
17    that Mr. Reifsnyder had contemporaneously could have  
18    been critical if those doc -- if those e-mails still  
19    exist as to what documents were selected in '18, '19  
20    and '20, but we have no record even to this day that  
21    Mr. Reifsnyder stopped an e-mail purge that is also  
22    part of their e-mail system.

23           So the other set of documents that we are moving  
24    to compel on have to do with claim files.   At the trial  
25    of this case in four weeks, we will be identifying

1     fourteen asbestos claims that Penn National contributed  
2     to the settlement. They sent a letter to Mr. Protopapas  
3     on September 21st and they identified fourteen claims  
4     that they had contributed to and they claim that those  
5     fourteen cases apply to the aggregate limit. We are  
6     asking this Court, in part, for a declaration --

7             THE COURT: Now let me stop you a minute.

8             MR. NES: Yes.

9             THE COURT: They sent a list of fourteen asbestos  
10     claims that they claim have been settled and the part  
11     they -- the money they paid in settlement should be  
12     deducted from the remaining coverage of the rest of  
13     these things?

14            MR. NES: That's exactly right.

15            THE COURT: Now do you-all have the policies  
16     they're talking about or do you?

17            MR. NES: We do. We have those two policies.

18            THE COURT: This is the '85 and '86, '86 and '87  
19     policies?

20            MR. NES: '86 to '87, '87 to '88.

21            THE COURT: So those two policies they say they've  
22     settled fourteen asbestos claims against one or both of  
23     those policies and that has reduced the coverage in those  
24     policies?

25            MR. NES: That's right. We argue that they are

1 interpreting their policies incorrectly. That those  
2 claims do not apply to the aggregate limit or at least  
3 most of those claims do not apply to the aggregate limit  
4 because our argument is, is that these are operations  
5 claims and that under the plain language of the policies  
6 operations claims do not apply to the aggregate limit of  
7 either of those policies.

8 But as part of this understanding of how Penn  
9 National decided to characterize or categorize those  
10 claims as applying to the aggregate limit, we asked  
11 them to produce claim files. We asked for claim files  
12 at the very beginning of this litigation. It was  
13 Request Number 4. We didn't receive anything.

14 So in October, the beginning of last month, I sent  
15 an e-mail asking them to supplement their production  
16 to provide us with the claim files for those fourteen  
17 claims, I didn't receive a response, so I sent a separate  
18 e-mail asking them and reminding them to supplement the  
19 response. I did not get a response. Finally, I sent a  
20 letter saying if you do not produce these claim files,  
21 you're forcing us to move yet again for a motion to  
22 compel. No response. We file the motion, then in a  
23 footnote we get a response they will produce 61,000 pages  
24 of documents at some undetermined time, so clearly they  
25 are accepting that those documents are relevant --

1 THE COURT: 61,000?

2 MR. NES: 61,000 pages of documents in claim files.

3 THE COURT: For fourteen claim files?

4 MR. NES: Yes, Your Honor. And that number, to be  
5 fair, doesn't really shock my conscious because the  
6 claim file mostly will probably be the discovery of the  
7 underlying asbestos claims.

8 So once those -- those should be -- despite the  
9 breadth of the number, those are files that should be  
10 able to be pulled in a day. I mean, this is not  
11 complicated. An insurance company keeps a claim file.  
12 Those files normally in my experience have the internal  
13 correspondence of the claims adjuster, any analysis or  
14 assessments of coverage, aggregate limit, et cetera,  
15 and the underlying asbestos claim, and those should all  
16 be in a one or a couple of places.

17 They have accepted that those are relevant, they  
18 need to be produced, but they still forced us to file  
19 this motion to compel, so we would ask that the Court  
20 grant the motion and provide a date certain when they  
21 need to produce those documents and we would ask by no  
22 later than December 1st.

23 THE COURT: And all this search now, this laborious  
24 search for the claims files now, has been precipitated  
25 by their continued failure to produce the insurance



1 policies that insured Covil. This all goes back to the  
2 same old thing. You've been trying since 2020 to get  
3 copies of the pertinent insurance policies that covered  
4 Covil claims. They have now at some point said we paid  
5 fourteen claims for Covil, but they haven't produced a  
6 claims file. Presumably those claims files would have  
7 some reference to the insurance policies.

8 MR. NES: That's correct, Your Honor.

9 THE COURT: Right now we don't know what the period  
10 of time the claims files -- have they given you any  
11 information about over what period of time these claims  
12 -- or have you figured out any --

13 MR. NES: Well, we know that the fourteen claims  
14 are claims that we tendered -- the receiver tendered to  
15 Penn National for coverage and Penn National participated  
16 in these particular settlements with other carriers. So  
17 they were not --

18 THE COURT: So these are just receiver tendered.  
19 They don't go back in time at all to talk about the  
20 broader issue of this other coverage?

21 MR. NES: That's exactly right. This is a separate  
22 issue that none of these claims were tendered before  
23 February of 2020, so the claim file itself in terms of  
24 their analysis will be very small presumably. There  
25 will be correspondence with the receiver and there will

1 be internal correspondence.

2 THE COURT: And, again, the claims file is a  
3 backwards way of trying to get to the coverage of these  
4 policies, but relating for a minute to the destruction  
5 issue, these are all things that should be within the  
6 ambit of destruction, correct?

7 MR. NES: That's correct, Judge.

8 THE COURT: They're still in those microfiches that  
9 are sitting in the -- at Penn National headquarters as  
10 far as you know?

11 MR. NES: No, the claim files themselves --

12 THE COURT: No, no.

13 MR. NES: I'm sorry.

14 THE COURT: Getting these claim files may be of  
15 interest to you for other reasons, but the big thing  
16 that drove you there at this moment in connection with  
17 the suit I've got is because you can't figure out any  
18 other way to start getting concrete information about  
19 the policies that covered Covil?

20 MR. NES: That's correct.

21 THE COURT: And this is another way of doing that.

22 MR. NES: Yes, Your Honor.

23 THE COURT: And for these universe of things, have  
24 they put a litigation hold now on their destruction?

25 MR. NES: We have not seen any litigation hold that

1 applies outside of Mr. Brent Reifsnyder.

2 THE COURT: And Reifsnyder says what about the  
3 litigation hold?

4 MR. NES: So what he says is that when he received  
5 the litigation hold, he stopped what his purge process  
6 is and his purge process are the microfiche or anything  
7 at Iron Mountain. Because the fourteen claims for the  
8 currently -- the current asbestos claims are being  
9 handled in the present, we have no reason to believe  
10 that those would be offsite at Iron Mountain or apply to  
11 the document retention policy.

12 THE COURT: Okay. All right.

13 MR. NES: Thank you, Your Honor.

14 THE COURT: So just reviewing for a moment, at  
15 this time we have got a whole bunch of discovery that  
16 is still -- that I've issued orders on a good many  
17 times and that Penn National now claims is subject to  
18 a stay because of their continued appeal at the Court  
19 of Appeals. Meanwhile, we have a trial that's gonna  
20 take place on December the 14th, right?

21 MR. NES: That's right, Your Honor. And to be  
22 clear, we don't -- there were several requests that we  
23 made that related directly to the May 5th order and we  
24 communicated to counsel that to the extent that there  
25 were requests directly related to the May 5th order,

1 despite our difference about whether we think it really  
2 should be stayed or not, we're not asking for anything  
3 forward looking. Everything we're looking for right  
4 now is simply backwards looking that has nothing it do  
5 with the May 5th order, has to do with their document  
6 retention policy and how it applied. And to show that  
7 they're being inconsistent with their argument, one of  
8 the issues that was in the May 5th order was the motion  
9 to quash the depositions. This Court denied that motion  
10 and they did appeal that, but they put a witness up  
11 anyway. So despite the fact that the deposition --

12 THE COURT: Well, there shouldn't be anything more  
13 clearly a part of discovery than the taking of a  
14 deposition and those matters are clearly not stayed by  
15 appeal.

16 MR. NES: That's right, Your Honor. So the very  
17 matters that I deposed Mr. Reifsnyder on last week  
18 and the -- if I can depose him on it, surely I get  
19 the documents that I should have gotten before the  
20 deposition.

21 THE COURT: All right.

22 All right. Mr. Yntema.

23 MR. YNTEMA: Good morning, Your Honor.

24 THE COURT: Good morning.

25 MR. YNTEMA: Brady Yntema for Penn National Mutual.

1           THE COURT:  You're gonna have to speak up a lot  
2 more than you are.  I'm not hearing you at all with  
3 that.

4           I don't mind if you sit, Mr. Yntema.  The main  
5 thing you need to do is speak into that microphone.

6           It's not working?  Has it got the green light on?

7           MR. YNTEMA:  The green light's on, yes.  I can --

8           THE COURT:  I'd prefer you to sit if that's what  
9 it's gonna take to be sure you're heard in this  
10 microphone.

11          MR. YNTEMA:  I don't think that microphone is  
12 actually even working.

13          THE COURT:  Well --

14          MR. YNTEMA:  I can -- I can speak louder.

15          THE COURT:  -- let's get that straight before you  
16 start on an argument here, okay?

17          MR. YNTEMA:  I can speak louder if that would help.

18          THE COURT:  Well, that's gonna be how it's gonna  
19 have to be.

20          All right.  Let me say this.  Hold for a minute.

21          It's about time that you've had a break anyway.

22          It's now -- well, they've got the clock wrong.

23          MR. NES:  11:15, Your Honor.

24          THE COURT:  It's 11:15, of course.

25          All right.  Let's take a fifteen minute break and

1 let's get some people from the clerk's office in here  
2 to get this sound system working correctly.

3 MR. NES: Yes, Your Honor.

4 THE COURT: Thank you so much.

5 Court will be at ease.

6 (Recess taken at 11:17 AM.)

7 (Back on the record at 11:31 AM.)

8 THE COURT: All right. Mr. Yntema for Penn  
9 National.

10 MR. YNTEMA: Yes, Your Honor. Again, Brady Yntema  
11 for Penn National, a defendant in this case.

12 Your Honor, I was not expecting an entire  
13 recitation this morning of -- of where we've been and  
14 why we're here today, but I'm happy to go back and  
15 point out a few things as far as from Penn National's  
16 perspective where we -- where we've been and kind of  
17 where we are today.

18 It is -- Mr. Nes is right. In 2018, Penn National  
19 first received a subpoena in the Finch case. That  
20 subpoena was ordered by the Court, and the firm Dean  
21 Omar, who represented the plaintiffs in that asbestos  
22 case, issued the subpoena to many insurance carriers,  
23 but one -- but the subpoena to many insurance carriers  
24 was received by Penn National and in that subpoena it  
25 listed a policy -- one policy number that they had record

1 of that Penn National could search for.

2 Penn National conducted that search and responded  
3 to the subpoena and produced all policies it could find  
4 based on the policy numbers that were provided in 2018.  
5 Thereafter -- and keep in mind Penn National had never  
6 been tendered the Finch case. Penn National to that  
7 point had never been notified of the Finch case.

8 Thereafter -- in fact, in Penn National's response  
9 I believe the verdict in Finch came down a few months  
10 after that. Penn National had never tendered any  
11 judgment or asked to participate in that judgment until  
12 it was brought into the lawsuit -- the coverage lawsuit  
13 that was pending in the Finch matter in the Middle  
14 District of North Carolina in 2019. I believe in the  
15 fall of 2019 either Zurich or The Hartford third-partied  
16 Penn National in. Covil did not file that action against  
17 Penn National -- the initial action against Penn National.

18 THE COURT: Let me just ask you something about  
19 what occurred then. The first you know about a dispute  
20 that might involve your coverage for Covil is 2018,  
21 correct, when you got subpoenaed like a lot of other  
22 insurance companies did in the Finch case and were  
23 provided a policy number, right?

24 MR. YNTEMA: Penn National wasn't aware of any  
25 coverage dispute. It was aware that they were receiving

1 a subpoena --

2 THE COURT: You received a subpoena in 2018 asking  
3 that you produce a policy that covered Covil Corporation,  
4 correct?

5 MR. YNTEMA: Yes, with --

6 THE COURT: In connection with the Finch matter,  
7 correct?

8 MR. YNTEMA: It was in the Finch matter. The  
9 subpoena was received -- it was issued in the Finch  
10 case, yes.

11 THE COURT: Right. Listen. We can spend all day  
12 doing this kind of dance. You -- you first got the  
13 notice in 2018 that there was interest in Penn National's  
14 coverage of Covil Corporation.

15 MR. YNTEMA: That's correct.

16 THE COURT: All right. At that time did you --  
17 did Penn National put any kind of litigation hold on the  
18 destruction of any policies for commercial general  
19 liability that might relate to this period of time?

20 MR. YNTEMA: No.

21 THE COURT: Why not?

22 MR. YNTEMA: At that time they were -- simply  
23 received a subpoena and it's not unusual to receive  
24 subpoenas -- you know, for an insurance carrier to  
25 receive a subpoena in any case across the country



1     wanting to know if they have coverage for a particular  
2     defendant. It may be an asbestos case or any sort of  
3     commercial general liability-type case.

4             THE COURT: All right. Then we move to 2019. By  
5     2019 you now know that they -- that Covil contends that  
6     you have coverage and they give you a policy number,  
7     correct?

8             MR. YNTEMA: In 2019, the -- the policy numbers  
9     that were provided were the same policy numbers that  
10    were provided --

11            THE COURT: Penn National was third-partied into  
12    an action in 2019, correct?

13            MR. YNTEMA: Yes, Your Honor.

14            THE COURT: And that third-partying we talk of  
15    colloquially here, but that was a contention by one of  
16    the other parties in the matter that Penn National had  
17    coverage for Covil, correct, in connection with  
18    commercial general liability?

19            MR. YNTEMA: Under the two policies that had been  
20    produced by way of their subpoena response in 2018.

21            THE COURT: All right. But -- you had knowledge  
22    at that point then of Covil, a big thermal insulation  
23    company in South Carolina and other places, and the  
24    contention was made in -- the matter in which your  
25    company was third-partied in is that it had coverage for

1 claims involving mesothelioma and liability flowing from  
2 asphalt from asbestos that Covil Corporation sold. You  
3 had information about that at that time; did you not?

4 MR. YNTEMA: That it was asbestos claims against  
5 Covil at that time in 2019?

6 THE COURT: Yes.

7 MR. YNTEMA: Yes.

8 THE COURT: And you also had information at that  
9 time that you had coverage; did you not?

10 MR. YNTEMA: We were aware we had -- we may have  
11 coverage under the policies that we produced in response  
12 to subpoena.

13 THE COURT: You had policies.

14 All right. At that point did you put a litigation  
15 hold on anything that would relate to the period of time  
16 for which it was claimed that exposures were had that  
17 led to possible coverage by your company?

18 MR. YNTEMA: No.

19 THE COURT: You would have known, would you not,  
20 at that time that the coverage that was being talked  
21 about was coverage related to not claims made coverage,  
22 but per occurrence coverage as it would have existed in  
23 policies for 1986-1987 and 1987-1988? You were aware  
24 that that was the claim being made; were you not?

25 MR. YNTEMA: Yes, I believe so. I think I

1 understand the question.

2 THE COURT: Right. And you put no other -- you  
3 put no hold on the destruction of records that might  
4 pertain to that period of time?

5 MR. YNTEMA: We had produced the two policies that  
6 we had received a request for and those were --

7 THE COURT: Now I'm not asking about that. You  
8 now know that there's a claim that your company  
9 provided coverage to Covil Corporation and you are  
10 aware from the third-party allegations made that there  
11 is a claim that you have coverage for far more than  
12 that period of time or a particular claim. It's a  
13 broader claim than that; is it not? That third-party  
14 situation.

15 MR. YNTEMA: And if Your Honor would look, I think  
16 Your Honor mentioned the whole world -- with the whole  
17 world that we're looking at and the world that we're  
18 looking at is Covil ceased operations, you know, before  
19 1992. Effectively ceased as a corporation.

20 THE COURT: So -- well, what -- what difference  
21 does that make to anything we're talking about now?  
22 You know somewhere between 2018 and 2019 that Covil  
23 Corporation is being sued and in that connection whether  
24 it's alive or not alive the contention is being made  
25 that your company wrote commercial general liability

1 policies covering Covil that might or might not have  
2 bearing on the coverage being asserted in these claims.

3 MR. YNTEMA: Covil ceased operations --

4 THE COURT: What does that have to do with anything?

5 MR. YNTEMA: I think it means a lot, Your Honor,  
6 if I -- if I can answer that question.

7 THE COURT: Yes, sir. You're not answering my  
8 question.

9 MR. YNTEMA: I'm going to.

10 THE COURT: You are not answering my question, so  
11 let me just say that to begin with. If part of that is  
12 that we don't care if they're out of business, that's  
13 something else to be litigated, but what I'm asking you  
14 is what your policy was for records that you have of  
15 Covil Corporation and you're trying to answer me by  
16 saying well, they've been out of business for a long  
17 time. That shouldn't make any difference in terms of  
18 your retention of records or anything, should it? Or  
19 do you go through them and figure out who's out of  
20 business and then knock those out?

21 MR. YNTEMA: Well, Penn National's document  
22 retention policy is twenty-five years from the date of  
23 cancellation or nonrenewal.

24 THE COURT: Well, then that -- so that doesn't  
25 make any difference whether the company is alive and in

1 business or not, does it?

2 MR. YNTEMA: Well, as far as the document retention  
3 policy for corporations that were -- that were dissolved  
4 in 1992, those -- those policies would have been slated  
5 for purge in 2017.

6 THE COURT: You mean you keep -- wait a minute.  
7 You mean you keep records of policyholders who are now  
8 dissolved or out of business? I thought what you were  
9 trying to tell me is that you just simply had something  
10 that said if they did not renew their policy with you,  
11 you would go twenty-five years from that time and then  
12 destroy the policy as I understood that to be.

13 Am I not --

14 MR. YNTEMA: Cancellation, non-renew date. Yes,  
15 Your Honor. Twenty-five years.

16 THE COURT: Well, then that cancellation non-renew  
17 date has nothing to do with whether the corporation was  
18 in business or not, does it?

19 MR. YNTEMA: Well, because the policy -- there  
20 couldn't have been a policy for Covil issued by Penn  
21 National. I mean, mind you -- I'll step back. The  
22 policies that were provided by Penn National were 1986  
23 through 1988. Those were the dates -- those are the  
24 years of coverage that Penn National we know of issued  
25 policies to Covil, but what the argument is, is that

1 Penn National should have put a litigation hold in place  
2 in 2018 when they received a subpoena.

3 Looking back twenty-five years from when Covil  
4 ceased operations, fast-forward twenty-five years, 2017  
5 would have been twenty-five years from the date it ceased  
6 operations. Those policies were subject to destruction  
7 in 2017 or before. Anytime I -- in 2018 or thereafter,  
8 a litigation hold would have been of no consequence. We  
9 had already moved on.

10 Now why was -- why was Covil's policy in existence?  
11 Why did Penn National have it and they were able to  
12 produce it and the answer has been we don't know; that  
13 it was there and it was in existence. That's the answer  
14 that Brent Reifsnyder just gave last week. He was the  
15 person that was in charge as the records custodian for  
16 the policies during that period of time and he said I  
17 don't know how that policy existed, but it did, and then  
18 also it shows that once we purge policies twenty-five  
19 years out or whatnot, we move on.

20 THE COURT: Well --

21 MR. YNTEMA: There will be another --

22 THE COURT: Mr. Yntema?

23 MR. YNTEMA: Yes.

24 THE COURT: You know, you don't get to decide based  
25 on not looking at your records that you don't have any

1 records because the company's been dissolved. You don't  
2 get to make that decision in discovery. In discovery,  
3 if you are being sued, which you are now for -- and the  
4 issue is the issue of coverage of policies, you don't  
5 get to decide that you're not gonna look and see unless  
6 there's a policy number. You've got the records. You  
7 say you've got the records. You got them in your main  
8 office, not at Iron Mountain the way we were told for  
9 over a year, that it would be terrible to search because  
10 it was all such a voluminous record, but you have them  
11 at your home office and they're on microfiche, the kind  
12 of technology that can be easily converted into something  
13 that can be searched.

14 So I don't understand the argument that it doesn't  
15 make any difference because this company has been out of  
16 business. You didn't keep records like that, did you?

17 MR. YNTEMA: Like what?

18 THE COURT: You didn't keep records of what you  
19 were gonna obtain based on whether a company was out of  
20 business, did you?

21 MR. YNTEMA: We kept a cancellation non-renew date.  
22 I'm trying to make -- I'm trying to bring sense to the  
23 gravity of what their argument is, is that twenty-five  
24 years from the date that Covil dissolved was 2017.

25 THE COURT: But you produced no records of any of

1     that kind. You just simply say I'm gonna tell you  
2     without you being able to look and see what their  
3     retention policy is, where it's written down or anything  
4     else; that this is when I say we started destroying  
5     records and this is why a litigation hold doesn't mean  
6     anything, but you have not showed them any basic records  
7     for them to be able to verify what you continue to assert  
8     to this Court and what your 30(b)(6) witness has to say  
9     about it. They are entitled to the records themselves  
10    to be able to test the truth of what you're telling this  
11    Court.

12           MR. YNTEMA: I want to make sure I understand,  
13    Your Honor. I'm not trying to be flippant about  
14    anything. The records that you're referencing that  
15    they're entitled to see, we have produced thousands of  
16    pages of records. We've produced the Y10K database that  
17    Mr. Nes referenced. It's sitting right here. We printed  
18    it out and we served it and we served it on --

19           THE COURT: The records they want are not any of  
20    that. The records they want are the policies themselves  
21    as issued to their clients and that -- that is something  
22    that's so basic that an insurance company has to produce.  
23    If a policyholder, even one from long ago, even one  
24    dissolved is sued and they ask for your records about  
25    whether you had a policy that covered them at a period in



1 time when policies covered such things as occurrences,  
2 meaning exposure that don't manifest until twenty-five  
3 years later, they are entitled to those policies. You  
4 say in answer we have those policies, but we have an  
5 awkward way of maintaining them on microfiche and you  
6 can only access the microfiche if you know the number.  
7 Now we know that before that became the method of  
8 searching them, you had those microfiche all along and  
9 at some point in 2010 you paid a clerk within Penn  
10 National operations to have an index made of those  
11 microfiche and you decided the way to make the index was  
12 the policy number and the last date of renewal or the  
13 date of nonrenewal, which would be the last date that  
14 the policy was effective is another way of saying that.  
15 That -- you did that in 2010. It's able to be done.

16 Now what they would like to do is look at that raw  
17 data just like your clerks did and see if they can  
18 determine more directly whether Covil has other policies  
19 that cover it. That's what this whole dispute is about.

20 MR. YNTEMA: We have opened our insurance  
21 repository to as you know --

22 THE COURT: You have not opened these microfiche  
23 for them to sit down and take those documents and  
24 digitize them and search them, have you?

25 MR. YNTEMA: We opened the insurance repository to

1 Ellis and Winters for their search, unfettered access to  
2 our microfiche, to all of our documents at Iron Mountain.  
3 They took a sampling. They went through the process from  
4 December or November all the way through -- until their  
5 report to the Court in March. They gave the clerk  
6 parameters. This -- these are the important policy  
7 documents. They're only the microfiche of concern  
8 because Covil existed up until like 1992 or before.  
9 Microfiche is what -- is the concern. The only way to  
10 do -- the only way to search the microfiche based on  
11 their report was by either a manual search, which would  
12 take years to do, or a -- or a digitized search.

13 THE COURT: How long did it take to do that search  
14 in 2010 that developed the index?

15 MR. YNTEMA: My understanding based on my  
16 recollection, and I may stand corrected, it was like  
17 nine months.

18 THE COURT: Well, gosh, that's not years and years  
19 and years, and that was a manual search --

20 MR. YNTEMA: Well, this was a manual --

21 THE COURT: Wait a minute. Wait a minute. That  
22 was a manual search that extracted a certain couple of  
23 pieces of information and put them on an index. It  
24 would have been a very simple matter to have done one  
25 further thing, which is to put on that index the name

1 of the insured. That was not done.

2 MR. YNTEMA: Historically Penn National had always  
3 saved their archived policies by policy number.

4 THE COURT: Well, I understand that, but that is  
5 not a helpful thing for an insured who does not have  
6 access to their records. We have an insured that's in  
7 that category and they quite reasonably now are saying  
8 you've still got the records, you took nine months in  
9 an age way before digitization. What would happen if  
10 you took each of those microfiche and ran it through  
11 any number of systems that can look at those things and  
12 translate them? Gosh, we know we can do that on our  
13 little cell phones now. We take a picture of something  
14 and then search it. I can do that right now with things  
15 that are just pieces of paper floating around my house  
16 that I want to send to somebody. This is not rocket  
17 science what's being asked here. These are microfiches  
18 and they can be digitized and it's not gonna take any  
19 nine months the way technology is today.

20 And so my question to you is why have you not  
21 allowed the -- the representatives of Covil to access  
22 this material and do just what I suggested?

23 MR. YNTEMA: There was great concern when your  
24 Court ordered Penn National to do just that and to  
25 digitize all of their microfiche and give it to the

1 receiver and receiver's counsel for their unfettered  
2 use. As I stated at the hearing last spring, we had  
3 grave concern as to the confidential nature of all of  
4 these policies being just simply digitized and handed  
5 over to receiver's counsel.

6 THE COURT: So your answer to that was to just not  
7 cooperate at all with discovery. I have corporations  
8 every day that come into my courtroom and what they do  
9 if they have concerns about the confidentiality of the  
10 information, they digitize it and then they provide it  
11 under a system where a protective order is issued. You  
12 decided on the front end simply to not provide any of it  
13 and then say it's because the way we had it set up, the  
14 time, we took nine months to make an index of it and sort  
15 it by policy number. I don't regard that as a good faith  
16 effort to respond to discovery, Mr. Yntema.

17 MR. YNTEMA: I think it's being taken out of -- out  
18 of context. I do, Your Honor. I do. I mean, I've  
19 been through this process. I've been in front of  
20 Your Honor many times and every time there's -- out  
21 of all due respect, I mean, I've been here and I've  
22 answered the questions that Your Honor has had about  
23 how Penn National stores its policies, and acknowledging  
24 we've had these discussions, and we had discussions.  
25 You've considered many affidavits from Penn National.

1 Penn National has been deposed on these exact questions  
2 repeatedly throughout -- throughout this case. And as  
3 far as --

4 THE COURT: Mr. Yntema?

5 MR. YNTEMA: Yes.

6 THE COURT: Answer me this. Again, the illustration  
7 I'm giving you, they are trying to determine whether  
8 there are other policies that cover Covil. You're saying  
9 you can't even determine that yourself because you are  
10 going to continue to rely on an index that was made by  
11 a clerk in 2010 that selected out the number and the  
12 expiration date of the policy or the nonrenewal date, as  
13 it's sometimes called, and you're saying that gives you  
14 blanket coverage from having to answer their discovery,  
15 but it has been suggested to you time and time again that  
16 the way to deal with that is to do just what I talked  
17 about, take a picture of the microfiche or in some way  
18 digitize it. If it took a hand effort of one clerk  
19 nine months to do it, I can't imagine why a concerted  
20 effort that involved a commercial company couldn't do  
21 all that in a lot less time than that with the use of  
22 digitized photography and then a search. That way is  
23 done all the time all over this country in every kind  
24 of context from a personal one to a business one. It's  
25 done every day. So don't tell me about how disappointed

1     you are that I don't agree with you in the various  
2     hearings we've had. I want you to respond specifically  
3     to what I just proposed to you now for the second time.

4             Why cannot these microfiche be digitized pretty  
5     simply and then searched for whatever wording there is  
6     in them that is needed to forward this litigation of  
7     that coverage?

8             MR. YNTEMA: It can be, but, again, I go back to  
9     Penn National's concern as to why Penn National felt  
10    the feel need to take it up on appeal was because of the  
11    concern about the confidentiality of all these other  
12    policies, the world that was being produced for the  
13    receiver's and their counsel's unfettered access.

14            THE COURT: You never raised confidentiality in any  
15    way to this Court when we argued this thing these many  
16    times. What you raised to the Court is it's impossible  
17    because it's by number and now we've got this thing of  
18    nonrenewal that's come up since. What it first was,  
19    was the numbers, we don't have the number, we can't  
20    do it and its onerous and terrible and the thing's  
21    too voluminous, then slowly but surely that's been  
22    chipped away, but now we're in a situation where after  
23    I make my ruling on what is now the seventh motion to  
24    compel, you finally say oh, we're concerned about  
25    confidentiality.

1           Did you ever make any projection to this Court  
2           about protecting the confidentiality of these records?

3           MR. YNTEMA:   In the spring of this past year when  
4           we had the hearing before the May 5th hearing.

5           THE COURT:   Of course, and that's when I got Ellis  
6           and Winters to be the mediator here and you didn't  
7           disclose to them what we're learning right now in this  
8           courtroom as of today.

9           MR. YNTEMA:   Yes, Your Honor.   Ellis and Winters  
10          was appointed by this Court in November to conduct its  
11          search and then after the search was conducted and they  
12          reported their recommendations, then thereafter the  
13          Court asked -- and then ordered that Penn National  
14          digitize all those microfiche records and incur the --  
15          the sole cost of that and give the receiver and its  
16          counsel unfettered use of all the policies that are  
17          listed on the microfiche and at that hearing I did state  
18          a concern, there was a concern of Penn National's as to  
19          the confidential nature of digitizing these microfiche  
20          and then producing them for --

21          THE COURT:   You haven't made any motion to that  
22          effect or prepared any kind of proposal to the Court  
23          about how confidentiality could be maintained.

24          MR. YNTEMA:   Just based on the unprecedented nature  
25          of that order, Penn National --

1           THE COURT: Unprecedented nature? What are you  
2 talking about?

3           MR. YNTEMA: For Penn National. Unprecedented  
4 nature for Penn National to have to digitalize all this  
5 microfiche and disclose it to other outside parties.  
6 Penn National felt that I had no choice but to appeal  
7 that. They felt it was more an order in contempt or  
8 sanctions.

9           THE COURT: We're not arguing here today about  
10 your appeal. We're arguing today about some specific  
11 information that this -- that Covil desires that looks at  
12 the -- what has occurred with all this other discovery  
13 dispute and now focuses itself rather specifically on  
14 fourteen policies and what it takes to get information  
15 about those policies.

16           So I don't understand where you're going with this  
17 broader argument about what the appeal means or doesn't  
18 mean. You know, the history would indicate that at  
19 a certain point in time that appeal will, again, be  
20 dismissed, and to me that has nothing to do with the  
21 hearing I'm having here today.

22           So how about respond to what's being said here  
23 today and whether you're gonna cooperate with them?

24           MR. YNTEMA: I think what Your Honor is --

25           THE COURT: Because what you've done every single



1 time every time a request is made you just don't answer  
2 it.

3 MR. YNTEMA: I disagree with that, Your Honor.  
4 We have answered those requests. We have complied with  
5 court orders, we have responded to discovery. The  
6 discovery that's at issue today is a fourth request for  
7 production that was served and then we took the appeal  
8 of the Court's order and the matter was up on appeal.

9 The Court's order was that -- that -- it's our  
10 understanding that there would be a time where there  
11 would be -- a Rule 30(b)(6) deposition would be conducted  
12 and then the motion to compel would be held in abeyance  
13 until that time. A Rule 30(b)(6) deposition has occurred  
14 and now we're here today on a motion to compel.

15 THE COURT: That's correct. And so far what I've  
16 heard you talk about is your appeal and a whole bunch  
17 of other things and the fact that you still rely on the  
18 fact that you can't easily access this material that's  
19 on microfiche to discover whether Covil's got other  
20 policies, but now it turns out they've got at least  
21 fourteen other policies because there are fourteen other  
22 claims that -- that you dealt with and they want to know  
23 about those policies.

24 MR. YNTEMA: Your Honor, just right now at issue  
25 in this case, in this case, are essentially two policies;

1 1986 through 1988.

2 THE COURT: Yeah, and you're saying that the  
3 fourteen claims there you've given them everything they  
4 want to know about the policies, but hey, by the way, we  
5 don't owe you anything or it's got to be reduced by what  
6 we've already paid out. That's basically your answer.  
7 That's not what they're asking.

8 They're asking a broader question and it's a  
9 response to the receiver's fourth request for production  
10 to which you've never made any response and now they  
11 have focussed very specifically on a piece of that and  
12 that is the one that they first propounded on October  
13 the 12th, you didn't respond, they then on October 27th  
14 asked you again, and here we still are with no response  
15 to those requests and now we've got the deposition's  
16 been taken and we know that there are fourteen cases  
17 in which there's coverage. You say it's all '86 and  
18 '87 and '88 policies. We don't know that. They're  
19 asking you for something different. In fact, to get  
20 at it the other way, they are also asking you for the  
21 claims files and you have not responded to that.

22 MR. YNTEMA: We have responded. I believe I  
23 responded in a prior e-mail to Mr. Nes, which I didn't  
24 print out today because I didn't think I would be arguing  
25 about this, but I did -- I did communicate that Penn

1 National would be producing its claims files.

2 THE COURT: That's not a -- that's not good enough  
3 with a trial date. Those things should be immediately  
4 produced. They are in the universe of things that is  
5 right there dead center of what they've already requested,  
6 which was broad enough to include these, but now they've  
7 zeroed in specifically on these claims files because of  
8 the 30(b)(6). They should have been immediately produced  
9 and still we had to come to court again for the seventh  
10 time and talk about compelling.

11 MR. YNTEMA: The claims files were agreed to be  
12 produced before this hearing and --

13 THE COURT: Well, they haven't been produced yet.

14 MR. YNTEMA: Right, and my understanding is that  
15 we agreed to produce them prior to December 1st for  
16 sure.

17 THE COURT: Well, that's --

18 MR. YNTEMA: As of this morning I hadn't checked  
19 with my client to see where in the process they are in  
20 getting that information so that I can produce it.

21 THE COURT: Well, that's a little beyond what it's  
22 gonna take to get ready for a December 14th trial,  
23 Mr. Yntema, with all of the other things that have to  
24 be done in this case.

25 How is it that you-all just kind of seized on

1 December the 1st as the date which you would produce  
2 those things?

3 MR. YNTEMA: I think it was suggested by Mr. Nes,  
4 but that's -- my recollection is that it was actually  
5 suggested by Mr. Nes this morning.

6 THE COURT: Well, prior to this morning's suggestion  
7 by Mr. Nes, you haven't yet responded and said yay, we're  
8 gonna produce them at a certain time, have you?

9 MR. YNTEMA: Yes. I mean, I think I was --

10 THE COURT: This morning?

11 MR. YNTEMA: This morning?

12 THE COURT: Is that when you told them December 1st  
13 is when you're gonna produce them?

14 MR. YNTEMA: No, Your Honor. No, Your Honor.  
15 I think that -- that was something that's been  
16 represented by -- by counsel and Mr. Nes before this  
17 morning --

18 THE COURT: Uh-huh.

19 MR. YNTEMA: -- and that's why, you know, we  
20 represented in our -- in our papers to the Court that  
21 we would be producing the claims file.

22 THE COURT: Well, how do you intend to relate that  
23 if you do, the claim file, back to the policies which  
24 back up that claim?

25 MR. YNTEMA: I think the claim file would just be

1 simply to address the asbestos cases that Penn National  
2 has been defending since it received its first tender  
3 in February of 2020. I mean, we -- Penn National has  
4 been participating in defense of Covil since it received  
5 the first asbestos tender under its coverage for Covil  
6 and has been participating in the defense, has been  
7 participating in mediations for every asbestos tender.  
8 And fourteen isn't the number to date that's been  
9 tendered. Mr. Protopapas may have the exact number,  
10 but it's been many, many, many, many more asbestos  
11 cases other than just the fourteen that was recently  
12 represented in Penn National's letter to the receiver  
13 saying now we've paid these settlement amounts for  
14 these particular fourteen cases and our position is  
15 this is an impairment of the policy limits under the  
16 two policies that are in dispute in this case.

17 THE COURT: And my projection to you is this.  
18 Only when you're -- when something serves your advantage,  
19 that being the contention that hey, yeah, we did  
20 participate in fourteen different claims, but we -- we  
21 want you to know on the front end that -- that all that  
22 money's gonna be taken out of what you can afford to  
23 look at for the claims you're now pursuing. That's --  
24 the fourteen claims we're talking about are not claims  
25 that they're tendering to you right now, they're claims

1     you've already paid and you already participated in  
2     settlement of and that is another way of through the  
3     back -- through another route trying to figure out what  
4     kind of policies you do have and what kind of claims  
5     you have paid because you've answered nothing based on  
6     the direct request for that except to say oh, it's too  
7     secret, it's too confidential, you're not gonna protect  
8     it or we can't access it because of our way of indexing  
9     these things since 2010 or it might already be gone  
10    because we've destroyed these things and even after we  
11    know there's plenty of litigation about coverage at  
12    Penn National, we continue to do whatever it is we're  
13    doing, which has not been quite defined in terms of  
14    destroying old policies. That's -- that's the picture  
15    I'm getting, Mr. Yntema.

16           MR. YNTEMA: I'm sorry I painted that picture and  
17    that wasn't my intent. I mean, I think that --

18           THE COURT: What was your intent then about saying  
19    that hey, the fourteen ones we've already paid, but  
20    we're still not gonna give you the policy numbers on any  
21    of that because we can't access them, but by the way, if  
22    we could give them to you, it's a declining policy so  
23    you don't get to look at as much coverage as you might  
24    think.

25           I mean, do you think that's a reasonable way to

1 deal with the more direct question of what kind of  
2 coverage do you have, what kind of policies do you have,  
3 and what periods of time, this or some other period,  
4 do they cover?

5 MR. YNTEMA: I'm just gonna tell you as far as  
6 those fourteen cases, it was a letter from Penn National  
7 just letting the receiver know how much they had paid  
8 in settlements for these block of fourteen cases.

9 THE COURT: And that was so that you --

10 MR. YNTEMA: It was updating the receiver on the  
11 status of -- of the policy.

12 THE COURT: So that -- so the receiver could know  
13 that the little handful of policies it's gotten for  
14 '86-'87 and '87-'88, by the way, we've already paid  
15 fourteen claims and so those policies don't have as  
16 much in them as you think. That was basically the  
17 purpose for that particular advisory to the receiver;  
18 was it not?

19 MR. YNTEMA: I think Penn National has somewhat  
20 of an obligation to inform its insured --

21 THE COURT: Right. No question about that.

22 MR. YNTEMA: -- about claims paid --

23 THE COURT: And don't they have a similar obligation  
24 to inform Covil of all the coverage that Penn National  
25 has got, if any?

1           MR. YNTEMA: All the coverage that Penn National is  
2 aware of, yes, and able to find.

3           THE COURT: Well, you're able to find more than what  
4 you've given them. Would you agree with that?

5           MR. YNTEMA: I don't --

6           THE COURT: You've got the microfiche. You haven't  
7 destroyed those, right?

8           MR. YNTEMA: Microfiche are still present at Penn  
9 National's headquarters, correct, yes.

10          THE COURT: And you've got the ability to search  
11 them by hand as you did before or digitize them or  
12 whatever it takes to see if there are policies, don't  
13 you?

14          MR. YNTEMA: There is a -- they can be digitized.  
15 There's no option to do that.

16          THE COURT: Well, you could --

17          MR. YNTEMA: Whenever Penn National was ordered to  
18 digitize it, it had never digitized -- no one had ever  
19 been ordered to digitize those documents, the microfiche  
20 anyway, prior to the spring of this past year, and we've  
21 spoken about the concern that Penn National had and why  
22 Penn National felt the need to have to appeal that order,  
23 which is on appeal right now.

24          THE COURT: Again, I'm not talking about  
25 appealability. I'm talking about whether you've got



1 the ability as a company to search your records and  
2 directly answer their discovery request about what kind  
3 of coverage you have. I don't care whether it's done  
4 by digitizing or whatnot. What was attempted to be done  
5 was to suggest the easiest way you could look again at  
6 these files. You did it by hand in 2010. Nobody's  
7 asking you to do it that awkward, old-fashioned way  
8 again, but what was suggested is you take a little bit  
9 more modern approach to how you might take those records  
10 and search them, and you're saying that your concern  
11 about the privacy of those records is preventing you  
12 from figuring out how you could search those records?

13 Is that what you're saying?

14 MR. YNTEMA: Not quite, Your Honor, but I think  
15 if -- if Your Honor understands me as saying that, I'm  
16 just trying to kind of spell out kind of where we are  
17 today and then you're asking me what is preventing  
18 Penn National from -- from digitizing the records --

19 THE COURT: I'm asking you what is preventing  
20 Penn National from using whatever methodology it  
21 wants to to try to look at all these microfiches and  
22 determine if there's other coverage. That is what  
23 Covil's been asking for months and months and months  
24 now and digitization was an attempt to more modernize  
25 how you would do it.

1           Now you've used that as a weapon to say oh, that's  
2   a terrible thing we've never been asked to do before?  
3   You picked your own method of laboriously going through  
4   those records, but it created a system that is very  
5   difficult to get into. You decided to do it that way.  
6   It would have been very simple for that index to have  
7   included one more piece of information, the name of the  
8   insured, but you decided in 2010 not to do that.

9           Now the request is being made to go back to those  
10   records and find out who's insured and the fact that  
11   digitization might be one way to do it is not the point.  
12   The point is you can do that, can you not, as a company?

13           MR. YNTEMA: The records can be digitized, Your  
14   Honor, yes.

15           THE COURT: No, sir. I'm not asking that question.  
16   That was simply a suggestion as to a method of making it  
17   easy to search those records, but you could figure out  
18   any way you want to. You have the records. You could  
19   search them and match up the name of the insured with  
20   the list of policies and expiration dates; could you  
21   not?

22           MR. YNTEMA: You can search the insured. At this  
23   point the only way without digitizing those documents  
24   is to manually go through each one of those.

25           THE COURT: Right. And you could do that; could

1     you not?

2           MR. YNTEMA:   It wouldn't be reasonable to do that.  
3     The --

4           THE COURT:   Well, you did it in -- you did it in  
5     2010 to develop a policy for destroying the documents,  
6     didn't you?

7           MR. YNTEMA:   In 2010, they recorded the policy  
8     numbers that had historically been recorded by Penn  
9     National long before 2010, but they were able to go  
10    through and look at the boxes or look at the microfiche  
11    and record the policy numbers, yes, ma'am.

12          THE COURT:   Well, they had to look at the individual  
13    policies to get that nonrenewal number.  That wasn't on  
14    the outside of the box, the outside of the box had the  
15    numbers, but what your 30(b)(6) says is that in 2010 he  
16    developed a methodology -- he was trying to figure out  
17    how could he do something that would then relate to when  
18    to destroy the records and he came up with the policy  
19    number and the date of nonrenewal or expiration.

20          It would be very simple -- and that took about  
21    three months to six months or nine months or however  
22    much it is for one clerk to in their off hours with  
23    everything else they had to do to do that.

24          MR. YNTEMA:   I think there were many more people  
25    than just one though.

1 THE COURT: Well, whatever.

2 MR. YNTEMA: Sure.

3 THE COURT: But this is a discovery request where  
4 you're supposed to do what it takes to answer the  
5 discovery and it's about a central point in this  
6 coverage lawsuit. It's to find out what policies cover  
7 Covil and you've got the ability to go back to those  
8 boxes and add something to that index, which now contains  
9 the policy number and the expiration date, and that is  
10 the name of the insured. You can do that, can't you?

11 MR. YNTEMA: Potentially by way of digitizing the  
12 documents, yes.

13 THE COURT: But you could do it by hand.

14 MR. YNTEMA: By hand it would make months and months,  
15 but --

16 THE COURT: Well, it took you nine months before or  
17 six months or three. We've got a lot of different  
18 testimony about how long it took, but you could do it,  
19 correct?

20 MR. YNTEMA: Yeah, Penn National, I think, could  
21 do that. I mean, I think they recorded policy numbers.  
22 They can go back and go through manually each microfiche  
23 slide. It could take a while to do.

24 THE COURT: Right. And if they wanted some other  
25 more modern technical way to do it, they might be able

1 to do it that way, right?

2 MR. YNTEMA: Yes, Your Honor.

3 THE COURT: All right. So your request today is  
4 what?

5 They are asking that you produce some very specific  
6 stuff today.

7 MR. YNTEMA: And I'm happy to work with --

8 THE COURT: No, sir. It's not happy to work with.  
9 They are asking for some very specific information today  
10 in this hearing. That's why they moved to compel you.

11 MR. YNTEMA: They moved to compel our responses to  
12 the fourth request for production documents, which we  
13 hadn't responded to. It was our -- in our opinion that  
14 the matter was on appeal and that any issues with respect  
15 to documents and further discovery requests were held  
16 in abeyance until after a Rule 30(b)(6) deposition was  
17 conducted, which we even took the position up until  
18 recently when the Court had a status conference that  
19 all of that was on -- on a stay, but the Court found  
20 that there was a necessity for trial in December and  
21 so we allowed the Rule 30(b)(6) to take place of Brent  
22 Reifsnyder and of Scott Maier, which has still yet to  
23 be scheduled, and allow that to be proceed.

24 And we had -- and there's mention in -- with respect  
25 to the topics that -- or part of the Rule 30(b)(6) topics

1     that we did make objection to because we felt that they  
2     were duplicative, that they were -- that they -- that  
3     Penn National had already provided a Rule 30(b)(6) on  
4     those topics, but yet they were incorporated into this  
5     most current Rule 30(b)(6) notice as well.

6             We didn't file a motion for protection order, we  
7     didn't file a motion to quash those notices because that  
8     would have shut everything down. What we said is we're  
9     not gonna do that, but we're gonna say these are the  
10    topics that we can produce a designee or designees on  
11    and allow the depositions to go forward and allow a  
12    trial to go forward. We could have tried to say and  
13    argue that this is all on appeal, we're not gonna  
14    participate.

15            This is on appeal. It's our position it should be  
16    stayed and it's stayed up until this point. We didn't  
17    take depositions, we were trying to be cooperative,  
18    and so now we're progressing toward a trial. We've  
19    provided one designee. We've offered up another  
20    designee whose deposition's going to take place in a  
21    week or so and we've -- we've produced our experts and  
22    disclosed our experts and we're progressing to a trial  
23    in this case.

24            Now that can be discussed -- I have another topic,  
25    I think, by Ms. Patterson, and then we can see what

1 discovery in this trial looks like and what that entails.

2 THE COURT: All right, sir.

3 Your reply.

4 MR. NES: Yes, Your Honor.

5 I'd like to start where we started and that is  
6 spoliation and the --

7 THE COURT: Speak a little bit more directly into  
8 that or speak louder.

9 MR. NES: How is that? Does that work?

10 THE COURT: A little better. There you go.

11 MR. NES: How's that, Your Honor?

12 THE COURT: Perfect.

13 MR. NES: So let's start with -- what I'd like to  
14 do is walk through a couple of issues that I think the  
15 record is -- is incorrect at this point and correct that  
16 and then finally what it is that we are specifically  
17 asking for.

18 First, when we talk about the spoliation timeline,  
19 the Court correctly identified our concern is that as  
20 of June of 2018 Penn National knew there were asbestos  
21 cases being filed against Covil and that it issued  
22 Covil insurance policies. It did not yet know the  
23 universe of policies at issue, but it did not issue a  
24 litigation hold and that error is directly in front of  
25 this Court because as Mr. Yntema said, his witness --

1 Penn National's witness last week said I don't know why  
2 Covil's -- the '86 to '87, '87 to '88 policies exist  
3 today, they shouldn't, and that's exactly the problem  
4 that we face, is that if those policies were pulled from  
5 the records from the automatic destruction because the  
6 policy number was identified and then 2018 rolls around  
7 and any other Covil policy that we just didn't have a  
8 number for had been identified, they very well may have  
9 been pulled and destroyed, and there's no system that  
10 Penn National can show us that would have identified the  
11 policy, that they would have saved the policy, that they  
12 would have QC'd their checks to make sure that that  
13 policy wasn't destroyed.

14 So the last area that we can ask for to try to  
15 understand why it is that the documents were or were not  
16 destroyed in 2018 is this request. All documents and  
17 communications related to the process of identification,  
18 collection and disposal of insurance policies and  
19 policy-related documents pursuant to Penn National's  
20 document retention or purge policies.

21 In other words, if there are e-mails in 2018  
22 between Brent Reifsnnyder and his staff saying guys,  
23 here's the list for this year, here's the ones to go  
24 pull and destroy, that's a completely relevant document.  
25 That would show either Penn National's policy was being



1 followed and no Covil policies are on there, Penn  
2 National's policy wasn't being followed or Penn National's  
3 policy was being followed and there was a Covil policy,  
4 but they've refused to even give us those basic e-mails.

5 So, first and foremost, we are asking this Court to  
6 compel them to produce their correspondence to the extent  
7 it still exists related to the document destruction in  
8 2018, 2019, 2020 and 2021, and if the answer is we simply  
9 don't have those anymore because we didn't issue a  
10 litigation hold, then we want that answer, too, but we  
11 are -- we believe that with respect to topic -- Request  
12 Number 11 that's a narrow request and it's directly  
13 related to the spoliation issues that are going to be at  
14 issue four weeks from now. Number 1.

15 Number 2 is the fourth request for production of  
16 documents, and this was our most recent motion to compel,  
17 and on page 3 of our motion to compel we outline the  
18 topics that we requested in the fourth motion to compel  
19 and these topics are directly targeted at how their  
20 document retention policy works, how it itself is QC'd  
21 and the litigation holds, how the litigation holds are  
22 issued and QC'd, again, relevant to the issues that are  
23 gonna be tried in four weeks and very narrowly tailored.

24 Today we have not heard a single argument that  
25 these are irrelevant, that they're overly burdensome.

1 The only argument is a vague reference to these requests  
2 being issued after this Court's May 5th order, which  
3 they say is on appeal, but these requests do not relate  
4 to that order, therefore, they are not stayed and they  
5 are relevant to the issues looking back.

6 Finally, as this Court was inquiring of Mr. Yntema,  
7 we have claim files, basic claim files, from Mr. Wright,  
8 who is a claims handler at Penn National, for fourteen  
9 asbestos claims that they paid on. They have no argument  
10 that they're irrelevant, they have no argument that  
11 they're overly burdensome. They've, in fact, said now  
12 that they will produce it, but I want the record to be  
13 clear today at this hearing is the first time I've heard  
14 they will produce documents on December 1st.

15 This is what their footnote says in response to our  
16 motion to compel. The receiver's motion to compel also  
17 asks this Court to compel Penn National to supplement  
18 its production to Request Number 4 of the receiver's  
19 first set of requests for production by December 1st.  
20 That is what our request was. Their answer is Penn  
21 National is in the process of compiling the requested  
22 documents for production, which will include approximately  
23 61,000 pages and anticipate being able to comply with  
24 this request.

25 So even today when we've filed the motion and they