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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 11**

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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

HEARING

COVIL CORPORATION, BY AND THROUGH
ITS DULY APPOINTED RECEIVER
PETER D. PROTOPAPAS

v.

2020-CP-40-02098

PENNSYLVANIA NATIONAL MUTUAL
CASUALTY INSURANCE COMPANY, ET AL.

*** UNOFFICIAL DAILY COPY TRANSCRIPT ***

BEFORE THE HONORABLE
CHIEF JUSTICE (RET.) JEAN TOAL

DATE TAKEN: Wednesday, October 25, 2023

TIME START: 9:40 a.m.

TIME END: 9:55 a.m.

LOCATION: Richland County Judicial Center
1701 Main Street
Columbia, South Carolina

REPORTED BY: Cindy A. Hayden, RMR-CRR
EveryWord, Inc.

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Page 3 1 PROCEEDINGS 2 * * * 3 THE BAILIFF: All rise. The Honorable 4 Retired Chief Justice Jean Toal presiding. 5 THE COURT: Thank you very much. 6 Please be seated. 7 Ladies and gentlemen, we have a very 8 full schedule today. For the court 9 reporter's benefit -- I think most of you 10 know this, but when you stand and address 11 the Court, please announce -- every time 12 you do, announce your name and the party 13 you represent. 14 I will try to keep up with telling her 15 which case we're on so she will know -- and 16 so the backup court reporter, for purposes 17 of quick transcripts, will know what we're 18 on. 19 The first thing is a case that is 20 scheduled for a nonjury trial in November, 21 and I'm statusing that briefly this 22 morning. Then two status discussions on 23 Bolton and on Perry. 24 And then hearings, and this won't be a 25 long one. This is on receiver's motion to	Page 5 1 THE COURT: -- I'm not going to limit 2 you, but I think people will be sensible 3 about those. I'm not worried about those. 4 And then, frankly, the ones we're 5 going to have to decide exactly how to 6 proceed on are the wrath of some 33 parties 7 that have various matters to present to 8 the Court in connection with the 9 receivership -- the Cape receivership that 10 is a subsidiary of the Tibbs case. 11 MS. McVEY: Yes, ma'am. 12 THE COURT: So, to me, let's just get 13 through this first set of things. And then 14 we can get all the folks involved in the 15 Tibbs matter together and decide. And if 16 some of you are only involved in that, just 17 know that I think it will probably be at 18 least an hour and a half before we get 19 there. 20 You know, this is the problem with 21 this janky system. What I'm going to 22 suggest -- are your mics now working at 23 your -- 24 MR. SHEALY: No, Your Honor. 25 THE COURT: Not working? How about
Page 4 1 seal and a report on the receivership of 2 Davis Mechanical. 3 Then informational discussion about 4 the Payne & Keller and what to do and what 5 kind of further proceedings we ought to 6 have and so forth. 7 And then the one that's going to be 8 the longest, which is all the motions in 9 the Tibbs matter, which I call the Cape and 10 related Cape third-party plaintiffs and 11 third-party defendants. 12 And, you know, I don't think the -- 13 the first five things are going to take all 14 that long. I would try, if possible, to 15 get through those things and see where we 16 are this morning and then break and try to 17 deal with the Tibbs things. 18 Now, I will turn to people who may 19 have some other view about it. Ms. McVey. 20 MS. McVEY: Your Honor, I think you're 21 right, especially with the first five. I 22 mean, I think you can give five minutes to 23 each side -- 24 THE COURT: Well, I -- 25 MS. McVEY: -- and get through this.	Page 6 1 this one? Kirby, go up there and see if 2 you can see about this one. 3 MR. SHEALY: No. 4 THE COURT: No? Who is in charge of 5 this? Madam Clerk? 6 THE CLERK: It's the box right below 7 your law clerk. 8 THE COURT: Well, I -- if that -- 9 that's not satisfactory for me, only 10 because somebody with -- 11 THE CLERK: Let me go get some help. 12 THE COURT: Yeah, let's get some help. 13 No sense in us -- we've tried to do this 14 once, and it only succeeded in making it 15 worse. 16 Be patient for a minute, y'all. I 17 think we can be pretty well heard here, and 18 so if you would like to start, I think we 19 can do that. And let's get somebody in 20 here who knows about this, and then we'll 21 pause for a minute while they work on it. 22 All right. Pretrial on Covil 23 Corporation against Pennsylvania Mutual. I 24 have the 12th interim status report on 25 Penn National. So I turn first to those

Page 7 1 who represent Covil, and that will be you, 2 Brad? 3 MR. NES: That's correct, Your Honor. 4 Brad Nes -- 5 THE COURT: Mr. Nes and -- 6 MS. PATTERSON: Nancy Patterson, 7 Your Honor. 8 THE COURT: Very good. And they are 9 the attorneys for the receiver of Covil 10 Corporation. 11 All right. Mr. Nes, you may proceed. 12 MR. NES: Thank you, Your Honor. 13 We're here for two reasons. The first 14 is the status conference on the discovery 15 order that you just mentioned as well as 16 the pretrial conference for the trial 17 scheduled on November 13th next month. 18 Turning to the first issue, the 19 November 13th upcoming trial, we are ready 20 for trial, Your Honor. We are only waiting 21 for the Supreme Court to remand the case 22 back. As you mentioned, the issue for the 23 Court right now is whether or not this will 24 be a nonjury trial. We feel confident that 25 this should proceed as a nonjury trial	Page 9 1 we were here at the beginning of the summer 2 in June. The Court ordered Penn National 3 to finalize the digitization of its 4 microfiche archives by July 31st. That 5 process was completed, but numerous errors 6 were identified. 7 The first set of errors had to do with 8 the searchability of the database. The 9 second had to do with the OCR of the 10 information available; in other words, what 11 documents were actually getting hit -- 12 excuse me -- what words were actually 13 getting hit during the searches. 14 On August 21st, this Court ordered 15 Penn National to correct those errors and 16 report back to this Court every two weeks 17 as to its status. Unfortunately, that was 18 two months ago, and in our view, the 19 problems with the OCR'g have not been 20 addressed. 21 We were asked by Penn National to 22 provide a report or a recommendation from 23 our expert witness as to how to correct 24 those problems. We provided that report to 25 Penn National on September 18th. Penn
Page 8 1 given that it is declaratory judgment 2 relief that we are seeking under various 3 Penn National policies. 4 As this Court will recall, last year, 5 we were three days away from trial when 6 Penn National issued its last-minute notice 7 of appeal. The reason I bring that up is 8 because most of the pretrial issues had 9 already been addressed. Findings of fact 10 and conclusions of law had been filed, 11 deposition designations, exhibit lists, 12 et cetera. 13 We believe that there is very little 14 that needs to be done to prepare in 15 addition to what was already done. We 16 believe updated witness lists and exhibit 17 lists need to be provided and a filing of 18 the oppositions to the findings of fact and 19 conclusions of law. Otherwise, the 20 receiver stands ready for trial as soon as 21 the Supreme Court gives this Court 22 jurisdiction to do so. 23 The second issue, the compliance with 24 this Court's May 5th, 2022, discovery 25 order. Again, as this Court will recall,	Page 10 1 National had a different view as to how to 2 correct those OCR problems. 3 My understanding from discussions with 4 Mr. Shealy is that those processes are 5 under way, but to date, none of the issues 6 regarding either searchability or the 7 correcting of the OCR have actually been 8 corrected yet. 9 So for those reasons, we do not 10 believe they are yet in compliance with 11 this Court's May 5th, 2022, discovery 12 order. 13 THE COURT: Very good. 14 All right. Before Mr. Shealy 15 addresses that, let's pause for a minute. 16 I think we've got an expert that can fix 17 this sound system. I'm hoping so. * * * 19 (Whereupon, there was a recess in the 20 proceedings from 9:48 a.m. to 9:49 a.m.) * * * 22 THE COURT: All right. Mr. Shealy, 23 you may proceed. 24 MR. SHEALY: May it please -- 25 THE COURT: By the way, I forgot to

Page 11 1 introduce Macey Webb. Attorney Webb is 2 attorney for the judiciary committee and is 3 in charge of parts of the judicial merit 4 selection screening process and is here 5 today to observe me in court. Back in the 6 day, a championship player for the 7 South Carolina softball team. 8 MR. SHEALY: May it please the Court, 9 Your Honor, Kirby Shealy here for Penn 10 National. I'm here with my co-counsel, 11 David Brown. 12 THE COURT: Mr. Brown, welcome. 13 MR. SHEALY: Your -- Your Honor, just 14 briefly on the -- on the trial, we 15 generally agree with Mr. Nes and the 16 recitation of sort of what needs to happen. 17 We will be ready, assuming that this Court 18 has jurisdiction in November. 19 The receiver submitted to the Court a 20 proposed schedule for the trial. We're 21 generally in agreement with it; although, 22 we think that it's at least possible this 23 case could take a little bit longer than 24 three days, but no longer than four. 25 But we -- everybody knows what -- who	Page 13 1 We had hoped that we would have had 2 access to the iPro database weeks ago. 3 That -- the parties have been moving as 4 fast as they can on that. But we've got 5 our -- we got credentials yesterday. 6 I think with a couple of searches, 7 frankly, because of the errors -- the 8 receiver pointed out in its report to 9 this Court that we can check those searches 10 and see if the same errors are resulting. 11 And then -- and then we've got to do 12 this -- this next level of -- of work that 13 has been suggested to us. 14 What has been addressed, though, by 15 putting this database on this litigation 16 platform is that that enhances the 17 searchability of the database. 18 Boolean connectors can be used. It's 19 a much more robust search mechanism, and 20 that's what the parties had -- had always 21 envisioned. 22 THE COURT: Well, that would really 23 address both of these issues if we really 24 have a digitization that has searchability. 25 I'm not as intimately familiar with the ins
Page 12 1 the witnesses are. And we are in pretty 2 constant communication in terms of taking 3 steps necessary to make the trial proceed 4 as efficiently as possible by taking 5 depositions of witness -- of expert 6 witnesses in advance and having those 7 deposition excerpts ready to go when the 8 trial begins. 9 As for the digitization process -- 10 THE COURT: I sure am frustrated about 11 that, Mr. Shealy. 12 MR. SHEALY: I know you are, 13 Your Honor. The -- so where we are, is 14 yesterday the parties received credentials 15 from Ellis & Winters' IT department to 16 access this -- this database on this 17 litigation platform known as iPro. 18 The conversation that Mr. Nes and I 19 had back on October 2nd was: Let's just 20 see if there -- if the software that iPro 21 uses to read the images of these files 22 produces better results or reduces the 23 error rate, and we can do that very 24 quickly. And if not, then -- then we've 25 got to do this next step with Dan Regard.	Page 14 1 and outs of OCR. But the idea is to have 2 searchable terms that can easily be 3 identified anywhere in the document. 4 And so here's -- here's what I'm going 5 to suggest, Mr. Nes, both of you: We've 6 all got to plan our life with this thing. 7 I blocked this time out, but I am having a 8 lot of potential incursions on that time as 9 we end this uncertainty about how to 10 proceed. 11 I want you two parties to do two 12 things for me. The first is, I want you to 13 search this database and -- under the new 14 protocol that Ellis & Winters has sent and 15 see what happens. And let me know quickly 16 about that. 17 The second thing is, I want the two of 18 you to send a joint letter to the Supreme 19 Court, telling them this case is scheduled 20 for nonjury trial on the declaratory 21 judgment on November the 16th and asking 22 them whether they can supply any 23 information about how -- where -- how our 24 matter stands. 25 MR. SHEALY: Yes, Your Honor.

Page 15 1 THE COURT: I don't want to do that 2 myself. But I think if both of you parties 3 do -- they may not answer you. That's 4 fine. But it's set for trial on November 5 the 13th. I think I might have misstated 6 the date. 7 So let's do that, and let me know as 8 soon as you can once you hear back from 9 that inquiry. 10 MR. SHEALY: Yes, Your Honor. Will 11 do. 12 MR. NES: Yes, Your Honor. 13 THE COURT: Very good. I think that 14 does what we need to do with Covil at the 15 present time. 16 MR. BROWN: Thanks, Your Honor. 17 THE COURT: Yes, sir. 18 MR. NES: Thank you, Your Honor. 19 THE COURT: Thank you very much. And 20 tell Ellis & Winters thank you very much 21 for getting us to this point. No sense in 22 crying over the multitude of gallons of 23 spilled milk. Maybe we ran out. 24 MR. SHEALY: Thank you, Your Honor. 25 THE COURT: Yes, sir.	
Page 16 1 - - - 2 (Proceedings concluded at 9:55 a.m.) 3 - - - 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	

CERTIFICATE OF REPORTER

I, Cindy A. Hayden, Registered Merit
Reporter and Notary Public for 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 and location
stated on Page 1 of this transcript; that the
foregoing proceedings 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, this 26th of October, 2023.

Cindy A. Hayden,
Registered Merit Reporter
Notary Public
State of South Carolina at Large
My Commission expires:
July 27, 2030

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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 COMPANY;
SAM J. CRAIN & CO., INC.; AND
SOUTH CAROLINA PROPERTY & CASUALTY
INSURANCE GUARANTY ASSOCIATION,

Defendants.

T R I A L

DAY ONE - MORNING SESSION

BEFORE THE HONORABLE
CHIEF JUSTICE (RET.) JEAN TOAL

DATE TAKEN: Monday, November 27, 2023

TIME START: 9:25 a.m.

TIME END: 1:13 p.m.

LOCATION: Richland County Judicial Center
1701 Main Street
Columbia, South Carolina

REPORTED BY: SHERI L. BYERS, RPR
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P R O C E E D I N G S

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(All exhibits were previously marked and entered into evidence.)

- - -

THE COURT: This is the matter of Covil Corporation against Pennsylvania National Mutual Insurance Company and others. It's Case Number 2020-CP-40-02098.

The matter before the Court today is a nonjury trial involving issues of coverage and other issues related to alleged policies of Penn National covering issues related to Covil Corporation.

We also have a matter that will be taken up in the course of this hearing that deals with the contention of spoliation on the part of Covil against Penn National related to the preservation or lack of same of its policies of insurance and perhaps other matters related to spoliation.

That is the universe of what should be tried as I see it. I will say by way of introduction, I have spent a happy weekend with

1 my family, but I have done much reading. I have
2 touched everything. I've absorbed some things
3 more strongly than others, but I think I've got
4 a pretty good outline. And frankly, some things
5 have been a revelation to me now that I've
6 gotten into it more deeply about what exactly
7 has transpired in connection with trying to find
8 these policies.

9 And particularly the role that Ellis &
10 Winters has played in this and the role that one
11 of the old law firms involved in this matter,
12 Gallivan White, has played in preparing
13 information related to these policies. Alleged
14 policies. So I think I've got a somewhat better
15 understanding of this matter.

16 I do not anticipate this matter lasting all
17 week long. We can -- I want to kind of get a
18 little bit of a concept from both sides as to
19 how you see this progressing. I know that I've
20 got a witness list, but I'd like for each of you
21 on each side, Mr. Nes, and probably Mr. Shealy
22 or whoever is going to appear on the other side
23 give me a little outline just briefly of who you
24 are going to present and how you concede the
25 matter will move forward. And then we'll

1 proceed with actually opening the trial.

2 So I will turn first to Mr. Nes and before
3 you begin, Mr. Nes, I would like for you to
4 introduce for the record the people at your
5 table with you.

6 MR. NES: Thank you, Your Honor. Brad Nes
7 with Morgan Lewis for the receiver for Covil
8 Corporation. With me is John Robinson of Smith
9 Robinson, and my partner Nancy Patterson, also
10 with Morgan Lewis, with us.

11 THE COURT: You also have the receiver for
12 plaintiff, Mr. Peter Protopapas. And
13 Mr. Protopapas' paralegal, Lindsay Valek, is
14 present.

15 Does that complete the list of people that
16 are here for you?

17 MR. NES: Yes, Your Honor.

18 THE COURT: All right. Mr. Shealy.

19 MR. SHEALY: May it please the Court, Your
20 Honor.

21 Your Honor, Kirby Shealy here for
22 Pennsylvania National. I'm here with David
23 Brown, pro hac vice, from Goldberg Segalla firm.
24 Also Boyd Wright, senior home office examiner
25 for Penn National.

1 THE COURT: He's the corporate
2 representative, as I understand it, is he not?

3 MR. SHEALY: Yes, Your Honor. That is
4 correct.

5 And we have technical folks here.

6 THE COURT: Yes, who have introduced
7 themselves to me. Thank you very much.

8 And I noticed that Brady Yntema is not with
9 us today. Please post me now on his situation.

10 MR. SHEALY: Your Honor, he's receiving
11 some treatment this morning. This is when he
12 receives treatment. I'm told that he hopes to
13 be here this afternoon. We'll just kind of see
14 how that goes.

15 THE COURT: Very good. I'm concerned about
16 him, and my best wishes go to him. And he needs
17 to be sure he takes care of himself. You've got
18 some very capable people at the counsel table
19 now. He knows a lot about this, of course. But
20 let's be sure we take care of him in the way he
21 needs to be taken care of. If I need to make
22 special accommodations with respect to the
23 things he will really participate in the most
24 actively, I know you will let me know that,
25 Mr. Shealy.

1 MR. SMITH: Yes, Your Honor.

2 THE COURT: Thank you, sir.

3 Now, Mr. Nes, would you kind of outline how
4 you intend to proceed with the case.

5 MR. NES: Yes, Your Honor. After opening
6 statement, we have five witnesses that we will
7 call either live or by video. The first witness
8 that we plan to call is the Penn National
9 corporate representative adversely, Mr. Wright.
10 We then follow that with Mr. Protopapas, the
11 receiver. And then one of our expert witnesses,
12 Sharla Frost, who is also in the courtroom
13 today. She's standing right here.

14 After that --

15 THE COURT: Is that Ms. Frost? Welcome,
16 Ms. Frost.

17 MS. FROST: Good morning.

18 THE COURT: I've certainly read a lot of
19 your words.

20 MR. NES: We then plan to call our other
21 expert witness via video testimony. He was
22 deposed, and then we did an actual trial
23 testimony.

24 THE COURT: That's Miller?

25 MR. NES: That's right. Charles Miller.

1 We will play his trial testimony in full. We
2 then plan to play two snippets of testimony,
3 video depositions of a Scott Maier, who was an
4 in-house lawyer at Penn National as well as
5 Brent Reifsnyder, who is the document custodian
6 within Penn National.

7 Both of those witnesses were originally on
8 our witness list. We understood that they would
9 be here live, but we have been informed last
10 week that they were no longer going to be here
11 live so we will just play snippets of their
12 video deposition to give you the highlights of
13 what we think is the most relevant testimony.

14 THE COURT: Very good. Let me say with
15 respect to this outline, there is a considerable
16 volume of material that I have received relative
17 to depositions, statements, writings, and other
18 matters related to Mr. Wright, Receiver
19 Protopapas, Ms. Frost, Mr. Miller, and expert
20 for the plaintiff, as well as both Mr. Maier and
21 Mr. Reifsnyder. And I have read all of that.
22 So I think I've got at least some perspective on
23 what they say, and I don't think anybody will be
24 disadvantaged if they don't appear live.

25 I think I've got a complete background and,

1 of course, this trial is all about focusing in
2 on the parts of the testimony that both sides
3 feel are important to the case as well as the
4 documents related thereto.

5 MR. NES: Thank you, Your Honor. There's
6 two other issues I think with the presentation
7 of the case. The first is that the parties have
8 stipulated that each side's exhibit list, the
9 trial exhibit lists, are admissible without
10 objection and, similarly, all of the depo
11 designations that we have made are similarly
12 admitted into the record without objection.

13 MR. SHEALY: That's correct, Your Honor.
14 We will get with our court reporter to make sure
15 that everything is -- everything's been
16 premarked and all of that but to make sure that
17 all of that is in the appropriate hands. But
18 that is absolutely correct.

19 THE COURT: I just cannot tell you how
20 grateful I am to both of you counsel for
21 handling this matter in that way. These are
22 voluminous records, and they're all important.
23 And to have agreement on the stipulation of
24 authenticity and as well as agreement on the
25 parts of the deposition or depositions that each

1 side wishes to admit, that's a major step
2 forward. Thank you so much for that.

3 MR. NES: Finally, Your Honor, you asked
4 about timing. I certainly don't see this case
5 now that the witnesses are not all going to
6 appear live that this would take all week. I
7 think we will wrap our case by mid to late day
8 tomorrow.

9 THE COURT: By mid to late --

10 MR. NES: By mid to late day tomorrow. I
11 would anticipate we will be closing our case by
12 lunchtime.

13 THE COURT: Great. Of course, both of you
14 realize on Wednesday I've got a pretrial, so I'm
15 going to have to interrupt this thing somewhat
16 for that, but I feel that ought to move along
17 smoothly and quickly. And perhaps you would
18 like a little break at that point to see where
19 you stand.

20 MR. SHEALY: Your Honor, you may recall in
21 our pretrial conference in chambers, I
22 mentioned -- I think this works out with respect
23 to your pretrial, but I have to be with my
24 father for a consultation of his condition that
25 morning. It's at 8:15 in the morning.

1 THE COURT: You are going to have plenty of
2 time to go to that, so that's not a problem.

3 MR. SHEALY: Thank you. That's the only
4 other thing, Your Honor.

5 THE COURT: I will turn to you for your
6 outline of your case, of course, Mr. Shealy.

7 MR. SHEALY: Yes, Your Honor.

8 THE COURT: All right. All right.
9 Mr. Shealy.

10 MR. SHEALY: Your Honor, the only other
11 sort of housekeeping matters is there are -- we
12 did file a summary judgment motion. I don't
13 know whether the Court is inclined to entertain
14 it before we get started, but that motion is
15 pending. There were a couple of motions in
16 limine that date back to when this was on
17 that -- at least on this side we thought this
18 was going to be a jury trial. Those are still
19 pending.

20 THE COURT: Yes, I have the motions
21 notebook. I would say to you that I plan to go
22 over the matters in the motion notebook right to
23 begin with, so that we will then commence the
24 trial.

25 MR. SHEALY: All right.

1 THE COURT: I'm prepared to deal with
2 those.

3 MR. SHEALY: Okay. As far as our case is
4 concerned, we may put Mr. Wright back on the
5 stand during our case in chief to go over other
6 matters that we may want to bring up. But
7 whether or not we play any other snippets of
8 depositions, we may not need to do that. So I
9 expect --

10 THE COURT: It's entirely up to you, and
11 you would be permitted to do that if you care
12 to. So that's not a problem.

13 MR. SHEALY: We have two expert witnesses
14 and both of which are going to be -- have to be
15 testifying remotely, and so I wouldn't expect
16 our case to take longer than about a day.

17 THE COURT: Tell me who your experts are,
18 just for the record.

19 MR. SHEALY: Bernie Heinze.

20 THE COURT: That's not exactly how I think
21 it's pronounced, but I know who you're talking
22 about. I just finished his material. So you've
23 got Heinze -- how we pronounce that name. And
24 who else?

25 MR. SHEALY: James Robertson.

1 THE COURT: Robertson. Right. I'm aware
2 of material for both of them.

3 MR. SHEALY: I think that's it, Your Honor.

4 THE COURT: Very good. Excellent.

5 All right. Well, to me, before opening
6 statements are given, I think what we ought to
7 do is get these motions out of the way. So the
8 first on my list is Receiver's Motion to Exclude
9 Evidence of the Receiver's Compensation
10 Qualified Settlement Fund.

11 MR. ROBINSON: Your Honor, Jon Robinson on
12 behalf of the receiver. Recognizing this
13 Court's holding and many other nonjury matters
14 under Brown versus Allstate in a nonjury setting
15 regarding admissibility of evidence, I think
16 this Court and our appellate courts have
17 determined that all evidence can come in in a
18 nonjury setting, and the trial judge, in its
19 discretion, can determine what is admissible and
20 is not.

21 And as such, we would draw that motion to
22 limit the testimony of Mr. Protopapas regarding
23 the compensation, and we'll allow the court to
24 exercise its discretion as to whether it's
25 admissible.

1 THE COURT: Very good. Motion is
2 withdrawn.

3 Second motion is Penn National's response
4 that does not need to be explored, as I
5 understand it, since the motion is withdrawn.

6 MR. SHEALY: That's correct.

7 THE COURT: Third is Penn National's Motion
8 In Limine to Exclude the Evidence -- Exclude the
9 Testimony of Charles M. Miller and related
10 Evidence and Plaintiff's Opposition to that
11 Motion.

12 All right. Mr. Shealy, you may be heard.

13 MR. SHEALY: Your Honor, I think we can, on
14 the same basis, withdraw that motion as well.

15 THE COURT: And, therefore, the plaintiff's
16 opposition does not need to be heard. Then we
17 have Penn National's Motion in Limine to exclude
18 testimony of Sharla Frost and related evidence.

19 Mr. Shealy.

20 MR. SHEALY: We will withdraw that as well,
21 Your Honor.

22 THE COURT: And, therefore, Plaintiff's
23 response withdrawn.

24 All right. Penn National's motion for
25 summary judgment.

1 MR. BROWN: May I approach, Your Honor?

2 THE COURT: You may.

3 MR. BROWN: Good morning, Your Honor. May
4 it please the Court, David Brown, for the
5 defendant. Goldberg Segalla. I appreciate the
6 court's inquiry about Mr. Yntema a little bit
7 earlier. He does need to receive treatment on
8 Mondays. He sometimes struggles the first part
9 of the week. He really wants to be down there.
10 Candidly, I told him not to come unless he's
11 feeling good. So knowing him, I guess he'll be
12 here as soon as he can but just wanted to give
13 you that update.

14 THE COURT: Thank you, sir.

15 MR. BROWN: Your Honor, Penn National filed
16 this motion for summary judgment in an attempt
17 the narrow the issues for trial. I think the
18 briefing has done that, and I say that for this
19 reason.

20 As Your Honor correctly pointed out, the
21 first issue to be addressed is the scope of
22 coverage under the two Penn National policies
23 that are at issue are what we referred to as the
24 '86, '87 policy, and the '87, '88 policy.

25 As I read through the briefing and looked

1 at these materials, I think a few things jumped
2 out at me and the main one being this. I don't
3 know that there's a huge disagreement about how
4 those two policies apply conceptually. I think
5 the issue becomes how do those policies apply in
6 the context of a given claim?

7 And one could come up with various
8 hypotheticals as to what might be a claim or
9 what the facts might be supported by giving
10 claims presentation for an asbestos claim. And,
11 of course, as you know from reading our brief,
12 the first argument we made is that the complaint
13 raises a nonjudicial issue because it really
14 asks for an advisory opinion.

15 Candidly, I don't know that I've ever seen
16 a declaratory judgment action that didn't
17 reference a specific claim. Usually they're
18 about is the John Doe claim covered or the ABC
19 Corporation claim covered, or even are these
20 thousand asbestos claims covered, and if so, how
21 do you trigger and allocate coverage and the
22 like? But this complaint doesn't refer to a
23 given claim.

24 The receiver, in his response brief, as I
25 read it at least is identified what it contends

1 is now the judicial nonadvisory issue and that
2 being whether or not 14 claims that were
3 referenced in a September 2022 letter from
4 Mr. Wright are subject to an aggregate limit
5 under the policy or not.

6 And maybe my colleagues here will correct
7 me when they get up, but at least my
8 understanding from both the proposed findings of
9 fact, the conclusions of law from Covil that
10 were a year ago, as well as the brief they filed
11 last week in connection with this motion,
12 identified that as kind of a singular coverage
13 issue. That is, do those 14 claims referenced
14 in the impairment letter, we refer to it as the
15 letter with Mr. Wright says, hey, just to let
16 you know, we paid \$600 some-odd thousand on this
17 claim to date.

18 Do they trigger operations coverage? Do
19 they trigger completed operations coverage? And
20 Covil acknowledges in its brief that the
21 completed operations coverage would indeed be
22 subject to an aggregate limit. But they contend
23 that the operations coverage would not be
24 subject to an aggregate limit.

25 So under which bucket do those 14 claims

1 fall? Operations or completed operations? And
2 hence, are they subject to an aggregate limit?

3 As least as I read it, that's the only
4 issue kind of in dispute, if you will, in terms
5 of coverage because those are the only claims
6 that are at issue. I think the record
7 establishes, and Your Honor is very familiar
8 with it, so thank you for being so familiar with
9 it, establishes that Penn National, since it
10 first received notice of any claims against
11 Covil, it has participated in the defense of
12 each claim tendered to it.

13 It has participated in indemnity payments
14 and settling claims. Penn National, the record
15 shows, has been very good about staying out of
16 Mr. Protopapas' way and Ellis & Winters' way.
17 The receiver retained the Ellis & Winters firm,
18 we actually didn't object to that, went along
19 with it, and has participated with other
20 carriers in paying for the defense. When it has
21 come time to settle claims has deferred to
22 Mr. Protopapas and the receiver to say here's
23 what we think the claim should be settled for,
24 or not, and then negotiated what an appropriate
25 payment for Penn National would be for that

1 payment.

2 And kind of conspicuously absent by -- in
3 this case is any contention by the receiver, I
4 think Mr. Protopapas' deposition testimony
5 confirmed this, any contention that Penn
6 National owes more money on a claim. So there's
7 not, for example, a contention here that, well,
8 on the John Doe claim, Penn National paid
9 \$50,000 and they should have paid 60,000. Or on
10 the James Smith claim, Penn National didn't pay,
11 they should have paid 20,000, whatever the
12 situation may be.

13 You know, frequently, and Your Honor has
14 dealt with a lot of declaratory judgment actions
15 in your career. Frequently, you know, that
16 comes up. Hey, I think your insurance carrier
17 didn't pay enough on this one or that one.
18 That's not before you. It's not any contention.
19 It's not any pleadings. It's not any motion.
20 It's not any proposed finding of fact or
21 conclusions of law here in this litigation.

22 So we kind of come back to kind of what is
23 the issue to be decided here. And I a hundred
24 percent appreciate that as claims go on -- Penn
25 National is presently participating in the

1 defense of some 30-odd claims again Covil. I
2 think the evidence shows and will show here from
3 the witness stand that Penn National is being
4 very respectful of the receiver, of Ellis &
5 Winters, as participating in the indemnity
6 appropriately.

7 And so, you know, I think might there be a
8 claim that comes up, I don't know, six months or
9 six years from now, what have you, where there's
10 a dispute about should Penn National have paid
11 more on this claim or less on that claim?
12 Maybe. But I think you would have to come back
13 to this court or some court and say, you know,
14 what are the facts of that claim? What are the
15 facts of the John Doe claim? And how does that
16 relate to Penn National's scope of coverage and
17 deal with it.

18 But what's before you now is I would
19 respectfully suggest nothing more than request
20 for advisory opinions on other than how to deal
21 with those 14 claims.

22 Now, there's a lot of information briefing
23 that frankly people like me litigate insurance
24 issues every day find really fascinating. Like
25 how do you trigger coverage? How do you

1 allocate coverage? What might be something that
2 is related to a products hazard exclusion or
3 what is the scope of ongoing operations. And
4 all that is fascinating, but it's really when
5 there's no claim that we're talking about in
6 terms of other than the 14. When there's no
7 claim that we're talking about as to how do
8 those facts -- how do those claims kind of
9 become implicated here? There's really, you
10 know -- there's not much to do.

11 So I guess when I say when we filed this
12 motion to try to narrow the issues for trial,
13 that's what I mean. I think we could be here
14 for weeks or months talking about hypotheticals,
15 but when we talk about concrete issues,
16 respectfully, I think it's those claims in that
17 letter and are they subject to a completed
18 operations analysis. Which even the receiver
19 acknowledges is subject to the Penn National
20 policy numbers or are they subject -- or are
21 they operations claim, which the receiver
22 contends is not subject to an aggregate limit.

23 So that's really kind of the specific
24 questions we want to point out on that. I think
25 I would just kind of say on that issue, which

1 you'll hear a lot about operations versus
2 completed operations during the course of trial.
3 And you read a lot about it.

4 I would like to say this: Most long-term
5 exposure claim, which an asbestos claim is,
6 someone is exposed and many years later they
7 have a manifestation of a disease. Most of
8 those claims are paid by insurance carriers
9 under a completed operations hazard coverage
10 precisely because that coverage is designed to
11 say if we insured Covil in 1980, and if someone,
12 you know, had exposure to a Covil product and
13 there's a disease progression, there's a trigger
14 period of coverage from the date of their
15 initial exposure or what the Supreme Court has
16 called the injury in fact here, opinions Your
17 Honor has written, up until the date of
18 diagnosis or date of manifestation of the
19 injury, all those policies are triggered.

20 And for the given policy, say the 1980
21 policy in my hypothetical, is triggered because
22 the operations of the insured, say Covil, were
23 over long before the diagnosis was made, long
24 before the injury is made, but yet that policy
25 is triggered.

1 And so the completed operations hazard is
2 where, at least in my experience, I think the
3 record will show most claims were paid because
4 that's kind of what that coverage is designed to
5 do. It's designed to say we don't -- your
6 coverage is not limited when the policy period
7 ends. You have completed operations coverage,
8 meaning operations were completed and the claim
9 comes along later, you have coverage.

10 The operations coverage, by contrast, is
11 meant to deal with claims that come up literally
12 during the policy period. So if somebody slips
13 and falls, for example, in the facility and
14 makes a third-party liability claim, that's a
15 claim that the injury clearly happened during
16 the policy period. The injury is clearly known
17 during the policy period. You're not waiting
18 20, 30, 40 years for a diagnosis. That's when
19 it happened.

20 The Penn National policies here from the
21 '86 to '88 only had operations coverage. I know
22 there's --

23 THE COURT: Well --

24 MR. BROWN: -- some dispute about that.

25 THE COURT: They were written to cover

1 occurrences.

2 MR. BROWN: True.

3 THE COURT: Per-occurrence policies. And,
4 of course, that was the landscape then, and I
5 remember those days well. I was a young defense
6 practitioner during that time. And when toxic
7 torts came along, that is when, at a much later
8 point in time, policies started to be made with
9 that policy period related to the claims made
10 during that period. The exposure is the
11 occurrence, but the manifestation may not take
12 place for 20 or 30 years.

13 MR. BROWN: Correct.

14 THE COURT: So I don't know what you're
15 talking about when you say the policy period,
16 but the policy period would affect a
17 per-occurrence policy, would be the period of
18 the exposure, would it not?

19 MR. BROWN: The occurrence.

20 THE COURT: The occurrence is the exposure.

21 MR. BROWN: Correct.

22 THE COURT: The inhalation of the lungs of
23 something that gets in the mesothelium and stays
24 there, it has all kind of things happen by way
25 of cell division and whatnot, and ultimately

1 manifests itself after a latency period of a
2 long time.

3 MR. BROWN: Correct.

4 THE COURT: But the occurrence for which
5 the coverage takes is in place for an operations
6 policy is the occurrence that took place during
7 the policy period, right?

8 MR. BROWN: The -- yes. I agree with you.
9 The policy defines occurrence as an accident,
10 including continuous or repeated exposure to the
11 same general --

12 THE COURT: Right.

13 MR. BROWN: That's the standard language
14 which we're all familiar. That's what this
15 policy --

16 THE COURT: And so the policy period, the
17 policy period now is when a claim is made. For
18 that period of time during which the claim is
19 made. That's how most of them are written now.
20 But if they're not written that way, there's
21 another very special subset of insurance that
22 has taken place now to deal with those type
23 cases.

24 But long-tail coverage, back in the old
25 per-occurrence days, means that these old

1 per-occurrence policies cover things that don't
2 manifest until years later. Isn't that right?

3 MR. BROWN: I agree with you that if the
4 facts are -- and some of the facts of those 14
5 cases are to this effect.

6 THE COURT: I'm familiar with every one of
7 those 14 cases, and the facts are the same in
8 all of them. The injury, some of them are lung
9 and most of them mesothelioma. But the
10 occurrences, the exposures, that is the time
11 these folks were working is the time when the
12 injury occurred, is it not?

13 MR. BROWN: I agree with that, and some of
14 those claims involve situations where there
15 were -- where a given plaintiff was working in
16 and around operations at Bowater plant or Duke
17 Energy plant or some sort of plant where Covil
18 was also working from '86 to '88.

19 THE COURT: Exactly.

20 MR. BROWN: Those claims would trigger the
21 policy, that would be occurrence, what would be
22 an operation loss, no dispute about that.
23 That's why we're defending and paying on those
24 claims.

25 THE COURT: Let me ask you out of

1 curiosity. Out of those 14 cases where Covil
2 has paid, were all those cases covered by the
3 two policies and the only two policies that have
4 ever been presented to the court?

5 MR. BROWN: The payments that were made
6 were made under those two policies, to answer
7 your question.

8 THE COURT: I'm not asking that question.

9 MR. BROWN: I'm sorry.

10 THE COURT: I'm asking a different
11 question. I'm asking whether the event of
12 exposure in each of those 14 cases in which the
13 occurrence in each of those 14 places was
14 covered by those two policies.

15 MR. BROWN: So there were other policies
16 that applied from other carriers as well as --

17 THE COURT: I'm not talking about any other
18 carrier but Penn National. And I'm still like a
19 dog with a bone.

20 MR. BROWN: Sure.

21 THE COURT: All this activity is taking
22 place with respect to finally doing something
23 with respect to the 14 that -- in which Penn
24 National has paid, and 30 more potentially, and
25 probably many others that are out there, and all

1 of those are not in the universe of these two
2 policies, are they?

3 MR. BROWN: I believe that many of those,
4 including some of the 14 and some of the others,
5 involve situations where there was no exposure
6 to a Covil operation from '86 to '88.

7 THE COURT: And yet Covil has participated
8 in the settlement of 14 of them, right?

9 MR. BROWN: They did settle and the
10 rationale for that, of course, as Your Honor is
11 well aware, the duty to defend is broader than
12 the duty to indemnify. All of those complaints
13 were fairly vague in terms of the allegation.
14 Penn National agreed to defend them all.

15 THE COURT: And they were all tendered to?

16 MR. BROWN: They were tendered. Penn
17 National agreed to participate in the defense
18 and has done so. And at some point in each of
19 those cases, a situation arose where there was a
20 recommendation from the defense counsel, here's
21 what we think this case -- you know, how we
22 analyze it. There was a recommendation or
23 activity on the part of the receiver to say
24 here's what we think is a reasonable resolution
25 to this case. And Penn National went along with

1 it and said we'll put in money.

2 THE COURT: The luckiest day you ever had
3 was when someone like Peter Protopapas got
4 involved for your insured. Because there's a
5 guy who's not trying to gauge you all. He's
6 trying to talk fairly as a defendant and as a
7 receiver for a defendant about what makes sense
8 and whether claims have validity and so forth
9 and so on. Would you agree with that?

10 MR. BROWN: I agree with you. The record
11 is Mr. Protopapas has done an outstanding job in
12 retaining counsel and defending the claims and
13 resolving claims. There's no dispute about
14 that.

15 On that score, I think it's worth noting
16 we're not here saying we're going get that money
17 back, right? And they're not here saying you
18 should have paid more. I think the only issue
19 is --

20 THE COURT: The only issue is whether it's
21 completed operations or operations coverage. If
22 it's completed operations, there's a limit. If
23 it's an operations coverage, there's not.
24 Right?

25 MR. BROWN: I agree with you. If there's

1 completed operations, there's a limit. If it's
2 ongoing operations, I agree that there's a
3 question about whether the aggregate limit
4 applies.

5 With regard to that point, just to finish
6 my thought, if I may.

7 THE COURT: Yes, sir.

8 MR. BROWN: Some of those claims involve
9 situations where there was no exposure from '86
10 to '88. You may say, well, gosh, why did Penn
11 National pay on it? Isn't the payment some
12 tacit acknowledgment that there was exposure
13 from '86 to '88 as opposed to in the '70s -- or
14 some of them were why did you pay?

15 I think the answer to that is insurance
16 companies pay on claims every day where, A, they
17 have a duty to defend. So they're paying money.
18 They're in it.

19 How many times have you been to a mediation
20 and a mediator says, well, what's it going to
21 cost? Even if you're right, what's it going to
22 cost you to defend this case and get to the end
23 of it? You put some money in.

24 Also, I think Penn National greatly
25 respected what Mr. Protopapas was doing, trying

1 to resolve the claims. Greatly respected Ellis
2 & Winters and what they were recommending. And
3 there's a question about we go along and put
4 this money in, and they did it. And I think
5 that was --

6 THE COURT: Well, I think some of it must
7 have to do this contention by Penn National that
8 it cannot access anything about its own records
9 except a policy number. We're going to get into
10 this before this matter is all over. But that
11 continues to be a source of immense frustration
12 to me.

13 I don't think -- I don't have any concept
14 that this business, that the only way to access
15 those things is through a number. If that were
16 the case, they never would have been able to
17 access the two that they say they got except for
18 one little thing.

19 The way they accessed that was not a number
20 that Reifsynder or Wright found. In fact, when
21 they are asked about that, if you only had the
22 name and not the number, how did you find it?
23 Oh, well, that's a good question. I think one
24 or the other of them said that. They got --
25 because Gallivan and White had some Covil

1 numbers. That's how they got it. And if
2 Gallivan and White had some Covil numbers, well,
3 one of my questions is, there has got to be some
4 information somewhere that relates these policy
5 numbers to the insureds.

6 MR. BROWN: On that point, as Your Honor I
7 think knows from the record, that this -- the
8 first claim that -- the first time Covil or any
9 claims came to Penn National's attention was
10 after the Finch verdict in North Carolina.

11 THE COURT: Yes, sir. Actually, you were
12 on notice before the Finch verdict in
13 North Carolina.

14 MR. BROWN: They requested information. We
15 didn't have any information. And then defense
16 counsel in that case said here are two policy
17 numbers. And then we said we're going to
18 search. Yes, we have them. Here they are. And
19 we've been paying under those policies ever
20 since.

21 What Gallivan White had or didn't have or
22 whether they had more in their files or not more
23 in their files, there's been a lot of exhaustive
24 work done by all the parties in this case. The
25 Court is well aware, I believe we plowed the

1 entire field of what's available from everyone
2 out there. And what you have available to you
3 is what you have in these boxes in these
4 filings. Which shows, we would respectfully
5 submit, even at the end of all the microfiche
6 efforts, all the digitization efforts, et
7 cetera, nothing more than the two GO policies
8 that we respond to these kind of asbestos injury
9 claims.

10 THE COURT: I certainly -- if there's been
11 some end to the microfiche effort, it's
12 certainly not come to my attention.

13 MR. BROWN: Yeah. I'm not sure it ever
14 ends, candidly, but I would say that as of
15 today, those two GO policies are the only ones
16 that anyone has been able to identify. There
17 were other kinds of policies found, as you see,
18 the workers' comp policies, commercial auto
19 policy, but in terms of general liability
20 policies that would be responsive to these sort
21 of long-tail exposure, asbestos claims, it's
22 just the two that we have that we've been paying
23 on.

24 And so, you know, I guess I will -- on
25 the -- you know, on the claims made at issue, I

1 want to be clear on this. These are
2 occurrence-based policy. Right? Claims-based,
3 like a professional liability policy where the
4 claim has to be made during the policy period,
5 we're not saying that these are claims-made
6 policies and because you didn't report it to us
7 between '86 to '88 we're not going to pay.
8 Right? That's not what we're saying.

9 Sometimes, as the Court well knows, that
10 comes up and directors and officers policies,
11 professional liability policies, medical
12 malpractice policy --

13 THE COURT: I see CGF policies now that I
14 have these claims that provisions in them --

15 MR. BROWN: Some of them do. There are
16 reasons for that in the marketplace that
17 thankfully we don't have to solve in this trial.
18 You may have to solve in other context before
19 Your Honor, I understand that.

20 But in terms of this trial, we acknowledge
21 these were not claims-made policies. We're not
22 saying we don't owe anything because the claim
23 didn't come forward from '86 to '88.

24 There were occurrence policies. The
25 occurrence definition is as we discussed and

1 Your Honor is correct about that. I think the
2 issue is we would contend that for all the
3 reasons we have articulated in our filings and
4 under the policy language that there has to
5 be -- because these policies only insure ongoing
6 operations, there has to be an exposure to a
7 Covil asbestos-containing product or operation
8 from '86 to '88.

9 Some of those clearly have, and we've paid
10 on them. Others, we suggest do not. Did we pay
11 on some of those? Yeah, we did. We did. And
12 we did it because I think we were making a
13 prudent business decision, and we were being, we
14 thought, deferential to Ellis & Winters and
15 Mr. Protopapas in going forward.

16 So in terms of what's to be decided in this
17 case, in this trial, on the coverage issues, as
18 we referred to them, and, again, counsel will
19 correct me, the Court will correct me if you
20 think there's more to be decided. But I could
21 talk all day about trigger and allocation and
22 Hegler and Crossmann and everything else, Boston
23 Gas, but I think the issue from the filings and
24 from the receiver's own filings is those 14
25 claims.

1 In that regard, we would ask that summary
2 judgment be granted on all the others. And
3 without prejudice, if the Court is inclined to
4 do that. Say, hey, if there's another John Doe
5 claim on another day, it comes back and raises
6 issues, yes, you ask to come back in front of me
7 and sort it out. But right now what I'm sorting
8 out is whether these 14 claims are operations
9 claims or completed operations claims.

10 THE COURT: All right, sir.

11 MR. BROWN: Thank you, Your Honor.

12 THE COURT: Mr. Nes.

13 MR. NES: Thank you, Your Honor. I'll try
14 to be brief.

15 Procedurally it's frustrating to see Penn
16 National file a motion for summary judgment ten
17 days before trial in what they say is an attempt
18 to narrow the dispute. But for reasons which
19 I'll explain in a minute, this is not narrowing
20 the dispute in any way. And I have an opening
21 statement which will walk through each of those
22 points.

23 But first, just very briefly, a summary
24 judgment motion has to exclude a claim. That's
25 what Rule 56 says. When Mr. Brown got up, what

1 he should have said is we're withdrawing our
2 motion because at the very beginning he said,
3 after reading our brief, he acknowledges that we
4 are seeking declarations with respect to 14
5 individual asbestos claims.

6 He also mentioned that, you know, in his
7 practice he --

8 THE COURT: So that right now ends it,
9 right?

10 MR. NES: That ends it. The summary
11 judgment has to be denied.

12 THE COURT: You are seeking declarations
13 that would have effect on more than just the 14
14 claims, would you concede that?

15 MR. NES: No, Your Honor. With respect to
16 the rulings that we're seeking, we would only
17 seek rulings using those 14 asbestos claims. So
18 the Court would say, I declare that trigger
19 coverage is continuous trigger of coverage,
20 apply that to these specific claims. And then
21 the parties can go out and use those
22 declarations in other claims.

23 THE COURT: Certainly as president or
24 person of authority of things of that nature.

25 MR. NES: And that is generally the way I

1 have seen it after declaratory judgment in
2 trials. Which is the complaints in asbestos
3 litigation and insurance are pled wrongly.
4 You've seen your fair share of asbestos
5 insurance complaints, but because the claims are
6 filed so fast, nobody in the coverage world,
7 when we're litigating asbestos claims,
8 identifies all the claims in the complaint.
9 Because the second you do it, two weeks later
10 there's two more, there's two more, there's two
11 more.

12 THE COURT: Let me ask you this: It is
13 acknowledged by the defendant that in the 14
14 claims that you asked declarations be made, that
15 it's not certain that the two policies that have
16 been discovered cover all those claims.

17 MR. NES: So there are a couple of problems
18 with that. First, when they were settling the
19 claims a year ago, they thought, I think, they
20 have a good argument on operations versus
21 completed operations. So they were adding all
22 these claims up thinking I'm going to hit my
23 million dollars and the receiver is out of luck.

24 But then we pointed out no one in the
25 insurance industry has ever taken that position

1 because it's just flat wrong based on the terms
2 of policy.

3 So realizing they've been settling these
4 claims, they had to come up with another reason
5 to get out of this. So their other reason was
6 let's shift from a continuous trigger to an
7 exposure trigger. When did they raise this
8 issue for the first time? Ten days ago in their
9 Motion for Summary Judgment for the first time
10 in all of these years of litigation. They've
11 now said all of a sudden an exposure trigger
12 applies.

13 The exposure trigger, as you will see in my
14 opening statement, will just cut all of the
15 occurrence-based liability policies in --
16 against the plain language of the policy.

17 Again, they're the ones who raise the issue
18 showing that we have a dispute. And those 14
19 asbestos claims that they settled, Mr. Brown
20 said something which I thought was fascinating.
21 He said they made prudent business decisions
22 because of the duty to defend. That's the first
23 time I have ever heard in my career someone
24 complaining on the insurance side. The duty to
25 defend with the duty to indemnify.

1 Just to be clear, the duty to defend starts
2 with the four corners of the complaint. That's
3 it. Four corners of the complaint, four corners
4 of the policy. But when you get to the duty to
5 indemnify, it's a huge hurdle. We have to show
6 as a policyholder that the claim should be
7 settled or a judgment is entered. So insurance
8 companies don't just come along and say, well,
9 that looks like a pretty good claim. We have a
10 duty to defend so let's settle. That's
11 preposterous.

12 But even if that was the case that they
13 want to take and maybe -- in fairness maybe
14 that's the way Penn National operates their
15 business. I don't know. But the point is not
16 why they settle. The point that we are going to
17 prove in this trial is that when they settle
18 those cases, using a continuous trigger, that
19 was the right way to go.

20 What they raised ten days ago on the
21 exposure trigger, that's wrong. And the reason
22 that the continuous trigger is important is
23 because there is no limit to the operations
24 coverage. That's the way the policy was
25 written. So when we got that letter that said

1 here are your 14 claims, we've settled them, but
2 you're running out of your aggregate limit, that
3 simply wasn't true.

4 So for those reasons alone, the Motion for
5 Summary Judgment needs to be denied.

6 Also, to be clear, we have five
7 declarations that we're seeking. We submitted a
8 60-page findings of fact, conclusions of law.
9 We then, a day after they submitted their
10 Summary Judgment Motion, submitted a 40-page
11 opposition.

12 In both of those, we raised five issues.
13 The first is there is no aggregate limit.
14 Second, the difference between an operation and
15 a completed operation. Third, is burden of
16 proof. Fourth, continuous trigger. And
17 finally, all sums allocation.

18 And as you will see, when we walk through
19 my opening, we are trying to apply those to the
20 14 asbestos claims at issue for guidance going
21 forward.

22 Thank you, Your Honor.

23 THE COURT: Very good. In reply.

24 MR. BROWN: Thank you, Your Honor.

25 Just simply on this point. The exposure

1 trigger that has been alluded to, that was in
2 our proposed findings of fact a year ago.
3 That's nothing new. The point is simply
4 triggered and allocation are two different
5 things.

6 The first question of trigger is how is a
7 policy triggered? And our contention is that
8 the Penn National policy is triggered by the
9 plaintiff's exposure to a Covil ongoing
10 operation during the policy period. Nothing
11 less and nothing more.

12 The second question is once there are
13 multiple policies triggered, how does a Court --
14 how does one then divide up the pie, if you
15 will, across all trigger policies? That is an
16 allocation question. We've always agreed the
17 law in South Carolina is a continuous injury
18 trigger for the policies that are triggered that
19 we paid on that basis and with the understanding
20 we've never disavowed that. I just wanted to
21 clarify that point before we go further into the
22 evidence.

23 THE COURT: All right, sir.

24 MR. BROWN: Thank you.

25 THE COURT: All right. The Penn National's

1 Motion for Summary Judgment is denied. It seems
2 clear to me that the 14 claims upon which issues
3 have been raised as outlined by plaintiff are
4 viable issues that involve declaration with
5 respect to two specific policies and on that
6 basis alone, summary judgment should be denied.

7 I don't think it's necessary for you to go
8 into all the other things that are raised with
9 respect to the complaint against Penn National
10 and the proposed findings that each side has
11 submitted, but on the basis simply of the 14
12 matters upon which settlement has been raised
13 and the letter from Penn National claims
14 department contending that coverage is being
15 exhausted by the payment of those matters, that
16 alone is enough to support the complaint that
17 has been lodged by Covil with respect to a
18 construction of this policy.

19 It may very well be before this matter is
20 concluded, there will be many other things that
21 have to be decided in connection with this
22 declaratory judgment. But at the minimum, the
23 core of it revolves around the 14 claims that
24 have been paid and what impact the payment of
25 those claims has on coverage under the policies,

1 the two policies that have been discussed this
2 morning. So the motion is denied.

3 All right. And now we've got Receiver's
4 Motion to Seal the Deposition transcripts of
5 Reifsnyder, Maier, Wright, Robertson, and
6 Heinze.

7 Mr. --

8 MR. SHEALY: Your Honor, I don't think
9 either side has any objection to either parties'
10 motion to seal.

11 THE COURT: So the same stipulation that
12 was made previously pertains here. We're in a
13 nonjury trial. There's no need to seal.
14 Protection will be given where it needs to be
15 given during the course of this trial to any
16 publication of things that need to be sealed.
17 Correct?

18 MR. NES: Correct, Your Honor.

19 THE COURT: Both sides are in agreement
20 with that?

21 MR. SHEALY: Yes.

22 THE COURT: And I certainly am as the
23 presiding judge.

24 All right. The motions have been -- all
25 right. And then Penn National's Motion to Seal

1 the Deposition Transcripts of Frost and
2 Protopapas, that, again, is nugatory given the
3 stipulations and rulings that have already been
4 made.

5 MR. NES: Correct, Your Honor.

6 THE COURT: Very good. The motions are
7 disposed.

8 Mr. Nes, do you need a moment, or are you
9 prepared to go forward?

10 MR. NES: I think I'm prepared to go
11 forward, Your Honor. I just want to make sure
12 this technology is.

13 THE COURT: All right. Opening statements
14 on behalf of the plaintiff.

15 Now, let me ask you this question.

16 MR. NES: Yes, Your Honor.

17 THE COURT: I was going to see if you had a
18 slide deck for me, which you do. Thank you so
19 much.

20 Give me one minute to get set up here
21 myself. All right.

22 Mr. Nes, you may proceed.

23 MR. NES: May it please the Court?

24 THE COURT: Yes, sir.

25 MR. NES: Your Honor, this is a simple case

1 at its core. Penn National simply refuses to
2 honor its contractual obligations with the
3 positions it's taken both with respect to
4 defense and indemnification.

5 Instead, they've tried to narrow the
6 receiver's access to Covil's available insurance
7 rights. Taken positions that are contrary to
8 the case law, contrary to the plain terms of the
9 policy, and quite frankly positions in some
10 cases that no insurance company has taken.

11 In some instances, Penn National has even
12 violated their own internal policies and
13 procedures and their course of conduct in this
14 litigation.

15 But to make matters worse, Penn National
16 has repeatedly violated its discovery
17 obligations in this case. The Court earlier has
18 ruled that this was a foot-dragging operation.
19 As the evidence will show, though, it's
20 unfortunately far worse than that.

21 Starting in 2018, Penn National
22 deliberately or recklessly destroyed historic
23 general liability insurance policies. It did so
24 on an annual basis in 2018, in 2019, in 2020,
25 and possibly 2021.

1 It wasn't until the receiver discovered
2 this annual purge during the Ellis & Winters
3 investigation that the conduct came to an end.

4 Penn National destroyed those documents
5 without issuing a litigation hold. They did so
6 without even searching their historic general
7 liability policies on microfiche that were being
8 destroyed for any mention of Covil and without
9 keeping any records of what they were
10 destroying. They also did all of this
11 microfiche destroying without a QC process in
12 place.

13 As the evidence will show, this
14 deconstruction caused direct harm to the
15 receiver's ability to marshal the insurance
16 assets for Covil. And that leads us to today.
17 A day that Penn National has tried to avoid,
18 including filing its latest summary judgment
19 motion, but today is the day we are going to
20 address the following issues.

21 First, this is a declaratory judgment
22 trial. We are seeking five declarations that
23 interpret two Penn National policies. The 1986,
24 1987 policy and the 1987, 1988 policy. We have
25 14 asbestos claims that we are specifically

1 seeking declaratory relief regarding. But we
2 will be asking for spoliation. We will be
3 present evidence that meets the elements of
4 spoliation in this state, and we will ask for an
5 order and relief related to that.

6 And then finally Penn National's Motion for
7 Summary Judgment, which this court has already
8 denied.

9 So starting with the declarations. First,
10 we want a declaration that there is no aggregate
11 limit in either the '86 or '87 policies. There
12 is no aggregate limit for operations coverage
13 because of the plain terms of the policy.

14 Second, we are looking for a clarification
15 about the distinction between an operations
16 claim and a completed operations claim. Our
17 position is that the exposure determines whether
18 it's operations or completed operations.

19 Third, a ruling that Penn National has the
20 burden when it wants to apply a claim to the
21 aggregate limit, which has to be a completed
22 operations claim, Penn National has the burden
23 to demonstrate that that is, in fact, a
24 completed operations claim.

25 Fourth, we ask this Court to issue a

1 declaration that a continuous trigger of
2 coverage applies to asbestos claims in the Penn
3 National policies. This Court has already ruled
4 in other receivership litigation for a
5 continuous trigger, and I believe that, if I
6 heard correctly, Mr. Brown said, during the
7 hearing, that that was consistent with
8 South Carolina law, continuous trigger. We
9 certainly agree.

10 And finally, an all-sums allocation.
11 Meaning that it is the policyholder, Covil, or
12 the receiver, that gets to decide which policies
13 apply and ask that carrier to provide all of
14 their limits or all sums. And then if that
15 carrier wants to go and seek compensation from
16 other carriers, then they can do that. That's
17 all-sums allocation.

18 There are a couple of rules to the road in
19 South Carolina, and South Carolina law applies,
20 both parties agree, to interpreting this
21 insurance policy. The interpretation
22 principles, which we'll walk through in a
23 minute, are well established. And most
24 importantly, if the policy is clear and
25 unambiguous, the Court has the right and the

1 obligation to interpret those policies for the
2 parties.

3 So, first, one important principle of
4 insurance interpretation, contract
5 interpretation, is that where the contract's
6 language is clear and unambiguous, the language
7 alone determine the contract's force and effect.

8 So we're going to be spending a lot of time
9 in this trial looking at the precise language of
10 the insurance policies.

11 Second, an interpretation that gives
12 meaning to all parts of the contract is
13 preferable to one which renders the provision in
14 a contract meaningless or superfluous.

15 That's going to be important, Your Honor,
16 because oftentimes in the insurance policy you
17 have to put certain parts together. You have to
18 put the definition with the insuring agreement,
19 and if you don't do that, you can run afoul of
20 what the policy truly means.

21 Third, an interpretation of unambiguous
22 insurance policy or a policy with a patent
23 ambiguity is for the Court. And we've had this
24 issue go all the way to the Supreme Court in
25 this case and back, and these are proper issues

1 in front of this Court.

2 And finally, courts must enforce, not
3 write, contracts of insurance, and their
4 language must given its plain, ordinary, and
5 popular meaning.

6 So turning to the first declaration we see
7 regarding the aggregate limit. In September of
8 '22, Mr. Wright, the claims handler for Penn
9 National, sent a letter to the receiver. This
10 is Exhibit 14. In that letter, Mr. Wright
11 identified 14 specific asbestos claims. He
12 identified two Penn National policies, and he
13 identified how much Penn National had
14 contributed to each of these settlements.

15 THE COURT: I'm going to say, Mr. Nes, that
16 I am familiar with this exhibit and have seen it
17 in its unredacted form so that I am familiar
18 with the numbers. I think it's appropriate for
19 this regard to have the matter redacted from
20 public view, but I have seen it.

21 MR. NES: Thank you, Your Honor. And that
22 actually does help.

23 So, again, the number that is the total
24 number that was marked out here as confidential,
25 Mr. Wright is letting the receiver know these

1 are all covered under the policy, we've paid it,
2 and now your aggregate limit is running out.

3 The problem with that is that the plain
4 language of the policy on page -- I believe it's
5 2 of the policy -- or sorry, page 1 of Exhibit 1
6 is the declarations page of the first Penn
7 National policy. And the declarations page
8 identifies specifically that there is a
9 \$1 million aggregate.

10 So the question is, what does that mean?
11 What applies to the aggregate limit? You can't,
12 as we said a minute ago, just look at the word
13 and make an interpretation. You have to look at
14 all of the terms of the policy.

15 So we first turn to insuring agreement.
16 After the declarations page, you have the
17 insuring agreement, also known as the coverage
18 agreement. It tells the parties what is
19 actually being provided.

20 Then there's a section, Section 3 called
21 Limits of Liability. It spells out exactly what
22 the limit of liability is for the policy. And
23 in this limit of liability, it clearly
24 identifies the defying terms of completed
25 operations hazard and products hazard. There is

1 no application in the limits of liability for an
2 operations hazard.

3 So based on plain terms of the policy, the
4 only two hazards that have a limit for the
5 aggregate are a completed operations hazard and
6 a products hazard. That's the plain language.

7 You will hear testimony today as background
8 regarding the history of that form. That form
9 is not a Penn National only form. That form was
10 created by an organization called The Insurance
11 Services Office.

12 THE COURT: That's the ISO form.

13 MR. NES: Correct. The ISO form was
14 created in 1973. That version. And in 1973, it
15 only had an aggregate for completed operations
16 and products. But they realized that was the
17 problem, the insurance industry. So in 1986,
18 they got together and they issued a new form.
19 The new form separated out a general aggregate
20 limit from the aggregate limit for completed
21 operations and products.

22 And Exhibit 104 is an example of where Penn
23 National itself in 1991 adopted that form. And
24 you can see on the highlighted version right
25 here, you see the word general aggregate other

1 than products and completed operations.

2 So not only is the plain language of the
3 '86, '87 policies clear, but when you look at
4 the history of the form and how it changes, it's
5 also clear. And here's a comparison between the
6 '86, '87 policy and the subsequent ISO change
7 that Penn National adopted. There's a general
8 -- there's an aggregate and then it changes to
9 general aggregate.

10 So going back to the letter, in this letter
11 Mr. Wright said he makes no distinction between
12 the '86, '87 aggregate limit issues and the
13 change to a general aggregate.

14 The second issue, though, that we have to
15 decide is operations versus completed
16 operations. Knowing that only completed
17 operations claims will apply to the aggregate
18 limits or product hazard, what is the difference
19 between an operation and a completed operation?

20 Here is a very simple picture that really
21 hits to the definition in the policy. If it's
22 ongoing work, that's an operation. The issue is
23 what was happening at the exposure? That's the
24 hazard. In those depictions, these are an
25 installation of an asbestos-containing product

1 or a removal of an asbestos-containing product.
2 That is the definition of an operation. Someone
3 is operating and during the course of their
4 ongoing operation someone gets exposed to
5 asbestos dust.

6 The difference, though, is a completed
7 operation. In a completed operation, the
8 gentlemen you see in this picture would have
9 completed their work. They would have left the
10 site. Whatever work their company was doing on
11 the site would have also finished the project
12 and left completely.

13 Then someone else comes in and is exposed
14 to their completed work. And it could be that
15 they've installed the asbestos-containing
16 product, someone else comes in and is chipping
17 away at it, both the person chipping away at it,
18 but also the party that left are both
19 responsible. But the party that left, that's a
20 completed operation. It's a completely
21 different hazard.

22 So where do we find this language in the
23 policy? Again, we look to the definitions. And
24 the definition of a completed operation hazard
25 says that it's only if the bodily injury occurs

1 after such operations have been completed. The
2 bodily injury occurred after such operations
3 have been completed.

4 Now, they may take the position that the
5 bodily injury is continuing and therefore the
6 bodily injury is happening during a later policy
7 period, but as we explained in great detail in
8 our brief, it refers to a single bodily injury.
9 The bodily injury. So unless the entire bodily
10 injury occurs after they have left the site,
11 it's an operation claim.

12 So here is a demonstrative of how this
13 works in practice. Let's assume someone was
14 exposed to asbestos in 1970. And they were
15 exposed to asbestos because of an ongoing work.

16 THE COURT: Let me stop you there. That
17 means that in this particular case Covil is on
18 the scene at a plant where D'Amico is working,
19 and it is either installing or removing
20 asbestos. And we know that Covil did both of
21 those kinds of operations. That would be
22 operations coverage, right?

23 MR. NES: That's correct. And we would
24 say --

25 THE COURT: Now, it is also quite common in

1 work-around plants that are covered with miles
2 and miles and miles of thermally insulated
3 piping, which is -- and valves and so forth,
4 that repairs have to be made to the pipe itself.
5 It's leaking or some other problem that's not
6 indigenous to the asbestos but is a product of
7 the flanges or the pipes themselves.

8 So a repair crew will come in there, crack
9 open the asbestos or, you know, repair a section
10 of line and shave off the -- what's on the
11 flange, and that asbestos might be asbestos
12 Covil initially installed there. So that would
13 be covered by both the manufacturer of the
14 insulation as well as those who put it in the
15 stream of commerce, like Covil. And that would
16 be a completed operations coverage, right?

17 MR. NES: That's a perfect example. That's
18 correct.

19 THE COURT: Okay.

20 MR. NES: So if we use that as our basis
21 that we look at exposure, when someone exposed
22 to either ongoing work or completed work, we
23 take that example, the only exposure was 1970.
24 Under our definition in the policy, every single
25 policy issued after that, it would remain an

1 operation claim. Why is that? When you get all
2 the way down to these Penn National policies,
3 way down here, why is it that it would still be
4 an operation claim? Because the issue is not
5 what was the policy period, the issue was the
6 injury had to occur after they left.

7 And as this Court is well aware, this is
8 one progressive injury. It's not just happened
9 to be different injuries every year. It's one
10 injury that gets worse and worse. So in this
11 context, the injury didn't start in 1970 as an
12 operation, stop, start again as a completed
13 operation. It was just one injury as an
14 operation.

15 The position that we anticipate that Penn
16 National will take -- and I say anticipate
17 because in fairness, Your Honor, we filed an
18 enormous brief a year ago, and in their findings
19 of fact, conclusions of law, they don't address
20 any of this. Then they file a summary judgment
21 motion on the argument that they were narrowing
22 the issues, and they don't address any of this.
23 So I'm just assuming this is the position
24 they're going to take.

25 What I assume the position they're taking

1 is that if an exposure happens in 1970, that's
2 an operation claim. But for every other policy
3 after 1970, it somehow converts into a completed
4 operation. But there's no policy language in
5 the policy itself that supports that. And they
6 certainly haven't pointed to anything.

7 So, therefore, when we apply this to the
8 principles that Mr. Wright applied in his
9 letter, each one of these asbestos claims that
10 are identified are operations claims. We know
11 that because, as they've said time and time
12 again in their brief, there was an exclusion in
13 these policies for completed operations. So the
14 only reason you're going to put an asbestos
15 claim on this letter and you're going to settle
16 it is if you have a good faith belief it's an
17 operations claim.

18 So now we look at declaration number 3,
19 which is that Penn National has the burden of
20 proof to categorize these claims.

21 What we will do in this trial, Your Honor,
22 is we will walk through some samples of the
23 asbestos claims that Penn National settled that
24 were identified on that letter. And we will
25 show a number of things. We will show that

1 it's -- the aggregate limits does not apply and
2 that these were operations claims.

3 We do not have that burden, but it is so
4 clear from the record that they serve as good
5 examples for moving forward. But to be clear,
6 if Penn National wants to apply any claim to the
7 aggregate limit, they have to prove that it
8 applies. And the reason for that is because it
9 is a limit of liability. And they have the
10 burden to prove the limit of liability.

11 The fourth declaration we're seeking is
12 related to a continuous trigger. We spoke about
13 this during the motion for summary judgment
14 hearing. Excuse me. But the issue here is, as
15 Mr. Brown said during the last argument, what
16 triggers the policy? How do we start knowing
17 that a policy is responsive?

18 Our argument is that each Covil asbestos
19 suit triggers the Penn National policies as long
20 as Penn National issued the policies from the
21 time the asbestos plaintiffs first were exposed
22 to asbestos at the time that asbestos-related
23 disease is clinically diagnoseable.

24 This is consistent with South Carolina law,
25 and it's consistent with this Court's prior

1 rulings, and most importantly it's consistent
2 with the plain terms of the policies.

3 Here's a graphic again that shows how the
4 continuous operations -- excuse me -- continuous
5 trigger would work. Again, let's take somebody
6 who is only exposed to asbestos in 1970. That
7 exposure will create a disease process that
8 ultimately manifests into asbestosis,
9 mesothelioma, or other disease.

10 But during that one disease process, they
11 are continuously injured. So each policy that's
12 issued on an occurrence basis, which covers
13 injury during a policy period, is triggered.

14 For the first -- I won't say the first time
15 because Mr. Brown says they raised it earlier.
16 But in their last filing, ten days ago, Penn
17 National takes the position that an exposure
18 trigger should apply.

19 In an exposure trigger, if someone is
20 exposed only in 1970, the only policy that's
21 responsive is the 1970 policy. Again, Mr. Brown
22 didn't point to the language of the policy to
23 support that, and it's not supported.

24 Moreover, Penn National itself didn't
25 operate that way. Penn National settled claims

1 and presumably they settled them in good faith
2 thinking they were covered. But you will see --
3 you asked the question during the Motion for
4 Summary Judgment hearing to Mr. Brown, you said,
5 "Were there any claims where the only exposure
6 was prior to Penn National policy periods?"

7 Almost all of them were. And we will walk
8 through five perfect examples. And it also
9 shows exactly why using these asbestos claims
10 are so important to provide guidance for the
11 parties going forward.

12 So the language of the continuous trigger,
13 again, is in the insuring agreement and
14 definitions of the policy. In the insuring
15 agreement, it says that it covers bodily injury,
16 and what is bodily injury? Bodily injury is
17 defined as covering death at any time. At any
18 time. It is not just covering damage during the
19 policy periods, but it's including death at any
20 time.

21 That's the language that other courts have
22 relied upon to say that the plain terms of the
23 policies clearly show a continuous trigger.

24 In our briefing both at the findings of
25 fact and conclusions of law as well as our

1 opposition to summary judgment, we have included
2 a significant amount of case law in these
3 issues. I will again just refer to the case law
4 that we did on continuous trigger in our
5 operation brief.

6 Finally, on the declarations --

7 THE COURT: Hang on for a minute.

8 MR. NES: Sure.

9 THE COURT: Go back to your insuring
10 agreement, continuous trigger.

11 MR. NES: Yes.

12 THE COURT: Okay. Your bodily injury
13 liability, that's what we're talking about here.

14 MR. NES: That's correct, Your Honor. In
15 the insuring agreement, it says, "The company
16 will pay on behalf of the insured all sums which
17 the insured shall become legally obligated to
18 pay as damages because of bodily injury."

19 So it's all damages because of bodily
20 injury.

21 THE COURT: "Or property damage to which
22 this insurance applies caused by an occurrence,"
23 right.

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

25 THE COURT: So occurrence is the operated

1 language for coverage for bodily injury, right?

2 MR. NES: That is correct.

3 THE COURT: And their argument is that the
4 occurrence is the first exposure, and that's it.

5 MR. NES: Correct.

6 THE COURT: And your argument is that the
7 exposure triggers -- is a continuous trigger
8 because the material is in the lungs and
9 continues to cause bodily injury?

10 MR. NES: That's right. That's correct,
11 Your Honor. So when you're exposed to asbestos,
12 then the injury begins. The bodily injury
13 begins. And that bodily injury continues
14 through multiple policy periods, including
15 through death at any time. And that's the
16 language of the definition. So when you put
17 them together --

18 THE COURT: All right. Let's get down to
19 that language.

20 MR. NES: That's a slide.

21 THE COURT: Mine is kind of blank here.

22 MR. NES: Sorry. Slide 35.

23 THE COURT: Hang on. All right.

24 MR. NES: The top right-hand corner.

25 THE COURT: "Bodily injury, meaning bodily

1 injury, sickness, or disease sustained by any
2 person which occurs during the policy period,
3 including death at any time resulting therefrom.

4 "An occurrence means an accident including
5 continuous or repeated exposure to conditions
6 which results in bodily injury, neither expected
7 nor intended from the standpoint of the
8 insured."

9 It's those pieces of language that you say
10 constitutes the foundation of continuous trigger
11 coverage.

12 MR. NES: That is correct.

13 THE COURT: Go ahead.

14 MR. NES: I'm sorry.

15 THE COURT: Go ahead. I just wanted to be
16 sure I was still tracking with what your
17 argument is.

18 MR. NES: Understood.

19 THE COURT: I'm not indicating agree or
20 disagree, I'm trying to follow the argument.

21 MR. NES: So our last declaration,
22 Declaration 5, has to do with all sums
23 allocation. And this primarily has to do with
24 once the settlement or judgment is rendered, how
25 are we allocating those dollars? Who has the

1 obligation to pay and when?

2 We take the position that the policy
3 language is clear that an all sums allocation
4 needs to apply. Penn National has taken a pro
5 rata allocation approach. In an pro rata
6 allocation there is a settlement, but they would
7 only be responsible for a share of that
8 settlement or judgment based on their -- what's
9 called time on the risk, the years that they
10 insured.

11 So if you take a chart like this, let's
12 assume the blue is all the settlement, they only
13 have to pay their portion equal to their
14 pro rata allocation. But it's an all sums
15 approach that is consistent with the policy
16 language. And in an all sums approach, it is
17 the policyholder that gets to choose which
18 policies it wants to pay up until those limits.
19 They have to pay all sums. Once that is paid,
20 it is then Penn National's obligation to go
21 after other insurers for their contribution.

22 The language for all sums is again found
23 directly in the policy. And we can turn back to
24 the insuring agreement.

25 THE COURT: This is 42?

1 MR. NES: This is 42, Your Honor.

2 THE COURT: All right.

3 MR. NES: The insuring agreement couldn't
4 be clearer. It says, "The company will pay on
5 behalf of the insured all sums which the insured
6 shall become legally obligated to pay as damages
7 because of bodily injury or property damage."

8 And, again, we will look to the definition
9 of bodily injury. And, again, similarly it says
10 that it will cover damage that occurs during a
11 policy period including death at any time
12 resulting therefrom.

13 So in this case we're going to ask the
14 Court to apply these declarations to the
15 specific claims identified in Mr. Wright's
16 letter.

17 When our expert witness, Ms. Frost,
18 testifies, we're going to highlight some very
19 specific claims so that we can walk through
20 later the issues of how they apply.

21 Now, Ms. Frost is an attorney. She's an
22 asbestos defense attorney by trade, so we are
23 not looking for her to talk about coverage
24 opinions. What we want to understand is were
25 these operations claims. And we have to learn

1 whether they're operations claims based on the
2 reason the claim settled. Was it because of
3 ongoing work or was it because of completed
4 work? Similarly, when were the exposures? Did
5 they happen during the policy period? Did they
6 happen before the policy period?

7 So these are good examples for the Court to
8 apply. And we can apply each of these five
9 declarations to those settlement claims.

10 So that's a good segue to the second issue
11 that we have to address, which is spoliation.

12 There's no question that Penn National has
13 a duty to preserve documents in this case. They
14 violated that duty by destroying documents. The
15 evidence will show that they had a culpable
16 state of mind in doing so.

17 And finally the relief we're seeking is
18 both an award of attorney fees as well as other
19 relief that we will discuss.

20 So, first, the duty to preserve documents.
21 The law is clear that a party has a duty to
22 preserve evidence during litigation and at any
23 time before the litigation when a party
24 reasonably should know that evidence may be
25 relevant to anticipated litigation.

1 Again, may be relevant to anticipated
2 litigation.

3 Here's a timeline of each time -- I'm
4 sorry, it's not each time. This is just a
5 representative sample of times in which -- this
6 is slide 53 -- times in which Penn National was
7 asked to provide all of their insurance policies
8 that cover Covil.

9 And I've heard this argument in this
10 litigation from Penn National before, and I
11 heard it again from Mr. Brown during the summary
12 judgment argument. Which is if we go back to
13 the June subpoena response that Mr. Wright sent
14 to the plaintiffs in the Finch case, that he was
15 only asked to search for some specific policy
16 numbers that were provided. I've heard that
17 argument over and over again.

18 But Exhibit C to that very subpoena, the
19 very first question it says, "Copies of all
20 liability insurance policies and endorsements
21 issued to Covil between 1969 and 1995, including
22 without limitation, commercial, general
23 liability, umbrella, or other liability
24 policies."

25 From the very day they received the

1 subpoena in May of 2018, they were on notice of
2 a couple of critical things. First, that there
3 were asbestos plaintiffs out after Covil.

4 Number two, they were identified that Penn
5 National had at least one or more Covil
6 policies. Three, that asbestos litigation is
7 not the type litigation that once it starts, it
8 just wraps up the next day. So they knew that
9 when they were requesting all liability policies
10 that were issued between '69 and '95, that they
11 had a duty to preserve documents.

12 As the timeline I put up reflects that
13 request for all liability policies was asked
14 over and over and over again. Once in the
15 North Carolina litigation -- or many times in
16 the North Carolina litigation, but the North
17 Carolina coverage litigation about the Finch
18 verdict.

19 It was requested by plaintiffs in other
20 cases. It was requested by the receiver. It
21 was requested by the receiver in the Zurich
22 action. It was requested by the receiver as a
23 third party in one of the cases. It was
24 requested by the receiver in this case. Over
25 and over again the receiver is asking for all

1 insurance policies issued by Penn National.

2 Here's a demonstrative of what the
3 microfiche looked like. Penn National maintains
4 their historic general liability policies that
5 were issued prior to 1991 on microfiche. And
6 the evidence will show that these very sensitive
7 microfiche files are simply kept in a box and
8 this box is kept at Penn National headquarters.

9 The evidence will also show that Penn
10 National violated its duty to preserve Covil
11 insurance policies. It did so by destroying
12 those very microfiche cards that contained
13 critical general liability policy information.

14 The testimony will show that the procedure
15 or the process of Penn National is to pull
16 microfiche cards and other policies during the
17 year, collect them all, and then send them out
18 to Iron Mountain to shred at the very end of a
19 year.

20 So we're talking about 2018, during the
21 course of the year microfiche are collected out
22 of that box, and that sometime in January of the
23 next year, so in this case 2019, they're sent
24 off to be destroyed.

25 The evidence will show for the 2018,

1 despite receiving that subpoena in May of 2018,
2 they did no litigation hold. They didn't search
3 at all for Covil policies when they were
4 destroying documents. They simply collected a
5 certain amount of microfiche, and they sent it
6 off for destruction.

7 Probably most concerning is there is no
8 record whatsoever of what they collected.
9 Moreover, there's no quality control, there's no
10 QC process. Brent Reifsnyder, the document
11 custodian at Penn National, testified -- and
12 it's in the record -- that he wears lots of hats
13 at Penn National. He runs the building. He
14 runs janitorial services. He runs the fleet of
15 cars. His job list is enormous.

16 So when it comes to these microfiche, what
17 does he do? He pawns it off to people -- anyone
18 he can find. His secretary, the guy that works
19 in the mail room. I couldn't even make this up.
20 This is the testimony that Brent Reifsnyder
21 identified to. He has them collect the
22 microfiche, and then he sends them off for
23 destruction at the end of the year.

24 These are millions, if not hundreds of
25 millions of dollars of occurrence-based general

1 liability policies that are being collected by
2 essentially clerks and no one is checking to see
3 what's being destroyed.

4 When I asked Mr. Reifsnyder what was the QC
5 process? He said those individuals QC
6 themselves. That's the process.

7 So this process lasted all of 2018,
8 destroyed in 2019. All of 2019, destroyed in
9 '20. All of '19 -- all of '20 destroyed at the
10 beginning of '21.

11 And then the question is all of '21, what
12 stopped this process from happening? As this
13 Court will recall, you ordered Ellis & Winters
14 to go in to Penn National and start looking for
15 insurance policies in November of '21.

16 When Ellis & Winters first went to that
17 process, we had a call -- we had a call between
18 receiver counsel, Penn National counsel, Ellis &
19 Winters and Mr. Reifsnyder. And in passing,
20 Mr. Reifsnyder mentioned that we had to hurry up
21 because he has an annual purge to get done. We
22 asked: You've been searching for Penn National
23 Covil policies? I assume there's a litigation
24 hold in place?

25 None.

1 So it was at that moment that we
2 immediately, as the receiver, started filing
3 discovery and serving request for hearings with
4 this Court. And immediately Penn National --
5 actually, it was about a month later -- but a
6 month later, Penn National sends their very
7 first litigation hold in the case.

8 So there is no question that documents were
9 destroyed on an annual basis between 2018 and
10 2020. It's not clear what happened in '21, but
11 we know for sure 2018, 2019, and 2020. There's
12 no question that these were all historic,
13 general liability policies on microfiche. Gone.

14 There's no question that the evidence will
15 show there is no record of what was destroyed,
16 and that no one, again, was searching for Covil
17 when they were destroyed.

18 THE COURT: Mr. Nes, let me ask you this:
19 That slide says Penn National destroyed CGL
20 policy issued to Covil for '85, '86, which was
21 quote/unquote renewed '86, '87 and '87, '88. We
22 know we have those two policies. How do you
23 know they destroyed '85, '86? How do you know
24 that a CGL policy to Covil existed for that
25 period of time?

1 MR. NES: Your Honor, because the '86, '87
2 policy is a renewal policy.

3 THE COURT: Exactly. So the evidence you
4 have that there is an old policy is in the
5 policy that was not destroyed. But policies
6 previous to that had been destroyed.

7 MR. NES: That's correct.

8 THE COURT: That would obviously include
9 the renewal process since they say they can't
10 locate it.

11 MR. NES: That's exactly right. So '86,
12 '87; '87, '88 were both renewal policies. The
13 testimony will be that those are on the exact
14 same terms and conditions, and they should be on
15 the same terms and conditions as at least the
16 '85, '86.

17 THE COURT: And what you don't know from --
18 since you don't have the '85, '86 policies, you
19 don't know whether that was a renewal? In other
20 words, how far back does it go? We've been
21 trying to find Covil coverage for a good long
22 time in this litigation.

23 And what happens when you have this purge
24 is that you never see the policy to which this
25 policy that we have refers to know whether it

1 was an original policy, original issue, or it
2 was a renewal. Just as these were renewals,
3 right?

4 MR. NES: That's exactly right.

5 So what has been raised in response, the
6 entire defense of Penn National is not that they
7 didn't destroy documents, they started with that
8 argument, we'll see that in discovery, but they
9 abandon that because they were destroying
10 microfiche. There was no litigation hold, so
11 they're not arguing really that they weren't
12 destroying anything or they shouldn't have
13 issued litigation.

14 Their defense is this chart, this single
15 chart, which says wait a minute, if you look at
16 the Penn National coverage, we've identified a
17 Hartford policy before that. This is simply a
18 working draft of the receiver's thoughts on what
19 the available coverage was in 2019. This is not
20 even the current coverage chart. Which we will
21 walk through during the testimony. But this is
22 not evidence of coverage. This is simply
23 evidence of what the receiver and the receiver's
24 team thought coverage was at a particular point.

25 What's relevant to some of the issues that

1 we're going to talk about, again, is the Ellis &
2 Winters report. If you will recall, Your Honor,
3 Penn National was taking the position for a very
4 long time in this litigation that the only way
5 you can search for a policy is by policy number.
6 And if we don't have the policy number, we're
7 not going to give you the policies.

8 Ellis & Winters got involved, did its
9 investigation, and very quickly identified three
10 additional sets of policies. Most importantly
11 an inland marine and an auto policy. These were
12 spanning '84 to '86.

13 Now these policies themselves are not
14 general liability policies. We're not arguing
15 that those policies are themselves responsive.
16 But they are really important evidence of what
17 Penn National was selling and what Covil was
18 buying during that time.

19 The evidence will show that Penn National
20 sold auto coverage during the '85 to '88 period.
21 Penn National sold and Covil bought inland
22 marine coverage. And finally that Penn National
23 sold and Covil purchased general liability
24 coverage from at least '85 to '88. And that
25 means there is a missing policy.

1 Those policies are only one set of the
2 problem. That was the general liability policy
3 where Covil was the name of insured. What about
4 other policies where Covil was either an
5 additional or supplemental insured? That's
6 another set of problems.

7 So what's the evidence? We've heard this
8 over and over. What's the evidence that you
9 will ever find Covil anywhere else on the policy
10 other than on the deck page? Again, all you
11 have to do is look at Exhibit 1. When you turn
12 to Exhibit 1, there is a special named insured
13 endorsement, and the very first name on the
14 special named insured endorsement is Covil
15 Corporation name.

16 This is a prime example of where Covil Corp
17 can be mentioned somewhere else in a Penn
18 National policy that is not simply on the
19 declarations page.

20 THE COURT: And this is the policy -- this
21 is one of the policies we had. This is the '86
22 policy, right?

23 MR. NES: That is correct.

24 THE COURT: So in that policy there's a
25 special named insured endorsement, and Covil

1 Corporation, Inc., and some of its other offices
2 and dormant corporations are listed here as
3 special named insured, right?

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

5 So this is evidence, at least some
6 evidence, that Covil be mentioned somewhere else
7 in the policy other than the dec page. But Penn
8 National itself, in a critical interrogatory
9 response -- and this is just a sample, they
10 essentially used this language over and over
11 again.

12 I'm sorry, my eyes aren't that good. I
13 have to get to the slide.

14 So this is slide 76. It's an interrogatory
15 response from December of 2019. So this is very
16 early. This is when they're in the Finch
17 coverage litigation with Zurich and Hartford.
18 Their response to the interrogatory that it says
19 "Identify all policies." They say, "Penn
20 National does not maintain its records in a way
21 that would provide a reasonable method of
22 searching for policies under which Covil is
23 named as an additional insured or qualifies as
24 an additional insured. Thus Penn National has
25 no reasonable method of identifying all

1 documents that may be responsive to this
2 interrogatory."

3 As you recall, Your Honor, when we talked
4 earlier, the standard for preservation is do you
5 have documents that may be responsive to
6 anticipated litigation? And in their own
7 discovery response, they say we can't search for
8 additional insured information because it's too
9 hard, but there may be responsive information
10 there. And what were they doing year after year
11 after year after year? They were collecting
12 microfiche and destroying it.

13 So you have a problem not only for the
14 identified '85, '86 policy, but also for the
15 policies we may never know about because there's
16 no record of what was destroyed.

17 So how does this impact the receiver? As
18 this Court is obviously well aware, the receiver
19 is charged with investigating and marshaling the
20 assets of Covil Corporation. That is what the
21 receiver's mission is. And to do so, the
22 receiver diligently requested policies over and
23 over again in multiple forms.

24 And because Penn National destroyed these
25 microfiche without identifying what they were

1 destroying and without searching for Covil, the
2 receiver has been hampered in his ability to
3 collect any potentially responsive policies for
4 the asbestos litigation.

5 The Courts are clear that when a party
6 destroys evidence, an inference may be drawn
7 that the destroyed evidence would have been
8 adverse to that party.

9 So the next issue we have to discuss is
10 under South Carolina law is state of mind of the
11 party in destroying this information. And Penn
12 National certainly had a culpable state of mind.

13 First, we look at Penn National's own
14 written policies. The first policy we turn to
15 is the document retention policy. What does the
16 document retention policy say about this? The
17 retention policy is clear.

18 It says, "It is imperative to remember that
19 if the records retention schedule calls for the
20 destruction of records and we have not destroyed
21 some or all of them, without a compelling
22 reason, courts may view this as selective
23 retention. And if selective records are
24 destroyed as part of a retention program or
25 destroyed outside the program, the courts may

1 view this as selective destruction. Either
2 selective retention or selective destruction can
3 subject the company to substantial fines,
4 penalties, and the loss of rights."

5 Penn National's own mandate says don't
6 destroy this, but they did it anyway.

7 Second, we look at their litigation hold
8 procedure. So what is the policy when you get
9 subpoena or lawsuit? The litigation hold
10 procedure is clear. It says, "Penn National is
11 committed to fully complying with its discovery
12 obligations. To do so, the company and its
13 employees will preserve and secure all
14 information that may be potentially discoverable
15 in relation to future litigation."

16 It goes on to say "A litigation hold shall
17 override any other company policy or procedure
18 that would normally require the information be
19 purged or destroyed."

20 Their own policy requires them to stop
21 purging when they are on notice of litigation.

22 As we talked about earlier, Penn National
23 eventually issued a litigation hold after it was
24 discovered they hadn't, and the litigation hold
25 that they issued actually is what should have

1 gone out in May of 2018.

2 It said, "Penn National Insurance must now
3 take immediate steps to preserve and not purge
4 any and all paper or policy-related documents
5 and microfiche."

6 But, again, this went out years after
7 microfiche and paper were destroyed.

8 Penn National's state of mind or culpable
9 state of mind can also be looked at in context
10 of what's happened in this case. This Court has
11 had to issue discovery orders in July of '21,
12 November of '21, May of '22, November of '22,
13 June of '23. We had an informal meeting with
14 this Court just two weeks ago. And in addition
15 to that, a protective order had to be put in
16 place.

17 So once Penn National issued that
18 litigation hold, they still would not agree to
19 not purge anything absent court order. The
20 receiver had to file a proposed protective order
21 for the Court to issue in February '22 mandating
22 that Penn National not destroy any other
23 documents. And then the attorney fee award that
24 was issued based on some of this discovery
25 misconduct in May. These are all further

1 evidence of Penn National's state of mind with
2 respect to this litigation.

3 The evidence will also show the receiver is
4 not alone. This is not targeted at the
5 receiver. Almost four years ago, in March of
6 2020, Penn National is in front of Judge Young
7 in Berkeley County.

8 THE COURT: Roger, not Robert.

9 MR. NES: Thank you, Your Honor.

10 Judge Young --

11 THE COURT: I have read Judge Young's
12 order.

13 MR. NES: -- issued a bench verdict in
14 which he found punitive damages, and it was for
15 similar misstatements that we will see today.

16 So putting this together, we will see that
17 we will prove Penn National never issued a
18 litigation hold, never suspended its annual
19 purge, never reviewed insurance policies for
20 Covil, never conducted quality control, and
21 destroyed historic CGL policies on microfiche.

22 We'll also show this was a violation of
23 their own document retention policy, their
24 litigation hold procedure, applicable law on
25 retaining documents, and a violation of their

1 own discovery obligations.

2 So in the trial that we will hear regarding
3 all of this, you're going to hear from the
4 following: From Covil you will hear from the
5 receiver, and the receiver will talk about the
6 reason his investigation was conducted. He'll
7 talk about the litigation with respect to other
8 insurers and specifically Penn National. He
9 will also talk about that coverage chart that
10 you saw earlier, and he'll discuss his
11 interaction with Mr. Wright and the letters that
12 he received.

13 Ms. Frost is one of our expert witnesses.
14 Ms. Frost is an asbestos defense lawyer. She
15 will walk through each -- some representative
16 samples of the asbestos claims so we can
17 understand why these claims settled.

18 Finally, you will hear from Charles Miller,
19 our insurance expert. Mr. Miller will provide
20 some helpful background on the transition of the
21 ISO form from '73 form to the '86 form. He will
22 also talk about the standards in the insurance
23 industry when you receive a litigation hold.

24 We also will call via corporate designee
25 Mr. Wright. Mr. Wright, as was discussed

1 earlier, is a senior claims examiner for Penn
2 National. He was the claims handler for Covil.

3 You will also hear from Brent Reifsnyder
4 via deposition. Mr. Reifsnyder is the one who
5 is the document custodian of the policies.

6 And you will hear from Scott Maier, also
7 from Penn National's in-house legal department,
8 via deposition. He was the one who did not
9 issue the litigation hold until very late.

10 And then we anticipate, as Mr. Shealy said,
11 that they will call two experts of their own,
12 Mr. Robertson and Mr. Heinze.

13 The relief. What relief are we seeking?
14 We're seeking two sets of relief. One related
15 to the declaratory judgment and a separate set
16 of relief related to spoliation.

17 With respect to the declarations, we are
18 requesting these five declarations that we
19 talked about at the top. That there's no
20 aggregate limit for operations, exposure
21 determines whether it's an operation or
22 completed operation. That Penn National has the
23 burden of proof, continuous coverage applies,
24 and also is allocations appropriate.

25 With respect to spoliation, the first order

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1 the sort of presentation Mr. Nes has made to
2 you, and frankly, our position with respect to a
3 lot of the coverage questions has already been
4 outlined for you by Mr. Brown during the
5 discussion of the summary judgment motion.

6 But I do want to at least highlight our
7 position with respect to the spoliation
8 contentions that have been raised by Covil in
9 this case.

10 Mr. Nes indicated in his opening that Penn
11 National refuses to honor its contractual
12 obligations to Covil. And that sort of opening
13 salvo is wholly inconsistent with Penn
14 National's behavior over the course of time that
15 it has been involved in asbestos litigation as
16 an insurer for Covil.

17 It has -- the evidence will show there's no
18 dispute it has defended the claims that have
19 been tendered to it. It has paid on claims that
20 it has been asked to pay on. And so this is
21 sort of -- the sort of broad brush that Penn
22 National gets painted with, we haven't -- we
23 haven't honored our contractual obligations.

24 But, Your Honor, if the Court will listen
25 to the evidence that is presented, the evidence

1 just doesn't bear that out. It doesn't bear out
2 this notion that Penn National has engaged in
3 some sort of spoliation.

4 As Your Honor is well aware, when presented
5 with two policy numbers for known policies of
6 Covil, Penn National produced two policies that
7 predate -- or should not have been still in
8 existence at the time that that request came.
9 They should have been destroyed. And if that --
10 if they had been destroyed, we might be having a
11 different conversation here today. But Penn
12 National produced those two policies.

13 It had a system of storing its historical
14 policy repository arranged by policy number, and
15 the evidence will show that that is not a system
16 that is unique to Penn National or unique to the
17 insurance industry. Storing documents in the
18 way that Penn National did is ubiquitous. It's
19 used frequently in the medical context. It's
20 used in a variety of context where there are
21 large volumes of information that need to be
22 tied to a particular patient, particular
23 customer, a particular client, and a particular
24 insured.

25 And it's also important for Your Honor to

1 understand the way Penn National's document
2 retention policy operates, and this will be
3 revealed in the evidence.

4 Penn National's document retention policy,
5 which is consistent with the law of the state of
6 Pennsylvania, consistent with what is used
7 normally in the insurance industry, says that
8 policies are maintained for 25 years after
9 cancellation or nonrenewal. And the way Penn
10 National has been carrying out that policy is in
11 a given year, it goes back 25 years and pulls
12 the policies that canceled or nonrenewed in that
13 year and destroys those policies.

14 And this is, again, the evidence will show
15 that in 2018, when Penn National received the
16 subpoena in the Finch case, 25 years previous
17 would have been 1993, if my math is correct.
18 That's two years after Covil ceased operations.

19 And if Penn National continued to follow
20 that policy up until the litigation hold was
21 issued in this case, it would have destroyed
22 policies that nonrenewed or canceled in 1994,
23 '95, '96. Again, well after three, four, five
24 years after Covil was no longer in business.

25 So to say that it engaged with a culpable

1 mind in destruction of policies that had
2 something to do with Covil is just not borne out
3 by what the testimony will show, and it's not
4 borne out by what has happened in the course of
5 discovery in this case.

6 After Your Honor ordered that this
7 policy -- this historic policy repository be
8 digitized, both sides have engaged in searches
9 and additional information has been pulled that
10 pertains to Covil, but no additional policies
11 have ever been found.

12 If -- if Penn National had engaged in some
13 sort of systematic destruction of policies
14 pertaining to Covil, then we wouldn't have the
15 two known policies that we have now. We
16 wouldn't have all of this other extraneous
17 information about Covil -- Covil that still
18 exists in the historic repository even today.

19 Now -- so, again, the record just doesn't
20 bear out what the allegation seems to say.

21 I want to go to the known policy, the '86,
22 '87 policy, which is Exhibit 5 of Penn National.
23 And that's been put up on the screen, Your
24 Honor. This is the declarations page. This is
25 what we understand to be the first of two

1 policies issued by Penn National.

2 And, Max, if you can -- if you can call
3 out -- this is the upper corner. And this is
4 the -- this says N-E-W. New business.

5 We heard today for the first time in
6 opening statement that this is a renewal policy.
7 There's been no evidence adduced in the course
8 of discovery, no testimony by any expert witness
9 who's looked at all of this, that there was a
10 policy issued by Penn National of which this
11 '86, '87 policy is renewal. And on its face
12 it's new business.

13 So as the -- as Your Honor hears the
14 evidence, we would just ask that you test that
15 evidence against these broad-sweeping
16 allegations that have been levied about Penn
17 National and whether all of this holds together.
18 Whether if we were doing the kind of things that
19 were going on in the case that was before
20 Your Honor, Protopapas versus Wall Templeton &
21 Haldrup where you have evidence -- you have
22 internal memo form USF&G indicating we've got to
23 destroy policies. None of that is here. We
24 don't have any of that kind of evidence here.

25 We have a very large repository of old

1 policies that Penn National continues to
2 maintain today that have been searched multiple
3 ways and are continuing to be searched today
4 that only reveal these two policies that Penn
5 National issued.

6 Your Honor, that's all I want to say at
7 this juncture. I think the evidence -- it's
8 time for you to hear the evidence so that we can
9 get to the end of this.

10 THE COURT: Thank you, Mr. Shealy.

11 All right. Mr. Nes, call your first
12 witness.

13 MR. NES: Your Honor, we will call Boyd
14 Wright as the Penn National corporate
15 representative.

16 THE COURT: Come around to the right and be
17 sworn.

18 - - -

19 BOYD WRIGHT, being first duly sworn,
20 testified as follows:

21 - - -

22 THE COURT: Thank you, Mr. Wright, and
23 welcome.

24 THE CLERK: Please state your full name for
25 the record and spell your last name.

1 THE WITNESS: Boyd Wright. W-R-I-G-H-T.

2 THE COURT: All right. Mr. Nes offers
3 Mr. Boyd Wright, the corporate representative
4 for defendant Penn National, being examined as a
5 hostile witness.

6 - - -

7 DIRECT EXAMINATION

8 - - -

9 BY MR. NES:

10 Q. Mr. Wright, could you introduce yourself
11 for the Court.

12 A. Boyd Wright.

13 Q. Mr. Wright, you are here as Penn National's
14 corporate designee; is that correct?

15 A. That's what I understand.

16 THE COURT: You have kind of a gentle
17 voice, Mr. Wright. If you speak up, I would
18 appreciate that. I know the court reporter will
19 too. As close as you sit to her, her equipment
20 needs to pick you up.

21 THE WITNESS: My wife yells at me for
22 yelling at her.

23 BY MR. NES:

24 Q. You're here as Penn National's corporate
25 rep, correct?

1 A. That's what I understand.

2 Q. You've worked at Penn National for over 20
3 years?

4 A. Yes.

5 Q. Since 2002?

6 A. Yes.

7 Q. Your current title is senior home office
8 claim examiner?

9 A. Yes.

10 Q. As part of your responsibilities, you work
11 on the claims handling side, not underwriting?

12 A. Correct.

13 Q. You are the claim handler for the Covil
14 account?

15 A. Correct.

16 Q. As part of that, you decide whether defense
17 coverage applies?

18 A. Yes.

19 Q. You also decide whether to pay
20 indemnification for settlements or judgments?

21 A. Yes.

22 Q. In doing that, you don't generally speak
23 with anyone else within Penn National to make those
24 decisions?

25 A. Correct.

1 Q. I'd like to show you what's been marked as
2 Plaintiff's Exhibit 14. That is tab 6 in your
3 binder.

4 Mr. Wright, this is a September 1, 2022,
5 letter that you sent to Mr. Protopapas; is that
6 right?

7 A. Yes.

8 Q. This letter was sent to advise the receiver
9 that the aggregate limits of the Penn National policy
10 were dwindling, correct?

11 A. Correct.

12 Q. I would like to look at the second
13 paragraph that says "Penn National provided your
14 office with the general liability policies issued to
15 Covil for the policy periods March 31, 1986, to '87
16 and March 31, 1987 to '88, two consecutive years.
17 Each policy has a \$1 million per-occurrence aggregate
18 policy limit subject to the terms, conditions, and
19 endorsements that compose the entire policy."

20 Do you see that?

21 A. Yes.

22 Q. When you wrote that, that was a true
23 statement, correct?

24 A. Yes.

25 Q. So when you're adjusting the claims, you

1 would agree that you have to take all of the terms,
2 conditions, and endorsements into account?

3 A. The entire policy, yes.

4 Q. I would like to turn your attention to
5 what's been marked as Plaintiff's Exhibit 1. This is
6 tab 1 of your binder.

7 This is a copy of the Penn National policy
8 issued for 1986, 1987 to Covil, correct?

9 A. Yes. It appears to be.

10 Q. I'm sorry, you said?

11 A. It appears to be.

12 Q. You would agree that this is the policy or
13 one of the two policies that you used to adjust
14 Covil's claims?

15 A. Yes.

16 Q. I would like to look particularly on
17 Exhibit 1, there's a section for aggregate
18 \$1 million. Do you see that?

19 A. On the first page?

20 Q. That's correct.

21 A. Yes, I do.

22 Q. And it simply says aggregate. There's no
23 other words there, right?

24 A. That line says "A million" -- "Each
25 occurrence a million aggregate."

1 Q. But with respect to aggregate, that word
2 stands alone?

3 A. Yes.

4 Q. When you adjusted the Covil claims that
5 were in the Exhibit 14 letter we just looked at, this
6 is the only page of the policy that you looked at to
7 understand the aggregate limit, correct?

8 A. No. I looked at both policies. The entire
9 policies. But there's the reference that the
10 intention is there's a \$1 million aggregate.

11 Q. I understand that. But to understand what
12 the aggregate meant, you didn't look at any other
13 terms or conditions in the policy, correct?

14 A. I looked at the entire policy.
15 Aggregate -- I looked at the entire policy.

16 Q. Let's turn to page 4 of the Penn National
17 policy. There's a section called Limits of
18 Liability. Do you see that?

19 A. Yes.

20 Q. In section A of Limits of Liability, it
21 says coverage A; do you see that?

22 A. Yes.

23 Q. And coverage A, there are two define terms
24 that are bolded, Complete Operations Hazard and
25 Products Hazard, correct?

1 A. Yes.

2 Q. But there is no operations hazard defined
3 in this section of Limits of Liability; is that
4 right?

5 A. Correct.

6 Q. Did you consider this Limits of Liability
7 section when you were adjusting the claim?

8 A. I considered it, but there's an exclusion
9 in the policy that eliminates completed operations
10 and products from coverage. So there is no products
11 or completed operations coverage.

12 Q. We'll get to that in a minute. But, again,
13 there is no definition of operations hazard in this
14 section, correct?

15 A. Not in this section, no.

16 Q. Okay. Let's turn to -- let's turn back to
17 your letter which is Exhibit 14. At the bottom of
18 Exhibit 14 --

19 A. Is that --

20 Q. It's tab 6.

21 A. Okay. Got it.

22 Q. At the bottom of your letter of Exhibit 14,
23 you say "As a result of the above-referenced
24 settlement payments, this letter serves to advise you
25 as Covil's court-appointed receiver that the global

1 aggregate policy limits applicable under the two
2 policies issued to Covil are impaired."

3 Do you see that?

4 A. Yes.

5 Q. You use the phrase "global aggregate policy
6 limits," right?

7 A. Yes.

8 Q. The word "global" does not appear next to
9 the word aggregate in Exhibit 1, the policy; isn't
10 that right?

11 A. No, it doesn't.

12 Q. You added that term to your letter?

13 A. Yes, because there's two policies involved.

14 Q. My question, sir, is when you were looking
15 at this letter, that the policy -- the word global is
16 not in the policy, correct?

17 A. No.

18 Q. Let's take a look at Exhibit 104.

19 A. Which?

20 Q. I'm sorry, tab 8.

21 This is a copy of a policy that Penn
22 National issued in 1991. We located this in the new
23 database that was created. I would like to turn to
24 page 5 of this exhibit. This is the declarations
25 page. Do you see where it says general aggregate

1 limit?

2 A. Yes.

3 Q. This policy language from the 1991 policy
4 is different from the Penn National policy we looked
5 at previously; isn't that right?

6 A. The dec page is different, yes.

7 Q. And the dec page is different in one way
8 because it now uses the word "general aggregate";
9 isn't that right?

10 A. Yes.

11 Q. And the word "general" does not appear in
12 the two Penn National policies next to aggregate?

13 A. In the two issued Covil?

14 Q. That's correct.

15 A. No, it doesn't.

16 Q. Let's look back at Exhibit 1. This is the
17 policy. You mentioned earlier that products and
18 completed operations are not applicable to Exhibit 1.
19 Do you recall that testimony?

20 A. Yes.

21 Q. And you believe that that is not part of
22 the policy -- or that products and completed
23 operations are not covered under the policy because
24 there's an exclusion in the policy for products and
25 completed operations?

1 A. Yes.

2 Q. Let's turn to page 30 of Exhibit 1. This
3 is a copy of the exclusion that you're referring to
4 as the product completed operations exclusion.

5 A. Yes.

6 Q. And in the top right-hand corner, there's a
7 number, GL 2104. Do you see that?

8 A. Yes.

9 Q. And that's the number for this policy form?

10 A. Yeah, yeah, right. The index number for
11 it.

12 Q. We look back to page 1 of Exhibit 1. About
13 two-thirds of the way down there is a list of
14 exclusions that are applicable to the policy.

15 A. Yes.

16 Q. Starting with GL 0104. Do you see that?

17 A. Yes.

18 Q. Now, exclusion 2104 is not listed there, is
19 it?

20 A. No, it isn't.

21 Q. And that was a mistake, correct?

22 A. No. Mistake because it's not listed?

23 Q. Correct. It was a mistake when -- when
24 this policy was being put together, 2104 was supposed
25 to be on there but it was left off?

1 A. That's what I was told, yes.

2 Q. So just to be clear, the first -- the dec
3 page has a mistake on it?

4 A. It's missing an endorsement.

5 Q. So that's a yes, it's got a mistake?

6 A. Yes.

7 Q. So let's look at when that mistake was
8 corrected. If we can turn to page 29 of Exhibit 1.

9 A. Okay.

10 Q. This is the change endorsement amending the
11 policy; is that right?

12 A. Correct.

13 Q. And on the change endorsement it says,
14 quote, Amending policy to delete products form GL0031
15 and add GL2104 products hazard as it was left off at
16 renewal.

17 Do you see that?

18 A. Yes.

19 Q. This is the form you're relying on to say
20 that the GL2104 should have been on the dec page?

21 A. Yes.

22 Q. And it should have been on the dec page
23 because a mistake was made when this policy was
24 issued?

25 A. When the dec page was typed out, it was

1 like that.

2 Q. I'm sorry, say that again.

3 A. When the declarations page was prepared, it
4 was left off.

5 Q. And it was left off at renewal. That was
6 the time it was issued?

7 A. That's what this form says, but that's not
8 what the dec page supports.

9 Q. Well, I'm not asking you about the dec page
10 yet.

11 A. No, but --

12 Q. Simply the word says it was left off at
13 renewal?

14 A. That's what this document says, yes.

15 Q. So that means that when it was left off,
16 based on those words, this was a renewal policy and
17 at the time renewing the policy, this form was left
18 off, that's what that says?

19 A. That's what it says, but that's not -- not
20 what happened.

21 Q. You have no personal knowledge of what
22 happened at the time this was issued, right?

23 A. I've been asked about this, and the dec
24 page, when it says new, that's the first time that
25 policy has ever been issued.

1 Q. My question, sir, though, is you're not --
2 you don't have any personal knowledge of what
3 happened, correct?

4 A. Other than what's stated here.

5 Q. You're not an underwriter either, are you?

6 A. No.

7 Q. And you spoke to no Penn National
8 underwriters to prepare for this testimony, correct?

9 A. I've talked to Penn National underwriters
10 about the content of this policy because they're the
11 ones that put it together for us.

12 Q. All right. So when it says at renewal, all
13 you know is what it says on the form, correct?

14 A. Correct.

15 Q. Now let's turn back --

16 A. I should add: And based upon what the
17 underwriters told me.

18 Q. Let's turn back --

19 THE COURT: Speak up some, Mr. Wright.

20 THE WITNESS: Excuse me?

21 THE COURT: Speak up some.

22 BY MR. NES:

23 Q. Do you remember you were deposed in this
24 case?

25 A. Yes, I do.

1 Q. I asked you whether you had spoken to the
2 underwriters?

3 A. Yes.

4 Q. You said you hadn't?

5 A. Yes.

6 Q. So you've spoke to them since you were
7 deposed last year?

8 A. Sure.

9 Q. Now, let's talk about your references on
10 page 1. You said in the top right-hand corner, it
11 said it was a new policy; isn't that right?

12 A. Yes.

13 Q. But you already said there were mistakes
14 made on this dec page; isn't that right?

15 A. That they left that endorsement off, yes.

16 Q. And that left it off, the document says, at
17 renewal?

18 A. The document says that, but as I said --

19 Q. So when it says new, that was also a
20 mistake. That should have said renewal; isn't that
21 right?

22 A. No.

23 Q. Let's turn to Exhibit 13, which is tab 5.
24 Are you there, sir?

25 A. Yeah.

1 Q. This is a letter you sent on June 15, 2018,
2 in response to the Finch subpoena, correct?

3 A. Yes.

4 Q. And you sent this to Covil's asbestos
5 defense counsel.

6 A. Yes.

7 Q. In this letter, in the third paragraph, you
8 explain this change endorsement we were just talking
9 about, right?

10 A. Yes.

11 Q. You say, quote, Penn National issued
12 commercial general liability coverage for the policy
13 periods of March 31, 1986 to '87 and March 31, 1987
14 to '88, two years, as the records reflect after the
15 policy was issued for coverage effective March 31,
16 1996 --" I believe that was supposed to be --

17 A. That's my typo, yes.

18 Q. "It was discovered endorsement GL2104 --"

19 THE COURT: Wait a minute. The 1996 is a
20 mistake, too?

21 MR. NES: That is correct.

22 THE WITNESS: That's my typographical
23 error.

24 MR. NES: That should be 1986.

25 THE COURT: Of course.

1 BY MR. NES:

2 Q. The phrase I want to point your attention
3 to is that last one. It says "It was discovered
4 endorsement 2104, exclusion, completed operations
5 hazard and products hazard, was inadvertently left
6 off the policy."

7 A. Yes.

8 Q. But in the form we're looking at, it didn't
9 say it was inadvertently left off the policy. It
10 said it was left off at renewal. Isn't that right?

11 A. It says it was left off, and it wasn't
12 purposeful. The issue of renewal, the policy doesn't
13 support that.

14 Q. My question, though, is when you were
15 quoting that change endorsement, the change
16 endorsement does not say "left off the policy"?

17 A. I'm summarizing what I've seen in those
18 records, and to my understanding, when I wrote the
19 letter, was that that endorsement was inadvertently
20 left off the policy.

21 Q. My question, though, is when you said left
22 off the policy, you didn't say left off at renewal?

23 A. No. No.

24 Q. Let's turn to Exhibit 37.

25 A. Which tab are we --

1 Q. Sorry, tab 7.

2 In the middle paragraph of this page --
3 this is -- sorry. Exhibit 37 is an August 21, 2019,
4 letter that you sent, right?

5 A. Yes.

6 Q. And you sent this one to the receiver?

7 A. Yes.

8 Q. You sent this letter in response to the
9 very first claim tendered to the receiver -- by the
10 receiver?

11 A. Yeah, I don't remember what the -- I don't
12 know if this was a first claim or not. It's one of
13 the early ones, I know that. I thought that Rollins
14 and Ashworth were the first two, but I might be
15 mistaken.

16 Q. At the top of the letter you say "Your
17 firm's email of August 5, 2019, was routed to the
18 undersigned attention"; correct?

19 A. Yes.

20 Q. Is this one of the first letters you recall
21 receiving or tenders?

22 A. It's one of the -- yeah, earlier cases that
23 was tendered.

24 Q. And would it be fair to say this
25 August 2019 letter is at least one of the early

1 letters you sent to the receiver?

2 A. Yes.

3 Q. Let's turn to the third paragraph. It says
4 "Penn National issued a comprehensive general
5 liability policy to Covil Corporation where the
6 policy periods of March 31, 1986, to March 31, 1987,
7 with one renewal of March 31, '87 to March 31, '88,
8 two years."

9 Do you see that?

10 A. Yes.

11 Q. You also say "We have attached the relevant
12 policy information we were able to obtain on these
13 policies from over 30 years ago for your review."

14 Do you see that?

15 A. Yes.

16 Q. In handling Penn National's claims, have
17 you treated the '86, '87 policy and the '87, '88
18 policy essentially the same terms and conditions?

19 A. Yes.

20 Q. And you have done that because those were
21 both renewal policies?

22 A. No. I did it because we had two years of
23 documented coverage with the first year being what we
24 believed to be a new policy.

25 Q. In this reference you do refer to it -- the

1 '87, '88 policy as a renewal policy, right?

2 A. That's correct, it was.

3 Q. And having reviewed both policies, which
4 are both renewal policies, it is your opinion that
5 the terms and conditions are essentially the same for
6 purposes of your job?

7 A. I don't believe that the earlier policy,
8 '86, '87, is a renewal. But for the purposes of what
9 I needed to do in addressing the claims against
10 Covil, I was treating them the same.

11 Q. The next paragraph says "Attached records
12 reflect after the policy was effective March 31, '86,
13 it was discovered endorsement 2104, exclusion,
14 completed operations hazard, products hazard, was
15 inadvertently left off the policy."

16 Do you see that?

17 A. Yes.

18 Q. Again, you didn't use the phrase "from the
19 policy at renewal" in your letter?

20 A. No, I didn't.

21 MR. NES: No further questions.

22 THE COURT: Cross-examination.

23 Mr. Brown, cross-examination.

24 MR. BROWN: Thank you, Your Honor.

25 - - -

1 CROSS-EXAMINATION

2 - - -

3 BY MR. BROWN:

4 Q. Mr. Wright, I pulled up here the same
5 policy, this '86, '87 policy. The version marked
6 Defendant's Exhibit 5. The one we were just looking
7 at with Mr. Nes.

8 So if you -- on the first page, if you look
9 at the phrase that says "new," what does that mean to
10 you as a claims handler for Penn National for 20
11 something years?

12 A. That's always been designated for us that
13 that's the first time or inception policy period.

14 Q. Okay. And if you can go to page 29 of the
15 exhibit.

16 A. Okay.

17 Q. He's calling it up.

18 This is the endorsements that you were just
19 being asked about.

20 A. I'm sorry, which?

21 THE COURT: What page are you on?

22 MR. BROWN: I'm sorry. I'm on page 29 of
23 Defendant's Exhibit 5.

24 THE COURT: Yeah. Hang on. I got you.

25 BY MR. BROWN:

1 Q. Look up at the screen. It's the phrase --
2 the same endorsement that you were just discussing
3 with counsel for the receiver where it says "Amending
4 policies to delete products form and add--" do you
5 see that, Mr. Wright?

6 A. Yes. Yes.

7 Q. Okay. Thank you.

8 Now, it says here "The products hazard
9 exclusion as it was left off at renewal."

10 Did I read that correctly?

11 A. Yes.

12 Q. Okay. And based on your understanding, do
13 you know whether that was a renewal or merely left
14 off at inception or what that means?

15 A. What I understand that to mean is that
16 because this was being -- this change was effective
17 on the policy sometime after it had been issued, that
18 whoever is putting this form together doesn't know
19 the status of the policy per se. I was trying to
20 look and see if it lists the effective date of the --
21 or not the effective date -- the issue date, and I
22 didn't see it on here.

23 Q. Okay.

24 A. But my understanding was -- or it looks
25 like they've got it identified as May 23, 1986. So

1 they're just backing it up to the policy inception
2 date.

3 Q. Okay. And based on your experience in
4 reviewing these kind of policy in your claims
5 handling function, is that something you've seen in
6 your time?

7 A. Where endorsements are added after the
8 policy is issued? Sure.

9 MR. BROWN: Yes, sir. Okay.

10 Okay. Let me ask you to pull up
11 Defendant's Exhibit 24.

12 Your Honor, this is the impairment letter
13 that -- same version that Mr. Nes was
14 discussing, but it's not redacted so it has
15 numbers on it.

16 THE COURT: Yes. Thank you.

17 BY MR. BROWN:

18 Q. Mr. Wright, there are several claims. I
19 believe 14 claims that are referenced here on this
20 letter; is that correct?

21 A. That sounds about right.

22 Q. And on each of these claims -- each of
23 those claims tendered to Penn National for defense?

24 A. Yes.

25 Q. And did Penn National agree to defend each

1 of them?

2 A. Yes.

3 Q. And did you pay defense counsel to defend
4 each of them?

5 A. Yes.

6 Q. Was that the Ellis & Winters firm?

7 A. Yes.

8 Q. And how did the Ellis & Winters come to
9 your attention in connection within the defense of
10 Covil?

11 A. When we first became aware of first claims
12 were tendered to us, Ellis & Winters had already been
13 vetted and hired by the receiver.

14 Q. Okay. And did you agree to continue to use
15 the defense firm that had been vetted by the
16 receiver?

17 A. Yes.

18 Q. Okay. And are you still using that firm to
19 this day?

20 A. Yes.

21 Q. And how were the defense costs on these 14
22 claims divided up?

23 A. Initially there were three insurers: Penn
24 National, Zurich, and Travelers, USF&G. Zurich
25 resolved the issues with the receiver, and so now

1 it's just Travelers and Penn National paying equal
2 share of the defense cost.

3 Q. When there were three insurers paying
4 defense cost, did Penn National pay a third of the
5 defense cost?

6 A. Yes.

7 Q. And once there were just two insurers,
8 Travelers and Penn National, did Penn National begin
9 to pay 50 percent of the defense cost?

10 A. Yes.

11 Q. Is that still the arrangement going on
12 today?

13 A. Yes.

14 Q. That is Penn National is paying 50 percent
15 of the defense cost on the claims that have been
16 tendered and accepted for defense?

17 A. Yes.

18 Q. Has Penn National rejected any cases and
19 denied any of the defendant?

20 A. No.

21 Q. With regard to these 14 claims, did there
22 come a point in time where there was a recommendation
23 to engage a settlement discussion and pay indemnity
24 on each of them?

25 A. Oh yes.

1 Q. How did that happen?

2 A. Well, counsel will eventually provide
3 either a pretrial report or a report that -- defense
4 counsel will provide a report that summarizes the
5 discovery to date and outline for us the evidence and
6 testimony as well as the dates, work sites, and so
7 forth that involved Covil. And oftentimes there
8 would be a phone conference between a receiver,
9 defense counsel, and insured representatives, and the
10 QSF representative later on.

11 Counsel would usually have placed a value
12 on what they thought settlement or trial value was
13 and the discussion would go from there.

14 Q. You just used a phrase there, QSF
15 representative, can you elaborate on that for us?
16 What do you mean by that?

17 A. Well, from the documents I was provided and
18 have seen, QSF, or qualified settlement management
19 people is a company that has accepted the funds that
20 the receiver obtained in settlement with the number
21 of different insurers relative to policies that were
22 issued to Covil. And that individual reports to the
23 receiver, Mr. Protopapas, regarding settlements and
24 payments and so forth. But he's involved in aiding
25 and evaluating and settling claims.

1 Q. So these conferences --

2 THE COURT: Mr. Wright, keep your voice up
3 just a little bit, please, sir.

4 THE WITNESS: I'm sorry.

5 THE COURT: Thank you.

6 MR. BROWN: I'll try to remind you as well.

7 BY MR. BROWN:

8 Q. Mr. Wright, in these conferences you've
9 described, I'm specifically focused on these 14
10 claims we're looking at, among the insured
11 representatives, receiver representatives and defense
12 counsel, are those the kind of calls in which you
13 participated on?

14 A. Yes.

15 Q. And Ellis & Winters participated?

16 A. Yes.

17 Q. And someone from Travelers?

18 A. Yes.

19 Q. And Zurich was involved? Someone from
20 Zurich?

21 A. Yes.

22 Q. Someone from the receiver?

23 A. Yes.

24 Q. Is that typically Mr. Protopapas or someone
25 else?

1 A. As far as I know, it's always been
2 Mr. Protopapas. There would be sometimes on cases
3 where just the group exclusive of defense counsel
4 would meet and talk about the case, but we have the
5 report.

6 Q. Okay. And on each of those 14 cases, was
7 there some consensus discussed in those calls about
8 what kind of settlement authority would be extended
9 to try to resolve those claims?

10 A. Typically, yes. It would be a discussion
11 over, okay, we've got a demand, what kind OF offer is
12 going to be made?

13 Q. Okay. And did Mr. Protopapas make
14 recommendations about how the receiver contended
15 those 14 claims should be settled? Up to what dollar
16 authority?

17 A. Yeah. Everyone -- yeah, I mean that's ...

18 Q. Okay. And on behalf of Penn National, did
19 you ever disagree with his recommendation or refuse
20 to go along with the amounts he proposed to offer on
21 these 14 claims?

22 A. No.

23 Q. So you always went along with that
24 consensus or the recommendation?

25 A. Once in a while I'd have a concern over a

1 case where maybe a plaintiff had very little or no
2 direct evidence against Covil, but the decision was
3 to -- receiver's decision was to pay. There's always
4 a risk with these cases, and I never, never disagreed
5 with what they wanted to do.

6 Q. Okay. Now, when you defended each of these
7 cases, did you do so subject to a Nonwaiver
8 Agreement?

9 A. Yes.

10 Q. On each of the 14?

11 A. Yes.

12 Q. And then when you made payments, was it to
13 resolve the claims against the insured and to resolve
14 Penn National's contribution forward that overall
15 settlement?

16 A. Yes.

17 Q. Have you ever since these settlements or
18 these 14 claims were made been asked to contribute
19 more on any of them?

20 A. No.

21 Q. Is Penn National seeking any recoupment
22 from the QSF with regard to any amounts it has paid?

23 A. No.

24 Q. Did you satisfy yourself that each of these
25 14 claims were covered under the terms of the Penn

1 National policies from '86 to '88?

2 A. Yes. The difficulty with these cases are
3 when the complaint comes in, the pleadings are so
4 broad and nebulous as to the specific defendant that
5 it's difficult to know if you have any exposure going
6 in. When we get to the point where we have counsel's
7 report, there may be areas that, you know, are -- the
8 plaintiff says he was at a work site, we can't tell
9 if Covil was working there, but there are Covil work
10 records, say, of employees that suggest Covil was
11 working on the site roughly about that time.

12 So we don't stake our insured out. We take
13 the evidence as we have it and give them the benefit
14 of the doubt that there is coverage afforded for
15 indemnification and then participate in the
16 settlement.

17 MR. BROWN: That's all I have. Thank you,
18 Mr. Wright.

19 Thank you, Your Honor.

20 THE COURT: Mr. Nes, redirect?

21 - - -

22 REDIRECT EXAMINATION

23 - - -

24 BY MR. NES:

25 Q. Mr. Wright, I would like you to turn back

1 to tab 6, which is Exhibit 14, the letter you were
2 just talking about with Mr. Brown.

3 A. Uh-huh.

4 Q. When you settled or authorized the
5 settlement of these claims on behalf of Penn
6 National, were you applying a continuous trigger of
7 coverage or an exposure trigger?

8 A. I was looking at if Covil had -- or was or
9 is suspected to have been performing work at this
10 site near or around this particular plaintiff during
11 Penn National's policy periods that we definitely
12 would make a payment.

13 Q. That wasn't my question, though. Did you
14 apply a continuous trigger on an exposure trigger?

15 A. Well, the injuries are all continuous from
16 the date the injury occurs. It's our position that
17 Penn National's coverage is triggered during the
18 policy period when the injury occurs. Not when some
19 prior time they were exposed and then continued to
20 have an injury through Penn National's policy
21 periods.

22 Q. Are you familiar with the terms continuous
23 trigger versus exposure trigger?

24 A. I've heard them expressed in a variety of
25 different ways, and it just depends on the individual

1 who is trying to explain it.

2 Q. It's fair to say you don't handle a lot of
3 asbestos claims in your day-to-day practice as a
4 claims handler?

5 A. I handle all of the company's asbestos
6 claims.

7 THE COURT: Mr. Wright, speak up. I'm
8 hearing you say you handle all asbestos claims?

9 THE WITNESS: I handle all of Penn
10 National's asbestos claims.

11 THE COURT: That's what I thought. That's
12 what I thought from your prior discovery
13 deposition.

14 BY MR. NES:

15 Q. You are the one who handles all of Penn
16 National's asbestos claims, but I didn't ask you if
17 you were the only person who handled their asbestos
18 claims. I'm talking about your knowledge of handling
19 asbestos claims. You've been with Penn National for
20 22 years. The majority of what you've done in
21 handling claims isn't asbestos claim; is that fair to
22 say?

23 A. In my time with Penn National?

24 Q. Right.

25 A. It's a good share of what I've done over

1 that period of time.

2 Q. Then let's use this as the example of an
3 exposure trigger. Someone is exposed to asbestos in
4 1970. That's the only evidence. Way before any of
5 the Penn National policy periods that we know about.
6 Just exposed in 1970. The way you handled Exhibit
7 14, is that claim covered or not?

8 A. Not.

9 Q. But you paid a whole bunch of claims where
10 the exposure was prior to the Penn National policy
11 periods only; isn't that right?

12 A. No. I already explained. The evidence
13 that came from counsel via their reporting suggested
14 that there was an operations exposure during this
15 time and we paid those.

16 MR. NES: No further questions.

17 THE COURT: Anything further from
18 Mr. Brown?

19 MR. BROWN: No, Your Honor.

20 THE COURT: Mr. Wright, thank you so much
21 for your testimony. You may step down.

22 All right. Mr. Nes, call your next
23 witness.

24 MR. NES: Your Honor, we call the receiver,
25 Peter Protopapas.

1 THE COURT: Mr. Protopapas, come around and
2 take the chair.

3 - - -

4 PETER PROTOPAPAS, being first duly
5 sworn, testified as follows:

6 - - -

7 THE COURT: You may you proceed.

8 - - -

9 EXAMINATION

10 - - -

11 BY MR. NES:

12 Q. Please introduce yourself.

13 A. My name is Peter Demos Protopapas.

14 Q. You were appointed by this Court to serve
15 as the Covil receiver; is that correct?

16 A. That is correct. On November 2nd, 2018.

17 Q. Before we get into your duties and
18 obligations as a receiver, could you provide us some
19 brief background on your professional and community
20 ties.

21 A. Certainly. I graduated from the
22 South Carolina School of Law in 2000. Took an
23 associate position at Lewis Babcock & Hawkins. Later
24 bake a partner at Lewis Babcock & Hawkins. Left in
25 2010 to start by own law firm with Robert Rikard

1 where we are at today.

2 Q. When did you first learn about the Covil
3 litigation?

4 A. On November 2nd of 2018.

5 Q. How did that come about?

6 A. I had previously worked with now
7 Judge Lydon, Sherri Lydon, who was a receiver for
8 Ponzi scheme cases, which my law firm handles on
9 behalf of investors. She became the U.S. Attorney in
10 2017. I spread the word I would be the receiver for
11 those types of cases. And I think that's how my name
12 circulated to be a potential receiver.

13 And Ms. Theile McVey, a lawyer in Columbia,
14 South Carolina, asked me if she could put my name up
15 to be a receiver for a company in her litigation. It
16 turned out to be Covil. And that was on that Friday,
17 November 2nd, 2018.

18 Q. I would like you to turn to tab 6 in your
19 binder. This is Exhibit 137.

20 Do you recognize this?

21 A. I do.

22 Q. And what is this?

23 A. This is the order appointing me as receiver
24 for Covil on November 2nd of 2018.

25 Q. I would like to turn to the next tab, which

1 is Exhibit 138.

2 A. This is an order clarifying the
3 receivership. Wall Templeton was the defense firm at
4 the time and refused to cooperate with me in the
5 first four or five months of the receivership. I
6 asked the Court to clarify whether they had to talk
7 with me. The Court was good enough to clarify that
8 and a couple of other issues.

9 And shortly thereafter, I fired Wall
10 Templeton. And the carriers then hired Ellis &
11 Winters, who I did not know prior to their
12 appointment in March of 2019, as a law firm for
13 Covil.

14 Q. Would you say that it's fair to say that
15 the two exhibits we looked at, Exhibit 137 and 138,
16 provide your charge as the receiver for Covil?

17 A. That is correct.

18 Q. What generally do you understand are your
19 obligations as the receiver?

20 A. To, one, identify the assets available, in
21 this case, primarily legacy liability insurance
22 policies; to field the claims to be made against
23 Covil by accepting service of lawsuits in other
24 identification of claims; tendering those claims to
25 the carriers and to competent defense counsel to vet

1 the claims and make a determination if the claim is
2 valid and if there is an asset that responds.

3 Q. When was the first time you interacted with
4 any lawyers for an insurance company related to
5 Covil?

6 A. On Monday, November 5th of 2018, I received
7 a phone call from a large New York law firm saying
8 they wanted to meet with me about Covil.

9 Q. What happened next?

10 A. They said they wanted to meet with me in
11 person. They showed up at my office on Wednesday,
12 November 7th. They met with me for an hour and a
13 half to tell me that every policy was exhausted and
14 there was nothing to be done in Covil other than
15 advise the court there was nothing to be done and
16 shut it down.

17 And then the next day they served me with a
18 lawsuit in North Carolina to declare they had no
19 responsibility for the Finch judgment. And that was
20 Zurich and Century Insurance and Travelers.

21 Q. So within the first few days of being
22 appointed the receiver for Covil, you were served
23 with a lawsuit by insurance companies in a
24 declaratory judgment action and they came down and
25 met with you; is that right?

1 A. They came down and met with me to explain
2 from their perspective that there was nothing to be
3 done.

4 Q. Do you have a background in insurance
5 coverage litigation?

6 A. I do not have a background in legacy
7 liability insurance.

8 Q. Do you have a background in asbestos
9 litigation?

10 A. I have no background in asbestos
11 litigation.

12 Q. So what did you do next?

13 A. I researched to find competent assistance
14 for the receivership. I identified at that time
15 Dubose Robinson, now Smith Robinson, and I identified
16 Morgan Lewis as law firms that were capable of
17 assisting me in representing Covil's interest
18 pursuant to their legacy liability policies.

19 Q. Once you hired counsel, what was your next
20 step?

21 A. The first year Covil was a very contentious
22 period of time. Two default cases were entered.
23 Those cases were set for trial in April of 2019. The
24 carriers had taken positions I thought were contrary
25 to Covil, so there was litigation in the Middle

1 District of North Carolina, litigation in the
2 district courts of South Carolina.

3 Wall Templeton failed to cooperate and
4 provide me any information regarding any of those
5 cases. I had to come to court for clarification in
6 February of '19. I then fired Wall Templeton. The
7 carriers refused to allow them to be fired. I then
8 sued Wall Templeton, and they took the hint that they
9 were fired. And that's when Ellis & Winters and
10 Nelson Mullins began to represent Covil.

11 Q. What steps did you take to investigate
12 Covil's overall coverage program?

13 A. We have a series of -- now we have in place
14 a series of subpoenas that we send up to known
15 carriers, Freedom of Information Act request that we
16 send to various governmental entities, like workers'
17 comp commissions and departments of insurance, to
18 call up as much information as we can to identify a
19 legacy liability program.

20 In the Covil program, there were documents
21 that had been put together in 2017 and early 2018 by
22 Gallivan White & Boyd and later Wall Templeton in
23 response to this Court's striking of an answer for
24 failure to participate in insurance-related discovery
25 prior to my involvement. And that -- I used that

1 information, but generally speaking is through the
2 discovery to brokers, workers' comp commissions,
3 industrial commissions, and insurance carriers.
4 Through that discovery process, we began to identify
5 the insuring broker.

6 Q. And so to be clear, you served subpoenas on
7 insurance companies seeking their insurance policies
8 related to Covil?

9 A. That's correct.

10 Q. And in the coverage litigation, you also
11 served a variety of discovery document requests,
12 interrogatories, requests for admission?

13 A. That's correct. We serve a ton of
14 discovery on as many people as possible that we feel
15 are tied to the entity.

16 Q. Please turn to tab 2 of your binder, which
17 has been marked by the Defendants as Exhibit 9. Do
18 you recognize this document?

19 A. I do recognize the document. This is a
20 policy chart that goes hand in hand with a policy
21 schedule. A schedule is a graph or spreadsheet, and
22 then this is just a visual representation to allow
23 folks an easier way to look at the policy coverage.
24 And because Covil is not a company that I worked for
25 or with in the '60s, '70s, and '80s, it is a work in

1 progress with all sorts of disclaimers that we put
2 into the fine print because we're doing the best that
3 we can with the information we have adjusting it
4 along the way.

5 For example, Scottsdale is not on this
6 exhibit. Scottsdale is on an earlier policy chart,
7 but Scottsdale had an asbestos exclusion, if I'm not
8 mistaken.

9 THE COURT: Mr. Protopapas, keep your voice
10 up, please.

11 THE WITNESS: So this schedule does not
12 have Scottsdale Insurance on it. An earlier
13 schedule would have Scottsdale Insurance. And
14 the reason why I made the decision to remove
15 Scottsdale Insurance at this time was they had
16 an asbestos exclusion, and I was dealing with
17 asbestos claims. So this is a work in progress
18 from day one even through now.

19 BY MR. NES:

20 Q. When was Exhibit 9 created?

21 A. I have not found the exact date; however,
22 by the settlements that are recognized in the exhibit
23 is after Hartford and TIG, the first two carriers to
24 reach an agreement, but prior to Century. Century
25 reached its agreement at the end of January of 2020.

1 Hartford and TIG entered their agreement, generally
2 speaking, early December of 2019. The Court approved
3 all three agreements in April of 2020.

4 Q. When this policy chart was created that is
5 Exhibit 9, did Hartford have disputes with the
6 receiver on Covil's available coverage?

7 A. Every single insured for Covil has a
8 dispute with Covil. Every single one. Hartford and
9 TIG were both of the opinion that they did not have
10 responsive insurance for the Covil claims as we were
11 setting forth, as Covil as was setting forth in its
12 papers in the Middle District of North Carolina or
13 the District Court of South Carolina.

14 We believe those policies mean X. Hartford
15 believes they mean Y. Hartford believed they had an
16 asbestos exclusion available to them for an '85
17 policy. Hartford believed that some of the policies
18 were incomplete, and that they did not have complete
19 policies, therefore, they did not have
20 responsibility.

21 It was a traditional, robust coverage
22 fight. And Hartford and TIG came to the conclusion
23 that maybe in part because of the Century, Travelers,
24 and Zurich alter ego cases, that perhaps they wanted
25 to get out. I don't -- they entered into a

1 negotiation, a settlement approved by the court.

2 Q. You talked about Hartford. I believe the
3 red is Travelers; is that right?

4 A. Red is Travelers. They dispute, for
5 example, the left-hand side of this chart. They
6 dispute they issued 54 to 64 primary.

7 Q. So when you say they dispute it, what you
8 mean is that even though it's on this chart,
9 Travelers is taking a position that they didn't issue
10 any of this coverage?

11 A. That's correct. No carrier agrees with any
12 of my charts.

13 Q. We've heard testimony today from a
14 gentleman named Boyd Wright. Do you know Mr. Wright?

15 A. I have interacted with Mr. Wright.

16 Q. I would like to turn to tab 4, which is
17 Exhibit 37. This is an August 21, 2019, letter that
18 Mr. Wright sent to you; is that right?

19 A. Correct.

20 Q. Was this the first correspondence you
21 recall receiving from Mr. Wright?

22 A. It is. And in the context of Covil, the
23 first six months we're dealing with the two default
24 cases, actually trying to get the files. In July of
25 2019, we still are trying to get our documents and

1 the Covil data tape is produced. And this whole
2 time, we're trying to figure out who to even tender
3 to.

4 So we get more comfortable and we tender to
5 Penn National in August of '19. But Penn National
6 was later in the program and our fight was with three
7 primary carriers, not Penn, but it was Travelers,
8 Century, and Zurich for other actions.

9 And so when we -- seven, eight months into
10 the Covil receivership, we began noticing that we
11 needed to be tendering to Penn National. And we
12 tendered to Penn National. And this, I believe, is
13 the first correspondence for Mr. Wright.

14 Q. When you received this correspondence, did
15 you assume that the representations that were being
16 made by Penn National about what was in the policy
17 actually was in the policy?

18 A. Yes.

19 Q. And in this letter, Mr. Wright referred to
20 the exclusion for completed operation hazard and
21 products hazard GL 2104. Do you see that?

22 A. I do.

23 Q. What did you understand that that meant?

24 A. That meant they had an exclusion through
25 the policy, that there were only two policies, that

1 one was -- the first policy was issued in March of
2 '86, and that it had an exclusion for completed
3 operations hazard and products hazard.

4 Q. And in the third paragraph there's a
5 reference to one renewal. Do you see that?

6 A. I do.

7 Q. What did you understand that to mean?

8 A. That there were only two policies.

9 Q. The next paragraph says "As the attached
10 records reflect, after the policy was effective on
11 March 31, 1986, it was discovered endorsement GL
12 2104, exclusion completed operations hazard and
13 products hazard was inadvertently left off the
14 policy."

15 Do you see that?

16 A. I do.

17 Q. What did you understand that to mean?

18 A. I understood it to mean that the policy did
19 not cover completed operations products hazards.
20 That it was excluded. And that there was some
21 ministerial issue but that I shouldn't be looking to
22 Penn on that basis.

23 Q. So you understood Penn National to be
24 representing that there was an exclusion for products
25 that completed operations coverage that was contained

1 on -- contained in the policy even though it wasn't
2 on the declarations page?

3 A. You may be giving me even more credit than
4 I deserve. I took it for what it is worth that I
5 should not look to them for any coverage on completed
6 operations or products and for those style of claims
7 to be looking elsewhere.

8 Q. Fair enough.

9 In the letter where it says "left off the
10 policy," do you recall the conversation I had with
11 Mr. Wright about the language of the change
12 endorsement?

13 A. I do.

14 Q. It does not say it was left off at renewal,
15 does it?

16 A. It does not.

17 Q. If it had said left off at renewal, would
18 that have impacted how you understood what he was
19 saying in this letter?

20 A. If I had picked up it was renewal, I would
21 have initiated this litigation on August 22nd of
22 2019.

23 Q. The coverage chart that we looked at
24 earlier does not refer to an earlier Penn National
25 policy. Is one of the reasons for that it was not

1 discovered that that language existed when that chart
2 was created?

3 A. No. When you have the policy itself that's
4 created, after TIG and Century settled, but -- after
5 TIG and Hartford settled, but before Century, that's
6 December of '19, January of '20, that chart is being
7 informed by what we are receiving from carriers and
8 what we are discovering in our cases. And so at that
9 moment in time, there was no identification by me
10 that there was a 1985 policy.

11 Q. I would like you to turn to tab 3, which is
12 Exhibit 14. Do you recognize this?

13 A. I do.

14 Q. What is this?

15 A. This is the -- what I would call the
16 erosion letter from Penn National.

17 Q. When you received this letter, what did you
18 understand Penn National is communicating?

19 A. So as the receiver, the prudent marshaling
20 and application of assets to valid claims is
21 relevant. It's important. It's my job. If there's
22 an aggregate limit of 2 million that will erode to
23 zero and take away the duty to defend, that is
24 important to the marshaling of assets. How you treat
25 a claim when you have a pot that becomes zero and

1 will be zero forever. That's important information.

2 So this letter is telling me we are eroding
3 your policy. We want to let you know that.

4 I disagree with that. I don't think the
5 policy can be eroded. And so I took this to mean we
6 are going to erode it to zero at some point. There
7 will be no duty to defend. We are going to tear up
8 the policy, be done with it.

9 Q. You've mentioned that there are several
10 carriers that you've dealt with as the receiver for
11 Covil Corporation. Has any other carrier taken the
12 position that an operations claim exhausted their
13 aggregate limits?

14 A. Only in Heaton Frost, which is a different
15 receivership, by a selective in a 1990s policy that
16 uses the word general aggregate, if I'm not mistaken.
17 But nobody else in Covil took the position that
18 operations has a general aggregate limit to them.
19 Nobody else. Not Hartford; not TIG; not Century; and
20 not Travelers today, who has up millions and millions
21 of dollars, have they taken their \$300,000 policy and
22 said it's exhausted. Nobody has.

23 Q. And that's a good clarification. So no
24 insurer that issued a policy prior to 1990 has taken
25 the position that an operations claims exhausted

1 their aggregate limit?

2 A. That's correct.

3 Q. When Mr. Wright settled or authorized the
4 settlement of these Penn National cases, do you have
5 an understanding of whether he was using an
6 operation -- excuse me, a exposure trigger or a
7 continuous trigger?

8 A. I'm not sure. And so, one, Mr. Wright's a
9 professional, and we interact on a frequent basis.
10 And I enjoy those interactions as we're discussing
11 the merits of cases and claims.

12 I disagree with Penn National on their
13 position on what their policies cover. I disagree
14 with them. And so when this first hit the head,
15 which was Rollins, in early 2020, I brought a lawsuit
16 right away on Rollins. It appeared that we were
17 going to have continuous problems on two different
18 positions as to what these policies do or don't do.

19 As a result, I brought a general DJ action,
20 because we both need some measure of predictability.
21 Otherwise, I will be left with filing one lawsuit for
22 every asbestos case in this court. I started doing
23 that in the spring of 2023 because this case was
24 going up on appeal. I didn't know if it would ever
25 get a final order to give us both clarity.

1 So I now have five or so pending lawsuits
2 on five other asbestos cases simply because I was
3 worried this case may not get reached soon enough,
4 and the qualified settlement will be eroded much
5 quicker than it should be.

6 And I don't know how to manage the Penn
7 asset if it actually has an aggregate limit. So
8 managing the Penn asset and the Qualified Settlement
9 Fund is why I brought this lawsuit in 2020 right
10 after the Rollins disagreement, which is now up on
11 appeal at the Supreme Court.

12 Q. What relief are you seeking in this
13 lawsuit?

14 A. I'm seeking declarations so we both know
15 going forward how we're going to operate. Is there
16 an aggregate limit? Am I managing \$1.2 million
17 remaining on those two policies? Maybe it's 600 on
18 one, 600 on the other. Is that what I'm managing?
19 Or am I managing a per occurrence with no aggregate
20 limit? Meaning each plaintiff is entitled to a
21 bigger amount of money if they have a recover
22 judgment, verdict, or settlement amount.

23 And I think that first, is there an
24 aggregate limit to the operations claims? Second,
25 how and when do they step in? So if you were to look

1 at the percentages paid by Penn on these 14 cases,
2 they're not paying 100 percent. They are paying a
3 smaller percent. Because they take the view, rightly
4 or wrongly, I mean that's part of why we're here,
5 that they have two years of 30 or some time on the
6 risk analysis. And if that's the proper analysis, so
7 be it. If they have an aggregate limit, so be it.

8 I don't want an aggregate limit because I
9 don't think it's there, but this is the clarity we
10 need here. So I need those two issues. What is a
11 completed operation and what is an operation? So
12 that when we look at these cases, we can make
13 decisions on which carriers are participating. So
14 those are 14 cases Penn participates in. There are
15 others that Penn doesn't participate in. And so
16 it's -- this will give us that clarity.

17 I also want to know do they step in first
18 on all sums and then we sort it out? How do we put
19 the pile -- how do we put the settlement pile
20 together, the pot of money together to offer to that
21 plaintiff, if the plaintiff has a valid claim?

22 So I'm asking for those declarations to
23 bring predictability to the Qualified Settlement
24 Fund, predictability to plaintiffs because the first
25 question they ask is going to be how much money is

1 available? And that's -- they're entitled to this
2 sort of discovery in South Carolina civil -- Rules of
3 Civil Procedure, they're entitled to know. And I
4 tell them today, I can't tell you definitively what
5 Penn National's obligations are. I have a lawsuit
6 with 2,000 filings in front of Justice Toal in
7 Richland County. You can read them. Here are the
8 most important ones to look at, but I can't tell you
9 exactly what it is because we don't have that
10 clarity. I need that clarity.

11 MR. NES: No further questions. Thank you,
12 Mr. Protopapas.

13 THE COURT: Cross-examination.

14 MR. BROWN: Thank you, Your Honor.

15 THE COURT: Mr. Brown.

16 - - -

17 EXAMINATION

18 - - -

19 BY MR. BROWN:

20 Q. Good afternoon now, Mr. Protopapas. How
21 are you?

22 A. Good afternoon.

23 Q. So a few things I want to cover with you
24 here, you mentioned toward the end of your testimony
25 on direct examination about starting in the spring of

1 2023 filing some actions again Penn National. I
2 think many of which are styled as third-party
3 complaints in underlying asbestos litigation; is that
4 correct?

5 A. I believe so, yes.

6 Q. And if I understood you, you're saying that
7 was your attempt to try to bring some clarity as to
8 what might be covered on the given claim. That is on
9 a claim-by-claim basis for that plaintiff, correct?

10 A. No. What I was saying is that I bring a
11 lawsuit in 2020, this lawsuit, so that the Court can
12 tell us what does Penn have to do?

13 Q. Right.

14 A. Mr. Wright is doing his job as he
15 understands the policies. I'm doing my job as I
16 understand the policies. There are dozens and dozens
17 of cases being brought against Covil. That case goes
18 up on appeal, respectfully, in a frustrating series
19 of events for me, as the receiver trying to manage
20 these assets, and is delayed and delayed and delayed.
21 I have no idea when that case gets tried. I didn't
22 know until three weeks ago, I think. And so as a
23 result, I might as well file a bunch of lawsuits just
24 to see what happens.

25 Q. I understand. I'm not quibbling with that.

1 My question is now that the Supreme Court has denied
2 Penn National's petition, we're here today, we're
3 going to get some order from Justice Toal promptly
4 once we conclude the evidence, I'm sure. Is it the
5 receiver's position that those other third-party
6 complaints don't need to go forward? That is that
7 this declaration will suffice for all of those
8 things? Or is this declaration limited to the 14
9 claims we've been talking about and each of those
10 claims still need to be litigated?

11 A. I believe that Penn National will respect
12 the decisions of this Court today. And as a result,
13 we should be able to come to an arrangement as to how
14 to handle the other Covil cases. But I think this
15 case should clarify for us and narrow our dispute.
16 Right?

17 So if a case is a hundred dollars is going
18 to be -- we all get together, we agree on what to
19 offer the plaintiff, it's a hundred dollars. But we
20 don't agree on how to participate in the hundred
21 dollars. Or maybe I'm scared. I'm going to erode
22 the Penn policy to zero too fast. That's not prudent
23 management. But now with some clarity, we both know,
24 okay, I am -- we can then come to some sort of
25 working arrangement.

1 But what we have managed to do, to
2 Mr. Wright's credit, I think, and respectfully for me
3 as well, if we push the disagreement on the coverage
4 to the side and look at the merits of the liability
5 case, and then when it comes to participation, I
6 don't point my finger and yell at Mr. Wright,
7 you're -- you need to do more. I don't do that. We
8 have this lawsuit to settle that. We're going to be
9 professionals and respectful to each other.

10 I brought the Rollins case first. This
11 case second. And I thought I'm not here to bury Penn
12 National in 10, 20, 50 or 100 cases. Let's just get
13 the clarity we both need. And once we have that
14 clarity, if the Court rules there's an aggregate
15 limit, the Court rules exposure trigger, if the Court
16 rules, I'm going to follow it. And that makes it, I
17 think, an easier way to handle in an unbelievable
18 number of claims for an incredibly liable company in
19 the right case.

20 Any one of those cases that are
21 well-founded is a \$30 million verdict. It just is.
22 Anywhere. In North Carolina, South Carolina, it
23 doesn't matter. It's a dangerous defendant for
24 liability.

25 Did I answer your question, sir?

1 Q. I understand, and that's very helpful. I
2 respect the fact that you and Mr. Wright have been
3 professional. You heard his testimony about that
4 earlier today, and it sounds like you agree that the
5 two of you have gotten along well in handling claims.

6 A. We do. We push disputes -- we don't
7 elevate and escalate the dispute with personality
8 conflict. We keep it professional.

9 Q. Thank you for that. If we can bring up
10 Defendant's Exhibit 24.

11 MR. BROWN: Again, Your Honor, this is the
12 impairment letter we referred to several times.

13 BY MR. BROWN:

14 Q. Along those lines, Mr. Protopapas, with
15 regard to these 14 claims, is it fair to say that the
16 receiver is not seeking any more money from Penn
17 National with regard to indemnity on those claims?

18 A. I think if the Court rules the way I do
19 these policies, I do anticipate a letter going to
20 Penn National, please reassess their contribution or
21 their participation in those settlements. I think
22 that will be another round of discussion. However,
23 my real thrust is going forward, you know, I don't
24 want to start a million lawsuits with Penn National
25 if it's not necessary. And so I think we would have

1 a dialogue about it.

2 THE COURT: Can I ask a question right
3 here?

4 MR. BROWN: Absolutely.

5 THE COURT: Mr. Protopapas, let me be sure
6 I understand what you're saying. With respect
7 to the September 1, 2022, letter from Mr. Wright
8 to you regarding the 14 cases, Mr. Wright
9 essentially says: I have made settlement
10 payments totaling X. As a result, the global
11 aggregate limits are impaired by the amount of
12 settlements I have authorized on behalf of Penn
13 National. And I regard why as the amount of
14 money in total that's available and much of that
15 has been depleted by these settlements.

16 That's what Mr. Wright says to you, right.

17 THE WITNESS: Yes, ma'am.

18 THE COURT: Now, Mr. Brown's asking you if
19 we get a resolution of this thing, I understood
20 you to be asking him whether he was going to go
21 back and ask you for more with respect to the 14
22 cases; is that the question?

23 THE WITNESS: That was the question,
24 Your Honor.

25 THE COURT: These 14 cases have all been

1 settled and resolved, have they not?

2 THE WITNESS: They have.

3 THE COURT: All right. So explain to me
4 what you're going to do with respect to the 14
5 cases. Are you going to ask him for more money
6 on those or ask him to remove the restriction of
7 the aggregate policy limits?

8 THE WITNESS: The first thing I would ask
9 to remove the restriction of the aggregate
10 policy limits so that moving forward the
11 participation would be more robust in future
12 cases.

13 THE COURT: Exactly. There wouldn't be an
14 aggregate policy limit if you win, but would you
15 go back and ask for more money on these cases?

16 THE WITNESS: I would point out to them --
17 I would point out to them I believe they've
18 underpaid under -- now they have clarity of the
19 policy where they look at it again. And if they
20 would not look at it again, I would make a
21 decision whether it's appropriate to bring a
22 lawsuit.

23 Now, frankly, Your Honor, some of these,
24 such as Ashworth were smaller, total number -- I
25 think it was a 60- or \$75,000 settlement. That

1 is not one that concerns me. The ones that
2 concern me are in the pipeline. There's a
3 February block and an April block.

4 THE COURT: These are already settled
5 cases.

6 THE WITNESS: These are already done, and
7 so I'm not focused -- I would ask them to look
8 at it, though.

9 THE COURT: But you're not as focused on
10 these that have already been resolved as you are
11 on ones that are quote/unquote in the pipeline,
12 they've been brought, they are actively being
13 pursued, they're on a docket for trial?

14 THE WITNESS: Correct.

15 THE COURT: Okay. I've got what I need.

16 MR. BROWN: Thank you, Your Honor.

17 THE WITNESS: What I would ask is that
18 the -- once the aggregate limit is removed, if
19 it is removed, that when we go forward, we find
20 the way to participate consistent with whatever
21 the Court's order is. And it may be there is an
22 aggregate limit. We just don't know.

23 MR. BROWN: Understood. Understood.

24 BY MR. BROWN:

25 Q. Let me ask you to pull up Defendant's

1 Exhibit 37. Just a copy of your deposition
2 transcript, Mr. Protopapas. In particular on
3 page 111, line 16.

4 A. Right. I'm not seeking a hard-dollar
5 number from Penn National. So here we are looking
6 for clarity going forward, but I don't think I'd be
7 remiss -- I don't know when the deposition -- I think
8 it was 2022. As this case rolls on and more and more
9 cases are being settled with limited participation by
10 Penn, if the Penn position is correct, I have no
11 qualms. If the Penn position is wrong, and I've
12 spent \$200,000 on Weist, which was a 1980 exposure,
13 something like that, I am going to go back on some of
14 those old cases and ask, and say, hey, would you look
15 at it again.

16 Q. So in fairness, I just want to start at
17 line 16. So I think it's consistent with what you
18 are saying just so the record is full. So when asked
19 that question in your deposition -- I'll get you the
20 date of the deposition.

21 THE COURT: Wait. I've got his deposition
22 here. Where are you?

23 MR. BROWN: I'm sorry, Your Honor. Page
24 111, line 16.

25 THE COURT: Hang on. All right.

1 THE WITNESS: Thank you.

2 MR. NES: Your Honor, to be clear for the
3 record, though, this is an improper impeachment.
4 The question was about the number of suits being
5 filed. I have no objection if he wants to read
6 this in, but this is an impeachment.

7 THE COURT: Well, what he's -- are you
8 looking at the -- what I'm looking at?

9 MR. NES: I think so. This is just the
10 answer, but if you look at the question. If you
11 could go up to get the question.

12 THE COURT: Yeah. The question is
13 Plaintiff's complaint does not avert and has
14 language that it contends/affords coverage for
15 the claims at issue or the manner in which the
16 claim asserted as Covil and Covil asbestos is
17 considered coverage under the Penn National
18 policy or identify any of the Covil asbestos
19 suits for which it seeks declarations from this
20 Court.

21 I guess my focus would be on the "or
22 identify any of the Covil asbestos suits for
23 which it seeks declarations from this Court."

24 Sitting here today, is there -- are there a
25 specific set of asbestos suits that receiver can

1 point to for which it is seeking coverage? Is
2 that what you're asking him about, Mr. Brown?

3 MR. BROWN: Yes. And that's not the
4 question.

5 THE COURT: I think I've read what the
6 question was out of the thing, and that's a
7 little bit different from what you're asking.

8 MR. BROWN: I was asking about his answer
9 here beginning at line 16.

10 THE COURT: Well, I mean, he's not
11 answering the question you're asking, though.

12 MR. BROWN: Okay. Well --

13 THE COURT: Objection is sustained.

14 MR. BROWN: Okay.

15 THE COURT: You what may want to rephrase
16 that.

17 MR. BROWN: Sure.

18 BY MR. BROWN:

19 Q. So in your deposition you were asked about
20 do you intend to go back and seek any money back from
21 Penn National with regard to those 14 claims,
22 correct?

23 A. I can't remember with respect to those 14
24 claims or not, and I apologize for that. But what
25 the purpose of this lawsuit was, in Rollins I

1 asked -- I put in my Rollins complaint \$50,000.

2 Q. Right.

3 A. I want less than 75-. And I did that
4 because there's a specific moment in Rollins where I
5 felt that was owed. This second lawsuit filed a
6 couple of months later was like, please, let's set
7 the table. How are we getting around? But because
8 that case from 2022 spent two years on appeal, we're
9 sitting here in 2023.

10 So I'm not -- I may go back and look at
11 Weist or whatever we settled in June of 2023, there
12 may be other cases that I'm going to say I want you
13 to relook at this in light of the Court's ruling.
14 What I want to avoid is robust litigation with Penn
15 when reasonable minds should be able to solve the
16 problem.

17 Q. Understood. So let me go back to
18 Defendant's Exhibit 24, the impairment letter.

19 THE COURT: And, Mr. Brown, I may say to
20 you, I think he's kind of answered what you
21 wanted him to ask despite that, so I'll retract
22 my sustaining of the objection.

23 I think he's gone forward and told you what
24 you want to know. Which is essentially in 2022,
25 of November 17, 2022, when the deposition was

1 taken, he was inclined to go forward rather than
2 to go back in time and try to get dollars added
3 for already settled cases. Now he's frustrated
4 for how long it took and how much litigation is
5 so he's wavering a little bit. So that's kind
6 of what I get out of what he said.

7 MR. BROWN: That's what I got as well, Your
8 Honor.

9 THE COURT: Very good.

10 MR. BROWN: We will move forward.

11 THE COURT: Now you're going back to the
12 Exhibit 24.

13 MR. BROWN: To the impairment letter.

14 THE COURT: Very good.

15 MR. BROWN: Yes. Thank you, Your Honor.

16 BY MR. BROWN:

17 Q. So, Mr. Protopapas, have you received in
18 your capacity as receiver for Covil or any other
19 companies impairment letters from insurers other than
20 this one?

21 A. I don't believe I have.

22 Q. Okay.

23 A. I will say the exception is the 1976, '77,
24 '78 Travelers policy, I agreed with them that the
25 products completed operation aggregate of 300,000 had

1 been exhausted.

2 Q. Okay.

3 A. And I stipulated to that in either my
4 deposition or in the filings in court.

5 Q. And would you agree with me that if an
6 insurer believes that his policy obligations are
7 subject to an aggregate limit that it should let the
8 insured know that periodically along the way?

9 A. Yes.

10 Q. Okay. And so if Penn National was correct,
11 it is correct that its policy obligations are simply
12 to an aggregate limit, to be determined, but assuming
13 they are correct and they paid \$2 million worth of
14 claims, and then sent you a letter and said we're
15 done, that would be very frustrating, wouldn't it?

16 A. Correct.

17 Q. And so if Mr. Wright was along the way, you
18 know, \$600,000 in, maybe should have done it sooner,
19 maybe should have done it later, but at this point in
20 time he decided I paid 14 claims, now is a good time
21 to let you know what our position is. The Court's
22 going to tell us whether there's an aggregate limit
23 on these claims or not, but we believe there is.

24 So would you agree with me that it was
25 prudent for Penn National to at least say, hey,

1 Mr. Protopapas, here's what we paid so far, here the
2 summary. I know you have it in your records, you can
3 go add it up yourself or we're going to do it in a
4 very short form for you just to let you know what
5 you're thinking.

6 A. I'm glad you sent the letter saying this is
7 how they view the erosion. I have no issue with
8 that. I have issue just with the assumption of
9 whether that policy actually has it or not.

10 Q. Understood. Understood. But that answers
11 my question. So thank you.

12 And similarly with regard to the letter,
13 the initial letter, which I believe was Plaintiff's
14 37. Pull that up. We discussed earlier.

15 THE COURT: Plaintiff's?

16 MR. BROWN: Plaintiff's 37.

17 THE COURT: Go ahead. Don't wait me.

18 MR. BROWN: It was in the notebook that
19 Mr. Nes provided to you.

20 THE COURT: I've got it here.

21 MR. BROWN: Tab 4.

22 THE COURT: I got you.

23 MR. BROWN: Thank you, Your Honor.

24 BY MR. BROWN:

25 Q. So, Mr. Protopapas, this was a letter that

1 Penn National had provided in response to a tender of
2 the Howe case, correct?

3 A. Correct.

4 Q. You discussed it some length your
5 examination, correct?

6 A. Correct.

7 Q. And by this time, Penn National has already
8 produced to you the two policies that it had,
9 correct?

10 A. I had those two policies either through the
11 Middle District of North Carolina action or some
12 other avenue. I don't know the exact -- but I had
13 them.

14 Q. Understood. And so the language that we've
15 been discussing today was not hidden in any way, that
16 is the language about this was whether this was a
17 renewal or nonrenewal or new business, that was all
18 in the documents. I appreciate you're not an
19 insurance coverage specialist, although you're
20 becoming one. But that was not hidden in any way by
21 Penn National, correct?

22 A. No. But, you know, I think the fact that
23 it says renewal, and it's now providing an exclusion
24 on a change of endorsement that I now recognize is
25 unsigned by Covil, raises more concerns with me today

1 in 2023 than I appreciated in 2019.

2 In 2019, I didn't sit there and say that
3 says renewal. There's a signature block, Covil
4 didn't sign it. I didn't have -- it was more in
5 August of 2019 of I have to find somebody to look at
6 a data tape that was produced late in 2019, that
7 Covil was facing a spoliation charge, a Rule 60,
8 which I believe was affirmed on appeal. There was a
9 lot of chaos in Covil.

10 And so I took the letter to say, okay, this
11 is what the Penn situation is. The robust arguments
12 with Travelers, Century, and Zurich consumed my time.

13 Q. Fair enough. I respect that and appreciate
14 that. My only question here is, Penn National is not
15 hiding anything from you with regard to this
16 position? It's laid out. You can agree with it or
17 disagree with it, but it's laid its position out
18 there, correct?

19 A. I think the renewal thing should have been
20 in there. I think -- look, I think the renewal --
21 the forgetting to put a meaningful exclusion at the
22 time of renewal, that required a more in-depth
23 explanation than what was given. It may not have
24 been recognized to be given to me at the time. I'm
25 not -- I respect Mr. Wright. I'm not saying other

1 than I -- there's more to this story than what's in
2 the '19 and that letter, Exhibit 37.

3 Q. Okay. So you have alluded a few times here
4 today about the -- I can't remember the phrase you
5 used -- the litigation involving Covil, the turmoil
6 with Covil, et cetera, and you kind of came in to
7 right the ship a little bit -- or a lot.

8 The litigation that was filed the week --
9 less than a week after you were appointed in your
10 current capacity as receiver, that was filed by you
11 said Zurich, Century, and Travelers?

12 A. Filed by Zurich, but with the knowledge of
13 Century and Travelers before filing.

14 Q. Okay. No knowledge by Penn National of
15 that filing, correct?

16 A. No, Penn National was on the sideline.
17 They weren't even named in that case.

18 Q. Right.

19 A. I brought a lawsuit -- there have been lots
20 of lawsuits in Covil. But the Penn National was a
21 sideline insurance company, like Scottsdale, like
22 some of the others that are later in the program.
23 And Hartford brought Penn to the Middle District of
24 North Carolina case as a third-party defendant,
25 perhaps. And that's really when I think Penn got

1 drug into the bigger coverage litigation. But I
2 didn't initiate my coverage litigation against them
3 in a meaningful way until this lawsuit in the spring
4 of 2020.

5 Q. If Penn National -- has Penn National ever
6 filed its own declaratory judgment action against in
7 Covil in the Supreme Court?

8 A. Not that I know of. No, I don't believe
9 they have.

10 Q. And my only point was that some of the
11 conduct you described in other carriers, Penn
12 National, they haven't tried to run to another state
13 or federal court in the state to file a DJ action.
14 They've answered this case. They've been here.
15 They've answered the Rollins case. They haven't
16 tried to run and hide or go to another forum for
17 anything, have they?

18 A. They have not.

19 Q. Okay. Let me ask -- let me pull up the
20 coverage chart again. So Defendant's Exhibit 9. I
21 believe it was Defendant's Exhibit 9, I believe the
22 Plaintiff's version was this notebook that Mr. Nes
23 provided to you.

24 MR. BROWN: The policy chart, Your Honor.

25 THE COURT: I got it.

1 BY MR. BROWN:

2 Q. So my first question, Mr. Protopapas, is
3 just how was this put together? Who put it together
4 and what kind of source documents were looked at in
5 order to do so?

6 A. So there is a -- for this specific policy
7 chart, I come into possession of the Covil files in
8 the summer of 2019. There's some of that file
9 represented here. I come into the carrier's version
10 of their coverage when the Zurich brings its lawsuit
11 in the Middle District of North Carolina. I get the
12 subpoena responses either from Penn or from Wall
13 Templeton or from somebody from the pre-receivership
14 Middle District subpoena. So we start getting
15 information in, and those become the sources, along
16 with more discovery, more discovery, more discovery,
17 of these policies.

18 Now, I will say that an important moment
19 was July of 2019, and it might have been this
20 courtroom, when a series of orders were issued
21 regarding a data tape and regarding the production of
22 files. And from those files is where we got the far
23 left red, which is in dispute with Travelers, that
24 where we believe they may have had responsibility.
25 So it's from productions from insurance counsel or

1 insurance companies, the records that Gallivan White
2 & Boyd and then Wall Templeton held were primary
3 sources for this analysis.

4 Q. And is it something you put together?

5 A. It's something I directed to be put
6 together. So I looked at a lot of -- especially in
7 Covil, I've looked at a lot of the original
8 information. For example, the Hartford policies,
9 I've looked at the Zurich policies, the Century
10 policies, the USF&G '76 to '78 policies. And if
11 there's secondary evidence of a policy, I will
12 generally find time to look at that as well.

13 Q. So you have mentioned earlier in your
14 testimony a Scottsdale policy that was subject to an
15 asbestos exclusion.

16 A. I believe it was subject to an asbestos
17 exclusion or claims made like during the evidence --
18 series of policies that were actually claims made
19 policies as opposed to occurrence. So I didn't feel
20 like I could make a valid -- I didn't believe they
21 were an accident.

22 Q. Where on this chart was the Scottsdale
23 policy? Where it was removed?

24 A. I don't know if there was a chart with
25 Scottsdale on it. You get a schedule which is --

1 this is -- a schedule is a graph, a chart, maybe
2 seven, eight columns. Column one would be year,
3 column two would be carrier, column three would be
4 policy. You know, they have series of columns in the
5 insurance legacy liability world. People find it
6 useful to have that sort of a chart. And then the
7 chart can sometimes be made into a graphic
8 representation, and this is a graphic representation.

9 Q. Understood. So let me ask a better
10 question with regards to Scottsdale. Regardless of
11 whether they were actually made in a version of the
12 chart, what year or years did this Scottsdale policy
13 cover when you identify?

14 A. It would be post '88. I apologize. I
15 can't remember the exact years.

16 Q. That's okay. So it would be on this chart
17 out to the right of the Penn National policy from '86
18 to '88?

19 A. I believe so, yes.

20 Q. But that you determined that this
21 Scottsdale coverage was subject to an asbestos
22 exclusion?

23 A. I believe it was asbestos exclusion or
24 claims made. But for a very good reason, I could not
25 bring them -- they did not have, I believe, an

1 indemnity obligation.

2 Q. Are you aware of asbestos exclusion kind of
3 became more commonly used post 1986?

4 A. I've seen them very often in '86.

5 Q. Okay.

6 A. And I've seen a handful in '84, '85. And
7 I've seen some with no asbestos exclusion in the
8 '90s.

9 Q. And are you aware that the insurance
10 services office that we discussed earlier today
11 promulgated an asbestos exclusion form in '86?

12 A. Yes. My understanding is that the
13 industry, for one reason or another, changed -- began
14 putting in a specific asbestos exclusions.

15 Q. Okay.

16 A. And I think it's '86. It may be '85.

17 Q. Okay. And so in your experience, it would
18 be fair to say that it's common or at least not
19 uncommon to see asbestos exclusions on policies in
20 the later '80s and into the '90s, correct?

21 A. That's where I've seen them. I've seen
22 them after '85, '84 normally. But I have lots of
23 policies in the '90s that do not have asbestos
24 exclusion. Each company kind of goes about modifying
25 the ISO or accepting the ISO changes at its own pace.

1 Q. Fair enough. And that was my point. Penn
2 National policy is from '86 to '88, even though there
3 might have been asbestos exclusion available at that
4 time from ISO, Penn National didn't put it on the '86
5 to '88 policies, correct?

6 A. Correct. I do not believe there's an
7 asbestos exclusion.

8 Q. And so some carriers did have asbestos
9 exclusions in the late '80s like perhaps Scottsdale
10 and some didn't like Penn National?

11 A. Hartford had asserted some asbestos
12 exclusion argument in Covil for that '84, '85, but it
13 didn't get off the ground because they couldn't find
14 all their policies, but they maintained a position
15 that they felt there was questions.

16 Q. Okay. So I'm glad you raised that Hartford
17 question. Let me direct your attention to that --
18 you mentioned '84, '85, I will use the '84, '85 and
19 '85, '86 years, so two years apart for coverage just
20 before these two Penn National policies on the chart.

21 I understand that Hartford took certain
22 coverage position about forms that it could or
23 couldn't find and believed to be the policies, but
24 did Hartford at least acknowledge those policies were
25 in existence?

1 A. They were real shaky, and so there were
2 very talented lawyer named Jim Ruggeri was very good
3 at walking the line of let's find a reasonable
4 compromise and settle because I think I'm going to
5 beat you on these things. So they would produce
6 documents, but they would have legends on them. This
7 can't be relied on. These may not be the actual
8 documents.

9 Q. Okay.

10 A. They had a whole bunch of that. I never
11 found an '85 policy. The primary policy for '85.

12 Q. Let me rephrase my question, then, in light
13 of that. Did you how -- did you satisfy yourself
14 that you should put Hartford on this chart from '84
15 to '86?

16 A. I satisfied myself the same way I satisfy
17 Travelers. The idea of I think there's enough, and
18 they're not going to agree with my charts, but that's
19 okay. I'm putting it on there so when I look at it,
20 I have a one glance moment where the case arose in
21 '73, these are the carriers I could look at. The
22 carriers arose in '64, these are the carriers I can
23 look at. And everybody will take coverage positions
24 different than what I think they have. But we have
25 to deal with plaintiff. We have to deal with the

1 plaintiff.

2 Q. With regard to the '84, '86 Hartford
3 coverage, did you also satisfy yourself that they had
4 umbrella policies during those years, that is,
5 sitting over the primaries?

6 A. I believe they had an umbrella policy for
7 those years. I don't believe they ever admitted to
8 it.

9 Q. Okay. So I believe you testified that in
10 December of 2019, you entered into a settlement with
11 Hartford and TIG with regard to an overall resolution
12 of their potential coverage obligations for Covil,
13 correct?

14 A. That's correct.

15 Q. And as a result of that resolution, did
16 they make certain payments to the Qualified
17 Settlement Fund?

18 A. They, along with Century, made
19 \$44.5 million in payments into the Qualified
20 Settlement Fund, which was then established in April
21 of -- April, May of 2020. I apologize. The day may
22 be May.

23 Q. Okay. Does that include a Travelers
24 contribution, or is that separate?

25 A. These were three carriers approved in

1 court, open court, in -- the order I believe is April
2 of 2020.

3 Q. Okay. And in consideration of the payments
4 made by Hartford, did you execute a release of
5 Hartford?

6 A. I did.

7 Q. And in that release did you release any
8 policy obligations that Hartford may have from '84 to
9 '86?

10 A. I did.

11 Q. And, in fact, if you're looking at this
12 chart, did you release any potential coverage
13 obligations that Hartford may have under each of the
14 policies here that -- where Hartford appears? That
15 is starting in roughly early 1978 through roughly
16 1986?

17 A. Yes. Any policy I allege they have are
18 released.

19 Q. Including the '84 to '86?

20 A. That's right. I wouldn't say they admitted
21 to those policies, but they certainly wanted to be
22 released from them.

23 Q. Okay. Now, going back to Penn National for
24 a moment, has Penn National defended each case that
25 you have tendered to them for defense?

1 A. There may be a 1991 case, and I apologize,
2 but generally speaking, they have -- or I mean, there
3 may be a one-off where the injury arises after 1988.

4 Q. Okay.

5 A. Then what I do is that's a Qualified
6 Settlement Fund obligation. I have flexibility to do
7 something if it is a valid claim. But generally
8 speaking, they have been participating since April of
9 2020. Once -- I think right around when this lawsuit
10 was filed.

11 Q. And the 14 claims that we've discussed at
12 some length in the impairment letter, did Penn
13 National pay defense costs in each of those?

14 A. My assumption is yes. I mean, until Ellis
15 & Winters writes me a letter saying we're not getting
16 paid. So my assumption would be that they have paid
17 on an agreement that they have with Travelers. I did
18 not insert myself into that agreement. But as long
19 as the carriers are providing a defense, I try to
20 stay away from interfering with how they negotiate
21 amongst themselves.

22 Q. In each case Penn National has defended,
23 has Mr. Wright sent you a nonwaiver letter?

24 A. I'm sure he has.

25 Q. And with regard to the kind of the dividing

1 up of the defense cost that you just mentioned, you
2 have left that with the carriers. Are you generally
3 aware who's paying what in terms of the defense cost?

4 A. I'm generally aware that they're on some
5 version of a 50/50 split.

6 Q. Okay.

7 A. I would think that the way Covil currently
8 operates, the defense cost should be dropping every
9 single year. And they are. You compare this defense
10 spend for 2019 to 2023, it is a drop because we do
11 not take the same approach as was taken in prior
12 litigation. So we evaluate the claims. We provide
13 information. We ask the plaintiff for information.
14 We get a report from Ellis & Winters. We meet on the
15 report. We try to make smart, earlier decisions, and
16 hopefully, that's reflected in the overall defense
17 fund.

18 Q. And with regard to the defense fund, so
19 we're clear, the QSF is not paying any defense cost,
20 correct?

21 A. The QSF is not paying defense cost except
22 the Qualified Settlement Fund. If a case goes to
23 trial in Richland County, I will supplement the
24 defense team or any county, North Carolina, I don't
25 care where, I will bring in at least one other lawyer

1 and I will do it at the expense of the Qualified
2 Settlement Fund, if necessary, so that we have the
3 best team. And it could be Matt Bogan and Robert
4 Meriwether from Nelson Mullins. I drug them in 2019.
5 The carriers agreed to pay. It may be a different
6 attorney with talent on an asbestos case.

7 I have -- I am planning for the day where
8 somebody is going to bring a case that I have to try,
9 I love Ellis & Winters, but I'm not going -- I'm
10 going to have a South Carolina firm in South Carolina
11 courts.

12 Q. Has any underlying asbestos claim against
13 Covil actually gone to trial since you've become the
14 receiver?

15 A. Thankfully, no. We won summary judgment a
16 dozen or so times in the Middle District of
17 North Carolina and in South Carolina District Court,
18 and the plaintiffs have dismissed us from a wide
19 variety of cases.

20 I believe the new relationship with the
21 plaintiff's bar is if we tell you you don't have a
22 case and you can't present evidence to us, then you
23 don't have a case. So now we're really having to go
24 all the way to the summary judgment hearing to get
25 some sort of consensus.

1 Q. Okay. And just if I might, put a fine
2 point on the defense cost piece for a moment.
3 Assuming that a complaint doesn't allege all the
4 exposure was in the '90s or later, after all the
5 coverage on this chart ended, including the Penn
6 National coverage, QSF is not paying any defense cost
7 save for the situation where you might go to
8 Mr. Bogan or Mr. Meriwether, or someone at Nelson
9 Mullins, or someone in South Carolina to be
10 co-counsel with Ellis & Winters, correct?

11 A. Correct.

12 Q. Okay. And your understanding generally is
13 that at present Penn National is paying an equal
14 share, that is, 50 percent with Travelers of the
15 defense cost, correct?

16 A. That's my understanding.

17 Q. Okay. Travelers has a lot more years of
18 coverage on this chart than does Penn National,
19 correct?

20 A. Do I think they have more coverage? Yes.
21 Do they? No.

22 Q. My only point is that Penn National is not
23 saying we only want to pay defense cost on a pro rata
24 basis. They're saying we have a defense obligation,
25 we're going to pay an equal share, correct?

1 A. That's correct. I don't know the decision
2 making between the two carriers. I think the duty to
3 defend is for all dollars, not just for one dollar.
4 It would seem appropriate to be on an even split.
5 But, you know, that's the facts. Indemnity
6 different.

7 Q. Okay. And so I'm coming to that. So with
8 regard to indemnity, you mentioned earlier some sort
9 of disagreement. I mean, is Penn National taking the
10 position that it would pay indemnity based on its
11 time on the risk of whatever policies or policy years
12 were triggered? Is that what you take issue with?

13 A. I take -- I believe there's some
14 inconsistency. Okay. Respectfully. I think there
15 are exposures that happened in the early '70s, the
16 exposure ends, and Penn will participate in a
17 resolution.

18 There are exposures in the '70s, the
19 exposure ends in the '70s, and Penn may not
20 participate.

21 So I think there's an issue on, one, what
22 is triggering that policy? Can we come to a court
23 order giving us clarity as to when the Penn policy is
24 triggered?

25 And then once it's triggered, is the

1 participation based on -- I mean, do I have the
2 ability to say to Penn that \$200,000 settlement, pay
3 it, and we'll sort out amongst ourselves.

4 Because now what's happening is the
5 Qualified Settlement Fund is picking up any
6 disagreement with Penn. And so that means the
7 Qualified Settlement Fund has a risk of eroding
8 faster than it should if the Penn asset responds the
9 way I say it does.

10 So, I mean, we're going to find a balance
11 after this case. And at that moment we have that
12 balance, I think Mr. Wright and I can sit in a room
13 for 20 minutes and say, okay, you were right on this,
14 I was right on that, how are we going to handle blank
15 case?

16 Q. Understood. So I just want to kind of make
17 sure I'm understanding the point you're making. So
18 we've talked some about trigger recurrence. Let's
19 assume for the sake of argument that Penn National
20 decided, rightly or wrongly, our two policies are
21 triggers, we're going to make the contribution toward
22 a given claim as they did on 14 claims we've been
23 talking about here today.

24 Then would you agree kind of the next
25 question is of all the years that are triggered, what

1 should we pay? All sums? Contribution rights? Or a
2 pro rata share with our two years as the numerator
3 and all the two years as the denominator?

4 A. I do think we have to come to the all-sums
5 question. And I do think that if you have a true
6 aggregate, general aggregate limit, then I'm not
7 going to ask all sums from Penn. I would ask all
8 sums from Travelers. Right? It's just one of those
9 things where I don't want the policy to erode faster
10 than it needs to if there's a general aggregate.

11 Q. I understand. I guess here my question --

12 THE COURT: Mr. Brown, we're at almost 15
13 after 1.

14 MR. BROWN: I'm sorry.

15 THE COURT: And I'm just wondering are
16 we --

17 MR. BROWN: I'm very close, but I'm also
18 happy to come back after the lunch break.

19 THE COURT: I was trying to conclude you
20 and have whatever redirect take place at the
21 lunch break, but at the same time I don't want
22 to unduly limit you. So you just tell me if you
23 prefer a break now, we can do that.

24 MR. BROWN: Why don't we take a lunch break
25 now.

1 THE COURT: I think that in mercy to the
2 court reporter, that's what we should do. Very
3 good. Let's break for lunch now.

4 Mr. Protopapas, don't talk about your
5 testimony with anybody.

6 THE WITNESS: I will not.

7 - - -

8 (A lunch recess transpired at 1:13 p.m.)

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CERTIFICATE OF REPORTER

I, Sheri L. Byers, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify:

That the foregoing deposition was taken before me on the date and at the time and location stated on page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing deposition as typed is a true, accurate and complete record of the testimony of the deponent and of all objections made at the time of the examination 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 27th day of November, 2023, at Lexington, Lexington County, South Carolina.

Sheri L. Byers,
Registered Professional Reporter,
Notary Public
State of South Carolina at Large
My Commission expires:
November 1, 2033

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

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 COMPANY;
SAM J. CRAIN & CO., INC.; AND
SOUTH CAROLINA PROPERTY & CASUALTY
INSURANCE GUARANTY ASSOCIATION,

Defendants.

T R I A L

DAY ONE - AFTERNOON SESSION

BEFORE THE HONORABLE
CHIEF JUSTICE (RET.) JEAN TOAL

DATE TAKEN: Monday, November 27, 2023

TIME START: 2:25 p.m.

TIME END: 4:13 p.m.

LOCATION: Richland County Judicial Center
1701 Main Street
Columbia, South Carolina

REPORTED BY: AMY A. BRAUSER, RPR RMR CRR
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2 P R O C E E D I N G S

3 - - -

4 THE COURT: Please be seated. All
5 right. A little more cross-examination by
6 Mr. Brown.

7 MR. BROWN: Thank you, Your Honor.

8 CON'T CROSS-EXAMINATION

9 BY MR. BROWN:

10 Q. Good afternoon.

11 A. Good afternoon.

12 MR. BROWN: May I proceed, Your Honor?

13 THE COURT: You may.

14 BY MR. BROWN:

15 Q. Mr. Protopapas, before we took our
16 lunch break, we were talking about the payment of
17 defense costs for the underwriter asbestos claims.
18 You recall that discussion?

19 A. I do.

20 Q. And I think you said that you generally
21 leave that to Travelers and Penn National as the
22 two participating carriers to work that out, but
23 you have an understanding that it's on an equal
24 shares basis, so 50/50 each carrier?

25 A. That's a fair summary.

1 Q. Okay. The -- as a Receiver, you've
2 resolved claims with four other carriers, correct?

3 A. Yes, I've resolved claims with -- when
4 you say "four others," I've resolved claims with
5 Century, Hartford, TIG/RiverStone, Zurich, and then
6 a partial resolution with United -- with
7 USF&G/Travelers.

8 Q. Okay. So five resolutions, but at
9 least four of the carriers, Century, Hartford,
10 Zurich, and TIG, they've completely resolved their
11 claims, so they've been fully released by the
12 Receiver in consideration of their payments to the
13 Qualified Settlement Fund?

14 A. Yes. Complicated Settlement Agreement.
15 But they have some obligations post-settlement. I
16 have some obligations post-settlement.

17 Q. Understood. But they do not have any
18 further obligation, for example, to defend or
19 indemnify Covil in connection with pending
20 asbestos-related bodily injury claims?

21 A. They do not.

22 Q. If they -- prior to those settlements,
23 did those four insurers, that is TIG, Zurich,
24 Hartford, and Century, pay defense costs on behalf
25 of Covil?

1 A. My understanding, I know that Century
2 and Zurich did. I do not know -- TIG disputed they
3 had a primary policy. I asserted they may have a
4 primary policy. Hartford disputed the whole thing.
5 So I don't know if they ever got into a program
6 paying defense costs.

7 Q. Okay. But at least with regard to
8 Century and Zurich, the Receiver has essentially
9 settled with them where they, if you will, bought
10 back their obligation to pay both defense and
11 indemnity?

12 A. Correct.

13 Q. Okay. Why doesn't the Receiver pay a
14 share of defense costs, stepping into the shoes of
15 at least Century and Zurich, as carriers with whom
16 they settled no defense costs presettlement?

17 A. My understanding of the law of South
18 Carolina is that an insurance carrier has a duty to
19 defend all or some on a case. I just said that
20 inartfully, and I apologize.

21 That if you have an obligation to
22 defend, it is broad enough that you must pay the
23 entire defense. If you do not have an obligation
24 to defend, you don't have to pay any of the
25 defense. And so the way I understand the law of

1 South Carolina is that any one insurer remaining
2 for Covil would have to pay the defense share, if
3 the Complaint, on its face, falls within the four
4 corners of the insurance policy. So I don't
5 believe there is a insured or client responsibility
6 to pay defense if a Complaint falls within the four
7 corners. A 1991 exposure, there would be no
8 carrier for me to tender it to, and that would be
9 something that Covil would have to handle on its
10 own.

11 Q. So just to flesh that out a minute. If
12 Travelers and/or Penn National as insurers with
13 primary GL policies responding to these claims has
14 a duty to defend, then the Receiver would then take
15 the position that the policies it has bought back
16 from carriers that would have otherwise been
17 defending do not have to contribute to the defense
18 costs?

19 A. That's my understanding.

20 Q. Okay. When it comes to indemnity as
21 opposed to defense costs, is that treated
22 differently by you in your role as Receiver?

23 A. In my role as Receiver, there is --
24 this case, hopefully, will set forth how the
25 Qualified Settlement Fund and how Penn should

1 participate. What we have done, our practice right
2 now to kind of allow the law to develop, is that we
3 meet and we try to establish the number that would
4 be a fair number to offer, putting aside how it
5 gets funded. Let's be fair to this Plaintiff.
6 Let's be fair to the defense counsel. Let's be --
7 let's make a fair analysis. At which point if we
8 can agree on what the number is, then we try to
9 agree on how it's going to get paid with everyone,
10 reserving the fact that we have our disputes.

11 I'm sure Travelers takes -- they
12 shouldn't be paying on something that -- I'm sure
13 there's a lot of this internally at the various
14 participants where everyone thinks they are paying
15 too much or someone is paying too little. But as
16 it stands now while we await some more -- some
17 clarity with the relationships, we're not going to
18 take it out on the Plaintiffs, we're not going to
19 take it out on each other if we don't have to, and
20 we're not going to take out on this Court and
21 burden the Court.

22 Q. Understood. But would it be fair to
23 say when it comes to indemnity of a given claim, as
24 opposed to defense costs, that the QSF, standing in
25 the shoes of those carriers with whom you've

1 settled and Travelers and Penn National all have a
2 seat at the table and all would have potentially
3 some obligation to indemnity to be determined
4 exactly how that all gets divied up?

5 A. Correct.

6 Q. So you make that distinction in your
7 mind between defense and indemnity, that is
8 defense, the carriers, would all Travelers and Penn
9 National indemnity, QSF may have a share and we'll
10 have to figure that out?

11 A. Correct.

12 Q. So you talked earlier today about, you
13 know, your contention that there should be some
14 sort of -- you used the phrase "all sums," all sums
15 allocation to Penn National policy.

16 Do you recall that discussion?

17 A. I do.

18 Q. And so that contention is essentially
19 that if a given policy, a Penn National policy is
20 chosen to pay indemnity on a claim, that the
21 Receiver or Covil would have the right to pick a
22 Penn National policy, you said '86, '87 policy, and
23 say when you want me to pay it. And then Penn
24 National would be responsible for resolving the
25 claim for appropriate number and then seeking

1 contribution back from others who may have some
2 responsibility for that given claim. Fair?

3 A. You're beyond my -- you're into an area
4 of the law that I think is challenging for me.
5 Okay. The best thing I can tell you, one of my
6 best skill sets as a Receiver is I know when I
7 don't know, and I try not to rush into what I don't
8 know.

9 So I think what all sums does is it
10 removes the pressure, the last-minute pressure that
11 comes with trying to fund a settlement. Okay.
12 That in part happens. Would it be fair for Penn to
13 pay 100 percent of the indemnity with no right to
14 go after somebody who may share that
15 responsibility? It doesn't sound fair to me.

16 To date, I have been -- I have done
17 what I hope is a transparent job with Plaintiffs to
18 say, These are the assets that Covil has. And when
19 you're asking for a settlement or when you're
20 making demands, you want to know what that is to
21 take into account. This is what's there. What
22 they all mean is getting sorted out. So make your
23 decision, advise your client the best that you can.

24 So I am -- I try to be transparent with
25 them and Transparent with Boyd Wright And Penn

1 National and with USF&G so that everyone sees the
2 same conundrum to try to settle the case. But I'm
3 not going to take a case to verdict or have yet
4 to -- if I think a case is worth a hundred dollars,
5 nobody else does or nobody will fund it, I'm not
6 going to take a case to trial that I feel has
7 incredible exposure to Covil if there's a fair
8 number the Plaintiff will except, that the
9 Qualified Settlement Fund in its best interest
10 should pay.

11 So I think I have been the one that has
12 been moving forward despite perhaps more limited
13 participation from either USF&G or Penn or before
14 them, Century or before that, Zurich.

15 Q. Understood. I guess this is what I'm
16 trying to understand, Mr. Protopapas. If the Court
17 were to determine that the allocation is as you've
18 requested, that is an all-sums basis for indemnity,
19 and if the Receiver says on claim X, you know, we
20 want Penn National to pay a hundred percent of it,
21 and if some of the policies with TIG, Zurich,
22 Hartford, Century would have responded to that loss
23 for indemnity, is the Receiver prepared to pay
24 contribution toward that claim? Would Penn
25 National pay it's own contribution, or is your

1 position that Penn National should just pay it all
2 and QSF just stays fully funded with its assets?

3 A. I think it's part of what -- that's
4 part of what today is. So the way I look at it is
5 I don't believe Crossman is the law of asbestos
6 personal injury cases. I don't. I believe that
7 that is -- that asbestos personal injury cases have
8 to be -- take into account that you -- I couldn't
9 buy policies or Covil essentially couldn't get
10 policies in the marketplace post '88, post '89 that
11 would have had coverage for their historic
12 operations.

13 And so I don't think Crossman is right.
14 Is a modified Crossman appropriate or is a more
15 narrow view of what can and cannot be responsive?
16 That, I think, is part of the direction that your
17 client needs and that I need.

18 Q. So just on the Crossman point for a
19 moment, you think that doesn't apply why? Because
20 it was a property damage case?

21 A. In part it's a property damage case.
22 Now, once again, I am not an expert in legacy
23 liability policies, so I try to stay my lane, which
24 is, I recognize there's a dispute, I recognize
25 there's an outstanding issue. I want to bring it

1 to a resolution so we can proceed forward in a
2 predictable manner.

3 Q. I understand. But I mean, you've kind
4 of packed a lot in there. So in property damage
5 cases, those contractors can't get coverage for
6 EIFS-related claims once EIFS looses on the
7 policies, just like asbestos exclusion on a GL
8 policy, right?

9 A. What I can tell you is when I read
10 Crossman, I didn't think it applied to asbestos
11 cases. If you want to ask me about, you know, an
12 area where I do profess some measure of in-depth
13 knowledge, I'm more than happy to. But I'm not --
14 I mean, Brian Barnwell in my office briefed
15 Crossman in part. It was him and the Nelson
16 Mullins team. I go to him and ask him -- you know,
17 those are the sorts of things that I do.

18 Q. Understood. What I'm trying to
19 understand is if there's a situation where there
20 are ten policy years that are triggered, and if
21 there are ten carriers, one for each year, and if
22 the carriers -- if it's pro rata time on the risk
23 allocation in one carrier, and they all kind of
24 agree we're all going to pay 10 percent of this
25 100-dollar settlement so everybody pays \$10, right?

1 A. If the carriers agree to something,
2 they can agree to whatever they want.

3 Q. Understood. If the rule is not pro
4 rata time on the risk but rather all sums, and in
5 my same hypothetical carrier in your one is chosen
6 to pay the whole hundred dollars, it can go get
7 contribution back from the other nine for ten
8 dollars each, so you end up in the same place,
9 which is everybody's paid ten dollars. It's just
10 the one carrier had to front the money, right?

11 A. If that's the law of South Carolina,
12 then that's what should happen.

13 Q. Well, I'm asking what position you're
14 taking as a Receiver here. And more to the point,
15 is it your position that if there's an all-sums
16 allocation ruling on indemnity, that the QSF no
17 longer has to participate in any settlement
18 payments?

19 A. I think to me, the QSF is a fund of
20 last resort. And so if there is funding other than
21 the QSF to resolve cases, it should be explored.
22 And so what I would hope would happen is in any
23 case involving a all-sum analysis where we are
24 struggling to fund a settlement, maybe Travelers
25 won't kick in, maybe Penn won't -- whatever it

1 happens to be, that we are allowed to choose the
2 year, respond, and then we can sort out the
3 Crossman issue with the direction this Court's
4 going to give us after the fact. But what I have
5 not allowed to happen since the settlement -- since
6 the Qualified Settlement Fund was established in
7 May of 2020, I have not allowed that dispute to
8 become a trial.

9 Think of the Finch case for a second.
10 This is what Finch is, if you really want to know
11 why Finch happened. Finch happened because in
12 September of 2018, Zurich and USF&G had a
13 settlement offer on the table of, I think it was
14 \$400,000. Neither of them would pay. Or maybe it
15 was a million. Neither of them would pay it. The
16 case was obviously worth a million dollars in
17 settlement, obviously. But they would not pay it.
18 So Zurich said, We only have \$250,000 of
19 responsibility, we're giving you the authority to
20 spend if you want to, Travelers. The case ends up
21 going to trial because a reasonable number from the
22 plaintiff is not met by the insurance companies
23 because neither one would step up to make the
24 actual payment. Now you have a \$32 million
25 verdict.

1 That scenario where the carriers either
2 put their interest in front of their insured or you
3 allow the risk of an outsized judgment to cripple
4 the entity. I won't have. I mean, I will do what
5 is necessary within the powers I have as a manager
6 of a Qualified Settlement Fund or as a Receiver to
7 extend the settlement authority and then sort out
8 who chips in or how much it gets chipped in later.

9 And that is part of what this lawsuit
10 is for. This lawsuit is to help me get direction
11 and help us address claims going forward. So the
12 Qualified Settlement Fund is going to do 80 percent
13 of the indemnity, right, which it -- I mean, you
14 can look at the numbers, it probably is something
15 like that. On a lot of these cases, it may be
16 hundred percent. Is that right? Is that how -- is
17 that how the South Carolina law is supposed to
18 work? Or can I choose all sums and say, You're
19 going to put up the money first, not the Qualified
20 Settlement Fund, and then you're -- if you want to
21 litigate the clawback money elsewhere, that burden
22 is on you. Now it's on me.

23 Q. So if the carriers with whom you
24 settle, the TIG, Zurich, Hartford, Century, that
25 paid money into the QSF, if they would be

1 responsible on a given claim the way the allocation
2 works for paying 80 percent of the money, do you
3 agree or disagree that the QSF should pay
4 80 percent of the money, assuming an all-sums
5 allocation to Penn National and Travelers?

6 A. I don't believe that the QSF is meant
7 to do more than what the insurance policies bought
8 back intended. And so if you have a claim that
9 would implicate -- now, what is the Hartford
10 policy, though, right? What is the Zurich policy?
11 What is the Century policy, right? I mean, there
12 are things within that that aren't as easy to say A
13 leads to B that leads to C. But what we're not
14 looking to do, or at least what I'm not looking to
15 do, is take advantage of any one carrier or treat
16 them unfairly within a receivership. And if I have
17 a dispute with a carrier, rather than sue them for
18 \$200 -- 1.8 million or whatever those 14 cases are,
19 what I've done is said, please help me understand
20 how we're supposed to go forward. I haven't sued
21 directly for bad faith in this case, have I? I
22 mean, I'm just trying to -- I am trying to be fair
23 with that.

24 Q. I understand.

25 A. And so there's -- there may come a

1 moment where Penn and I disagree on how a case
2 should be handled, and I'm sure we have had those
3 disagreements. But what I would like from the
4 declaratory judgment is guide rails for both of us
5 going forward. And for me, the guide rails that
6 are best for the Qualified Settlement Fund is being
7 able to allocate the initial responsibility for
8 indemnity to a year. And whether that year gets
9 the clawback left or sideways or however on a
10 policy term, that issue, to me, would be specific
11 to what the qualified settlement fund's obligations
12 are under its settlement agreements with Hartford,
13 under its settlement agreements with Century, under
14 its settlement agreements with Zurich, and what
15 their individual policies were when they were
16 bought back.

17 Q. I appreciate you're not -- you don't
18 believe the Qualified Settlement Fund should be
19 obligated to do more than the policies issued by
20 TIG, Zurich, Hartford, and Century be obligated
21 to -- no dispute about that. I agree with that.

22 My question is, do you think the
23 Qualified Settlement Fund should be able to do less
24 than what those four carriers' policies would do if
25 they were -- had not been settled?

1 A. I do think they can be the funding of
2 last resort. Now, do I take that -- and what I
3 mean by "funding of last resort," I mean everyone
4 else's policies pay and erode before the Qualified
5 Settlement Fund has to pitch in. That's not the
6 practice of the Qualified Settlement Fund on those
7 14 cases, as you can see. None of them went to
8 trial. And the major amount of indemnity came out
9 of the QSF. So I take a real -- I take a -- my
10 approach is the Qualified Settlement Fund should
11 get the benefit, or Covil should get the benefit of
12 its insuring contrast to the most amount allowed
13 under the contract itself. Pursuant to the terms
14 of your contracts. But they should always go
15 first, and the QSF should always go second.

16 Q. Second meaning that they would then pay
17 by way of contribution what they owe or second
18 meaning they wouldn't pay anything until the Penn
19 National and Travelers limits were exhausted?

20 A. I would like to see them either
21 exhausted or not implicated in a case before the
22 QSF steps in.

23 Q. Okay.

24 A. Take, for example, the QSF's
25 obligations, right. If somebody has a fair claim

1 in 1988 and you assert and win properly the product
2 completed in aggregate limit of Penn National or
3 aggregate -- the products complete -- the completed
4 operations and products coverage doesn't exist or
5 is exhausted, I am going to use the Qualified
6 Settlement Fund as the fund of last resort to
7 extend a settlement offer, if it's a good case, if
8 it's a proper viable case, to that plaintiff.
9 There's no insurance policy that gives me that
10 obligation. But I am doing it because, frankly, as
11 the funding of last resort and the fair thing to do
12 with that plaintiff who just managed to get hurt in
13 a year where there's no insurance, I'm going to
14 have more responsibility ultimately than Penn has
15 for claims against Covil because of the way we
16 approach the Qualified Settlement Fund and
17 claimants. So I would like that money to be used
18 for clearly noncovered claims, 1990 exposures, 1991
19 exposures, and as the date of first exposure climbs
20 against Covil, we go from '69 when I first started
21 to '74 is the date of first exposure now, roughly.
22 You're going to be tagging more and more areas
23 where there is no insurance coverage, late '80s,
24 early '90s. And so I think the Qualified
25 Settlement Fund should make fair settlement offers

1 in those cases that Penn would have no
2 responsibility for that postdates their policy.

3 So I would like that money to be used
4 and the Penn money to be used and managed -- or the
5 coverage managed in a way where there's the most
6 benefit to Covil, and I think that is having the
7 insurance policies go first.

8 Q. So if the -- if a given -- a given
9 claimant comes forward and -- well, let me back up.

10 Leaving aside the Finch verdict,
11 which -- well, to your knowledge, is Finch the only
12 case that's actually gone to a jury against Covil?

13 A. I mean, since 2018. I can make that
14 statement.

15 Q. Okay. Since 2018, since you got
16 involved as Receiver, what is the -- what is the
17 most amount paid in any one claim for settlement on
18 behalf of Covil?

19 A. Can we caveat it ones that did not --
20 the ones that postdate -- ones that were filed
21 before me and went into default have a settlement
22 number that is large.

23 Q. Let's leave those aside. So cases
24 against Covil that have been filed since you became
25 the Receiver where you have engaged Ellis & Winters

1 or counsel, filed a timely answer, you know, come
2 in and negotiated them with plaintiff's counsel,
3 you know, in a fair-minded, wholesome way, what is
4 the most money that's been paid on any one claim by
5 way of settlement to Covil?

6 A. Maybe 700 or 750. And I'm sorry, I may
7 be off on that.

8 Q. That's fair enough.

9 A. A lot of cases.

10 Q. Would it be fair to say -- I'm sorry, I
11 didn't mean to interrupt.

12 A. There just have been a lot of cases.

13 Q. I understand.

14 Would it be fair to say that none have
15 been over a million dollars?

16 A. I don't think so. If there is, there
17 would be one off or two off.

18 Q. And so if the Court were to adopt an
19 idea that the QSF doesn't have to pay anything
20 other than as the funder of last resort on
21 indemnity, it's already not paying defense costs,
22 and if the settlements are less than a million
23 dollars, less than two million dollars, and Penn
24 National and Travelers have to pay all those, the
25 QSF would never have to pay anything unless and

1 until you get to claims that where all the exposure
2 was post 1988, correct?

3 A. Or if you have a products exclusion, a
4 completed operations exclusion. I've already
5 submitted into federal court and in Middle District
6 of North Carolina that Travelers' products and
7 completed operations were exhausted. If there's no
8 coverage for products or completed operations,
9 which are a third of the claims, perhaps. I don't
10 know. Whatever that number is. Those are all QSF
11 claims now.

12 Q. So going back to the 14 claims on the
13 impairment letter that we've been discussing, is it
14 fair to say that Penn National has not made any
15 sort of claim for contribution against the QSF for
16 any amount it paid on those?

17 A. It has not.

18 Q. Okay.

19 Let's pull up Defendants' Exhibit 6.

20 (Exhibit Number 6 was previously marked and
21 referenced.)

22 THE WITNESS: If I may add one caveat,
23 when the order comes out in this case, if it
24 answers these questions, I'm going to abide
25 by that order, right. I mean, that's what I

1 am going to do. I'm going to go forward with
2 that order as my guideline. Is that fair?

3 BY MR. BROWN:

4 Q. I understand.

5 Sorry. I meant to turn the TV back on
6 after lunch.

7 A. Is this the September 1st letter?

8 Q. No, it's the policy. It's the Penn
9 National '86, '87 -- I'm sorry, '87, '88 policy.
10 (Discussion held off the record.)

11 MR. BROWN: May I approach, Your Honor?

12 BY MR. BROWN:

13 Q. I believe Mr. Nes was good enough to
14 say that the policy I'm referring to is Tab 2 of
15 the Boyd Wright notebook.

16 THE COURT: '87, '88?

17 MR. BROWN: Yes, Your Honor.

18 THE COURT: All right.

19 BY MR. BROWN:

20 Q. And in particular, if we could -- I
21 want to go over to page -- on the exhibit, it's
22 Bates stamp 81, Penn National Policy 81 at the
23 bottom. Definitions applicable to Section 2 at the
24 top.

25 MR. NES: Your Honor, for the record,

1 I'm going to object to any questions asking
2 the Receiver to interpret the insurance
3 policy. He's not been designated as our
4 expert witness on insurance policy
5 interpretation.

6 THE COURT: I understand. I must say
7 that we have now gotten into -- I don't know
8 whether this is some kind of semi-legal
9 argument about how or rule about all sums or,
10 you know, just what this is. But it's a far
11 cry from his normal job as Receiver to ask
12 him to blue sky and speculate as to what he's
13 going to do with your claims and the QSF,
14 so --

15 MR. BROWN: Appreciate that.

16 THE COURT: -- I tell you, I think
17 you're on the edge of what he's put up here
18 to talk about.

19 MR. BROWN: I appreciate that and I'll
20 wrap this up. And I only raise these
21 questions because the testimony that he, for
22 example, disagrees with the Crossman position
23 and disagrees with Penn National's coverage
24 position.

25 THE COURT: That's no surprise to you

1 from the findings of fact and conclusions of
2 law they submitted quite sometime ago. They
3 don't disagree with Crossman, but they say
4 Crossman doesn't apply because Crossman is a
5 different kind of policy and is talking about
6 a property damage-type risk as opposed to
7 this, and they said all-sums claim applies
8 here because of the language about bodily
9 injury and so forth in your policy.

10 MR. BROWN: I understand that. I
11 understand that argument, and I'm sure we'll
12 have a healthy debate about that at the
13 appropriate time.

14 THE COURT: Exactly. That's a far cry
15 from what this fact witness can tell you.

16 BY MR. BROWN:

17 Q. If you could just pull up the
18 definition of bodily injury and highlight that.
19 That the left corner.

20 A. I got it.

21 Q. Top left.

22 A. I'm with you.

23 Q. Okay. So is this language that you've
24 looked at before, Mr. Protopapas?

25 A. I'm sure I have.

1 Q. Okay. And this definition of bodily
2 injury includes: (Reading)

3 Bodily injury, sickness or
4 disease sustained by a person which
5 occurs during the policy period,
6 including death at any time resulting
7 therefrom.

8 Did I read that correctly?

9 A. You read that correctly.

10 Q. And the "during the policy period"
11 language modifies the bodily injury, correct?

12 MS. PATTERSON: Objection, form. We
13 are now getting into expert testimony, asking
14 the Receiver to interpret the insurance
15 policy.

16 THE COURT: Again, we're talking about
17 a judge here, we're not talking about a jury.
18 They covered their position about this very
19 well in their submissions. They take the
20 position that this is open-ended, that it
21 includes all sums because it's bodily injury
22 that occurred at any time during the policy
23 period, and they take the policy period not
24 to be the two years, they take it to be the
25 coverage they are talking about, which is a

1 very different thing. So ask -- I mean, I
2 don't know that that's something Peter is
3 going to add to by giving you his legal
4 opinion about.

5 MR. BROWN: So let me ask this one
6 question and I'll be done with it.

7 BY MR. BROWN:

8 Q. Is this language different than the
9 language at issue in Crossman that you read when
10 you said you read the Crossman opinion?

11 A. I'd have to -- I apologize. I'd have
12 to go get the Crossman.

13 THE COURT: The Court --

14 MR. BROWN: I'll leave it at that.

15 THE COURT: The Court knows that it's
16 very different. Two different -- completely
17 different things. The language is different
18 and -- but you're talking about in terms of
19 injury is very different. That doesn't mean
20 Crossman support your point of view, but this
21 policy and the Crossman policy are not the
22 same. I'm looking at both of them.

23 MR. BROWN: I appreciate that.

24 We'll -- I appreciate -- I'll look forward
25 the opportunity to go through those in more

1 detail, and I'll pass the witness.

2 THE WITNESS: Thank you.

3 MR. BROWN: I think that's all I have,
4 Mr. Protopapas. Thank you very much.

5 MR. NES: No redirect.

6 THE COURT: Redirect?

7 MR. NES: No, Your Honor.

8 THE COURT: You may come down,
9 Mr. Protopapas.

10 THE WITNESS: Thank you, Your Honor.

11 THE COURT: You may call your next
12 witness.

13 MS. PATTERSON: Your Honor, Receiver
14 would next call Sharla Frost.

15 THE COURT: All right. Ms. Frost, come
16 around, please, and be sworn.

17 (WITNESS SWORN.)

18 THE CLERK: Please have a seat on the
19 witness stand and state your full name for
20 the record.

21 THE COURT: Let's get her on the stand
22 first.

23 MS. PATTERSON: Your Honor, may I
24 approach? I've got a witness notebook for
25 you.

1 THE COURT: Good. Thank you. And
2 remind me your name.

3 MS. PATTERSON: Nancy Patterson.

4 THE COURT: Thank you so much.

5 MS. PATTERSON: Your Honor, I'm just
6 going to slide this back slightly.

7 THE COURT: I wouldn't touch that for
8 anything in the world. You just don't
9 know --

10 MS. PATTERSON: I won't touch it. I'll
11 do my best to see it.

12 THE COURT: Just --

13 MS. PATTERSON: I can see it just fine.

14 THE COURT: Move your podium if you
15 need to, but that's dangerous territory.
16 Ms. Patterson, on direct.

17 THE WITNESS: And may I state my name
18 for the record, Your Honor?

19 THE COURT: You sure may.

20 THE WITNESS: My full name is Sharla Jo
21 Frost.

22 MS. PATTERSON: Your Honor, may it
23 please the Court. Nancy Patterson on behalf
24 of the Receiver.

25

1 DIRECT EXAMINATION

2 BY MS. PATTERSON:

3 Q. Good afternoon, Ms. Frost. How are
4 you?

5 A. I'm good. Thank you.

6 Q. Excellent.

7 You've already stated your name for the
8 record. Could you, please, tell the Court where
9 you currently reside?

10 A. Yes, I split my time between Houston,
11 Texas and my ranch property in the southeastern
12 corner of Oklahoma.

13 Q. And you are an attorney?

14 A. I am.

15 Q. All right. How long have you been
16 licensed to practice law?

17 A. I was licensed in 1987.

18 Q. And I understand you're retired from
19 the full-time practice of law. We'll get to what
20 you did in a moment, but what are you currently
21 doing?

22 A. I spend about a quarter of my time, I
23 do strategy work for certain clients, I negotiate
24 settlements on behalf of clients in asbestos and
25 talc cases. I run a cattle ranch and I write

1 children's books.

2 Q. I won't ask you which of those things
3 is your favorite.

4 You've been designated, as you're
5 aware, by the Receiver to provide expert testimony
6 in this case here today. But before we get into
7 your opinions, I just want to have you provide the
8 Court a little bit of information about your
9 background and experience.

10 You should have in the notebook in
11 front of you what's been marked as Trial
12 Exhibit 94.

13 (Exhibit Number 94 was previously marked and
14 referenced.)

15 THE WITNESS: I do.

16 MS. PATTERSON: Your Honor, I believe
17 that is the third-to-the-last tab in the
18 notebook.

19 BY MS. PATTERSON:

20 Q. And can you --

21 THE COURT: I have it. I have it. I'm
22 looking right at it.

23 MS. PATTERSON: Thank you, Your Honor.

24 BY MS. PATTERSON:

25 Q. Could you tell the Court what that is?

1 A. It is my CV.

2 Q. And is that a true and correct copy of
3 your current CV?

4 A. It is.

5 Q. All right. We're not going to go
6 through the entire document, it's lengthy, but I
7 did want to touch on a few highlights from your CV.

8 MS. PATTERSON: Your Honor, just for a
9 moment, this is not clicking.

10 MS. VALEK: Tell me when you want to go
11 to the next one.

12 MS. PATTERSON: Let's go to the next
13 one. All right. There we go.

14 BY MS. PATTERSON:

15 Q. And in order to move things along
16 quickly, you assisted me in putting together a few
17 slides highlighting some things, correct?

18 A. I did.

19 Q. All right. Could you tell the Court
20 when you graduated from law school and where you
21 attended law school?

22 A. Yes. I graduated law school in 1987
23 from Baylor Law School in Waco, Texas.

24 Q. And are you licensed to practice law in
25 the state of Texas?

1 A. I am.

2 Q. Have you been licensed throughout your
3 career in other jurisdictions?

4 A. I have. And I currently maintain an
5 active license in Oklahoma. When I retired in June
6 of 2020, I went inactive in Colorado, West
7 Virginia, and Mississippi where I had previously
8 held active licenses.

9 Q. Could you tell the Court about your
10 federal court admissions?

11 A. Yes. I have been admitted in the
12 United States Supreme Court bar since 2012. I am
13 admitted in the Federal District Courts for all of
14 the Texas courts and the Oklahoma courts. Over the
15 years, I've been admitted pro hac in various
16 federal courts around the country, specifically in
17 North Carolina, Mississippi, Florida, and some
18 elsewhere.

19 Q. That's in the federal courts?

20 A. Those are federal courts, correct.

21 Q. Very good. Thank you.

22 During your lengthy career, have also
23 been granted admission via pro hac vice to practice
24 law before various state courts outside of Texas
25 and Oklahoma and these other states?

1 A. I have.

2 Q. All right. Very good.

3 And again, is this demonstrative that
4 we prepared, does this represent the case -- I'm
5 sorry, the states, the other jurisdictions in which
6 you've been granted pro hac admission throughout
7 your career?

8 A. It does.

9 Q. And that includes the state of South
10 Carolina?

11 A. It does.

12 Q. All right.

13 MS. PATTERSON: Let's go to the next
14 slide, please.

15 BY MS. PATTERSON:

16 Q. Could you provide the Court a brief
17 summary of the various law firms where you worked
18 following your graduation from law school in 1987?

19 A. I started my career at Fulbright and
20 Jaworski in Houston, which at the time was the
21 largest law firm in Houston, I believe the largest
22 in Texas. From there, I went to a Fulbright
23 spinoff, which was a litigation boutique, where I
24 began my work as an asbestos defense lawyer. And
25 then over the years, I had my own firm for almost

1 20 years. Then I went to the local office of
2 Wilson Elser where I was the managing partner for
3 the Houston office. Wilson Elser is an
4 international law firm based out of New York. I
5 finished my career as a partner at Tucker Ellis,
6 which is a Cleveland-based law firm, and was in
7 their Houston office.

8 Q. And what year did you begin handling
9 asbestos cases?

10 A. 1989.

11 Q. So just two years out of law school?

12 A. Correct.

13 Q. All right. Did you end up specializing
14 in asbestos litigation, in particular asbestos
15 cases representing defendants throughout your
16 career?

17 A. Not intentionally, but yes, I did.

18 Q. All right. And did you develop, as we
19 have listed here, experience in case development
20 and trial experience on behalf of defendants in
21 asbestos cases?

22 A. I did. I did both case management and
23 trial work for a variety of different kinds of
24 defendants in asbestos litigation over the years.

25 Q. And we'll get to the variety of

1 different clients you represented. I want to talk
2 to you just for a minute about case development.

3 We have listed here "Record Retention
4 and Review." Can you tell the Court what your
5 experience is in that regard in the area of case
6 development?

7 A. Yes. Over the years, I was involved
8 with various clients collecting and collating
9 documents to prepare for defense cases. I helped
10 with record review and analysis of those documents
11 once they were collected in order to provide a
12 defense for whichever defendant it was that I was
13 dealing with at the time.

14 Q. Okay. And I'm going to ask you about
15 your trial experience, your actual trial
16 experience. Before I get to that, and I know this
17 is asking you to estimate, but over the course of
18 your 30-plus year career, how many asbestos cases
19 do you think you were involved in as counsel for a
20 defendant?

21 A. Literally thousands.

22 Q. All right. In terms of your actual
23 trial experience, how many asbestos cases have you
24 taken to trial?

25 A. I had more than 60 cases where I went

1 to trial, and through either to verdict or
2 virtually to verdict, cases that settled on the eve
3 of resolution. There were dozens and dozens of
4 other cases that we prepared for, were ready to go
5 to trial, but those resolved short of an appearance
6 in the courthouse.

7 Q. And those cases that you actually tried
8 or the cases that you got up to the brink of
9 trying, were you generally acting as first chair
10 trial lawyer on those matters?

11 A. I was. In probably 95 to 97 percent of
12 the cases I tried during my career, I sat as first
13 chair.

14 Q. All right. The other thing we have
15 listed on this slide mentions "Verdict and
16 Settlement Analysis." We're going to talk more
17 about this in specifics in a few minutes. But
18 basically, if you could provide the Court a
19 high-level summary of the work you've done in
20 verdict and settlement analysis throughout your
21 career.

22 A. Part of my assignment on behalf of the
23 defendants whom I represented was to analyze cases
24 to determine whether they were appropriate for
25 trial or better suited for settlement. So a

1 significant portion of my assignment on behalf of
2 clients was to make a verdict analysis and assist
3 them in decision-making on whether cases should go
4 forward to trial or should be settled.

5 MS. PATTERSON: Let's go to the next
6 slide. Already there. Thank you.

7 BY MS. PATTERSON:

8 Q. I'd like to talk a little bit about the
9 types of clients that you've represented throughout
10 your career. Could you give the Court, again, a
11 high-level summary of the variety of clients you've
12 represented?

13 A. I started my career by representing the
14 Manville Personal Injury Settlement Trust, and I
15 have represented clients of that size all the way
16 down to -- I represented a Ford dealership in
17 Mukilteo, Washington, north of Seattle. So I have
18 represented both larger and small defendants in the
19 asbestos space throughout the time that I have done
20 this work.

21 Q. And you mentioned the Manville Trust.
22 Is that the Manville Trust that was created after
23 the Johns Manville bankruptcy?

24 A. That is correct. The Manville Personal
25 Injury Settlement Trust.

1 Q. Okay. And is fair to say that you have
2 represented defendants in the asbestos litigation
3 occupying various different positions within the
4 industry, manufacturers, distributors, property
5 owners, insulators, things of that nature?

6 A. That is a fair characterization of the
7 types of cases and clients that I've handled.

8 Q. You also have listed here that you've
9 served as a member of national trial teams for
10 various defendants. Can you provide the Court some
11 background on what you've done in that capacity?

12 A. Yes. I was on the national trial team
13 for Johnson & Johnson in connection with their
14 early talc cases, and in fact, had one of the first
15 defense verdicts in a talc mesothelioma case.

16 I tried cases as trial counsel for
17 Pfizer in both property damage and products
18 liability cases related to asbestos.

19 I did a significant number of cases for
20 Georgia-Pacific in connection with their joint
21 compound products.

22 I was primary trial counsel for
23 Turner & Newall both before they went bankrupt and
24 then after they came back as a bankruptcy trust.
25 And then I've tried silica and asbestos cases for

1 American Optical, which is a protective
2 equipment -- respiratory protective equipment
3 defendant. And I was on the national trial team
4 for Dana, which is a friction defendant. I'm not
5 sure I ever actually ended up going to trial for
6 them, but I was trained and ready to go on those
7 cases as well.

8 Q. As you know, we're here today on behalf
9 of the Receiver for Covil Corporation. And as I
10 know you're aware, Covil was an insulation
11 contractor that at one time had significant
12 operations, particularly in the southeast United
13 States.

14 Have you had experience during your
15 career representing insulation contractors?

16 A. I have. Turner & Newall had an
17 asbestos contracting arm. The Quigley Company,
18 which was a subsidiary of Pfizer, had a contracting
19 section that installed their products. And there
20 were at least two of the defendants that were
21 members of the Center for Claims Resolution who had
22 contracting arms and for whom we provided defense
23 in the context of the CCR.

24 Q. How would you say -- and I know this
25 may be difficult for you to brag about yourself a

1 little bit, but I'm going to ask you to.

2 How would you say your background in
3 the area of asbestos litigation and trial strategy
4 compares to your peers?

5 A. I probably have as much experience in
6 the defense of asbestos cases as anyone in the
7 country except for maybe Al Parnell and
8 John Fitzpatrick.

9 MS. PATTERSON: Next slide, please.

10 BY MS. PATTERSON:

11 Q. Your CV lists a number of organizations
12 with which you've been involved and which you are a
13 member in a number of activities. We just picked
14 out a few here. Are these that we've listed here,
15 in your view, particularly relevant to the opinions
16 you're going to be providing to the Court?

17 A. They are. I was fortunate to be
18 president of the Litigation Counsel of America
19 between 2010 and 2011. That is exclusively a trial
20 lawyers organization and covers both defense and
21 plaintiff side. I was elected to the membership of
22 the American Board of Trial Advocates. Again, that
23 is a trial group and is specifically focused on
24 litigators. Chambers USA chose me as one of their
25 products liability mass tort spotlight lawyers

1 during 2017, 2018, and 2019, and that was the
2 asbestos trial spotlight. I shared that with
3 Mr. Parnell and Mr. Fitzpatrick.

4 Then in 2018 I was voted by my peers in
5 Houston as the Houston Lawyer of the Year for
6 product liability litigation for defendants. And I
7 have been an active member of the DRI. And in
8 fact, I realize that there is one item missing from
9 my CV. I was actually a speaker at the DRI two
10 weeks ago providing a defense closing argument in a
11 mock asbestos case.

12 Q. And where did that take place?

13 A. That was in Austin.

14 Q. All right. Thank you.

15 Is the testimony that you're prepared
16 to offer today as an expert witness based on your
17 education, your training, and three decades of
18 experience as an asbestos trial defense lawyer as
19 you've described for us here today?

20 A. It is.

21 MS. PATTERSON: Your Honor, on behalf
22 of Receiver, we would proffer Ms. Frost as a
23 testimony practice expert on the history and
24 evolution of the asbestos litigation and the
25 evaluation of asbestos defense claims such as

1 the one against Covil.

2 THE COURT: Mr. Shealy?

3 MR. SHEALY: No objection, Your Honor.

4 THE COURT: By reason of her education,
5 training, and experience, I qualify Sharla J.
6 Frost, Esquire, as Plaintiff's expert in the
7 area of the history and evolution of asbestos
8 litigation and evaluation of asbestos claims.

9 MS. PATTERSON: Thank you, Your Honor.

10 BY MS. PATTERSON:

11 Q. We put up a slide here that you and I
12 worked on together which is just a summary of the
13 opinions that you'll be providing today.

14 First, you'll be talking about the
15 history and evolution of asbestos personal injury
16 claims in the United States, correct?

17 A. Correct.

18 Q. And that includes, as we've talked
19 about, the analysis and management of asbestos
20 litigation by Defendants, potential defendants, and
21 their insurers, correct?

22 A. That is correct.

23 Q. All right. And then finally, you're
24 going to talk with us a little bit about the
25 verdict risk analysis, generally the factors that

1 you look at, and more specifically, as to certain
2 actual claims filed against the Covil Corporation,
3 correct?

4 A. That is correct.

5 Q. All right. Thank you?

6 MS. PATTERSON: Let's go to the next
7 slide.

8 BY MS. PATTERSON:

9 Q. I'm going to -- just again to sort of
10 speed things along, we'll group the bucket 1 and
11 bucket 2 of your opinions together, which is the
12 history and then the management and evolution of
13 asbestos claims.

14 MS. PATTERSON: Go to the next slide.

15 BY MS. PATTERSON:

16 Q. Did you assist me in putting together a
17 timeline to assist the Court with a discussion of
18 the history of the asbestos litigation?

19 A. I did.

20 Q. All right. Let me again, and I know
21 the Court is well familiar with this, but what
22 types of products generally contained asbestos in
23 the early part and the middle part of the 20th
24 century?

25 A. There were literally hundreds of

1 products that contained asbestos. As of relevance
2 to these cases, we're really looking at thermal
3 insulation products and the types of products that
4 were installed in industrial settings.

5 Starting in the 1920s, there's a focus
6 on worker risk associated with the manufacture of
7 asbestos-containing products, and that was sort of
8 the beginning of the analysis of risk of asbestos
9 and its health effects.

10 Q. And as we've indicated here on the
11 timeline, was it in the '20s where there really
12 became scientific evidence available linking
13 asbestos to various severe industrial illnesses?

14 A. Yes. And I believe it was 1924, Cooke
15 in the UK published a case report about a young
16 woman named Nellie Kershaw who is famous in the
17 asbestos litigation as being the unfortunate young
18 woman whose medical condition was later identified
19 as asbestosis, and she was a worker weaving
20 products at one of the Turner & Newall facilities
21 located there in England.

22 Q. And Turner & Newall, which later --
23 many years later became a client of yours, correct?

24 A. That is correct.

25 Q. The next item we put on this timeline,

1 and again, I would stress this is an overview of
2 some events that you deem to be significant.

3 The next thing we have is an entry for
4 1930, the Merewether and Price article. Could you
5 tell the Court what that is and why you deem that
6 to be significant in the history?

7 A. Merewether and Price were inspectors on
8 behalf of the British government, and they were
9 actually looking at the working facilities of
10 Turner & Newall. And based on their analysis, they
11 determined that workers who were exposed to
12 asbestos during the manufacturing of products, in
13 this instance, weaving, because these were textile
14 workers, were at an increased risk of the
15 development of lung problems and other health
16 issues from that exposure. And as a result of
17 Merewether and Price's groundbreaking piece of
18 medical literature in 1930, the British government
19 instituted the first regulations to limited the
20 amount of asbestos exposure in the workplace and
21 potentially protect workers from the health risk.

22 Q. And, of course, asbestos products
23 weren't only prevalent in the UK, they were also
24 prevalent here the United States. If we go to the
25 next entry on our timeline, you mentioned Johns

1 Manville. We've heard mention of that previously.

2 The Johns Manville corporation, what
3 was the business that that company was in back in
4 the early part of the 20th century?

5 A. The Manville corporation was founded
6 in, I believe, 1858. They were one of the largest
7 consolidated companies using asbestos. They mined
8 it, they used it, and then they made products of it
9 that they then sold into industry. They were a
10 US-based company, and those products were widely
11 used in industry. They began to see workers' comp
12 claims as early as the 1930s and began to settle
13 them in that time period.

14 Q. Let's go to our next entry on the
15 timeline. This is 1964. The Selikoff conference,
16 the New York Academy of Sciences. Could you tell
17 the Court about the Selikoff conference and why you
18 deem that to be an important event in the evolution
19 of the litigation?

20 A. After the Merewether and Price study in
21 1930, there were some studies in the United States
22 that dealt with workers, particularly insulation
23 workers in the shipyards, and they concluded that
24 those workers were in a safe environment. The
25 important part about the Selikoff conference and

1 the subsequent publication in 1964 was that he
2 coordinated with the insulation union and concluded
3 that, in fact, those earlier conclusions were
4 incorrect and that insulation workers, those people
5 who were using thermal insulation products, were at
6 an increased risk of health problems related to
7 their work. So it was a groundbreaking finding
8 that people who were using the products as opposed
9 to those who were manufacturing the products were
10 at a health risk from their work environment.

11 Q. Okay. In and around this period of
12 time, in the 1960s, mid-1960s, what types of
13 companies were the primary defendants in asbestos
14 cases?

15 A. This was sort of the beginning era of
16 cases, and they were what were sometimes referred
17 to as "The Big Dusties." It was Johns Manville, it
18 was Turner & Newall, Pittsburgh Corning
19 corporation. Fibreboard Corporation owns Corning
20 corporation. Those companies that were
21 manufacturing either asbestos-containing cement
22 products or asbestos-containing thermal insulation
23 products because those were the types of products
24 that generated the highest levels of exposure for
25 the workers who were using them.

1 Q. The next entry we have on the timeline,
2 and you mentioned the company Fibreboard. The next
3 thing we have here is the 1973 decision in Borel
4 versus Fibreboard. Can you, again, highlight for
5 the Court the importance of that decision and why
6 it's important in the evolution of litigation?

7 A. Well, Borel was the first case to find
8 liability against a manufacturer of
9 asbestos-containing products, applying what was
10 then the new standard of Restatement Second of
11 Torts Section 402A and strict liability for
12 exposures related to those asbestos-containing
13 products. There had been some cases before that.
14 Tom Play, which was in 1966, was a defense verdict,
15 but the plaintiffs bar continued to pursue cases.
16 The 1973 Borel case was really the starting point
17 for what I would consider to be the generation of
18 asbestos-containing personal injury product
19 litigation.

20 Q. Is the Borel case or the immediate
21 aftermath of the Borel case when you consider that
22 the litigation began to expand at a significant
23 pace?

24 A. That was the beginning of the
25 beginning. That was the explosion point for the

1 asbestos litigation.

2 Q. All right. The next entry we have on
3 the timeline, again we're back to Johns Manville,
4 1982, that company filed for Chapter 11 bankruptcy.
5 It was facing a number of lawsuits at that time.
6 Can you tell the Court why that was significant to
7 the litigation as a whole?

8 A. The Manville bankruptcy changed the
9 landscape. They were the first of the big
10 bankruptcy. They began the cascade of bankruptcies
11 that were associated with the larger
12 asbestos-containing product manufacturers. And
13 they were notable for the fact that they were
14 created, both in their use of bankruptcy to contain
15 their asbestos litigation, but also in their
16 marshaling of assets to support the fund that they
17 set up that was designed to compensate claimants
18 going forward.

19 Q. And what types of assets did they
20 marshal to set up that fund?

21 A. They had some stock. They didn't have
22 a lot. And their biggest asset, according to both
23 the court records and to the press at the time, was
24 that they had a significant amount of insurance
25 coverage, and the insurers were either willing or

1 compelled to give those funds to the bankrupt
2 estate to then be used in order to compensate the
3 claimants going forward. So very creative and new
4 use of the Chapter 11 statute.

5 Q. The next entry on our timeline refers
6 to a New York Times article. And if you'll look in
7 your notebook, marked as Exhibit 102 --

8 MS. PATTERSON: And, Your Honor, this
9 is the first tab in the witness notebook.

10 BY MS. PATTERSON:

11 Q. And we admitted into evidence the New
12 York Times article published in 1986. Again, what
13 is significant to you about this article in the
14 context of the evolution of litigation in this
15 case?

16 A. Well, this one is illustrative. There
17 were a whole series of articles in the New York
18 Times related to the Manville bankruptcy and how
19 unusual it was and how groundbreaking it was.

20 This particular article notes in what
21 is page 3 of 4 that the plan was going to be funded
22 with \$615 million of insurance money. And that was
23 significant because that was a recognition that
24 there was liability and ongoing litigation risk
25 associated with the continuing filings of asbestos

1 cases.

2 Q. Let's go to the next entry on the
3 timeline, 1988, the Manville Trust which you've
4 mentioned a few times. Is that the year in which
5 the Manville Trust became operational?

6 A. Yes. That was the year that the trust
7 was set up and the bankruptcy court gave it
8 permission to begin operations.

9 Q. And it became a client of yours. How
10 did that work?

11 A. It did. The firm that I worked for was
12 Texas and Oklahoma counsel, both for management and
13 trial of cases that were filed against Manville.
14 And, of course, if you filed a case that alleged
15 Manville exposure, that claim was actually against
16 the trust, and the trust was responsible for either
17 resolving those cases or trying them.

18 Q. Let's go to the next entry, which is
19 1990, again, the Manville Trust, the payments
20 regarding -- related to the trust were stayed and
21 the trust was restructured at that time.

22 Could you provide the Court some
23 background on what happened at that point?

24 A. Well, the trust had estimated that it
25 was going to have, if I recall correctly, 125,000

1 cases filed against it over the lifetime of the
2 trust, which was estimated to be about 25 years.
3 Unfortunately what they found was that they had
4 almost that number of cases filed against it in the
5 first year of its existence and there simply was
6 not enough money in the estate and the trust to be
7 able to deal with the onslaught of claims, so the
8 case was taken back into bankruptcy court in front
9 of Judge Lifland who issued a stay for all
10 activities against the trust as they went in to
11 reconfigure and reevaluate how the trust would
12 work. And they no longer tried cases at that
13 point. It became a settlement vehicle only with a
14 reduced amount of settlement payment based on the
15 limited amount of resources in the estate.

16 Q. Let's just pull up the next two, 2000
17 and 2001. These are two additional bankruptcies.
18 Why did you find these two bankruptcies notable in
19 terms, again, of the continuing evolution of the
20 litigation?

21 A. Well, Pittsburgh Corning, which was one
22 of my active clients, was one of the remaining
23 manufacturers of asbestos-containing thermal
24 insulation products. They were able to sort of
25 hang on until the year 2000, and they filed for

1 bankruptcy. Shortly thereafter, the Center for
2 Claims Resolution did what was called "unbundling."
3 There was a group of manufacturing clients and
4 other defendants that handled cases jointly, and
5 they had reached the point that there were too many
6 claims, too many cases, and not enough money to
7 cover that. So they disbanded, but by doing so,
8 those defendants also began the process of filing
9 for bankruptcy. Turner & Newall had been a member
10 of the CCR, and they shortly thereafter filed for
11 bankruptcy in the UK.

12 Q. And were there other bankruptcies that
13 began in and around this period of time?

14 A. As I said earlier, there was a whole
15 cascade of them. USG, Pittsburgh Corning,
16 Fibreboard, Owens Corning. Kind of you name it.

17 Q. All right. During this period of time,
18 and let's sort of talk about 1973, which you said
19 was sort of the beginning of the explosion of
20 cases, to the early-to-mid 2000s, was there a
21 change in the type of company or defendant that was
22 being sued in these cases?

23 A. There was.

24 Q. And what was that change?

25 A. Once Manville went bankrupt, no

1 plaintiff ever remembered another Manville product.
2 So, you know, within weeks, there were no more
3 identifications of Manville.

4 One of the Plaintiff medical experts,
5 Dr. Brody, talks about the waves of development of
6 disease. There was a similar set of waves of
7 development of defendants. So the first wave was
8 the manufacturers, the miners, the millers. The
9 next wave was the manufacturers of products,
10 thermal insulation. From there, it became those
11 who used the products. So you went to the
12 contracting defendants and the distributors and so
13 on. And that classification and wave of litigation
14 continues even today as companies with more and
15 more distant relationship to significant amounts of
16 asbestos in their products become defendants in the
17 litigation even as we speak.

18 Q. And as a trial lawyer who was handling
19 these cases beginning, I think you said in 1989,
20 was it your experience that insurance companies
21 were frequently involved in defending and settling
22 these cases on behalf of their insureds?

23 A. Yes.

24 Q. All right. And by the late 1980s and
25 early 1990s, based on your experience in this area

1 of litigation, do you have an opinion as to whether
2 insurers would have generally been aware of the
3 danger of asbestos personal injury claims to their
4 insureds and policyholders?

5 A. They would have been. And as evidenced
6 by the reference this morning from Penn National's
7 counsel, in 1986, even the ISO made a change to the
8 standard policy to exclude asbestos exposure from
9 most policies that were being written for
10 insurance.

11 Q. All right. By the late 1980s and again
12 the early '90s, again, based on your experience, do
13 you have an opinion as to whether companies who
14 were using asbestos-containing materials or had
15 operations in or around such materials were
16 generally aware of the potential for personal
17 injury claims arising from their employees or third
18 parties?

19 A. Yes. Based on the litigation, it is
20 clear that that was a growing area of litigation,
21 and the OSHA regulations that came into effect in
22 1972 and applied to workplaces in terms of asbestos
23 exposure further would have been noticed to those
24 using those products, that there was a
25 responsibility to maintain levels and protect

1 workers.

2 Q. And in your opinion, by this point in
3 time, again the late '80s and into the early '90s,
4 was it important for companies and their insurers
5 in industrial settings to preserve and retain
6 documents related to their operations?

7 A. Yes.

8 Q. And why was that important?

9 A. Well, they were going to need to defend
10 the cases, and they needed to be in a position to
11 evaluate the cases and evaluate the risk that they
12 faced from those cases, and it's impossible to do
13 that if one doesn't have documents or information
14 from which to make that analysis.

15 Q. All right.

16 MS. PATTERSON: Let's go to the next
17 slide.

18 BY MS. PATTERSON:

19 Q. I want to turn now to your opinion
20 regarding verdict risk analysis that we've asked
21 you to do. You talked earlier about the fact that
22 you have experience in this area. Let me just ask
23 you generally, what are the types of factors, at a
24 very high level, that you look at to determine a
25 verdict risk analysis when you're examining an

1 asbestos personal injury case?

2 A. I take a look at the disease process
3 that's alleged. I look at the job classification
4 of the claimant. It's usually a male plaintiff.
5 So I look at what he was doing, what his conditions
6 of work were, what his conditions of exposure were.
7 Damages information, if that's available.
8 Jurisdiction, plaintiff's counsel, verdicts for
9 that counsel and for that jurisdiction. So those
10 are the types of information that I look at for an
11 individual case to make a verdict risk analysis.

12 Q. Now to be clear, you were not asked in
13 this case to perform any sort of damage analysis
14 with regard to the cases you reviewed, correct?

15 A. That is correct.

16 Q. All right. You focused, for purposes
17 of this case, more on disease type and conditions
18 of exposure, correct?

19 A. That is correct.

20 Q. All right. And we'll get to the letter
21 that we've heard a lot about today, but you were
22 asked to review the 14 cases identified in the
23 September 2022 letter by -- from Mr. Wright to the
24 Receiver, correct?

25 A. I was.

1 Q. And were you provided documents to
2 review in that regard?

3 A. I was. I got eight lovely, large
4 D-ring notebooks full of materials. It comprised,
5 I believe, four bankers boxes full of materials.

6 Q. Okay. And we'll talk in a minute about
7 the types of materials --

8 THE COURT: Welcome to my world. I get
9 that about every week.

10 THE WITNESS: Every week. Yes, Your
11 Honor.

12 MS. PATTERSON: Let's go to the next
13 slide.

14 BY MS. PATTERSON:

15 Q. So you mentioned disease types. So
16 again, these are things I know the Court is well
17 aware of, but just for the purposes of the record,
18 could you talk us through your analysis generally
19 of disease type when you're reviewing a case and
20 making a verdict risk analysis.

21 A. For the purposes specifically of these
22 cases, I was looking really at whether they were
23 mesothelioma. Mesothelioma, as you are well aware,
24 is what's called a "signature disease" by the
25 plaintiffs' experts. That means that it is a

1 disease that is most commonly associated with
2 exposure to asbestos. It is a type of lung cancer
3 that occurs in the mesothelial lining of the lungs.
4 It is exquisitely painful. It is invariably fatal.
5 And it is associated with an extraordinarily high
6 risk of an adverse verdict for a defendant,
7 particularly in a living mesothelioma case, but
8 also in the death cases.

9 Q. And what about lung cancer?

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

18 Q. Okay. Thank you.

19 MS. PATTERSON: Let's go to the next
20 slide.

21 BY MS. PATTERSON:

22 Q. So I want to talk to you about one of
23 the other factors, in particular the other factor
24 that you were looking at with regard to the cases
25 against Covil, and that is the conditions of

1 exposure. And what we have here are two types of
2 exposure, direct exposure and bystander exposure.
3 Could you, again, generally provide a description
4 of each of those for the Court?

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

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

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

25 A. The industrial hygiene literature and

1 the medical literature related to asbestos all
2 demonstrate that each of these types of activities
3 have been proven to release friable asbestos that
4 in turn presents a risk of exposure to those people
5 who are in the vicinity.

6 Q. And as, again, a practitioner in this
7 area for over 30 years, did you become familiar
8 with various industrial settings in which workers
9 who might have direct exposure or bystander
10 exposure were working?

11 A. I did. I have had both deposition
12 testimony opportunities and literature
13 opportunities to hear people describe it and to
14 read about those types of exposure.

15 MS. PATTERSON: Let's go to the next
16 slide. You can go ahead and populate. There
17 we go.

18 BY MS. PATTERSON:

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

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

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

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

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

20 Q. Like the scaffolding?

21 A. The scaffolding, yes.

22 And the laborers or helpers who did the
23 cleanup or did other sorts of tasks in the vicinity
24 of any of these other positions also are
25 demonstrated in the literature to have fairly

1 significant exposure and are, therefore, at risk.

2 Q. Okay. And with regard to your review
3 of the cases that were filed against Covil, tell us
4 what you looked at in terms of operations and job
5 sites.

6 A. Well, I read the deposition
7 transcripts, both of the workers or -- and/or the
8 coworkers, to understand the conditions of
9 exposure, and I identified the dates in which they
10 were alleged to be on the various properties. I
11 looked at the type of work that they were doing,
12 looking at the descriptions to see what levels of
13 exposure were likely associated with their task.
14 And then applying the standard that was actually
15 generated originally in a Fourth Circuit case by
16 the name of Lohrmann, I looked to see what the
17 proximity was to the product, how close were they
18 to either the product or the work activity, what
19 the duration of that exposure was and with what
20 frequency they would have had exposure in that
21 setting. All of those go into evaluating the
22 likely strength of the product identification or
23 the exposure identification, depending on the
24 claimant.

25 Q. And next I'll have you look at Trial

1 Exhibit 14, which is the second-to-last tab in your
2 notebook, and it's the September 1, 2022 letter
3 that we've already seen and heard testimony about
4 today.

5 (Exhibit Number 14 was previously marked and
6 referenced.)

7 BY MS. PATTERSON:

8 Q. Do you recognize this document.

9 A. I do.

10 Q. And were you provided this document in
11 the course of your work as an expert witness in
12 this case?

13 A. I was.

14 Q. And this lists the 14 cases that as of
15 the date of the letter to which Penn National had
16 contributed towards settlement. Did you understand
17 that to be the case?

18 A. That was my understanding.

19 Q. Okay. And we asked you to review each
20 of these cases, correct?

21 A. You did.

22 Q. All right. And let me go ahead and
23 take you to the next.

24 MS. PATTERSON: And let's go back for
25 just a second if you don't mind.

1 BY MS. PATTERSON:

2 Q. We have five of them highlighted.
3 Those are the ones that we're going to talk about
4 in a little bit more detail. Just to save time and
5 be efficient for the Court, we're not going to go
6 through all of them.

7 MS. PATTERSON: But let's go to the
8 next slide.

9 BY MS. PATTERSON:

10 Q. Again, you gave us a little bit of an
11 idea of the eight notebooks and the boxes that
12 you've got. Again, can you provide the Court some
13 detail about what was contained in those boxes and
14 documents?

15 A. Each of the cases had a plaintiff's
16 Complaint with written discovery responses.
17 Depending on the case, there was either a
18 deposition transcript of the plaintiff, a coworker
19 or a family member to substantiate the allegations.
20 For most of the cases, there were some sort of
21 Covil records that related to contracts with the
22 facilities, where it was located or something else
23 to document the location, and then there were Covil
24 defense counsel pretrial reports from the Ellis &
25 Winters firm that analyzed and summarized certain

1 of the information. I went back and for each of
2 the Ellis & Winters reports, I read all the
3 underlying materials to confirm that I agreed with
4 their analysis and summary of the materials, but it
5 was a good overview for each of the cases.

6 Q. And did you find that you agreed with
7 the Ellis & Winters' pretrial --

8 A. I did, with minor -- as is always the
9 case when there are a lot of cases, there were a
10 couple of times when I would have highlighted
11 something slightly different in a setting, but
12 there was nothing substantive that I disagreed
13 with. They did a very good job of analyzing the
14 cases and doing it thoroughly.

15 Q. And one thing that we didn't include on
16 here, but I just wanted to ask you, did you also
17 review, in certain of the cases where they existed,
18 motions for summary judgment and oppositions filed
19 by Covil to the motions for summary judgment and
20 the exhibits to those pleadings?

21 A. Yeah, I did. For those cases in which
22 a motion for summary judgment and an opposition had
23 been filed, which was some of the cases, not all of
24 them, I reviewed those materials as well.

25 Q. Okay.

1 MS. PATTERSON: And, Your Honor, just
2 for the record, the documents that are
3 pertinent to Ms. Frost's review with regard
4 to all 14 of these cases are in evidence as
5 Trial Exhibits 15 through 28.

6 Let's go to the next exhibit -- or next
7 slide.

8 (Exhibit Number 103 was previously marked and
9 referenced.)

10 BY MS. PATTERSON:

11 Q. Exhibit 103, if you'll turn to that,
12 and that's going to be the second tab in the
13 notebook.

14 Could you tell the Court what
15 Exhibit 103 is?

16 A. Yes. That is a declaration that I
17 prepared in support of the Receiver's proposed
18 findings of fact and conclusions of law that
19 includes within it the summary of my analysis of
20 each of the 14 cases on Exhibit 14, which is the
21 September 1st, 2022 letter referencing the
22 14 cases.

23 Q. Okay. And the declaration, for the
24 record, is 23 pages long and you signed it back in
25 December of 2022, last year, when this case was

1 initially scheduled to proceed to trial; is that
2 correct?

3 A. That is correct.

4 Q. All right. And this is in the record
5 as well and provides a more fulsome discussion of
6 your review of each of these cases; is that right?

7 A. That's correct.

8 MS. PATTERSON: Let's go to the next
9 slide.

10 BY MS. PATTERSON:

11 Q. As I indicated, we're not going to go
12 through all 14, but we've selected five of these to
13 highlight for the Court. You're welcome,
14 certainly, to refer to your declaration if you need
15 to. Not meant to be a memory test.

16 The first one we're going to talk about
17 is the Ashworth claim, Robert Ashworth, and the
18 trial exhibit documents related to Mr. Ashworth are
19 contained in Trial Exhibit 16. This lawsuit was
20 filed in August of 2019.

21 Did you review the case materials
22 related to Mr. Ashworth's case against Covil?

23 A. I did.

24 Q. All right. And having reviewed those
25 documents, what did you determine in terms of the

1 appropriateness and resolution of this case and
2 why?

3 A. Well, I determined that it was an
4 appropriate case for resolution for variety of
5 reasons. He was a deceased lung cancer case. He
6 had exposure in his job as a laborer, pipefitter,
7 welder, and carpenter at the Celanese plant. The
8 particular spot we were looking at in terms of
9 overlap with Covil was the Celanese plant in Rock
10 Hill, South Carolina. His dates of exposure were
11 in 1980 and 1981. The Plaintiff's opposition to
12 Covil's motion for summary judgment said that he
13 worked at Celanese from '80 to '81 doing mostly
14 valve work associated with boilers, and the
15 coworker, Mr. Cornwell, who worked with him at
16 Celanese during that time period said that
17 Mr. Ashworth was working at a time when Covil
18 workers were at Celanese continuously because they
19 had been there continuously from 1970 to 1985.

20 I did not find in the materials
21 provided to me that Covil was successful in its
22 motion for summary judgment. Accordingly, since
23 that is a case where Covil did not obtain summary
24 judgment, it was my opinion that that was a case
25 that was appropriate for resolution by settlement

1 because you had both the documented exposure or
2 connection to Covil, a disease that could be
3 associated with asbestos and a risk of a verdict
4 against them.

5 Q. And again, the documents you reviewed
6 indicated that Mr. Ashworth worked at the Celanese
7 facility in Rock Hill, South Carolina in 1980 and
8 '81, correct?

9 A. That is correct.

10 Q. And according to the records, the Covil
11 records that were in the file, Covil was on-site
12 performing insulation contracting work from at
13 least 1970 to 1985?

14 A. That is correct.

15 Q. All right. Let's go to -- and I guess
16 just to wrap it up, did you determine that that
17 case, because of the information that you saw in
18 the file, was one that was appropriately a
19 candidate for settlement and resolution?

20 A. I did.

21 Q. Let's go to the next one. The claimant
22 is Ronnie Jonas, and this was a case filed in
23 February 2020. Did you have an opportunity to
24 review materials associated with Mr. Jonas' case
25 against Covil?

1 A. I did.

2 Q. All right. And can you tell the Court
3 what you determined in the course of your analysis
4 regarding Mr. Jonas' case, the exposure, and the
5 appropriateness of settling that case?

6 A. Yes. Mr. Jonas presented as a living
7 mesothelioma claimant, so the highest type and most
8 dangerous type of medical condition. He was
9 exposed to asbestos during his work as a welder at
10 Duke Energy Corporation, and he was on-site at
11 facilities where Covil was located during 1981 to
12 1983.

13 This was, again, a case where there was
14 a motion for summary judgment filed on behalf of
15 Covil, but Plaintiff's response to that indicated
16 that Mr. Jonas worked in close proximity to
17 individuals removing and replacing
18 asbestos-containing insulation and that he also was
19 working in the presence of Covil insulation
20 employees at the Duke facility.

21 As a consequence, I considered that to
22 be a case that presented a significant risk of an
23 adverse verdict against Covil and was one that was
24 appropriate for resolution by settlement.

25 Q. And in particular, one of the pieces of

1 evidence you reviewed in Mr. Jonas' case was the
2 deposition testimony of a coworkers, Mr. Fitcher
3 (phonetic); is that right?

4 A. That is correct.

5 Q. All right. And did Mr. Fitcher's
6 testimony indicate that he had observed Covil
7 employees working on-site performing insulation
8 work between 1981 and 1983?

9 A. Yes. Mr. Fitcher noted in his
10 deposition that he first saw Covil employees
11 on-site from '81 to '83, and he thought that Covil
12 was actually the only insulation contractor at that
13 facility during that time period.

14 Q. And the 1981 to 1983 time period
15 overlapped with the period of time when Mr. Jonas
16 was working at the Duke Catawba facility, the
17 Plaintiff, correct?

18 A. That is correct. It is consistent with
19 Mr. Jonas' testimony on that issue.

20 Q. And given the review of the records and
21 the testimony and the documents, did you consider
22 the Jonas case to be an appropriate case for
23 resolution rather than trial?

24 A. I did.

25 Q. All right. Let's go to the next one,

1 which is Edward Morgan, Senior. This is a case
2 filed in August of 2021.

3 Did you have an opportunity to review
4 materials associated with Mr. Morgan's claim
5 against Covil?

6 A. I did.

7 Q. And having reviewed those documents,
8 can you describe to the Court your analysis of the
9 verdict risk and appropriateness for settlement of
10 that case?

11 A. Yes. Mr. Morgan presented as a living
12 lung cancer case. He had been an electrician's
13 helper, described as a "top helper." During the
14 course of his career, he had worked at the Champion
15 paper mill in Canton, North Carolina. He claimed
16 to have been exposed to asbestos through his work
17 as an electrician's helper between 1964 and 1967.
18 And he had worked alongside contractors in that
19 time period, including the Covil folks who were
20 on-site at the work site.

21 So he -- this would provide
22 documentation in the record to support exposure to
23 a Covil work site. And he was someone that did not
24 appear to present an opportunity for a successful
25 motion for summary judgment on behalf of the

1 Defendant.

2 Q. And again, the records indicated that
3 Covil was on-site performing ongoing operations, at
4 least as early as 1963; is that right?

5 A. That is correct.

6 Q. And continuing until sometime
7 mid-to-late 1960s, correct?

8 A. That is correct.

9 Q. All right. And that coincided with the
10 period of time where Mr. Morgan was working at that
11 facility, the Champagne -- the Champion paper mill,
12 correct?

13 A. That is correct.

14 Q. All right. And did you consider, based
15 on the documents you reviewed, the Morgan case to
16 be one that was appropriate for resolution rather
17 than trial?

18 A. I did.

19 Q. Okay. Next let's go to the case filed
20 by Gary J. Moss. This one was filed
21 September 10th, September 10th, 2021.

22 Did you have an opportunity to review
23 records regarding Mr. Moss' case?

24 A. I did.

25 Q. And based on your review of those

1 records, did you determine that that case was one
2 that was appropriate for resolution?

3 A. I did.

4 Q. All right. And did you describe your
5 process in analyzing the Moss case?

6 A. Yes. Mr. Moss' case was a deceased
7 mesothelioma case. He was no longer living at the
8 time of the Amended Complaint. He was exposed to
9 asbestos through his work as an insulator, and he
10 had been on-site at the Duke Power Catawba nuclear
11 station, assuming I'm pronouncing that correctly,
12 during the time when Covil was the company that was
13 providing contracting work at that work site. And
14 that was during the 1981 to 1985 time period.

15 Accordingly, that would have provided
16 sufficient product exposure information such that I
17 did not feel that Covil would be entitled to a
18 motion for summary judgment. Since they would not
19 be entitled to a motion for summary judgment
20 finding on their behalf, it is a case that I felt
21 was appropriate for them to resolve rather than
22 risk going to trial.

23 Q. And again, the job position that
24 Mr. Moss held was an MDE welding inspector at
25 various Duke facilities, including Duke Power. Is

1 that what you gleaned from the records you
2 reviewed?

3 A. That is correct.

4 Q. All right. And there were documents --
5 well, were there Covil documents in the file,
6 including invoices and purchase orders
7 demonstrating Covil had been on that job at least
8 until 1983?

9 A. Yes. The invoices showed that Covil
10 provided insulation, labor, and materials for
11 construction of the Catawba nuclear plant at least
12 in the early 1980s. And the invoices and purchase
13 orders make it clear that Covil stayed on the job
14 until at least 1983.

15 Q. And there was -- in this particular
16 case, unlike some of the others, you were able to
17 review Mr. Moss' deposition testimony as well.

18 A. That is correct.

19 Q. And did he provide testimony about dust
20 in the plant and other conditions in the plant that
21 indicated exposure?

22 A. Yes. He testified that there was a lot
23 of grinding and he was around a tremendous amount
24 of dust in the workplace.

25 Q. All right. And you determined that

1 this was another case that was appropriate for
2 resolution?

3 A. Yes.

4 Q. All right.

5 And finally, the last one we'll take a
6 look at is the claim filed by Tommy Wannamaker in
7 November 2021.

8 Did you have an opportunity to review
9 materials associated with Mr. Wannamaker's case
10 against Covil?

11 A. I did.

12 Q. All right. And did you determine that
13 that case, based on your verdict analysis, was one
14 that was appropriate for settlement?

15 A. I did.

16 Q. All right. And could you give the
17 Court a brief summary of why you came to that
18 conclusion with regard to Mr. Wannamaker's case?

19 A. Yes. Mr. Wannamaker presented as a
20 living mesothelioma claimant. His job description
21 was as a pipefitter, steamfitter, insulator, and
22 welder, so he had the type of exposures that were
23 associated with a high amount of friable asbestos
24 exposure. His dates of exposure at the Winyah
25 power plant in Georgetown, South Carolina was

1 between 1977 and 1979.

2 Q. And again, I'm going to stop you.

3 And that's based on his deposition
4 testimony, correct?

5 A. That is correct.

6 Q. All right. Go ahead.

7 A. And the records indicated that Covil
8 performed insulation contracting for various jobs
9 at that power plant from the late 1970s through the
10 1980s.

11 Q. All right. And those were ongoing
12 operations, based on the records, that Covil was
13 performing during that period of time, correct?

14 A. That is correct.

15 Q. And Mr. Wannamaker worked at the plant
16 during that period of time?

17 A. He did.

18 Q. All right. Did you determine from your
19 review of the records that Mr. Wannamaker's case
20 was one that was appropriate for resolution rather
21 than trial?

22 A. I did.

23 Q. All right. And again, Exhibit 103,
24 your trial declaration, contains the information
25 you provided the Court today on these five cases

1 and also on the other nine cases that you reviewed,
2 correct?

3 A. That is correct.

4 Q. All right.

5 MS. PATTERSON: Your Honor, I have
6 nothing further for this witness.

7 THE COURT: All right.

8 Cross-examination, Mr. Shealy?

9 MR. SHEALY: Briefly, Your Honor.

10 THE COURT: Wait a minute. You
11 unplugged everything. Mr. Shealy wanted to
12 ask something about it.

13 (Discussion held off the record.)

14 MS. VALEK: Would you like me to plug
15 back in?

16 MR. SHEALY: No, no, I'm fine.

17 I'll be very brief, Your Honor.

18 CROSS-EXAMINATION

19 BY MR. SHEALY:

20 Q. Ms. Frost, good afternoon.

21 A. Good afternoon.

22 Q. You have an impressive resumé and a
23 long history defending asbestos cases, correct?

24 A. Yes --

25 Q. That's not fair --

1 A. Thank you, but yes.

2 Q. Yeah, I'm sorry for asking a question
3 quite like that.

4 So as I understand it, you reviewed the
5 14 cases that are the subject of Mr. Wright's
6 letter and came to the same conclusion that the
7 Receiver came to, that Ellis & Winters came to, and
8 that Penn National came to, that they were
9 appropriate for settlement, correct?

10 A. Yes, sir.

11 Q. Okay. And you haven't heard anybody in
12 the courtroom today taking a position that, Gosh,
13 we shouldn't have settled those 14 cases, have you?

14 A. I have not.

15 Q. And you've been here all day, haven't
16 you?

17 A. I have.

18 Q. All right.

19 MR. SHEALY: I don't think I have any
20 further questions. Thank you, Ms. Frost.

21 THE COURT: Very good.

22 Thank you for your testimony,
23 Ms. Frost. You may step down.

24 THE WITNESS: Thank you, Your Honor.

25 THE COURT: Unless you have something

1 in redirect, Ms. Patterson.

2 MS. PATTERSON: No, Your Honor.

3 THE COURT: Thank you very much.

4 Appreciate it.

5 THE WITNESS: Thank you, Your Honor.

6 THE COURT: All right, Mr. Nes.

7 MR. NES: In terms of our next witness,
8 we'll be playing witnesses via deposition
9 excerpts. And we have some options as to
10 which ones to play. So I think part of it,
11 in terms of which ones we select, it would be
12 helpful to know when the Court would like to
13 break for the day because some are a little
14 bit longer than others.

15 THE COURT: Well, I'd love for you to
16 get finished with this witness today, that's
17 for sure. So that's the first thing.

18 MR. NES: Well, so we have three videos
19 that we'd like to play. One is an hour and a
20 half, one is an hour.

21 THE COURT: An hour and a half. Who is
22 this witness?

23 MR. NES: This is our expert witness,
24 Charles Miller, and that includes the
25 cross-examination.

1 THE COURT: I've read everything of
2 Miller's up one side and down the other, I
3 will tell you that. An hour and a half on
4 one, and how much on the other?

5 MR. NES: One is 30 minutes.

6 THE COURT: Two hours?

7 MR. NES: Yes, Your Honor. Those are
8 the shorter clips.

9 THE COURT: You don't have any others,
10 do you?

11 MR. NES: We have one more that's
12 50 minutes.

13 THE COURT: All right. Well, I'm going
14 to ask you to have a word of prayer with
15 yourselves about how much you're going to
16 play of Mr. Miller. I understand
17 Mr. Miller's testimony completely. I've read
18 two huge things.

19 MR. NES: Your Honor, if you have
20 reviewed Mr. Miller's testimony, we are happy
21 to submit it in the record, and that is fine.
22 No need to play Mr. Miller. I do think --

23 THE COURT: I think you ought to -- you
24 know, if you want to complete the record a
25 little bit, I don't mind you playing some,

1 but playing two hours of it is a little bit
2 excessive, in my humble opinion.

3 MR. NES: Well, one of the problems
4 that we have, Your Honor, is that that
5 includes the Penn National cross. So I'm not
6 sure --

7 THE COURT: As well it should.

8 MR. NES: Yes.

9 THE COURT: That's why I say you're
10 going to have to have -- they dispute very
11 highly, you know, what he thinks about
12 operations as opposed to complete operations
13 as opposed to some of the other issues. So
14 we want to give you a full chance for their
15 viewpoint to be expressed and for him to
16 stand or not stand up under their
17 cross-examination.

18 But that said, I just pray for a little
19 bit of relief of this because I would like to
20 be finished with that witness today.

21 MR. NES: What we would propose is a
22 quick break to consult with --

23 THE COURT: Let's do that. I think
24 that's a swell idea. Let's take a ten-minute
25 recess.

1 MR. NES: All right.

2 (A recess transpired from 4:01 p.m. to 4:08 p.m.)

3 THE COURT: What do we got going here?

4 MR. NES: Yes, Your Honor. Our
5 testimony just went fast. So we now are
6 going to submit to this Court a flash drive
7 with the video clips that we would have
8 shown. The testimony is already in the
9 record. The Court already has the paper
10 copies of it. So it's for the Court's --
11 these are just going to be demonstrative
12 examples of some of the testimony for the
13 Court to consider or not consider.

14 THE COURT: You sure you're okay with
15 that? I promise you that what I will do, I
16 will view the video today or tomorrow
17 morning. As you all know, I'm an early
18 riser. So I'll do it on the early side
19 tomorrow morning. But I will view it before
20 my court commences tomorrow. And if I have
21 any desire for something further than what's
22 in the video, I will let you all know.

23 MR. NES: Wonderful.

24 THE COURT: Is that a peaceful
25 resolution to that?

1 MR. SHEALY: It is, Your Honor. And
2 just to make sure that the record is clear,
3 both sides' designations we've already
4 submitted.

5 THE COURT: Exactly. And that's what
6 I've already read.

7 MR. SHEALY: You've already read it
8 all. So what they are submitting to you are
9 maybe condensed versions.

10 THE COURT: And, you know, a picture is
11 worth a thousand words. I agree with that,
12 and I will give it the importance that it
13 deserves. So I promise you before I come to
14 court tomorrow, I will have viewed the video.

15 MR. ROBINSON: And, Your Honor,
16 Ms. Valek is presently putting them on thumb
17 drives. We will give Mr. Shealy a copy and
18 give the Court a copy. And to save the Court
19 time, I think that's all we have for the day.

20 MR. NES: Yes, Your Honor.

21 THE COURT: Perfect. Now, let's talk
22 about where we stand on a going-forward basis
23 then. I am going to view Mr. Christian [sic]
24 Miller's testimony by video, right?

25 MR. NES: Yes, Your Honor.

1 THE COURT: Isn't that his first name?

2 MR. NES: Charles.

3 THE COURT: Charles.

4 All right. So then where does that
5 leave us in terms of -- we've got Maier and
6 Reifsnyder.

7 MR. NES: So it's the same issue for
8 both of them. They are not going to be
9 appearing live, so their depositions are
10 already in the record. We will, on the same
11 flash drive, simply provide a condensed
12 version for you to watch for each of those.

13 THE COURT: That's awesome. And again,
14 if you provide those, I can't promise I'll
15 get through all of them by tomorrow morning
16 or tonight, but I will do my very best.

17 So, Lindsay, if you can give me both
18 those -- all three of those things.

19 So what we've got, then, is going to
20 the defense's case.

21 MR. NES: That is correct.

22 THE COURT: Is what it looks like to
23 me.

24 Kirby, are you prepared to go forward
25 tomorrow?

1 MR. SHEALY: We will be. Your Honor,
2 one of our witnesses is on the West Coast.
3 We just got to tell them what time to be
4 prepared. He's going to be testifying
5 virtually. The other is currently in trial
6 in Philadelphia. We just got to make sure
7 he's in a space where we can put him in a
8 conference room somewhere.

9 THE COURT: Excellent.

10 MR. SHEALY: And so we'll do the same
11 thing.

12 THE COURT: And we will just kind of
13 see how that gets worked out.

14 MR. SHEALY: That's right.

15 THE COURT: All right.

16 So that would be -- and you got -- that
17 would be Heinze and Robertson.

18 MR. SHEALY: That's correct.

19 THE COURT: And those would be our
20 witnesses.

21 MR. SHEALY: We still need to talk
22 about whether we put Mr. Wright back up.

23 THE COURT: Exactly. And that's
24 perfectly your option because he's your
25 corporate representative, and he's only been

1 placed up as a hostile witness. And you have
2 a complete right to put him up in your case,
3 if you choose to do that.

4 MR. SHEALY: But, Your Honor, I have no
5 reason to believe that we won't finish
6 tomorrow.

7 THE COURT: I think that's good. All
8 right. Well, we'll try for that. If we
9 can't, then -- you know, we obviously
10 wouldn't go the whole day so, Kirby, would
11 take my beloved classmate to see the doctor,
12 and then we would go forward on Wednesday
13 afternoon.

14 MR. SHEALY: Okay. Thank you.

15 THE COURT: That sounds like a winner.
16 Thank you very much.

17 Well, with that, court will be
18 adjourned for the day to reconvene at
19 9:30 tomorrow morning.

20 (Proceedings were adjourned at 4:13 p.m.)

21 - - -

22

23

24

25

1 STATE OF NORTH CAROLINA

2 COUNTY OF DAVIDSON

3

4 C E R T I F I C A T E

5 I, Amy A. Brauser, RPR RMR CRR, the officer
6 before whom the foregoing trial was taken, do hereby
7 certify that the witness was duly sworn prior to the
8 taking of the foregoing testimony; that the testimony of
9 said witness was taken by me to the best of my ability
10 and thereafter reduced to typewriting under my
11 direction; that I am neither counsel for, related to,
12 nor employed by any of the parties to the action in
13 which this trial was taken, and further that I am not a
14 relative or employee of any attorney or counsel employed
15 by the parties thereto, nor financially or otherwise
16 interest in the outcome of the action.

17

18 This is the 27th day of November, 2023.

19

20

21 _____
22 Amy A. Brauser, RPR RMR CRR
23 Notary Public # 20023030055
24
25

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 COMPANY;
SAM J. CRAIN & CO., INC.; AND
SOUTH CAROLINA PROPERTY & CASUALTY
INSURANCE GUARANTY ASSOCIATION,

Defendants.

T R I A L

DAY TWO - MORNING SESSION

BEFORE THE HONORABLE
CHIEF JUSTICE (RET.) JEAN TOAL

DATE TAKEN: Tuesday, November 28, 2023

TIME START: 10:03 a.m.

TIME END: 1:05 p.m.

LOCATION: Richland County Judicial Center
1701 Main Street
Columbia, South Carolina

REPORTED BY: SHERI L. BYERS, RPR
EVERYWORD, INC.
P.O. Box 1459
Columbia, South Carolina 29202
803.212.0012

APPEARANCES:

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COVIL CORPORATION, BY AND THROUGH ITS
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P R O C E E D I N G S
- - -

THE COURT: Mr. Shealy, your witness.

MR. SHEALY: Your Honor, may it please the Court. Before we start with Mr. Heinze, I wanted to put a procedural motion on the record.

Because the plaintiff has rested, as I understand it, we would at this time move for an involuntary nonsuit under 41(b) for the reasons set forth in the summary judgment motion filed earlier.

Your Honor, also, I point out to the Court that because the plaintiffs have failed to set forth a factual predicate for the relief they seek with the evidence they submitted at trial, that's an additional basis, but also that the claims that the plaintiff is making for declaratory relief appears to contradict the claims for relief set forth in the complaint. Claim B and I are -- seem to be contrary to the declarations they are seeking.

We believe that they should be judicially estopped from taking a different position now. For all those reasons, we ask for an involuntary

1 nonsuit.

2 THE COURT: Very good. Mr. Nes, there's no
3 need to reply. I deny all the motions at this
4 time, and the matter will go forward.

5 MR. SHEALY: Thank you, Your Honor.

6 MR. BROWN: If I can approach, Your Honor?

7 THE COURT: Yes, sir.

8 Mr. Brown for the defense.

9 - - -

10 BERNIE HEINZE, being first duly sworn,
11 testified as follows:

12 - - -

13 THE CLERK: Can you please state your full
14 name for the record.

15 THE WITNESS: Yes, I can. It's Bernd G.
16 Heinze.

17 - - -

18 EXAMINATION

19 - - -

20 BY MR. BROWN:

21 Q. Mr. Heinze, this is David Brown. Can you
22 hear me?

23 A. Good morning, Mr. Brown.

24 MR. BROWN: Okay. Your Honor, at this time
25 the only exhibit I was going to mark is a copy

1 of Mr. Heinze' CV, which is marked as
2 Defendants' Exhibit 40. I have another copy if
3 you would like me to hand it up.

4 THE COURT: Mr. Heinze' CV admitted.

5 MS. PATTERSON: Your Honor, with
6 permission, I don't mean to interrupt. Do you
7 mind if I move over there? I have a hard time
8 hearing the witness.

9 THE COURT: Not a bit. Move around as you
10 need to.

11 Ms. Patterson is your opposing counsel for
12 this witness, and she will be moving around as
13 she can to hear you, Mr. Brown.

14 MR. BROWN: Excellent. I will wait for her
15 to get all set.

16 THE COURT: Mr. Brown.

17 - - -

18 EXAMINATION

19 - - -

20 BY MR. BROWN:

21 Q. Mr. Heinze, could you please give us --
22 again spell your last name for us and give us your
23 full name.

24 A. Sure. It's Bernd G. Heinze, H-E-I-N-Z-E.

25 Q. And what is your current professional

1 business location?

2 A. 610 Freedom Business Center, Suite 110,
3 King of Prussia, Pennsylvania 19406.

4 Q. And what business are you associated with
5 there?

6 A. The Heinze Group.

7 Q. Okay. And what is the business of The
8 Heinze Group?

9 A. We are a consulting entity that undertakes
10 consultants for policyholders, insurance companies,
11 self-insured entities, and reinsurers with regard to
12 matters pertaining to insurance claims, litigation
13 management, and general insurance industry
14 activities.

15 We also represent a number of nonprofit
16 professional associations and undertake audit
17 activities on behalf of insurance companies,
18 self-insured entities, whether by line of business or
19 by the virtue of the entire portfolio.

20 From time to time, I'm also asked to be a
21 party-appointed arbitrator and also from time to time
22 an expert witness in matters such as these.

23 Q. Okay. Could you describe with a little
24 more detail the audit activity for insurers and
25 self-insured companies that you just mentioned?

1 A. Yes. We are retained by virtue, Your
2 Honor, of a number of insurance companies,
3 self-insured entities, venture capitalists and
4 investors to look at a particular type of claim or
5 portfolio of claims for a line of business of claims,
6 and we will then go in and work with these senior
7 claim management team to come up with a set of
8 queries in which we will audit the various claims in
9 that portfolio or line of business and also utilize
10 best practices to ascertain whether the claim
11 professionals are utilizing and complying with the
12 best practices of the industry as well as the claims
13 guidelines of the entity itself.

14 Those audit reports are then provided to
15 senior management and used with regard to some of the
16 rating activities that are taking place with a number
17 of the rating agencies across the country.

18 And for the investors, we will look at an
19 insurance company or particular line of business and
20 look at all of the activities I have previously
21 mentioned, as well as the reserves, and provide the
22 investors with guidance as to whether the reserves on
23 the particular claims are appropriate or whether
24 additional work needs to be done to increase or lower
25 the reserves respectively before they are interested

1 in investing or purchasing that particular entity or
2 line of business.

3 Q. And does much of that work involve
4 so-called runoff risk such as environmental
5 exposures?

6 A. Yes, it does.

7 Q. And would that include within its ambit
8 asbestos-related, bodily injury claim exposures?

9 A. Yes, it does.

10 Q. Okay. You also mentioned that you serve
11 from time to time as an expert witness in litigated
12 matters. How much of your total professional time
13 these days is associated with expert witness work?

14 A. I would say maybe 30, 35 percent.

15 Q. And do you do that for both insurers and
16 policyholders?

17 A. Yes, I do, for both.

18 Q. All right. Let me ask you briefly about
19 your educational background. If you could, just kind
20 of walk us through your educational background and
21 your work history after law school.

22 A. I attended and graduated from the Canisius
23 University in Buffalo, New York, with a Bachelor of
24 Arts degree in international relations and economics
25 and graduated there in 1978. Attended Temple

1 University School of Law here in Philadelphia. And
2 prior to that, spent some time at the American
3 University School of Foreign Policy and Foreign
4 Services.

5 I, in the meantime, have also worked for
6 Congressman Jack Kemp from Buffalo, New York, and
7 worked there as a congressional assistant. Graduated
8 from Temple University of School of Law in 1983 and
9 became a litigation associate with the Marshall,
10 Dennehey, Warner, Coleman & Goggins law firm here in
11 Philadelphia. I worked there between 1983 and 1987.

12 I was then recruited by the Wilson, Elser,
13 Maoskowitz, Edelman & Dicker law firm also here in
14 Philadelphia. Worked there as an associate from 1987
15 through 1997 rising up to become an equity partner
16 within the firm.

17 And in the 1997, I had an opportunity to
18 join the Reliance Insurance Company and work there
19 from 1997 through the year 2000 as the vice president
20 and chief national litigation counsel.

21 Q. As part of your role at Reliance Insurance
22 Company, did you have responsibility for how the
23 company maintained its policy and
24 underwriting-related records?

25 A. I did not have responsibility for the

1 oversight of that, but I did become involved when
2 issues of policies, archiving of policies, and
3 looking for lost policy information was at issue.

4 Q. Okay. And then have you been with The
5 Heinze Group since you left Reliance Insurance
6 Company?

7 A. Yes, in the year 2000.

8 Q. Okay. And just briefly, the Reliance
9 Insurance Company, I know it's going through a
10 liquidation, but when you were there, what kind of
11 business did it write and how would you describe
12 the -- that company's policyholders and the risk that
13 you were then serving as vice president of claims
14 with regard to?

15 A. It primarily wrote property, casualty,
16 liability, risk exposures, as well as workers'
17 compensation exposures. And the policyholders were
18 everything from people like us to larger corporations
19 and Fortune 500 companies.

20 MR. BROWN: Okay. Your Honor, at this time
21 the defendant would tender Mr. Heinze to the
22 Court as an expert in insurance industry
23 operations, customs, and practices.

24 MS. PATTERSON: No objection, Your Honor.

25 THE COURT: All right. Without objection,

1 Mr. Heinze, by reason of his training,
2 education, and experience, is fully qualified as
3 an expert in the matters tendered by Mr. Brown.

4 MR. BROWN: Thank you, Your Honor.

5 BY MR. BROWN:

6 Q. Mr. Heinze, were you at some point asked by
7 my law firm to take a look at issues in this Covil
8 versus Penn National matter?

9 A. Yes, sir, I was.

10 Q. And could you tell the Court what you did
11 in order to educate yourself, bring yourself up to
12 speed as to the matters disputed in this action?

13 A. Yes. I received a record of documents and
14 materials, deposition testimony and other pleadings,
15 which I reviewed. And in conjunction with my
16 experience, education, and training over the past 40
17 years, analyzed those activities and those pleadings
18 with specific regard as to whether the document
19 retention policies and the work to try to find
20 evidence of policies by Penn National Corporation of
21 the Covil Corporation were within the generally
22 accepted insurance industry customs, standards, and
23 practices.

24 Q. And did you form an opinion as to whether
25 the Penn National policies were in accordance with

1 those standards and practices?

2 A. Yes, I did.

3 Q. And what is that opinion?

4 A. Based upon a review under the totality of
5 circumstances and looking at all the documents I had
6 before me, I was able to form an opinion that the
7 activities of Penn National were in fact in keeping
8 with generally accepted insurance industry customs,
9 standards, and practices.

10 And, Mr. Brown, in addition to looking at
11 the materials, I also went to Penn National to meet
12 with the people that actually undertake the archival,
13 retrieval activities and had them walk me through how
14 that is actually done by taking a piece of the
15 film -- numerous films of microfiche, putting them
16 into a machine, and seeing the actual policies that
17 were being reviewed.

18 Q. When did you do that?

19 A. I don't remember the exact time, but it was
20 prior to my deposition in this case. I believe it
21 was earlier this year.

22 Q. Okay. Could you elaborate --

23 A. Went to Harrisburg, Pennsylvania, to the
24 corporation headquarters and met with the people
25 there.

1 Q. If you could just elaborate for us. I
2 think we're all kind of interested in what that
3 procedure looks like on the ground, so to speak.
4 What did you observe while you were there in that
5 regard?

6 A. I met with two ladies, and they -- I told
7 them what my purpose was, and they were aware that I
8 was coming. And they walked me to the area where the
9 microfiche films are stored. And, Your Honor,
10 they're stored in long boxes probably -- I would
11 guess probably the nature of two-and-a-half-feet long
12 and maybe about -- oh, maybe 10 inches wide. And the
13 microfiche opaque films are actually filled in those
14 boxes and separated by policy number.

15 We then picked a particular box at random,
16 and the box was taken back to a cubicle where an
17 opaque projector was contained. And the ladies put
18 the actual film into the videotape projector, which
19 then allowed the image to be projected on to a
20 screen. And we were able to view all of the aspects
21 of the policy on that screen.

22 And we did that for about five to six
23 different policies to make sure that the practice was
24 consistent, and I was able to determine that it was
25 also consistent with what we would do at Reliance, as

1 I had done in my prior activities as an attorney,
2 when looking and asking an insurance company to
3 search for records of policies.

4 Q. Okay. Now, there's been a lot of
5 discussion in this case about the fact that the
6 documents were listed and stored by policy number.
7 Could you share with us what your -- do you have an
8 opinion satisfactory to yourself to a reasonable
9 degree of professional certainty about whether that
10 is a process that complies with industry standards?

11 A. I do and it does. And primarily it is a
12 process that is employed by insurance carriers
13 because during the course of any given policy year,
14 the name of an insured may change due to
15 acquisitions, name change particularly, different
16 reasons or another. And if the policy number is
17 given at the inception of the policy, that will never
18 change regardless of what the name of that insured
19 is. So that gives additional ways to make sure that
20 once that policy number is in hand, that we can
21 search for any policies in place for that particular
22 insured regardless of what its name was at the
23 inception, during the course of the policy period, or
24 the date of expiration.

25 Q. I want to ask you about document

1 destruction. We've had some -- a lot of discussion
2 in this case about Penn National's policy of
3 destroying or purging documents after some period of
4 time.

5 Let's start with this question: Do all
6 insurers, in your experience, have a policy of some
7 sort with regard to the destruction of historical
8 underwriting documents?

9 A. Based upon my experience, yes, they do.

10 Q. And why is that?

11 A. It's done for the purpose of making sure
12 that the documents that are retained are those that
13 are particularly relevant to the insurance company's
14 ongoing operations. And back in the days of the
15 1980s and 1990s, until we have the cloud storage
16 electronic systems that we have today, it was to make
17 sure that the warehouse of documents could be purged
18 or destroyed at a particular time when it was deemed
19 that there would be no further engagement or
20 involvement of those policies.

21 Q. In your experience in working with the
22 regulators, is the document retention and destruction
23 of policies something that insurance regulators
24 monitor?

25 A. That insurance regulators -- I missed the

1 last part of that, Mr. Brown. I'm sorry.

2 Q. That the regulators monitor.

3 A. They don't particular monitor it from a
4 realtime perspective; however, as they undertake
5 market conduct exams and analyses, they will look at
6 document retention policies and ensure that during
7 the course of their audits, as they undertake their
8 reviews, that the insurance company is evaluated as
9 to whether they are in compliance with those document
10 retention policies.

11 Q. And in this case, did you -- did you gather
12 any information about the Pennsylvania Commissioner
13 of Insurance and its work with Penn National on its
14 document retention policies?

15 A. Yes. I believe that the decision and the
16 analysis was that they were in compliance with the
17 document retention policies.

18 Q. And is it your understanding that Penn
19 National was a Harrisburg, Pennsylvania, based
20 company, that its chief regulator was the
21 Pennsylvania Commissioner of Insurance?

22 A. That's correct, yes.

23 Q. Okay. The policy here with Penn National
24 in terms of maintaining documents before destruction,
25 with regard to underwriting information specifically,

1 the policy information was 25 years. Do you have an
2 opinion as to whether 25 years was a reasonable time
3 frame that complied with industry standards?

4 A. I do. And it was that the insurance
5 companies that I work with had document retention
6 policies with document retention years in that same
7 time frame of 20 to 25 years.

8 Q. Okay. In the insurance industry, how are
9 so-called missing policies cases typically handled by
10 the insurer? Meaning if someone comes forward and
11 says I believe it was a policyholder and can you find
12 my policy? Or I was a policyholder for this year. I
13 think I was a policyholder for another year. Can you
14 find that policy? How does the industry respond to
15 that?

16 A. In the ordinary custom and practice and
17 particularly also with what I did, we would take
18 whatever information the policyholder provided to us
19 with regard to the existence of policy information
20 that they believe they had in hand and went back into
21 our archival system to see whether we could locate
22 such a policy. Whether that was done through paper
23 records, electronic records, or microfiche, we would
24 take a look to see if we could find that particular
25 policy number and see whether a policy could then be

1 located and found and provided to the insured.

2 Now oftentimes the insured may not have had
3 that kind of information. We might have had
4 secondary evidence of paystubs, check requests,
5 canceled checks, minutes of board meetings, and other
6 activities. Perhaps a binder, a quote from a broker,
7 an insured broker, insurance broker that the
8 policyholder worked with, and we would also take a
9 look at that information to see if we could track any
10 of the information from those documents or materials
11 and find any additional documents that would relate
12 to policies from that aspect.

13 Oftentimes we would find declaration pages
14 only or portions of policies only, but in most of the
15 circumstances, since these were policies that were
16 ISO policies or Insurance Service Office policies, we
17 could reconstruct them based upon the ISO number at
18 the bottom of the page. At least the aspects of that
19 portion of the policy with the exclusion of any
20 additional endorsements that would have been added on
21 at the end.

22 Q. So you mentioned several different types of
23 so-called secondary evidence there. Would it be
24 correct to say that even if the insurer couldn't find
25 the policy, that is, as we presented to the Court as

1 the full policy, if there was some of those kinds of
2 secondary evidence, that would aid in a search?

3 A. Absolutely, yes.

4 Q. Okay. And is that sort of secondary
5 evidence, even if the policy number or name was not
6 on something, you would expect an insured coming
7 forward seeking coverage to be able to provide?

8 A. Yes.

9 Q. Okay. Now, in this particular case, you're
10 aware that two policy numbers were provided to Penn
11 National, and Penn National located those policies, a
12 so-called '86, '87 and '87, '88 general liability
13 policy, correct?

14 A. Correct.

15 Q. Based on your review of the matter, did you
16 see any secondary evidence of any other policy years?

17 A. No.

18 Q. Okay. There was in the '86, '87 policy an
19 endorsement for a products-completed operations
20 hazard exclusion that was on that policy, correct?

21 A. Yes.

22 Q. And did you see a comment about the
23 addition of that endorsement, that it needed to be
24 put on as of the time of -- it should have been put
25 on at the time of renewal?

1 A. Yes, I did see that.

2 Q. Okay. And did that indicate to you there
3 was an earlier policy period issued by Penn National
4 to that -- to Covil Corporation on those same terms
5 and conditions?

6 A. No. Because the declaration page for that
7 policy year said that it was a new policy for that
8 policy year.

9 Q. Okay.

10 A. And there has been no prior policies.
11 Looking back, then, at the following policy, the '87,
12 '88 policy, the prior policy was also listed on the
13 declaration page for the subsequent policy, but there
14 was no prior policy that was listed on the initial
15 policy of Penn National that was afforded to Covil
16 Corporation.

17 Q. Meaning that if there was an '85, '86
18 policy, you would have expected to see that policy
19 number listed on the declarations page of the '86,
20 '87 policy?

21 A. Yes.

22 Q. Now, you were active in the practice of law
23 as a defense lawyer and management of insurance
24 companies in the '80s and '90s, correct?

25 A. Yes.

1 Q. Were you aware of asbestos and other kinds
2 of long-tail bodily injury claims in litigation that
3 companies and their insurers were facing, correct?

4 A. Yes.

5 Q. Did you have experience in defending those
6 claims and analyzing coverage for those claims?

7 A. I did, yes.

8 Q. Okay. Both serving as defense counsel and
9 as coverage counsel?

10 A. Correct. Yes.

11 Q. And then at Reliance managing the claims
12 operation as they responded to those types of claims?

13 A. Yes.

14 Q. Based upon that litigation that began and
15 prior to the late '80s and '90s and based upon events
16 that happened, including Johns Manville Trust and
17 otherwise, did the insurance industry standard
18 develop with regard to stopping all destruction of
19 insurance policies?

20 A. I think it depended upon what the insured
21 was doing and what its business was at the time.
22 Obviously, for Johns Manville and others, GAF, Gypsum
23 Corporation, there were policies that were being
24 maintained because they were asbestos manufacturers,
25 but not with respect to other general liability

1 policies that were issued to companies that fell
2 outside of the manufacturing and production of
3 asbestos or asbestos-containing materials.

4 Q. Are you aware of any insurance company in
5 the United States that stopped destruction of GL
6 policies for nonasbestos manufacturers in the '80s
7 and '90s?

8 A. I'm not aware of any, no.

9 Q. Now, I want to turn to -- well, have you
10 reviewed the documents related to a litigation hold
11 that Penn National issued in this case in 2021?

12 A. Yes.

13 Q. Okay. First of all, what is -- based on
14 your understanding and based on insurance industry
15 standards and practices, what is the purpose of a
16 litigation hold?

17 A. The purpose is to ask an insurance company,
18 particularly in this matter, or any entity that
19 receives a litigation hold, to preserve information
20 that is based upon a lawsuit or litigation or other
21 inquiry that is received from a policyholder for its
22 law firm.

23 Q. Okay. And in this particular case, Penn
24 National did not issue a litigation hold until 2021,
25 correct?

1 A. That's right. December 17th of 2021.

2 Q. Okay. And do you have an opinion as to
3 whether the failure to issue a litigation hold
4 earlier complied with industry standards and
5 practices?

6 A. I don't know that I would call it a
7 failure. There was not a litigation hold that was
8 put in place prior to that time. And I believe that
9 based upon the information that had been provided to
10 Penn National, based upon the litigation and question
11 of two policies for 1986 to 1987 and 1987 to 1988,
12 Penn National acted in accordance with industry
13 customs, standards, and practices in continuing to
14 undertake its activities and then respond to
15 litigation hold when it was put in place in December
16 of 2021.

17 Q. In your experiences -- well, are you
18 familiar with any insurer in the United States that
19 places a litigation hold as a matter of course any
20 time coverage litigation is filed?

21 MS. PATTERSON: Your Honor --

22 THE WITNESS: No, I'm not aware of.

23 MR. BROWN: Hold on. There's an objection.
24 Hold on.

25 MS. PATTERSON: Your Honor, I just want to

1 object at this time. And I can cover it in
2 cross. But he did testify in his deposition
3 that he was not planning to offer any opinions
4 with regard to litigation hold or customs and
5 practices.

6 THE COURT: Overrule the objection. He's
7 been qualified generally and is able to speak
8 about these matters. And this is not the first
9 time in the course of this examination that
10 litigation hold has been mentioned without
11 objection, so I overrule the objection.

12 MS. PATTERSON: Thank you, Your Honor.

13 MR. BROWN: Thank you, Your Honor.

14 BY MR. BROWN:

15 Q. Mr. Heinze, I think I might have
16 interrupted you there so let me back up.

17 Are you familiar with any insurer in the
18 United States that has placed a litigation hold as a
19 matter of course any time coverage litigation is
20 filed against them?

21 A. I am not, no.

22 Q. Okay. And in this -- you reviewed the
23 pleadings in this case, correct?

24 A. Yes.

25 Q. And in the pleadings in this case, was

1 there ever a claim made for Penn National for a
2 missing policy in the pleadings?

3 A. Correct. Yes.

4 Q. Was there such a claim ever made for a,
5 quote/unquote, missing policy in the pleadings?

6 A. No.

7 Q. Okay. Do you know why Penn National placed
8 the litigation hold in place in late 2021?

9 A. I believe that it was Scott Maier who sent
10 an email to Brent Reifsnnyder advising that there had
11 been coverage litigation in which Penn National was
12 involved in respect of the 1986 to 1987 and 1987 to
13 1988 policies that have been issued to Covil
14 Corporation.

15 And that in another case in which Penn
16 National is not a party, Covil had requested policy
17 information and related documents from Penn National
18 that Covil believed that Penn National may have
19 afforded to Covil Corporation in underlying asbestos
20 cases with regard to those other matters.

21 MR. BROWN: Okay. All right. That's all I
22 have. Thank you, Mr. Heinze.

23 THE WITNESS: Thank you, Mr. Brown.

24 MR. BROWN: With the Court's permission, I
25 will trade places with Ms. Patterson.

1 THE COURT: All right.

2 - - -

3 EXAMINATION

4 - - -

5 BY MS. PATTERSON:

6 Q. Good morning, Mr. Heinze. I don't think
7 you can see me, but my name is Nancy Patterson. We
8 met over video about a year ago when I took your
9 deposition. Do you recall that, sir?

10 A. I remember your voice, Nancy.

11 Q. All right. Very good. Good to hear yours
12 again, sir.

13 Do you happen to have a copy of your
14 deposition transcript, the one that I took back in
15 November of '22, handy there with you this morning?

16 A. I can bring it up if you would like, yes.

17 Q. I may need you to do that. I just wanted
18 to make sure you had it available if that becomes
19 necessary. Thank you.

20 A. Sure.

21 Q. Do you recall telling me at the time of
22 your deposition last year that you have been deposed
23 over 100 times as a paid expert witness?

24 A. I've been deposed over a hundred times and
25 was paid for the time that I took in reviewing the

1 records and documents that I was asked to review and
2 then testified with regard to industry customs,
3 practices and standards with regard to the issues
4 that were before the court at the time.

5 Q. So the answer so my question is, yes, you
6 recall telling me that you have been deposed over a
7 hundred times?

8 A. Yes.

9 Q. All right. I want to sort of pick up where
10 Mr. Brown left off on the issue of litigation holds.
11 Do you recall testifying in your deposition that you
12 were not planning to offer any opinion regarding
13 litigation holds?

14 A. At that time, yes, that's correct.

15 Q. All right. And are you aware -- let me ask
16 you this: Have you reviewed the litigation hold
17 policy that was produced by Penn National in
18 connection with this case?

19 A. Yes.

20 Q. All right. And when did you review that
21 policy?

22 A. It was with respect, I believe, of the
23 initial materials that I reviewed at the time that I
24 was retained, Nancy.

25 Q. Okay. But you just weren't asked to opine

1 about it until sometime after your deposition,
2 correct?

3 A. That's correct, yes.

4 Q. Did you happen to notice in that policy
5 that is in place at Penn National that it does not
6 apply to the claims department?

7 A. Yes.

8 Q. All right. And are you aware of any
9 insurance company that has a litigation hold policy
10 administered by its legal department and a separate
11 litigation hold policy administered by a claims
12 department?

13 A. The documents and the litigation hold
14 policies, Ms. Patterson, that I'm familiar with are
15 either company-wide or specific to a particular
16 branch of that organization.

17 Q. All right. Do you recall that I asked you
18 that question, the question that I just asked you in
19 your deposition last year?

20 A. Yes.

21 Q. All right. Do you recall the answer you
22 gave at that time?

23 A. Not off the top of my head now, no.

24 Q. Could you please, then, sir, pull up your
25 deposition transcript, and I'd ask you to look at

1 page 206, starting at line 10.

2 A. Yes.

3 Q. All right. And if you will follow along
4 with me, the question I asked you during your
5 deposition, which I took on December the 7th, 2022, I
6 asked you "Are you aware of any insurance company
7 that has a litigation hold policy administered by its
8 legal department and a separate litigation hold
9 policy administered by its claims department?"

10 And could you read the answer that you give
11 me at that time, sir.

12 A. Sure. I responded "I would not be able to
13 respond to that one way or the other."

14 Q. All right. Thank you.

15 Mr. Heinze, you are aware, I believe, of --
16 and I think you referred to it in your testimony
17 earlier in response to one of Mr. Brown's questions,
18 you're aware of a subpoena that was served on Penn
19 National requesting policy information regarding
20 Covil. And that subpoena was served back in May of
21 2018. Did you see that in the materials that Penn
22 National provided you?

23 Mr. Heinze? I think he froze, Your Honor.

24 THE COURT: What's the problem?

25 MS. PATTERSON: I think the video froze.

1 THE COURT: Ask the question again.

2 MS. PATTERSON: Mr. Heinze, can you hear
3 me?

4 THE COURT: He's trying to respond to you
5 down on my computer.

6 MR. BROWN: He's answering the question on
7 this computer. We just can't hear it.

8 THE COURT: Mr. Heinze, can you hear me?
9 I can't hear you that's the problem.

10 Be patient, Mr. Heinze. We're trying to
11 get this fixed. Sorry.

12 - - -

13 (Off the record.)

14 - - -

15 THE COURT: Okay. Ms. Patterson.

16 MS. PATTERSON: Thank you, Your Honor.

17 BY MS. PATTERSON:

18 Q. Mr. Heinze, you are back with us. Sorry
19 about that.

20 Let me go back to the question that I was
21 asking which had to do with the subpoena that was
22 issued to Penn National back in May of 2018. You're
23 familiar with that; is that correct, sir?

24 A. Yes, I am.

25 Q. Do you recall specifically what was being

1 asked of Penn National? What documents Penn National
2 was being asked to search for and provide?

3 A. Might I be able to see it, please.

4 Q. Let me just ask it -- it's in the record.
5 Do you recall as you sit here?

6 A. I recall that I saw the subpoena. I don't
7 recall specifically as I sit here now all the various
8 aspects of it word for word, but I recall that it was
9 in relationship to the 1986 to 1987 and 1987 to 1988
10 policies that have been issued to Covil Corporation
11 by Penn National.

12 Q. Very good. Do you recall that the subpoena
13 also asked for Penn National to search for any
14 policies related to or covering the Covil
15 Corporation?

16 A. I believe that's true, yes.

17 Q. All right. And you were asked questions by
18 Mr. Brown earlier about whether or not a litigation
19 hold was issued by Penn National in response to the
20 receipt of that subpoena. Do you recall those
21 questions?

22 A. I do.

23 Q. All right. And I understand your testimony
24 to be that the nonissuance of a litigation hold at
25 that time, in your opinion, is -- comports with the

1 custom and practice in the insurance industry?

2 A. Yes, ma'am.

3 Q. All right. Do you recall when I took your
4 deposition back in December of 2022, you indicated
5 that you were not planning to provide any opinion
6 about whether or not the litigation hold or a
7 litigation hold should have been issued by Penn
8 National at that time. Do you recall that?

9 A. Yes, as I testified earlier. Yes.

10 Q. So the opinion you are offering today, that
11 the failure or nonissuance of a litigation hold back
12 in May or June of 2018, that's a new opinion that
13 you're offering for the first time today, correct?

14 A. Correct. It was not something that we
15 reviewed at the deposition.

16 Q. Well, it was a question I asked you at the
17 deposition, and you said you weren't offering an
18 opinion on it at that time, correct?

19 A. That's correct.

20 Q. All right. So that's a new opinion that
21 you have formulated after I took your deposition in
22 December of last year, correct?

23 A. Yes.

24 Q. All right. And that new opinion was never
25 disclosed to us by you or Penn National, was it,

1 prior to this morning?

2 A. I don't know what has been disclosed to
3 you, Ms. Patterson.

4 Q. Thank you, sir.

5 Do you know or do you -- let me ask you
6 this, sir. You testified about the December 2022 --
7 I'm sorry, December 2021 litigation hold that was
8 issued by Penn National by Mr. Maier, correct?

9 A. Yes.

10 Q. And are you aware that Mr. Maier has
11 testified that that's the only litigation hold that
12 Penn National has ever issued in connection with any
13 Covil litigation?

14 A. That's my understanding of his testimony,
15 yes.

16 Q. All right. Are you aware that Penn
17 National was named as a defendant in a coverage
18 action by another carrier regarding coverage related
19 to Covil in October of 2019?

20 A. No, I'm not.

21 Q. You're not aware of that litigation at all?

22 A. Correct.

23 Q. Are you aware, sir, that the claims --
24 well, that the receiver for Covil Corporation in 2019
25 served a subpoena on Penn National for records and

1 documents?

2 A. I believe, yes, that is when the records
3 that I reviewed, yes.

4 Q. All right. Are you aware that no
5 litigation hold was issued after that subpoena was
6 issued by the receiver?

7 A. Yes, as Mr. Maier testified.

8 Q. All right. Are you aware, sir, that the
9 case that we are here about today was filed in April
10 of 2020?

11 A. Yes.

12 Q. And you're aware, obviously, that Penn
13 National was named as a defendant in this case,
14 correct?

15 A. Yes.

16 Q. Yet the litigation hold regarding matters
17 pertaining to Covil was not issued by Penn National
18 until over a year and a half later in December of
19 2021, correct?

20 A. That's my understanding, yes.

21 Q. And over three and a half years after the
22 initial subpoena in the Finch matter, correct?

23 A. Correct.

24 Q. All right. Let's go back to a discussion
25 of your prior work as an expert witness. In addition

1 to being deposed on over a hundred occasions, you've
2 also testified in trials or arbitrations on
3 approximately 12 to 15 occasions; is that correct?

4 A. Yes, ma'am.

5 Q. And two of those cases were here in
6 South Carolina, correct?

7 A. That's correct.

8 Q. All right. And we talked about those in
9 your deposition. Just briefly, one of the cases you
10 testified in -- here in South Carolina was the
11 Portrait Homes case; is that right?

12 A. Yes, ma'am.

13 Q. All right. And that was back in 2019,
14 correct?

15 A. Correct.

16 Q. And you were testifying on behalf of Penn
17 National as an expert in that case, correct?

18 A. Yes, ma'am.

19 Q. And, in fact, Mr. Brown, who's the lawyer
20 who questioned you earlier today, was the lawyer you
21 worked with in connection with the Portrait Homes
22 case, correct?

23 A. Yes.

24 Q. And you testified at the trial of that
25 matter?

1 A. Yes.

2 Q. And you were retained by Penn National in
3 the Portrait Home case to opine, as an expert
4 witness, on whether the activities of Penn National
5 and its affording of a policy to a subcontractor was
6 within the customs and practices of the insurance
7 industry and the standard of care. Is that correct?

8 A. No. I was retained as an expert to review
9 the entirety of the record that I was provided and to
10 opine, with a reasonable degree of professional
11 certainty, as to whether the actions of Penn National
12 with regard to taking the position that it did in
13 requesting the subcontractor as to whether or not
14 they wished to have a defense in that case was
15 reasonable and appropriate under all of the relevant
16 circumstances.

17 Q. Do you recall that I asked you that, the
18 same question I just asked you, that I asked you that
19 question in your deposition in December of last year?

20 A. There were many questions that were asked.
21 That may very well have been one of them.

22 Q. All right. If you could pull up your
23 deposition again, sir.

24 A. Sure.

25 Q. Page 71, line 6.

1 Let me know when you have it, Mr. Heinze.

2 A. I'm there.

3 Q. All right. Great. At line 6, I asked you
4 back in December of this year, "And what were you
5 retained to opine in this Portrait Homes case?"

6 Could you read the Court the answer you
7 gave me at that time?

8 A. Sure. I responded that, quote, It was a
9 question whether the activities of Penn National and
10 its affording of a policy to a subcontractor was
11 within the customs and practices of the insurance
12 industry and the standard of care.

13 Q. Thank you.

14 And you testified in that case, the
15 Portrait Homes case, that Penn National's conduct was
16 appropriate and was in keeping with the customs and
17 practices in the insurance industry and standard of
18 care, correct?

19 A. Correct.

20 Q. That was a bench trial before Judge
21 Roger Young in Berkeley County, South Carolina,
22 correct?

23 A. That's right.

24 Q. Now, I'll represent to you, Mr. Heinze, the
25 opinion in that case has been marked and admitted in

1 this case or in this trial as evidence. It's been
2 marked as Trial Exhibit 122, and that's the March 23,
3 2020, opinion from Judge Young.

4 Have you ever reviewed Judge Young's order
5 in that case?

6 A. I did.

7 Q. And do you recall that Judge Young ruled
8 against Penn National following that trial?

9 A. I am.

10 Q. And do you recall that Judge Young found
11 that Penn National was liable for breach of contract
12 and bad faith refusal to pay?

13 A. I am, yes.

14 Q. And are you aware that Judge Young found
15 that Penn National was liable for punitive damages in
16 excess \$8 million? Do you recall that?

17 A. I do.

18 Q. Do you recall that Judge Young found that
19 Penn National put its interest ahead of the insured
20 in that case?

21 A. That was the judge's finding, yes.

22 Q. And that the judge also found that Penn
23 National failed to perform a reasonable investigation
24 of that claim and knowingly misrepresented coverages
25 under the policies and failed to disclose important

1 information that it had in its possession to the
2 insured.

3 Are you aware that those were among the
4 court's findings in the Portrait Homes case?

5 A. Yes, I am.

6 Q. And during your testimony in the Portrait
7 Homes case, you also testified about another case
8 against Penn National that took place back in 2007.
9 That's the Penn National versus Johnson case. Are
10 you familiar with that?

11 A. Yes.

12 Q. And in the Penn National versus Johnson
13 case, you actually testified against Penn National,
14 correct?

15 A. That's correct.

16 Q. And in that case, Penn National versus
17 Johnson, you testified that Penn National, among
18 other things, quote, Failed to conduct an
19 investigation of the facts surrounding the claim
20 which was in derogation of the standards and
21 practices of the insurance industry constituting bad
22 faith. Correct?

23 A. Yes.

24 Q. And you further testified in the Johnson
25 case that Penn National made no effort to protect its

1 insureds' rights thus constituting bad faith. Do you
2 recall that?

3 A. I do.

4 Q. All right. And specifically do you recall
5 that the Johnson case, where you were testifying
6 against Penn National, in that case Penn National was
7 ordered to pay \$6 million in punitive damages as a
8 result of bad-faith conduct?

9 A. That's correct. I recall that, yes.

10 Q. All right. You provided some testimony
11 here today about the policy search that was
12 conducted -- the policy search that was conducted by
13 Penn National following receipt of the subpoena back
14 in May of 2018, correct?

15 A. Yes.

16 Q. And you told us this morning that as a part
17 of your work to -- as an expert regarding that
18 particular issue, you made a trip to Penn National's
19 home office in Harrisburg, Pennsylvania, correct?

20 A. Correct.

21 Q. And you recall you and I discussed that at
22 your deposition because I think you made the trip
23 just a couple of weeks before we met last year. Do
24 you recall that?

25 A. Yes, I do.

1 Q. All right. And you told me at the time you
2 wanted to go to Penn National to, quote, See how the
3 document retrieval system worked and what it looked
4 like. Is that right?

5 A. That's right.

6 Q. And you met with two ladies there that you
7 referred to as administrative ladies?

8 A. Yes.

9 Q. And that meeting lasted about two hours,
10 correct?

11 A. Correct.

12 Q. You did not, however, during that meeting
13 in Harrisburg meet with Boyd Wright, the gentleman
14 who works in the claims department as the claims
15 handler for Covil, did you?

16 A. No. I believe that both he and
17 Mr. Reifsnyder were out of the office or on vacation.

18 Q. All right. And that was the next question
19 I was going to ask you. You also didn't meet with
20 Mr. Reifsnyder when you were there to review the
21 retrieval system and the storage system, did you?

22 A. Correct.

23 Q. You did tell me about the room where the
24 documents or I guess I should say the microfiche was
25 stored, correct?

1 A. Yes.

2 Q. And that the microfiche is stored in little
3 cellophane pouches in long boxes, correct?

4 A. Yes.

5 Q. And that there are thousands of those
6 little cellophane pouches containing the microfiche
7 film, correct?

8 A. Correct.

9 Q. You certainly didn't attempt to review all
10 of the microfiche in the room that day, correct?

11 A. No. I asked the ladies to show me --
12 randomly pick a policy number and let's take a look
13 and see what we're able to retrieve.

14 Q. All right. And I think at your deposition
15 you said you were able to review three or four items
16 before the bulb in that opaque projector machine
17 burned out. You weren't able to review anything
18 else, correct?

19 A. Correct.

20 Q. Did you ever see any kind of index, either
21 electronically or paper form, of the terminal digit
22 marking system that would show, for example, what
23 numbers were associated with what policyholders?

24 A. No, I didn't ask for one. I was merely
25 interested in watching the retrieval system and how

1 the process worked.

2 Q. Right. But you were asked some questions
3 this morning about this indexing system or about the
4 number system, and you said that that was something
5 you're familiar with. I just want to know did you
6 ask anyone at Penn National during that trip or at
7 any other time whether they maintained any sort of
8 index where you could look at policy numbers and
9 insureds and sort of try to link that up? Did you
10 ever ask about that?

11 A. No, Ms. Patterson. As I testified, I was
12 merely interested in seeing how the process worked
13 and to see whether it was in compliance with what I
14 have done in the past and what industry customs and
15 practices are with regard to the retrieval of
16 policies.

17 Q. So you don't know whether any such index
18 exists, do you?

19 A. Correct.

20 Q. As the expert for Penn National, do you
21 know who was involved in any -- at any point in time
22 in the actual search for historical policies after
23 the Finch subpoena was received in May of 2018?

24 A. I seem to recall in looking at the
25 materials, Ms. Patterson, that Mr. Reifsnyder had a

1 team of people that he worked with and requested them
2 to exhaust all options to find evidence of any
3 policies that would be responsive to the subpoena.

4 Q. And I appreciate that, Mr. Heinze, but
5 respectfully, that wasn't really the question. I
6 just want to know do you know who was involved in the
7 actual search?

8 A. I don't. As I testified, I do not know the
9 names.

10 Q. Do you how many hours Penn National
11 personnel devoted back in 2018 to searching for
12 historical policies related to Covil Corporation
13 after they received the subpoena in the Finch matter?

14 A. No. All I know is that they reviewed all
15 of the documents they had in hand and could attempt
16 to locate and that no additional policies other than
17 the 1986, '87 and 1987, 1988 policies were able to be
18 found.

19 Q. Well, sir, what are all of the documents
20 that they had in hand?

21 A. All of the documents that they were able to
22 review in searching for the information in response
23 to the subpoena.

24 Q. That's what I'm asking you. What documents
25 did they review?

1 A. I'm not aware of what documents were
2 reviewed, Ms. Patterson. All I know is that a search
3 was initiated to review all of the information that
4 Penn National had in order to try and find any
5 evidence of additional policies.

6 Q. But you don't know what documents were
7 reviewed, do you?

8 A. Correct.

9 Q. And you don't know who in particular was
10 involved in that review or search, correct?

11 A. Not by name, no.

12 Q. And you don't know how many hours were
13 spent by Penn National personnel in performing that
14 search for records, do you?

15 A. Correct.

16 Q. All right. And you have never, in your
17 capacity as an expert witness in this matter, asked
18 Penn National about whether they have a system or had
19 a system prior to 2018 whereby they could search for
20 historical policy documents by policyholder name; you
21 never asked that question, did you?

22 A. I think that I may have seen in the
23 documents in the record that the matter in which
24 policy searches were being able to be undertaken was
25 by policy number.

1 Q. And, again, Mr. Heinze, do you recall that
2 I asked you that very same question during your
3 deposition last year?

4 Mr. Heinze?

5 A. Yes.

6 Q. Do you recall that I asked you that same
7 question during your deposition last year?

8 A. I don't recall off the top of my head all
9 the questions that you asked. That may very well
10 have been one of them.

11 Q. Okay.

12 A. That is my testimony as to what I was able
13 to glean from the record of documents that I reviewed
14 and the testimony of the Penn National witnesses.

15 Q. Okay. But, again, Mr. Heinze, I'm just
16 asking if you recall that I asked you that question
17 last year.

18 A. Not off the top of my head. I'm sorry.
19 There were a lot of questions.

20 Q. That's fine. Let's take a look at it, at
21 page 50 of your deposition. If you could pull that
22 up.

23 A. Okay.

24 Q. At line 20, the question I asked, "And I
25 take it, then, in your capacity as an expert witness

1 in this case, you have never asked Penn National or
2 sought out information as to whether Penn National
3 ever had a system prior to May of 2018 whereby it
4 could search for historic policy documents by
5 policyholder name?"

6 Could you read your answer to that question
7 to the Court, please.

8 A. Yes. I said, "Correct. My interest was
9 what they did in this situation in response to the
10 subpoena and request for documents."

11 Q. All right. Thank you.

12 I want to move now to some of the testimony
13 you provided this morning regarding the two policies
14 that were located, the '86, '87 policy and the '87,
15 '88 policy covering Covil. You, of course, have had
16 an opportunity to review both of those policies,
17 correct?

18 A. Yes.

19 Q. Do you recall, sir, in reviewing the '86,
20 '87 policy that it indicates it's a renewal policy?

21 A. I recall that there is an endorsement that
22 is added to the back of the policy, which indicates
23 that the endorsement was placed on the policy because
24 it was not done at the time of renewal.

25 Q. And respectfully, Mr. Heinze, that was not

1 my question. Do you recall that there's an
2 indication on the '86, '87 policy that is a renewal
3 policy? Do you recall that or not?

4 A. As I testified, Ms. Patterson, I'm aware
5 that there is an endorsement that indicates that
6 there is an endorsement requirement because it was
7 not added on at the time, as is stated on the
8 endorsement, at the time of renewal. And as I
9 testified, the declarations page indicates that it is
10 a new policy and at inception of 1986 was the first
11 year in which this coverage was afforded to Covil
12 Corporation.

13 Q. Do you have any information -- I'm sorry.
14 I didn't mean to interrupt you. Were you finished
15 with your answer?

16 A. Yes.

17 Q. All right. Do you have any information,
18 Mr. Heinze, about the underwriting process with
19 respect to the two policies that you are aware of,
20 the '86, '87 and '87, '88 policy?

21 A. Ms. Patterson, what do you mean by
22 underwriting process?

23 Q. My question is, do you have any information
24 about the underwriting process with respect to those
25 two policies? I asked you this question back in your

1 deposition.

2 A. Right. And I'm asking you what do you mean
3 today by underwriting process?

4 Q. Anything that was involved in the actual
5 underwriting process, the review of the application,
6 the consideration by the underwriters, anything
7 regarding the underwriting process.

8 A. I see. No, I don't.

9 Q. All right. And, in fact, you've testified
10 previously that you do not have any information as to
11 the manner in which the underwriters at Penn National
12 put the coverages together for the '86-'87, '87-'88
13 policies, do you?

14 A. That's correct.

15 Q. You've never been provided or reviewed the
16 underwriting file related to those two policies,
17 correct?

18 A. Correct.

19 Q. But you have reviewed the policies, and
20 you've -- well, let me ask this question. You
21 understand that Penn National has contributed to
22 settlements of a number of claims made against Covil
23 Corporation, correct?

24 A. Yes, as well as defended some of those
25 claims.

1 Q. Correct. And I'm sure you recall seeing in
2 the documents you reviewed a letter from Mr. Boyd
3 Wright from September of 2022 identifying 14 claims
4 in particular that Penn National contributed toward
5 settlement of; do you recall that?

6 A. I do.

7 Q. And those 14 claims were all covered claims
8 under the Penn National policies that you referred to
9 today, the '86, '87 and the '87, '88?

10 A. I didn't make any determination as to
11 whether they were covered or not covered,
12 Ms. Patterson. I took the information in
13 Mr. Wright's letter for what it said.

14 Q. Okay. But you understand that Penn
15 National contributed to the settlement of those
16 policies -- of those claims under those policies,
17 correct?

18 A. Yes, as I testified.

19 Q. All right. And based -- well, did you
20 identify, Mr. Heinze, any ambiguities in the 1986,
21 1987 policy?

22 A. No.

23 Q. Did you identify any ambiguities in the
24 1987, 1988 policy?

25 A. No.

1 Q. Did you identify anything in either policy
2 that you believe was inaccurate?

3 A. Well, to the extent that I had no
4 information with regard to the underwriting process,
5 it would be difficult for me to give an opinion
6 before Your Honor with regard to the accuracy or
7 inaccuracy of any aspects of these policies.

8 Q. Fair enough. But you did conclude that
9 both of them were unambiguous?

10 A. Yes.

11 MS. PATTERSON: All right. Thank you, Your
12 Honor. That's all I have.

13 THE COURT: Mr. Brown.

14 MR. BROWN: Thank you, Your Honor.
15 Briefly.

16 THE COURT: Mr. Brown, I may have some
17 questions too.

18 MR. BROWN: Okay.

19 THE COURT: So it might be well -- how
20 would you like me to handle that?

21 MR. BROWN: Go ahead.

22 THE COURT: Let me go on and ask mine, and
23 you will be able to follow up.

24 MR. BROWN: Yes.

25 - - -

1 EXAMINATION

2 - - -

3 BY THE COURT:

4 Q. Mr. Heinze, can you hear me?

5 A. Yes, Your Honor. I can very well. Thank
6 you.

7 Q. Good. I'd like to ask you a couple of
8 questions, if I could, sir. Can you see me?

9 A. Yes, Your Honor, I can. Thank you.

10 Q. Very good. I'm curious about what the
11 microfiche that were in these boxes and identified
12 simply by a tab that had a policy number. Was there
13 anything else about how these materials were kept
14 that would identify the year of the policies that
15 were in those boxes?

16 A. Not that I recall, Your Honor. I think
17 that -- my recollection is that they were kept in
18 sequential order by policy number.

19 Q. Well, I have looked at lists -- there's a
20 whole notebook that must have 500 pages in it, and
21 it's nothing but a bunch of policy number lists. And
22 they're not sequential at all. I mean, they jump all
23 around in terms of numbers.

24 There's some talk about a digital
25 identification that focuses on the last two numbers

1 of these policy numbers, and I don't completely
2 understand that to know whether there is some way to
3 identify the years we're talking about since the
4 documents I've seen and the boxes that have been --
5 few have been photographed that I've looked at don't
6 seem to be sequential. Does that make any sense?

7 A. I understand. I understand what you're
8 saying, Judge. And I think the best way to answer
9 the question is that once the policy is located, that
10 the policy year, the date of inception, and the date
11 of expiry will be located on that declarations page,
12 which should be one of the first pages on the
13 microfiche.

14 Q. Oh yes, I understand that completely. What
15 I'm trying to figure out, though, is how you just got
16 a whole bunch of boxes with a whole bunch of policies
17 stored, and they are not in any kind of sequential
18 order, how you can search for a particular year. For
19 example, if you have a 25-year retention policy, how
20 would you identify the materials that are eligible
21 for purge if you don't have anything that identifies
22 on the box or the tabs what's in there in terms of
23 policy year?

24 A. Yes. I understand your question, Your
25 Honor. I think from what I can tell to Your Honor,

1 is that a fair reading of the evidence is that there
2 was no microfiche that was destroyed during the time
3 period in which Covil Corporation was an insured of
4 Penn National. That being 1986 through 1988. Or
5 through the time that it went out of business in
6 1991.

7 Mr. Reifsnyder went through the process of
8 identifying those materials that may have been within
9 that 25-year window. I don't know what the process
10 was that he went through with regard to identifying
11 those documents, but I do know from reading the
12 materials, that the evidence is that there was
13 nothing destroyed during the period in which Covil
14 Corporation was an insured or the time that it went
15 out of business in 1991.

16 Q. What is the material that you're referring
17 to right now to make the determination that no
18 policies that covered Covil -- and you're taking it
19 from a date of 1986, as I understand it?

20 A. Yes, Your Honor. That's right. That was
21 the day of inception. And, again, I think in
22 answering your question, Judge, I go back to
23 Mr. Reifsnyder's testimony where he described how the
24 underwriters' underwriting records were kept on
25 microfiche between 1970 and I believe he said 1992,

1 when the company then converted to a image write
2 system.

3 It's an electronic system in which
4 documents are scanned and can then be searched with
5 an OCR reader. They did that about two years. It
6 was found not to be as good in terms of searching as
7 paper was in 1994. So they switched to a paper
8 system in 1994 to the early 2000s when they then went
9 to the more efficient electronic system.

10 And in reading Mr. Reifsnyder's testimony,
11 I was able to determine that there was some
12 destruction, but it certainly was not within the time
13 period that Covil asked for information pertaining to
14 its policies that were either nonrenewed or not
15 canceled between 1986 and 1988.

16 Q. All right. Do you know of any material
17 that Penn National has that relates by way of some
18 kind of key or index the policy numbers to the date
19 the policy was issued in any kind of index?

20 A. I'm not aware of any of that one way or the
21 other, Judge. I'm sorry.

22 Q. And are you aware of any kind of index that
23 would relate the policy numbers to the name of the
24 insured?

25 A. Not without pulling the policy number and

1 identifying the name of the insured that is
2 associated with that policy number, Judge.

3 Q. I understand. So you're saying you don't
4 know of any separate key or index that would do that?

5 A. That's correct, Judge.

6 Q. Okay. So if you don't have a key and all
7 you've got is a bunch of documents in boxes and the
8 policy numbers are not sequential, that is, they
9 don't start at one, you know, in 1900 and go on a
10 straight line but rather they're randomly in there
11 without reference to sequence, do you know of any way
12 that Penn National had of deciding what years were in
13 what boxes?

14 A. Well, I think one of the important
15 distinction -- the answer to your direct question,
16 Your Honor, is, no, I don't. I think that would have
17 to come from Mr. Reifsnyder directly. But I think
18 you also have to look at the situation that it was
19 not just the microfiche records but also all of the
20 other records that Penn National had or maintained.
21 Writings, binders, payment slips, bills and invoices,
22 things of that nature that were organized in some way
23 by date that were then subject to the document
24 retention policy.

25 THE COURT: I see. I thank you for

1 answering my question, Mr. Heinze.

2 THE WITNESS: Your Honor, it's a pleasure.

3 THE COURT: Mr. Brown?

4 MR. BROWN: Nothing further, Your Honor.

5 Thank you very much, Mr. Heinze.

6 THE WITNESS: Thank you, Mr. Brown.

7 Your Honor, may I be excused?

8 THE COURT: You are excused.

9 THE WITNESS: Thank you, Your Honor. I
10 wish you all a very happy holiday season. Thank
11 you for the privilege of being with you this
12 morning.

13 THE COURT: Yes, sir.

14 Mr. Brown, what who is your next witness?

15 MR. BROWN: Your Honor, if we could indulge
16 the Court for a morning break so Mr. Shealy and
17 I may discuss that.

18 THE COURT: Sure. That's what I thought.
19 Our court will be in recess about 15 minutes.

20 MR. BROWN: 11:30, we'll be ready.

21 THE COURT: Very good. Court will be in
22 recess until 11:30.

23 MR. SHEALY: Thank you, Your Honor.

24 MR. BROWN: Thank you, Your Honor.

25 - - -

1 (A recess transpired from 11:15 a.m. to 11:33 a.m.)

2 - - -

3 THE COURT: Mr. Shealy.

4 MR. SHEALY: Your Honor, we're just waiting
5 on the witness to join. He was just sent the
6 email. It had to be sent from your computer.

7 THE COURT: Okay.

8 MR. SHEALY: As soon as he's in the
9 meeting, we'll let you know.

10 THE COURT: Who is your next witness,
11 Mr. Reifsnyder?

12 MR. SHEALY: Mr. Robertson.

13 THE COURT: Okay. Mr. Robertson. I'm
14 prepared on him. Read the stuff to date.

15 - - -

16 JAMES ROBERTSON, being first duly
17 sworn, testified as follows:

18 - - -

19 THE CLERK: Please state your full name for
20 the record.

21 THE WITNESS: My name is James Robertson.

22 MR. BROWN: May I proceed, Your Honor?

23 THE COURT: Yes. Proceed, Mr. Brown, on
24 direct. Mr. Robertson.

25 MR. BROWN: Thank you.

1

- - -

2

EXAMINATION

3

- - -

4

BY MR. BROWN:

5

Q. Good morning, Mr. Robertson. This is David

6

Brown. Can you hear me okay?

7

A. Yes.

8

Q. Okay. Unfortunately, the courtroom setup

9

here is such that you can't really see me. We can

10

see you and if the Court has some questions later,

11

you will be able to see her. But counsel for Covil

12

and I will be asking you some questions from a podium

13

just adjacent to the screen here, so I apologize for

14

that. But you won't be able to see us quite as well.

15

A. Are you close to a microphone?

16

Q. I am. Am I too soft?

17

A. No. A little echoey.

18

MR. BROWN: Okay. I can try to back up a

19

little bit.

20

THE COURT: Hang on for a second.

21

Mr. Robertson, you can see me, can't you?

22

THE WITNESS: I'm sorry, I couldn't

23

understand.

24

THE COURT: Can you hear me, sir?

25

THE WITNESS: Yes, ma'am.

1 THE COURT: I am going to suggest that you
2 bring your podium around here, Mr. Brown.

3 MR. BROWN: That's a good idea.

4 THE COURT: And see if you can't get in
5 here and get this microphone over here.

6 Let's see how that does.

7 THE WITNESS: That's better if you're
8 closer to the microphone there.

9 THE COURT: Can you hear him?

10 MR. BROWN: Let me try this, Mr. Robertson.
11 How's this? Can you hear me okay?

12 - - -

13 (Off-the-record discussion.)

14 - - -

15 BY MR. BROWN:

16 Q. If you don't understand me or have a hard
17 time understanding questions from counsel for Covil
18 when they get up for cross-examination, just let us
19 know. We'll be glad to speak louder or do what we
20 can to make ourselves heard.

21 A. Certainly.

22 Q. All right. I think you previously stated
23 your name for the record, but could you spell your
24 last name for us.

25 A. R-O-B-E-R-T-S-O-N.

1 Q. And, Mr. Robertson, where do you
2 currently -- where do you currently live?

3 A. 3320 Charla Drive -- Charla spelled
4 C-H-A-R-L-A -- in Prescott, Arizona, 86305.

5 Q. Are you affiliated with a business there?

6 A. I have been self-employed in a business
7 known as Interisk Limited for a little over 30 years.

8 Q. Okay. And what is the business of Interisk
9 Limited today? I'm guessing it's changed some over
10 the years, but what is the business of the company at
11 present?

12 A. Yes. Over time and in part because I've
13 aged, the only kind of assignments that I accept
14 today are basically expert witness engagements
15 related to underwriting matters, insurance company
16 operations, and in particular the history and
17 development of coverage under liability forms all the
18 way back to the origin. I've become kind of an
19 insurance historian in that work.

20 Q. Okay. If you could give us -- describe
21 your educational background for us just starting with
22 your college work.

23 A. I began college by attending Knox College
24 in Galesburg, Illinois, and then transferred to the
25 University of Iowa in Iowa City, Iowa. I received my

1 BA degree from the university in 1969 with majors in
2 psychology, religion, and one class short of a major
3 in philosophy.

4 Later, after beginning my work career, I
5 enrolled in a -- I guess you would call it a
6 part-time for a working person's master's degree
7 program at Pepperdine, and I received a Bachelor of
8 Science and administration degree from Pepperdine in
9 1976.

10 Q. Okay. And if you could describe your work
11 history since that time when you received your degree
12 from Pepperdine. Just kind of places you've worked
13 the kind of work you've done over the years.

14 A. I began working in the insurance industry
15 in 1970 as a lead underwriter with the Hartford
16 Insurance Group. I advanced through several
17 positions with the Hartford and during that time
18 obtained two professional insurance designations.
19 One is the chartered property casualty underwriter,
20 or CPU designation, and the other is the associated
21 risk management or the ARM designation.

22 After leaving the Hartford in 1974, I
23 became the underwriting manager of a regional
24 insurance agency in southern California. I was under
25 writing that administrative manager, I should say.

1 So I was responsible for the operations of the agency
2 as well as our relationships with numerous insurance
3 carriers and surplus lines markets.

4 I left that position in 1975 to become a
5 risk management consultant with a firm that was
6 well-known at that time. And during the time that I
7 was a consultant with them, they also gave me --
8 asked of doing the research to develop a publication
9 that became known as *The Umbrella* --

10 THE COURT REPORTER: The Umbrella?

11 MR. BROWN: I'm sorry, Mr. Robertson.

12 THE WITNESS: Did you have a question?

13 BY MR. BROWN:

14 Q. I just wanted to clarify for the court
15 reporter. You said *The Umbrella Book*?

16 A. Yes, that's the name. The title of the
17 book. *The Umbrella Book*.

18 Q. All right. Sorry. Go ahead.

19 A. Right after that publication was the -- I
20 received an offer to go to work for a large
21 international insurance brokerage firm basically in a
22 consulting position. And I started work for a sister
23 company called Reed Risk Management International.
24 This work involved basically going to various
25 provinces of Reed Risk around North America for the

1 purpose of helping to develop captive insurance
2 companies and sophisticated self-insurance programs
3 for their large clients. That were large number of
4 oil and gas companies, large contracting companies,
5 hospitals, stevedores, large number of companies that
6 I worked with during that period of time.

7 When I left Reed Risk Management, I was
8 reengaged by the first consulting firm, Warren,
9 McVeigh & Griffin, to create a revised version of *The*
10 *Umbrella Book*, which was published as a loosely
11 updatable publication -- reference publication in
12 1979.

13 And I continued with Warren, McVeigh &
14 Griffin as a risk management consultant and as the
15 editor of *The Umbrella Book* until 1974 at which time
16 I left the firm and became an independent consultant.

17 My independent consultancy was purchased in
18 1977 by Coopers & Lybrand. Actually, I was part of
19 the consulting division of Coopers & Lybrand, which
20 was one of the big six accounting firms that existed
21 at that time. But they had a division called
22 Actuarial and Benefits Consulting, and that's the
23 division that I joined in charge of risk management
24 engagements and also expert witness insurance
25 litigation engagements on the West Coast.

1 Q. Okay.

2 A. I was with Coopers & Lybrand for five years
3 and then left in mid 1972 to start the company which
4 was known as Interisk. That's where I've been
5 employed ever since.

6 Q. And in your worked at Interisk, have you
7 consulted on matters involving long-tail exposure,
8 bodily injury claim such as exposure to asbestos?

9 A. Yes. In fact, for the last several years,
10 that's probably been the most frequent kind of
11 engagement that I've been retained for.
12 Environmental claims, asbestos claims, in particular,
13 have occupied a great deal of my time.

14 MR. BROWN: Your Honor, at this time the
15 defendant will tender Mr. Robertson to the Court
16 as an expert in insurance industry standards,
17 customs, and practices.

18 MR. NES: No objection.

19 THE COURT: All right. By reason of
20 Mr. Robertson's training, education, and
21 experience, I find that he is qualified without
22 objection as an expert in insurance agency
23 standards and other matters as tendered by
24 Mr. Robertson.

25 And, Mr. Brown, I will say, I have trial

1 Exhibit Number 35, which is the professional
2 résumé of Mr. Robertson. I could not hear
3 completely the dates he was giving, but the
4 dates I'm looking at here are 1992 to present
5 time Interisk; 1987 to '92, Coopers Lybrand;
6 1978, '79 and '84 to '87, James A. Robertson
7 Associates; 1975 to '76, Warren, McVeigh &
8 Griffin, also 1979 to '83; 1976 to '78 Reed Risk
9 Management; 1974 to '75, Tausch Insurance
10 Brokers; 1970 to 1974 the Hartford.

11 Is that correct, Mr. Robertson?

12 THE WITNESS: Yes, ma'am.

13 THE COURT: Very good. Thank you. I just
14 don't know if I was hearing or picking things up
15 correctly, but that's the record as in the CV.
16 And I think the court reporter was having a
17 little bit of struggle with that too.

18 Thank you, sir.

19 MR. BROWN: Thank you, Your Honor. Those
20 dates are also reflected on Defendants' Exhibit
21 41 in the record. We will make that available
22 to the court reporter as well.

23 THE COURT: Excellent.

24 BY MR. BROWN:

25 Q. Mr. Robertson, were you engaged by our law

1 firm to look at this matter as a potential expert
2 witness for Penn National in this case?

3 A. Yes, I was.

4 Q. Okay. And what did you do to educate
5 yourself or bring yourself up to speed as to matters
6 in this field?

7 A. I was provided with a substantial variety
8 of documents to have been produced in this matter
9 including -- just a minute. If I can look at my
10 list.

11 I'm sorry, I'm having a technical problem
12 of my own.

13 There were a variety of things. There were
14 some of the pleadings and motions in the defense
15 matter as well as this matter. Then I was provided
16 with the depositions. I now had -- well, I have
17 two -- two depositions, rather, for Boyd Wright; one
18 for Brent Reifsnnyder; two depositions -- discovery
19 deposition and the trial deposition for Mr. Miller;
20 and a deposition of Mr. Protopapas; and finally the
21 deposition of Sharla Frost. I also had the exhibits
22 for each one of those depositions.

23 I was provided with a copy of the Penn
24 National policies for Covil that were issued in 1986
25 to '87 and 1987 to 1988. There was also a report

1 from Ellis & Winters. The various interim reports, I
2 believe, that were also compiled by Ellis & Winters.
3 And the record retention policy from Penn National
4 Insurance.

5 I think that covers the range of documents
6 that were provided to me.

7 Q. Okay. Thank you, sir.

8 And based on your review and your
9 background and experience, were you able to form any
10 opinions to a reasonable degree of professional
11 certainty as to how the two insurance policies apply?

12 I want to focus on that, not records
13 retention and all that right now. I want to talk
14 about the two policies that are before the Court, the
15 '86, '87 and '87, '88 policies you described. Did
16 you form any opinions about that?

17 A. Yes.

18 Q. What are those?

19 A. Well, both of these are packaged policies.
20 The title is basically special multi-peril, which was
21 a form of package policy that included coverage parts
22 for property, crime, I believe there was boiler, and
23 also general liability. These were forms that were
24 promulgated by the Multiline Insurance Rating Bureau
25 rather than the Insurance Rating Bureau or the

1 Insurance Services Office, which are the grading
2 organizations that most cases refer to.

3 The Multiline Insurance Rating Bureau did
4 ultimately merge with the Insurance Rating Board to
5 become the Insurance Service Office, but many of the
6 original S&P forms were not revised for many years,
7 and that includes the forms that were used by Penn
8 National for the Covil policies.

9 Q. If I could just stop you right there,
10 Mr. Robertson.

11 A. A particular liability coverage that was
12 provided in the Penn National policies did exclude
13 products and completed operations but was rated on
14 the basis of various installation classifications for
15 states in which Covil operated.

16 Q. Mr. Robertson --

17 A. Solely the installation risk -- what is
18 known in the industry as an operation hazard or
19 operations risk and was not based on any other
20 exposure.

21 Q. Okay. Mr. Robertson, let me stop you right
22 there, if I might. I apologize. You were fading in
23 and out a little bit. I just want to make sure that
24 we're properly hearing you and capturing your
25 testimony here.

1 You mentioned the Multiline Insurance
2 Rating Bureau as a company that merged with another
3 one later to become the Insurance Services Office; is
4 that correct?

5 A. Yes.

6 Q. And so the Penn National policy forms that
7 you observed in the '86 to '88 policies were forms
8 promulgated by that Multiline Insurance Rating
9 Bureau?

10 A. That's correct.

11 Q. And would it be fair to say that at that
12 time they were, if you will, standard insurance
13 industry forms?

14 A. They were -- they were considered standard
15 insurance industry forms. Although, there's -- it's
16 important, I think, to distinguish that when a
17 commercial policy is issued, every policy tends to be
18 a little different from every other policy. Even
19 though the base forms that are used may be the same,
20 there are usually modifications that are unique to a
21 particular company.

22 Q. And were the forms that you've described
23 that were used by Penn National -- and I want to
24 focus on the general liability coverage parts here,
25 in the '86 to '88 policies, were they -- was that

1 form language consistent with what developed in to
2 the CG 0001 ISO form later after the merger?

3 A. I believe the Form CG 001 is a designation
4 that was given to the 1986 CGL forms. Is it not?

5 Q. I believe that's correct. I'm asking the
6 question.

7 A. The generation of forms that were used in
8 the Penn National policy actually go back to around
9 1973.

10 Q. Okay.

11 A. And there were substantial changes in the
12 1976 commercial general liability policy. Even the
13 title changed when those policies were finally
14 issued. I believe by 19 -- by 1986, rather, that
15 there were not provisions that were issued or
16 available in the industry for the special
17 multiperil-type policies.

18 Q. Let me go back to these two '86 to '88 Penn
19 National general liability policies. You mentioned a
20 few moments ago in your testimony that they were
21 rated for operations exposure. What do you mean by
22 that?

23 A. The general liability coverage, which, by
24 the way, the term general liability should be
25 clarified. It refers to an entire class of insurance

1 than insurance liability risk.

2 General liability dates back all the way
3 even before the 1920s, at the beginning of the 20th
4 Century, and initially it included separate coverage
5 forms for different types of exposures. So, for
6 example, there was owner's liability policy, and
7 there was a tenant's liability policy, and there was
8 a landlord's liability policy. And ultimately, those
9 became combined in what was called OLT, or owners,
10 landlords, and tenants, because they were all
11 basically premises, that is, the business of
12 operating a premises from which your business is
13 conducted or which is occupied by the insured.

14 Then there were separate policies that were
15 developed for manufacturers and for contractors.
16 Those ultimately became known as the M&C or
17 manufacturers and contractors liability policy. And
18 then the manufacturers and contractors hazards were
19 operations typically conducted away from premises
20 that were owned or operated by the insureds.

21 That's the distinction between the premises
22 hazard and the operations hazard. Premises involves
23 a fixed location but at which the insured does
24 business. Whereas operations involves going out to
25 other customers -- or other contractors to build

1 something, to install something, to do whatever work
2 of the company is engaged in.

3 There was a separate hazard products
4 liability and for completed operations liability, and
5 all those combined in one form. And by the 1920s, in
6 order to have a complete program of insurance for a
7 fairly substantial company, you would need to buy
8 separate policies for OLT, M&C, product, contractual
9 liability, and for another risk called owners and
10 contractors, which was basically the risk of
11 liability incurred as a result of the work of others.

12 So the industry and policyholders
13 recognized that this had become a very complex
14 system, and in order to try and simplify it, they
15 combined coverage form to what became known in 1940
16 as comprehensive general liability.

17 Comprehensive in that sense simply meant
18 common coverages, and the initial general liability
19 forms in 1940 and forward from that point on involved
20 premises risks, operations risks, owners and
21 contractors protective liability. And then an option
22 of the company, if they accepted the risk, they could
23 have products liability. But originally it was not
24 covered.

25 Q. Okay.

1 A. There were several generations of the comp
2 general liability policy. They went through changes
3 or development over time. So, for example, there
4 were new additions in 1941, 1943, 1947, 1955, 1966,
5 and 1973. And ultimately in the 1980s, then the
6 coverages that evolved by that time became known as
7 commercial general liabilities in order to avoid
8 confusion over the meaning of the term comprehensive.

9 Q. Okay. And I want to focus on the two Penn
10 National policies at issue here, the '86, '87 and '88
11 policies.

12 A. Yes.

13 Q. If I understand you, those two policies
14 were part of a special multiline peril policy and at
15 least the general liability coverage forms were part
16 of the 1973 coverage forms from the Multiline
17 Insurance Rating Bureau; is that correct?

18 A. Yes.

19 Q. All right. And focusing again on the two
20 Penn National policies at issue in this case, they
21 were -- was operations coverage afforded under those
22 policies?

23 A. Yes.

24 Q. And was completed operations hazard
25 coverage afforded under those policies?

1 A. It was specifically excluded under those
2 policies.

3 Q. Okay. And was the products hazard covered
4 under those policies?

5 A. No. It was also excluded along with the
6 completed operations.

7 Q. All right. So I want to ask you about the
8 operations coverage that was covered under those two
9 policies. Could you describe for us, based on your
10 experience and keeping with the insurance industry
11 standards and practices, the kinds of risks covered
12 by the operations coverage under those policies.

13 A. Well, Covil's business was basically either
14 selling insulation products or selling and installing
15 them and those risks of going out to various work
16 sites. And I came to understand at the time that
17 Covil apparently had contracts for installation,
18 which is very sophisticated construction and
19 projects, specifically nuclear power plants and other
20 large power plant operations. And they would provide
21 the installation, various parts of the -- key parts
22 of the power plant, I think, that needed to be
23 insulated against heat exposure.

24 So they were basically hired either by the
25 power plants or by the general contractor for the

1 power plant to do these installation operations at
2 the power plant location.

3 Q. And how would the operations coverage for
4 Covil be triggered? How would it apply?

5 A. Operations is generally understood to be
6 triggered when there is either bodily injury or
7 property damage directly resulting from the work
8 that's being performed by the named insured at the
9 time that the policy is in effect.

10 Q. Okay.

11 A. If the injury or the damage occurs after
12 the work is completed and the policyholder has left
13 the job site, then that's considered to be a
14 completed operations risk.

15 Q. Okay. And I want to be --

16 A. So --

17 Q. I'm sorry, go ahead.

18 A. -- in order to be covered under the Penn
19 National policies, there would need to be an
20 occurrence of injury during Penn National's policy
21 period arising out of its operations during the
22 policy period.

23 Q. Okay. So I want to be very specific.
24 We're talking about asbestos bodily injury claims in
25 connection with this litigation, correct?

1 A. Yes.

2 Q. So if, hypothetically, a given plaintiff
3 who presents with a claim or a lawsuit today has
4 evidence that he or she was exposed to
5 asbestos-containing products installed by Covil
6 during Covil's ongoing operations from '86 to '88,
7 then would that trigger the operations coverage under
8 these two Penn National policies?

9 A. The key thing that has to be present for a
10 Penn National policy to be triggered in 1986 is that
11 there must be injury because of work they are doing
12 and exposure to the claimant in 1986.

13 Q. Okay.

14 A. If the injury arose out of work, even
15 though it was performed by Covil, but it was
16 performed and the injury was performed -- I'm sorry,
17 the work was performed at an earlier time, let's say
18 1970, the policy that's in effect in 1970 is the one
19 that would provide operations coverage.

20 But later policies, regardless of the
21 insured that issued the policy, would also trigger as
22 a result of bodily injury during the policy periods,
23 they would treat those same claims as completed
24 operations because the policy that they issued was
25 not in effect at the time the original injury

1 occurred and there was no work being performed during
2 the policy period.

3 Q. So I want to --

4 A. I'm not sure that's ever been clarified
5 properly in anything that I've read in this matter.

6 Q. Okay.

7 A. And I think that's the very important
8 subject to -- to become clear on, that the policy
9 that is in effect when the worker is exposed
10 considers that to be an operations risk. But a
11 policy that's in effect and with bodily injury is
12 still occurring years after the operation is
13 completed, they treat it as completed operations
14 risk.

15 So basically, there's still coverage for
16 the injury, but if treated differently by the
17 insurance industry, by the custom of how these
18 policies have been designed and what they've been
19 designed to insure.

20 Q. Okay. So, Mr. Robertson, let me -- I want
21 to be -- kind of drill down on that a bit with some
22 specific questions. So let me go back to one I just
23 hypothetical imposed a moment ago.

24 Assume that a given plaintiff was exposed
25 from '86 to '88 to asbestos during Covil's ongoing

1 operations, then would that -- and had a bodily
2 injury from that exposure to asbestos in '86 to '88,
3 and Covil was working from '86 to '88 at a location
4 where that plaintiff was being exposed, then would
5 that claim trigger operations coverage under these
6 two Penn National policies?

7 A. Yes.

8 Q. Okay. Now, assume that the same plaintiff
9 was exposed in 1970, as you put it, and to Covil's
10 ongoing operations at that time and had asbestos in
11 his lungs that resulted in a disease progression that
12 manifested under a diagnosis decades later, but there
13 were no ongoing operations of Covil that that given
14 plaintiff was exposed to from '86 to '88, would
15 that -- would that claim in '86 to '88 be considered
16 an operations loss or a completed operations loss?

17 A. Completed operation.

18 Q. Okay.

19 A. For a policy in effect in 1970 when the
20 claimant was exposed would be treated as an
21 operations claim.

22 Q. And if Covil had a policy in later years
23 after its operations were completed that contained
24 completed operations hazard coverage, then that
25 policy would be obligated as well, correct?

1 A. Yes. And it's my understanding that Covil
2 didn't purchase separate policies for operations and
3 for completed operations.

4 Q. Okay. And where did you gain that
5 understanding?

6 A. There was an exhibit that was produced in
7 the Finch matter that was part of the documents that
8 were provided to me, and it was a complete list of
9 apparently all of Covil's insurance policies that
10 went back to at least the 1960s and all the way
11 through to the time the company ceased operations in
12 1992. That list contained separate policies
13 identified as covering only products and completed
14 operations versus the other policies on the list
15 which only covered Covil's operations --

16 Q. Okay.

17 A. -- or operations risk.

18 Q. Mr. Robertson, there's been a couple other
19 issues raised that I want to ask you about. Are you
20 aware of an endorsement for completed operations
21 hazard exclusion and products hazard exclusion, the
22 2104 endorsement was on -- added to the '86, '87
23 Covil policy?

24 A. Yes.

25 Q. And have you seen the language when it was

1 added to the effect that it needed to be added
2 because it was not included at the time of renewal?

3 A. Yes. I have seen that.

4 Q. Okay. And on that same '86 to '87 policy,
5 have you also seen the declarations which showed that
6 the policy was new at that time?

7 A. Yes.

8 Q. Okay. If there had been an '85, '86 Penn
9 National policy and a policy with another carrier,
10 such as the Hartford policy that's been shown, would
11 there have needed to be an endorsement on the Penn
12 National policy to show how those two policies would
13 coordinate coverage?

14 A. Yes, there would.

15 Q. Why is that?

16 A. Well, if two policies were issued with the
17 same effective dates covering the same risks, every
18 time a claim arises, the two coverages is going to
19 clash with another. And, of course, the -- in part,
20 the problem depends on whether Covil presents a claim
21 to each policy. But if they do present a claim to
22 each policy, each insured is entitled to know about
23 the other insurer. And ordinarily when you sort that
24 out, you put an endorsement on each one of those
25 policies to avoid a conflict.

1 Now, companies do sometimes purchase
2 additional policies covering similar risks, but limit
3 it to a specific location for a job site. But that
4 wasn't the case here with Covil. They were
5 purchasing one policy each year for its separate
6 risks of operations and completed operations.

7 Q. Okay.

8 A. The other thing that is important to
9 emphasize from a business practice is the companies
10 don't intentionally increase their expenses by buying
11 duplicate insurance coverage. It's a bad business
12 practice. And on top of that, it creates many
13 problems, coverage conflicts.

14 For example, these conflicts can arise when
15 two companies merge, suddenly there are two groups of
16 policies covering risks of a specific part of it for
17 each company.

18 And the most common practice to avoid a
19 problem, a conflict between those policies is when
20 these two companies merge, the company that is
21 absorbed, typically all of its coverage is canceled
22 and the coverage is then added to the purchasing
23 company's insurance program.

24 Q. Mr. Robertson -- I'm sorry.

25 A. But avoiding that kind of conflict and also

1 avoiding duplicate expense is very common business
2 practice.

3 Q. Mr. Robertson, I want to turn your
4 attention to a September 2022 letter from Penn
5 National that described amounts that have been paid
6 on 14 claims by Penn National. Are you familiar with
7 that letter?

8 A. Yes, I am.

9 Q. Okay. And have you looked at the evidence
10 from the underlying claims of each of those that were
11 referenced by those 14 sites?

12 A. Yes. There was an Excel spreadsheet, and I
13 don't remember who had prepared that, but it
14 enumerated all the evidence as to each one of those
15 14 claims. It was analyzed in detail by Sharla Frost
16 during her deposition.

17 Q. And is it fair to say that you don't take
18 any issue with the idea that those 14 claims should
19 have been settled on reasonable terms with the
20 plaintiffs? You agree with that?

21 A. No. I mean, I do agree with that --

22 Q. Okay.

23 A. -- but on the basis of my understanding of
24 how claims decisions need to be made and not on the
25 basis of any experience. I've never been a claims

1 adjustor. So I just want to make it clear that I'm
2 not purporting to be an expert in claims in that
3 sense.

4 Q. Yeah. So just so we're clear on that
5 point, first, simple question, you agree that it was
6 appropriate to go out and settle those claims on
7 reasonable terms with those 14 plaintiffs, correct?

8 A. Yes.

9 Q. Okay.

10 A. But not necessarily because each one of
11 them may have been covered.

12 Q. I understand. I'm coming to coverage in a
13 minute.

14 A. I looked at them from the standpoint of
15 whether there were actual exposures, Covil's
16 operations from 1986 to '88. But I reasoned that and
17 based upon my experience in seeing how many claims,
18 thousands of claims have been resolved over my
19 career, it's entirely probable that in some cases it
20 was simply a good business decision for Penn National
21 to participate in the settlement rather than to fight
22 or to litigate over that claim.

23 Q. Okay. Mr. Robertson, I want to turn to a
24 separate issue. There's been a question raised about
25 whether an aggregate limit on these two Penn National

1 policies would apply to ongoing operations exposures.

2 Do you have an opinion satisfactory to
3 yourself to a reasonable degree of professional
4 certainty about that question?

5 A. Yes.

6 Q. And what is that opinion?

7 A. I'd like to bring up, if I may, the --

8 Q. Sure. I could bring it up on the screen.

9 If you could bring up Defendants' Exhibit 6.

10 A. Yeah. If you could bring up the limits of
11 liability provision of the 1986 policy.

12 Q. Yeah. This is -- Exhibit 6, I believe, is
13 the '87, '88 policy, but it's on Bates-stamp 47.

14 A. The same language appears in both policies.

15 Q. So it's Bates-stamp 47?

16 A. Now I'm not seeing your screen.

17 Q. Yeah, just wait one second. It's not
18 showing.

19 MR. BROWN: Okay. And, Max, if you could
20 highlight the bottom right, pull out the bottom
21 right column, the last two paragraphs.

22 THE COURT: Is this on limits of liability?

23 MR. BROWN: Yes, Your Honor.

24 THE COURT: All right. Which paragraphs
25 are you referring to?

1 MR. BROWN: The one at the bottom that says
2 Coverages A and B.

3 THE COURT: I got that.

4 THE WITNESS: It's identified in the --
5 actually, there's a separate endorsement called
6 Amendment Limits of Liability Single Limit in
7 those policies, and that's the form I'm
8 referring to. It would be Form GL 99170381.

9 MR. BROWN: Okay.

10 THE COURT: Am I looking at the same?

11 MR. BROWN: What page of the policy are you
12 looking at, Mr. Robertson?

13 THE WITNESS: Well, I have several copies
14 of the policy. The one that I'm looking at that
15 was -- had the handwritten cover sheet that I
16 believe was part of the discovery process from
17 the microfiche, and it's page 7 of that
18 document. Like I said, it was the form number,
19 just to be sure to clarify, is GL 99170381.

20 MR. BROWN: Okay.

21 THE COURT: What's the Bates-stamp number?

22 MR. BROWN: That's what I'm looking for,
23 Your Honor.

24 THE COURT: You're not on Bates-stamp
25 Number 47?

1 THE WITNESS: Let me see if I can find the
2 policy that's Bates-stamped.

3 Okay.

4 THE COURT: Are we on limits of liability?

5 MR. BROWN: Yes, Your Honor. On the limits
6 of liability.

7 THE COURT: Bates-stamp page 50 or 47?

8 MR. BROWN: Yeah, pull up page 50, Max.

9 BY MR. BROWN:

10 Q. Is this the language you're referring to,
11 Mr. Robertson?

12 A. No. Sorry.

13 MR. BROWN: That's okay.

14 Well, go back to page 47, if you would,
15 Max. And if you could pull out that Coverages A
16 and B language at the bottom -- bottom right.

17 BY MR. BROWN:

18 Q. Is this the language you're referring to,
19 Mr. Robertson?

20 A. You're looking at the declaration page, not
21 the limits.

22 MR. BROWN: No, that's from the limits of
23 liability section. We can pull it back out to
24 show you the full section it comes from, if you
25 would like.

1 MR. NES: I'm sorry, where is that?

2 THE COURT: It's right at the bottom of 47.
3 It's the Coverages A and B; is that what you're
4 talking about?

5 MR. BROWN: Yes, Your Honor.

6 MR. NES: Got it.

7 THE COURT: Okay.

8 BY MR. BROWN:

9 Q. Is this the language you're referring to,
10 Mr. Robertson?

11 A. I'm not seeing it on the screen.

12 Q. So you don't see the -- you don't see the
13 text on the screen?

14 A. The only thing I'm seeing on the screen is
15 the declaration page of the 1987 policy.

16 Q. Okay. Let's try that again.
17 Do you see this, Mr. Robertson?

18 A. The screen is still stuck on Penn National
19 policy.

20 THE COURT: Read it out to him.

21 BY MR. BROWN:

22 Q. Mr. Robertson, let me just read the
23 language to you.

24 A. Oh, I'm sorry. I'm sorry. Technology.
25 It's the window.

1 Q. Okay. Do you now see the language that
2 says --

3 A. Yes, I am seeing it now. Where it says
4 Coverages A and B of the single limits endorsement.

5 Q. Yes.

6 A. It's slightly different, but it says "For
7 purposes of determining the limit of the company's
8 liability, all bodily injury and property damage
9 arising out of continuous or repeated exposures to
10 substantially the same general conditions shall be
11 considered as arising out of one occurrence."

12 Q. Now, what in that language is important to
13 you in addressing the aggregate limit issue?

14 A. If the claim related to asbestos arise out
15 of substantially the same general condition, that is,
16 the same type of exposure to asbestos dust in the air
17 during Covil's operations, it's possible that that
18 may be considered a single occurrence even though
19 there are separate claims all arising from the same
20 cause. It's basically the same principle that
21 applies to applying the aggregate limit with product
22 liability claim.

23 Q. And indeed on the declarations page of this
24 policy was the per-occurrence limit and the aggregate
25 limit the same?

1 A. That's correct.

2 Q. Okay.

3 A. Now -- and by the way, I think I should
4 make it clear that my opinion on the application of
5 this coverage form is based on my experience as an
6 underwriter and on seeing how industry publications
7 that have been written about how the drafters of the
8 policy intended the language to apply. But it's not
9 based on trying to interpret the coverage, which is
10 the court's jurisdiction.

11 MR. BROWN: I understand.

12 You can take this down, Max.

13 BY MR. BROWN:

14 Q. Mr. Robertson, a couple of other things.
15 You're aware there have been issues raised in this
16 case about Penn National's document retention policy,
17 correct?

18 A. Yes, I am.

19 Q. And have you reviewed Penn National's
20 document retention policy with respect to its
21 underwriting policy materials?

22 A. I did.

23 Q. Do you have an opinion about the
24 reasonableness of that policy as it comports with
25 insurance industry standards and practices or not?

1 A. When I read those policies, I was struck by
2 the length of time the documents were retained as a
3 matter of company policy. In particular, the three-
4 to five-year retention period for liability policies.

5 In my experience in reviewing the retention
6 policies of companies in many other cases over the
7 last 40 years, I have to say that Penn National's is
8 the longest written document retention policy I have
9 encountered.

10 Q. Okay. And then finally have you -- you're
11 familiar with the fact that Penn National stored its
12 historical underwriting policy documents on a
13 terminal digit system, correct?

14 A. Yes.

15 Q. And is that a system that you have seen --
16 well, is that a system that you have an opinion on
17 whether it meets industry standards?

18 A. It's been my observation that virtually
19 every insurance company whose policies I need to
20 examine during the course of my career have always
21 used these policy numbers as the basic manner of
22 storing the policy documents.

23 Number one, it creates a clear distinction
24 between the coverage providing the separate similar
25 sounding company names.

1 Number two, it is in particular more
2 efficient because remember that these systems had to
3 be developed during the time computer systems were
4 being developed. Computer systems are numeric
5 systems. Initially, they were -- they could only
6 handle numeric document and numeric data for many
7 years until the development of digital and policy OCR
8 systems, optical character recognition systems, that
9 were capable of handling alphanumeric content.

10 Those were recent developments. And so
11 these basic historical systems the companies had for
12 finding documents by policy number were the most
13 efficient and accurate way the companies had of
14 retaining documents. This should be pointed out that
15 the purpose of retaining these documents was
16 typically not for claims but for regulatory and in
17 particular tax, county, and actuarial purposes, but
18 not for claims purposes. Those were conciliary to
19 the requirement purposes that the policies were
20 needed for.

21 Claims, when they were presented to the
22 insurance company, it was the policyholder's
23 responsibility to present the documents showing that
24 it had insurance coverage with the company. And so
25 the original expectation was that if you made a claim

1 against an insurance company, you would give the
2 insurance company a copy of your policy.

3 However, in the age of occurrence coverage
4 and long-tail liability, it turns out that companies
5 did not have very good document retention policies of
6 their own with respect to their liability coverage
7 and retaining the policies.

8 Q. And by "companies," you mean insurers in
9 that context?

10 A. Yes. Policies.

11 MR. BROWN: All right. Mr. Robertson,
12 that's all I have. I thank you for answering my
13 questions. I think Mr. Nes, as counsel for
14 Covil, will have some questions for you.

15 THE WITNESS: Thank you, Mr. Brown.

16 THE COURT: All right. Mr. Nes on cross
17 examination.

18 MR. NES: Thank you, Your Honor.

19 - - -

20 CROSS-EXAMINATION

21 - - -

22 BY MR. NES:

23 Q. Good morning, Mr. Robertson. Can you hear
24 me?

25 A. I can't see you. I can only hear you.

1 MR. BROWN: Can we approach to fix the
2 camera?

3 THE COURT: Certainly.

4 MR. BROWN: It went off during my
5 questioning. I'm not sure why.

6 MR. NES: Justice Toal, here is a copy of
7 the deposition.

8 THE COURT: I think I had it here too. All
9 right.

10 BY MR. NES:

11 Q. Can you see me now, Mr. Robertson?

12 A. Yes. Thank you.

13 Q. Great. Do you have a copy of your
14 deposition with you?

15 A. I do have it, and if you will give me just
16 a minute, I'll pull it up.

17 Q. Sure.

18 A. The deposition of December 6, 2022,
19 correct?

20 Q. Correct. Just in case we need it, we've
21 got it.

22 A. All right.

23 Q. Earlier you testified about your CV. Is
24 the CV that you reviewed current and accurate?

25 A. Yes. You mean the CV that was attached to

1 the deposition?

2 Q. That's correct.

3 A. Yes. I mean, other than the passage of
4 time and the years.

5 Q. Fair enough. In that section you have an
6 area where you have courses taught. Do you recall
7 that?

8 A. Would you repeat that, please.

9 Q. Sure. On your résumé, you say that you've
10 taught courses, correct?

11 A. Oh yes, that's right.

12 Q. But you actually haven't taught a course in
13 45 years?

14 A. No.

15 Q. You also have a list of book publications,
16 but you haven't published a book in over 30 years?

17 A. That's right.

18 Q. You have a list of articles published,
19 correct?

20 A. Yes.

21 Q. You haven't published an article in over 20
22 years?

23 A. Twenty years, yes, that's right.

24 Q. You worked for Hartford Insurance Company?

25 A. Correct.

1 Q. You did that from 1974 -- I'm sorry, 1970
2 to 1974?

3 A. 1970 to 1974, it was -- and it was the
4 Hartford Insurance Group.

5 Q. You worked for the --

6 A. Not the Hartford Insurance Company.

7 Q. You worked for the Hartford Insurance Group
8 from 1970 to 1974 as an underwriter?

9 A. I was an underwriter and supervising
10 underwriter.

11 Q. Since 1974, you have not worked as an
12 employee of any insurance company?

13 A. Correct.

14 Q. You're the president and CEO of your own
15 company now?

16 A. Yes, I am.

17 Q. You primarily serve as an expert witness in
18 insurance coverage disputes?

19 A. Yes.

20 Q. In the last ten years, only about
21 10 percent of your engagements have been with the
22 policyholder; is that right?

23 A. I don't know if that is correct or not. It
24 changes over time.

25 Q. Do you --

1 A. But I have -- historically, I've had
2 approximately 30 percent or so of my engagements were
3 from policyholders.

4 Q. Do you recall testifying in that deposition
5 last year that the last 10 to 15 years you've only
6 represented policyholders about 10 percent of the
7 time?

8 A. It's possible. I don't recall the
9 testimony specifically, but it may be my best
10 recollection at the time of the deposition.

11 Q. Could you pull up your deposition at page
12 30, line 18, and let me know when you're there.

13 A. All right.

14 Okay.

15 Q. The question is "Let's focus on the last
16 15 -- 10 to 15 years, what percentage of your
17 engagements have been on behalf of policyholders in
18 the last 10 to 15 years?"

19 Could you read your answer?

20 A. "A smaller number, probably more like 10 to
21 15 percent."

22 Q. Thank you, Mr. Robertson.

23 You have a website, correct?

24 A. Yes. Interisk does have a website.

25 Q. Your company's website says that you

1 specialize or have a niche specialty in umbrella and
2 access liability forms and environmental coverage,
3 correct?

4 A. That's correct.

5 Q. You didn't review any umbrella policies in
6 this case, right?

7 A. No, I did not. But ...

8 Q. Well, that's all I was asking.

9 You didn't review any excess policies,
10 correct?

11 A. No.

12 Q. You didn't review any environmental forms,
13 correct?

14 A. No.

15 Q. You're not offering a legal opinion in this
16 matter?

17 A. No.

18 Q. You never worked as a claims handler?

19 A. Correct.

20 Q. You did not consult any articles that you
21 had previously written to render your opinions in
22 this case, right?

23 A. No, I didn't.

24 Q. None of the books or articles that you've
25 written address the standards for document retention?

1 A. No, they don't.

2 Q. You didn't do any independent research
3 regarding operations hazards versus completed
4 operations hazards for this case, right?

5 A. That's not correct.

6 Q. Could you pull back up your testimony at
7 page 40, line 18. Let me know when you're there.

8 A. I'm sorry, at the time of the deposition.

9 Q. I'm just asking you to turn to your
10 deposition. Are you at page 40, line 18?

11 A. Yes, I am.

12 Q. I'm going to read this. It says,
13 "QUESTION: In preparation for your testimony in this
14 case, did you do any independent research regarding
15 the distinction between operations hazard claims and
16 completed operation hazard claims for the purposes of
17 your testimony?"

18 Could you read your answer in the
19 deposition?

20 A. At the time of the deposition I said --

21 Q. No, Mr. Robertson. Mr. Robertson.

22 Mr. Robertson, I'm just asking you --
23 Mr. Robertson, I'm just asking you to read what your
24 answer was at the deposition first.

25 A. It's "No. I am relying totally on my

1 experience in prior work and prior research in that
2 area."

3 Q. You reviewed both the 1986 and 1987
4 insurance policy that Penn National issued to Covil,
5 correct?

6 A. Before you proceed, Mr. Nes, I think the
7 previous answer needs to be amended.

8 Q. And what would you like to amend it to be?

9 A. Well, because since the time of my
10 deposition, I have reviewed the references for prior
11 work that I did that was related to these topics.
12 And I would consider that to be my research.

13 Q. So your opinions when you issued them
14 previously were not based on research, but when you
15 came to trial, they were based on your research; is
16 that right?

17 A. On my experience and on my research.

18 Q. You haven't disclosed what those specific
19 articles are, did you?

20 A. I beg your pardon.

21 Q. You haven't disclosed what those articles
22 that you referred to were, did you?

23 A. No. The work -- the research really has
24 involved reading other documents in other cases that
25 I've been involved in.

1 Q. You were served with a subpoena in this
2 case, right?

3 A. Pardon me?

4 Q. You were served with a subpoena in this
5 case. Do you recall that?

6 A. For the deposition, you mean?

7 Q. That's right.

8 A. Yes.

9 Q. And we asked for your documents, and you
10 produced your documents. Do you recall that?

11 A. Yes, but I didn't have those available at
12 the time of the deposition.

13 Q. I understand that. But my question is, you
14 got a subpoena asking us -- asking you for your
15 documents. Do you recall that?

16 A. Yes, I did, and I produced everything in
17 our file --

18 Q. But you haven't --

19 A. -- at the time.

20 Q. But you haven't produced those new articles
21 that you reviewed; is that a fair statement?

22 A. No. I've had no request to produce those
23 since that time.

24 Q. You reviewed the 1986 and 1987 Covil
25 policies that were issued by Penn National, right?

1 A. Yes.

2 Q. You did not identify any ambiguities in
3 those policies?

4 A. No, I didn't.

5 Q. And that is still your opinion today, that
6 there are no ambiguities in those insurance policies?

7 A. None that I'm aware of.

8 Q. And you have no basis to determine whether
9 any of the information in the policies is inaccurate?

10 A. No. To the best of my knowledge, the
11 information in the policies is accurate and was
12 validated by the premium audits that were conducted
13 for each of those policies and which also were among
14 the documents that were produced.

15 MR. NES: Thank you, Mr. Robertson. I
16 don't have any other questions.

17 THE COURT: Mr. Brown.

18 MR. BROWN: Does the Court have any?

19 THE COURT: I don't have any questions.

20 MR. BROWN: Okay. I don't either. Let me
21 sign off on the witness.

22 No further questions, Mr. Robertson. Thank
23 you very much for being here today, and we are
24 going to close the video down here. Have a good
25 afternoon.

1 THE WITNESS: All right. Thank you very
2 much.

3 MR. BROWN: Thank you.
4 Thank you, Your Honor.

5 THE COURT: All right. Ladies and
6 gentlemen, where do we stand now?

7 MR. BROWN: If I could have just 20
8 seconds.

9 THE COURT: Certainly. Certainly.

10 MR. BROWN: Your Honor, we don't anticipate
11 calling any other witnesses. I'll defer to
12 Mr. Shealy on the deposition designations.

13 THE COURT: All right. Let me ask you
14 this: There were some discussion yesterday,
15 since your corporate representative is not going
16 to put up in your case but rather has only been
17 examined in Plaintiff's case, that you might
18 call your corporate representative.

19 MR. BROWN: We don't see the need to do
20 that.

21 THE COURT: Well, I'm going to do some
22 prayerful consideration of whether I will ask
23 him some questions then.

24 MR. BROWN: Very good.

25 THE COURT: But let's see what else we got

1 going here.

2 MR. BROWN: Sure.

3 MR. SHEALY: Your Honor, the only other
4 thing -- and this is just out of abundance of
5 caution -- just as all these designations are
6 already in, but we have prepared, as Plaintiff
7 did, a flash drive containing the videos of the
8 designations that we've already offered to
9 Your Honor. We are happy to copy those onto
10 your laptop. I suspect that it's largely
11 duplicative but just because we couldn't
12 completely compare what was already given to
13 you. And again ...

14 THE COURT: I would appreciate that. I
15 think that's a great idea.

16 MR. SHEALY: Okay.

17 THE COURT: We'll get that done at a
18 certain point here. So that will be helpful.
19 Thank you very much, Mr. Shealy.

20 MR. SHEALY: Okay.

21 THE COURT: So you're ready, subject to
22 what I do about asking Mr. Wright any questions,
23 you're prepared to close your case?

24 MR. SHEALY: We are.

25 THE COURT: All right. And, Mr. Nes, give

1 me some idea of where you stand.

2 MR. NES: I think we are ready to proceed
3 to closings as soon as that last issue is
4 resolved.

5 THE COURT: Okay. We've got a quarter of 1
6 now.

7 Yes, I would like to ask Mr. Wright a
8 couple of quick questions. I think I can do it
9 right now. We can break for lunch and come back
10 to close. And, of course, that would be subject
11 to whatever you all want to do as a result of
12 the questions I ask of Mr. Wright. I would like
13 to ask Mr. Wright some questions.

14 Mr. Wright, could you come forward.

15 Mr. Wright is still under oath. He was
16 sworn yesterday, and I think he's aware that
17 he's still under oath.

18 - - -

19 EXAMINATION

20 - - -

21 BY THE COURT:

22 Q. Mr. Wright, how were the '86 and '87 Covil
23 policies located? Exactly what happened? Explain to
24 me exactly how they were found, who found them, and
25 just exactly how that happened.

1 A. Bill Silverman with Wall Templeton provided
2 the two policy -- or the policy numbers and with
3 those numbers, we were able to locate the
4 underwriting materials that would eventually allow us
5 to prepare the policies.

6 Q. All right. The underwriting materials are
7 something different from these microfiche policies,
8 right?

9 A. No. No. They're the same.

10 Q. The same thing?

11 A. The microfiche is truly underwriting
12 material and with that underwriting material, it
13 could include applications that are sent to the
14 company, and the company just simply refuses the
15 risk. They put a number on it. It could be we
16 accept the risk. We provide a quote. The potential
17 insured doesn't want the policy. So there's still a
18 number on it, like a policy number, but it's
19 obviously for reference purposes.

20 It could be the policy is delivered and
21 they either don't pay the premium or reject it so
22 coverage never applies. Or it could be like in
23 Covil's case, we have these two policy numbers and --
24 or sequential years and that's the underwriting
25 material where we can take the declarations pages and

1 have underwriting reconstruct the policy for us.

2 Q. And does the file contain the policy and
3 any other underwriting material that you -- like
4 you're talking about? Like you just described?

5 A. My understanding is when you look at the
6 microfiche for the associated number, it will have a
7 variety of information. It may have some
8 endorsements, it may not. It will have ratings
9 material and what the underwriter went through --
10 whatever they process they go through.

11 Q. And it's all filed under a policy number?

12 A. It's all filed under a number. When the
13 application comes in, that number is assigned to it.

14 Q. And as you store it in a bunch of boxes,
15 how do you know what years are encompassed?

16 A. Well, the system -- it took me a little bit
17 to get my head around the system that was used. They
18 use this terminal digit system which takes the last
19 two numbers on the policy.

20 Q. Is that the 53 and then the dash 8 beside
21 it?

22 A. The dash 8 was an old system that just
23 tells you what year the policy expired. So like the
24 dash 8 would be expired in '88.

25 Q. Okay.

1 A. And so that --

2 Q. And then what is the 53?

3 A. Well, the 53 would be the -- as the number
4 is laid out, the last two digits are what they then
5 use in reverse order to file the policy. Which you
6 end up with 00 to 99. So you've got a hundred
7 segments. And when they have a policy number, they
8 know from those last two numbers what section to go
9 to to look for policies. But they are not organized
10 by year, they're organized by policy number only.

11 Q. So tell me how you got your head around how
12 you go and find a particular -- you've got two
13 things. One, you're looking for a policy number for
14 a particular policy, but also you've got a retention
15 system that allows for purging when 25 years expire.

16 So how are you able to go in to these
17 microfiche and determine which of them qualify for
18 purging?

19 A. From what I understand historically
20 occurred was in about 1998 the company took this --
21 well, in the earlier '90s sometime, I'm not certain
22 when, they put all this paper they had that was
23 filing up on microfiche.

24 Q. In the '90s?

25 A. Early '90s.

1 Q. Okay.

2 A. They put this material on microfiche. They
3 may have started using earlier, but I know up until
4 about that time that's when the microfiche kind of
5 stops.

6 And sometime in the late '90s, about '98,
7 they went through all microfiche and determined what
8 microfiche needed to be disposed of.

9 Q. And how did they determine that?

10 A. They looked at each and every slide.
11 That's how they came up with all those lists of
12 policy numbers that take up all those pages.

13 Q. Yeah. And what were those? Policies that
14 were more than 25 years old?

15 A. Well, if it's a work comp policy, they were
16 saving it for 50 years. If it's any other type of
17 policy, as I understand it, 25 years from the date it
18 was canceled or nonrenewed. So if a policy was
19 incepted in, say, 1965, and those people were with us
20 for 20 years, until 1985, all the documents
21 pertaining to that body of policies would all be on
22 sequential microfiche slides that ...

23 Q. But they wouldn't be sequential policy
24 numbers, would they?

25 A. No, they wouldn't. It would be the same

1 policy number. And those documents would not be
2 destroyed if the policy nonrenewed in '85 for 25 more
3 years. So at times it's possible to say, well, hey,
4 I've got a risk that goes back into the '70s, but if
5 that policy didn't expire until a much later time,
6 that material may be available.

7 Q. I see.

8 A. So they cleaned it up in about '98.

9 From my experience, as much as they would
10 like to say that they were removing microfiche, I
11 don't think they ever did it. I really don't.

12 Q. You think they just stayed there in those
13 storage facilities?

14 A. Yeah. What we have to understand is what
15 Mr. Reifsnyder does is every year he purges
16 documents. He does not destroy what he's purged. He
17 pulls it out of the inventory of documents, and he
18 puts his stamp on it that things he pulls out in,
19 say, 2020 aren't going to be destroyed for 25 more
20 years. That's the purge from the body of records.
21 They're stored, but they're marked for what year
22 they're to be destroyed in.

23 Q. When does he destroy them?

24 A. Well, that's just it. He would mark, say,
25 anything he pulled out in -- let's say he takes the

1 material that's generated in, you know -- I'll just
2 pick a year like 2010. He would take all the
3 material that's in 2010 and he would segregate it.
4 Okay. This is -- these documents have a 25-year
5 disposal period. So he sets them aside and marks
6 them all, okay, that's for destruction in 2035.
7 That's his purge process.

8 Q. Uh-huh.

9 A. His destruction process is every year he
10 goes and looks at the stuff that they've set aside.

11 Q. That's to be purged for that -- for 2019,
12 he looks in 2020, in January, and says, all that 2019
13 stuff that was marked purge in 2019 --

14 A. Correct. Now --

15 Q. -- that's what he destroys?

16 A. Right. And if they miss any material, they
17 don't go -- excuse me, they don't go back and start
18 looking through the repository of all this material
19 to see, hey, did we miss something? They look at the
20 specific year that would correspond with what needs
21 to be destroyed and nothing else.

22 Also from talking to Mr. Reifsnyder, it's
23 very apparent that a lot of this process was not
24 occurring during COVID because we were shut down for
25 two years. And one of his big concerns when we came

1 back on board was all the facilities things he had to
2 deal with, this was not a high priority.

3 Q. On the low priority side.

4 A. Yeah. We'll get around to it kind of
5 thing.

6 THE COURT: Okay. Thank you, sir.

7 THE WITNESS: All right.

8 THE COURT: Just give me one more minute.

9 THE WITNESS: Okay.

10 THE COURT: That's all I have. Thank you,
11 sir.

12 THE WITNESS: All right.

13 MR. NES: Your Honor, given the testimony
14 that's been entered, I do have one question for
15 him, if that's okay.

16 THE COURT: All right. You may. And, of
17 course, Mr. Shealy, you may come back and close
18 it out, if you wish.

19 MR. SHEALY: Thank you, Your Honor.

20 THE COURT: All right.

21 - - -

22 FURTHER EXAMINATION

23 - - -

24 BY MR. NES:

25 Q. Mr. Wright, have you read Brent

1 Reifsnyder's corporate representative testimony that
2 was taken on November 10th, 2022?

3 A. No.

4 MR. NES: Thank you.

5 THE COURT: All right. Mr. Shealy or
6 Mr. Brown, any redirect?

7 MR. SHEALY: No, Your Honor.

8 THE COURT: Very good.

9 You may come down, Mr. Wright. Thank you
10 very much.

11 All right. Now as I understand it, both
12 cases have been closed.

13 MR. NES: There's one procedural matter I
14 just want to raise very quickly.

15 THE COURT: Yes, sir.

16 MR. NES: We submitted our expert,
17 Mr. Miller, via video. I've seen the process
18 where the experts were confirmed as experts. I
19 did put that on the record in the video, but
20 nobody's actually confirmed it. So I don't know
21 the South Carolina procedure. I just want to
22 make sure --

23 THE COURT: I think that probably just
24 cleaned the record up. There's no objection,
25 and Mr. Miller is qualified by reason of his

1 education, training, and experience in the
2 matters you tendered during the deposition of
3 Mr. Miller.

4 MR. NES: Thank you, Your Honor.

5 THE COURT: All right. And his deposition
6 has attached to your qualification of him and
7 his curriculum vitae. And I have looked at both
8 of those things and make this determination
9 based thereon.

10 MR. NES: All right.

11 THE COURT: Now, with respect to any
12 further motions by either party, I assume both
13 parties would make motions for summary judgment
14 or motions for directed verdict and so forth and
15 on. Since this is nonjury, I don't think
16 there's any need to formalize those, but if you
17 feel any need to formalize anything along those
18 lines now would be the name to do it.

19 Mr. Nes.

20 MR. NES: None from us, Your Honor.

21 MR. SHEALY: Your Honor, I will just renew
22 the motion or involuntary nonsuit that we made
23 at the close of the plaintiff's case under
24 Rule 41(b) on the same basis that by all of the
25 evidence, we do not believe the factual

1 predicate has been established to justify the
2 relief that has been sought by the plaintiffs in
3 this case.

4 THE COURT: Sure. All right. That's what
5 I hoped you would do to be sure to preserve your
6 position with respect to those matters, and I
7 make the same ruling. I deny the motion.

8 So now we move to closing statements, and
9 I'm going to take a break for lunch before you
10 do your closing statements, if that's all right.

11 MR. NES: Yes.

12 THE COURT: So we'll do that now. And what
13 I will do -- where is my computer? It's down
14 there. I'm going to bring my computer over to
15 defense table and let you all place on it, just
16 like Ms. Valek did for me, the videos of the
17 testimony so that I will be able to reference
18 those.

19 MR. ROBINSON: Your Honor, as a matter of
20 housekeeping, we do have all of the exhibits
21 that need to be entered into the record with the
22 clerk of court.

23 MR. SHEALY: They need to be transferred to
24 the clerk of court's custody, I guess.

25 MR. ROBINSON: And Ms. Valek has charge of

1 all of them, which I understand are right here.
2 So we just want to make sure those exhibits are
3 entered into the record. We have all of the
4 Covil exhibits prepared and here to submit to
5 the clerk of court.

6 THE COURT: Let me ask you this -- and I
7 guess I'm asking clerk's office or court
8 reporter or both for your advice along these
9 lines. These are an enormous volume of paper
10 records, all of which have been digitized and
11 put on thumb drives by the two parties involved.

12 What is the preference of the clerk's
13 office? Do you all want the paper records? Is
14 that how you have to receive them?

15 THE CLERK: We don't have to receive them
16 that way, no.

17 THE COURT: You can receive them in thumb
18 drives?

19 THE CLERK: That would be easier for us,
20 but it's up to --

21 MR. ROBINSON: We can submit it via thumb
22 drive, Your Honor.

23 THE COURT: That's what I would do. My
24 sympathies go to them for having to longtime
25 preserve these things. But I don't want to do

1 anything that causes the record not to be as you
2 need it to be for any appeals of this matter or
3 any further review.

4 So I'm going to just leave it in your good
5 hands. Know that they have paper records and
6 that may be in their determination what they use
7 and know that we have -- both sides have all the
8 stuff in flash drives. And if that can do, they
9 may do it that way. But I'm going to leave it
10 up to the parties to make that decision in
11 consultation with each other.

12 MR. ROBINSON: Your Honor, also for the
13 record, there is an exhibit index list that is
14 already in the record, so the documents that
15 will be submitted will be in accordance with
16 that exhibit list and agreed to by counsel.

17 THE COURT: And that exhibit -- marked
18 exhibit list is what I've been using the whole
19 time to go back and forth to reference these
20 various notebooks that I've been using to keep
21 up with testimony.

22 MR. ROBINSON: I think we can agree that
23 that exhibit list will control the documents
24 submitted.

25 THE COURT: And the same is true of the

1 defense. There are notebooks and there are a
2 key I have used to go in that -- in fact, I
3 marked my binders that way so I could more
4 easily file things as we went along in trial.

5 MR. SHEALY: We're in complete agreement
6 with that, Your Honor.

7 THE COURT: Great.

8 MR. ROBINSON: Thank you.

9 THE COURT: And then for -- just by way of
10 planning for this afternoon, we'll have closing
11 arguments, and then I will discuss with you how
12 we want to proceed. I revived my old -- now
13 over a year old submitted findings of fact and
14 conclusions of law by Plaintiff. And I don't
15 know how Plaintiff is going to proceed now that
16 the trial is over, but I have that old order --
17 proposed order here that I still got from the
18 old filings.

19 You all never -- Mr. Shealy, filed anything
20 in opposition to that because this was the start
21 of all these appeals that went on.

22 MR. SHEALY: Your Honor, I believe actually
23 there is an old findings of fact conclusions of
24 law that was filed at that time by the defense.

25 THE COURT: Is that the 40-page document?

1 MR. SHEALY: Well --

2 THE COURT: I can't -- I thought that was
3 the case, but I can't find the blooming thing.

4 MR. SHEALY: Well, in any event, I know
5 ours does, and I'm sure theirs would need to be
6 revised.

7 THE COURT: That's what I'm saying. So,
8 you know, what I'm saying to you is this:
9 Ordinarily -- I'm going to be violating the way
10 I normally handle almost everything I ever have
11 done since I've been a circuit court judge,
12 which is I rule from the bench, and then tell
13 you the general outlines and then the parties
14 submit.

15 But in light of the fact that what the
16 parties did as we began trial was to put a good
17 deal of effort into preparing competing findings
18 of fact and conclusions of law, which are in the
19 nature both of a submission of a proposed order,
20 but also in the nature of a brief by the parties
21 of what your final position is in this nonjury
22 trial.

23 In light of that methodology, I am not
24 going to rule from the bench today. I'm going
25 to get those proposed findings of fact and

1 conclusions of law, which I also regard as your
2 final brief for the Court about the matter.

3 Is that satisfactory to both sides?

4 MR. NES: Yes, Your Honor. That's what we
5 anticipated. We can also add in the trial
6 testimony that occurred --

7 THE COURT: Exactly. I mean, things have
8 moved around a little bit in the course of the
9 trial of the matter, and you will want to take
10 that into account in the way you draw the
11 concluding proposed orders.

12 MR. SHEALY: Your Honor, just as another
13 matter of housekeeping, if we decide to just
14 present our final position vis-a-vis a revised
15 proposed finding of fact conclusion of law in
16 lieu of an oral summation to Your Honor, would
17 that be acceptable to you?

18 THE COURT: It will.

19 MR. NES: We certainly don't want that. We
20 would like to do our --

21 THE COURT: The Plaintiff is going to want
22 to make some final statement. You won't be
23 disadvantaged if yours isn't of the length of
24 theirs because I will take into account what is
25 said. I probably will get a copy of what is

1 said, as I sometimes do if I need things out of
2 the record. But I will not make a decision
3 about this matter until I get the actual
4 proposed orders, which are also in the form of
5 persuasive briefs to me about the position of
6 each party.

7 MR. SHEALY: Your Honor, this is the --
8 what we filed a year ago, December 5th.

9 THE COURT: Good. If you've got that, do
10 you mind my --

11 MR. SHEALY: I don't mind at all.

12 THE COURT: I hunted mightily, but I
13 couldn't find the darn thing.

14 MR. SHEALY: Of course, this will be
15 revised.

16 THE COURT: Sure. All right. It's 1:05
17 now. I'm going to bring my laptop down to you
18 all to put on the various things that you want
19 to put on it.

20 And what time do we want to come back for
21 closing arguments?

22 MR. BROWN: 2:30?

23 THE COURT: That's fine. Very good. 2:30.

24 - - -

25 (DEFENDANTS' EXHIBIT NUMBER 60, Thumb Drive

1 of Exhibits, was marked for identification.)

2 - - -

3 (PLAINTIFF'S EXHIBIT NUMBER 139, Thumb
4 Drive of Exhibits, was marked for
5 identification.)

6 - - -

7 (A lunch recess transpired at 1:05 p.m.)

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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 28th day of November, 2023, at Lexington, Lexington County, South Carolina.

Sheri L. Byers,
Registered Professional Reporter,
Notary Public
State of South Carolina at Large
My Commission expires:
November 1, 2033

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

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 COMPANY;
SAM J. CRAIN & CO., INC.; AND
SOUTH CAROLINA PROPERTY & CASUALTY
INSURANCE GUARANTY ASSOCIATION,

Defendants.

T R I A L

DAY TWO - AFTERNOON SESSION

BEFORE THE HONORABLE
CHIEF JUSTICE (RET.) JEAN TOAL

DATE TAKEN: Tuesday, November 28, 2023

TIME START: 2:27 p.m.

TIME END: 4:07 p.m.

LOCATION: Richland County Judicial Center
1701 Main Street
Columbia, South Carolina

REPORTED BY: AMY A. BRAUSER, RPR RMR CRR
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P R O C E E D I N G S
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THE COURT: Everybody in place, ready to proceed?

MR. NES: Yes, sir, Your Honor, we're ready.

THE COURT: Mr. Nes, closing for the Plaintiff. Thank you, sir.

MR. NES: May it please the Court.

THE COURT: You may proceed.

MR. NES: Your Honor, at the beginning of this case trial, I mentioned that there are two issues. There was a declaratory judgment in trial and there was a spoliation hearing. With respect to those two issues, we seek separate relief.

I also mentioned at the beginning of this trial that this is a case about a company that had violated its obligations. And as we'll see today, the evidence that's in the record now demonstrates conclusively that Penn National is interpreting its policies contrary to the plain language and meaning of those policies, and that Penn

1 National spoliated evidence, and it did so in
2 a way that harmed the Receivers charged from
3 this Court, which was to marshal the
4 insurance assets of Covil Corporation.

5 Starting with the declarations, there
6 are two policies that are in complete form, a
7 1986, 1987 primary policy and a 1987, 1988
8 primary policy, both general liability
9 policies. We seek five declarations from
10 this Court interpreting those policies. We
11 have offered specific asbestos cases that the
12 Court can use as guidance. But to be clear,
13 we are seeking declaration and guidance from
14 this Court as to how to interpret those
15 insurance policies for both those claims as
16 well as claims going forward so that the
17 parties do not have to have repeated disputes
18 regarding routine asbestos cases.

19 So the first declaration that we seek
20 is a declaration regarding the meaning of the
21 aggregate on the declarations page of the two
22 primary policies.

23 As this Court is aware, the
24 declarations page has the word "aggregate,"
25 and that's it. So to interpret what that

1 aggregate means, you have to look at the
2 plain terms of the policy and you have to
3 look at all of the sections of the policy.

4 So we turn to Section 3, "Limits of
5 Liability." And the limits of liability
6 section is clear. In Coverage A, the limit
7 of liability only applies to completed
8 operations hazard and products hazard. Those
9 are defined terms in the policy, and there is
10 no mention of operations hazard, which is
11 also a defined term.

12 This change -- this -- the reason that
13 the policy form changed in -- after 1986 was
14 because of that very issue, that the
15 aggregate limit only applied to completed
16 operations and product claims. So the ISO
17 form was changed, Penn National used that
18 change, and the language became "general
19 aggregate limit other than products completed
20 operations." But before that, the language
21 was clear, it only applied to those two
22 claims.

23 For the first time, I think, in this
24 case, we heard during the direct examination
25 of Mr. Robertson that he wanted us to look at

1 another section of the limit of liability
2 section, and that section had to do with
3 Coverages A and B. And I'll hand up for the
4 Court a highlighted copy of that.

5 That language, however, does not change
6 or reference the limit of liability discussed
7 in Coverage A. That has to do with a
8 different issue, which is how many
9 occurrences are happening. The Defendants
10 have not raised what is called "the multiple
11 occurrences versus single occurrence" issue
12 in any of this litigation. We have not
13 sought it, they have not sought it. But to
14 the extent that the Court is inclined to
15 address that issue, which has not been
16 briefed, this Court has already addressed the
17 fact in asbestos cases that multiple asbestos
18 claims constitute multiple occurrences. But
19 again, this does not have anything to do with
20 interpreting whether the aggregate limit
21 applies to operations claims or not.

22 So when looking at page 1 of the
23 aggregate, our position is that the
24 operations coverage, the operations hazard,
25 any claim falling within that, is unlimited.

1 There is no aggregate limit based on the
2 plain terms.

3 We heard testimony or this Court has
4 heard testimony from Mr. Miller, our expert
5 witness, who walked through the history of
6 the form and why that change occurred.

7 The second declaration that we're
8 seeking has to do with how this Court
9 distinguishes between an operations claim and
10 a completed operations claim. Again, we look
11 to the policy language. The policy language
12 is clear that a completed operation hazard is
13 only if the bodily injury occurs after such
14 operations have been completed. And because
15 of the nature of an asbestos injury being one
16 continuous injury, unless the person who was
17 operating leaves the premises, the work is
18 completed and someone becomes injured, that
19 hazard remains an operations claim.

20 And again, our expert witness,
21 Mr. Miller, testified, but not only did he
22 testify about what his opinion about it was,
23 he explained what the literature and why it
24 was that way. He explained that what is
25 being covered in these insurance policies is

1 hazard. So when you're covering the
2 operations hazard, you're covering ongoing
3 work, Covil is actually at a site doing
4 ongoing work.

5 When you cover completed operations,
6 you're covering a completely different risk,
7 a completely different hazard. You're
8 covering the risk that Covil goes and does
9 some work, leaves, and then at some later
10 point, someone gets hurt. But Covil has
11 already left; the job is completed. That's a
12 different risk. And that's what Mr. Miller
13 explained. There's been no dispute in the
14 testimony about that, nor has there been any
15 citations to articles or secondary literature
16 that challenge Mr. Miller's opinions.

17 The third declaration that we seek has
18 to do with the burden of proof. We have not
19 heard any opposition to this, Your Honor.
20 Because it's a limit of liability, it is the
21 burden for the insurance company to prove
22 that a particular claim is an operation claim
23 or a completed operation claim. And that can
24 become important because if there is any
25 dispute between the policyholder and the

1 insurer about whether a particular claim
2 falls within the aggregate and the insurance
3 company, in this case Penn National, wants to
4 say the Doe claim is actually applying to the
5 aggregate limit, they have the burden to show
6 that that's a completed operation claim. The
7 policyholder doesn't have that burden.

8 The fourth declaration that we seek has
9 to do with when the policy is triggered. And
10 as this Court has addressed on many
11 occasions, a continuous trigger applies. But
12 again, why? Because of the specific language
13 in the policy. The specific language in the
14 policy is that these are occurrent space
15 policies. What they are covering is an
16 occurrence, which means an accident including
17 continuous or repeated exposure to conditions
18 which results in bodily injury. These are
19 occurrence policies. And when it says that
20 it's covering an accident that results in
21 bodily injury, bodily injury is defined as
22 sickness or disease sustained by any person
23 which occurs during the policy period,
24 including death at any time resulting
25 therefrom.

1 THE COURT: Is this how the Covil
2 policies in '86 and '87 were called upon to
3 respond to the 14 claims that have initial
4 exposure during operations that took place
5 years before these policies? Is that how
6 these policies came, in your view, to be
7 policies that Covil responded to, took the
8 tender and paid off?

9 MR. NES: That's right.

10 THE COURT: They paid off on those
11 policies?

12 MR. NES: That's right.

13 THE COURT: And that is why they then
14 sent that letter trying to limit the total
15 amount of coverage.

16 MR. NES: Yeah, I think a couple of
17 things were happening there. First I think
18 they took the position that continuous
19 trigger applies and that even though the
20 exposure happened way back here in 1967, and
21 that was the only exposure, that was going to
22 trigger the policy down here (indicating).

23 THE COURT: That's the only thing that
24 could have for these cases that they settled,
25 right?

1 MR. NES: That's right. So then the
2 question is, well, why is it that they would
3 pay those claims if that's a continuous
4 trigger. And my theory is, Your Honor, is
5 that at that point, they viewed the aggregate
6 limit in very basic terms, and so they
7 thought we're paying claims, let's add them
8 up, we get to a million and we can walk away.

9 But we filed our brief, and they read
10 the cases and they saw the testimony, and
11 they read the policy, and they have not put
12 any defense to that. They have not really
13 challenged that the aggregate limit applies
14 only to completed operations of products
15 claims.

16 So now you get to a point where, wait,
17 if continuous trigger applies and there's no
18 aggregate limit, we got to figure out a way
19 to limit this policy, so let's go with
20 exposure trigger. The problem is, is that
21 with an exposure trigger, it doesn't take
22 into account the actual language of the
23 policy in the correct way because it doesn't
24 account for the fact that this is an
25 occurrence policy and it's covering injuries,

1 including death at any time.

2 So that's why continuous trigger makes
3 sense not only for these occurrence policies,
4 but also in the context of asbestos claims
5 because, again, it's just one injury that's
6 occurring.

7 So the final declaration we seek is all
8 sums, and it's a related analysis, Your
9 Honor. So in the first analysis, we're
10 looking at what triggers the policy, but once
11 we determine what triggers the policy, and
12 we're at Slide 19.

13 THE COURT: Hang on. I got to get -- I
14 got my slides out of whack here. Hang on.

15 I got it.

16 MR. NES: So this is what an all sums
17 analysis looks like in a chart. The
18 policyholder gets to decide which policy they
19 want to choose that's triggered, and they ask
20 the insurer to pay up to their limits, and
21 then the insurer has the burden to go get
22 contribution from someone else. And again,
23 this is not based on public policy, this is
24 based on the plain language of the policy.
25 And the plain language says: (Reading)

1 The Company will pay on behalf
2 of the insured all sums, which the
3 insured shall become legally obligated
4 to pay as damages because of bodily
5 injury which the insurance applies
6 caused by occurrence.

7 So again, all sums because of bodily
8 injury. And what is the definition of bodily
9 injury? Again, it's: (Reading)

10 Bodily injury means bodily
11 injury, sickness or disease sustained
12 by any person which occurs during the
13 policy period, including death at any
14 time, resulting therefrom.

15 And that last phrase is so important,
16 as this Court noted to Mr. Brown during one
17 of the exchanges because this also
18 distinguishes it from Crossmann. Crossmann
19 was limited to the policy period. Here, this
20 says "including death at any time." And as
21 the case law we talked about during my
22 opening mentions, you cannot have superfluous
23 language in an insurance policy. Every term
24 has to mean something.

25 So applying these declarations, we

1 offered an expert witness, Ms. Frost.
2 Ms. Frost is a former asbestos defense lawyer
3 who has tried a number of cases and is a
4 prominent member of the defense bar. And she
5 walked through the history and evolution of
6 asbestos litigation, the management of
7 asbestos cases, and finally, the risk
8 analysis of those 14 asbestos cases that Penn
9 National settled.

10 So I'm going to talk about five of them
11 very quickly just to point out two issues.
12 The first issue is the dates of exposure.

13 For this Ashworth case, the only
14 evidence in that record was that it was
15 exposed during 1980 to '81. So when Penn
16 National authorized a settlement, this idea
17 that there was some vagary and they just
18 settled for business reasons, that is frankly
19 preposterous. Insurance companies do not
20 hand out indemnity dollars in any world that
21 I've lived in in the last 20 years. You have
22 to prove these things to the insurer to show
23 they are on the hook and there's a risk.
24 Here the risk was that the exposures were
25 between 1980 and 1981.

1 Now, putting aside the fact that they
2 did settle these claims and whether or not
3 they believed that continuous trigger applied
4 at that time or not, it should be clear from
5 what we have put in the record that this is
6 an exposure as an exemplar that would trigger
7 continuous coverage.

8 Second, the manner of exposure was
9 ongoing work at the site. So when you put
10 those two together, it was ongoing work up
11 until 1981, and you have 1981 is the last
12 exposure. Again, think about that chart.
13 We're right here, we're 1981. It's the only
14 exposure. It's ongoing work. That means
15 when we get to the policy down here
16 (indicating) that's 1987, '88, that is an
17 operations claim and there's no aggregate
18 limit for it.

19 Again, it's really the same with the
20 rest of these claims. This is an exposure in
21 '81 to '83, ongoing work. This is '64 to
22 '67, ongoing work. '81 to '85, ongoing work.
23 '77 to '79, ongoing work. There was no
24 testimony, no challenge whatsoever from the
25 Defendants.

1 Now, again, we don't have the burden of
2 proof on this, Your Honor, but if we did, we
3 met it. We went through each one of these
4 claims to show what they were, and again, for
5 the reasons that we discussed at the
6 beginning. I think those five declarations
7 can be applied to those particular claims.

8 So then we move to spoliation, and this
9 is Slide 30. Penn National, there's no
10 question, had a legal obligation. Putting
11 aside the industry standard, they had a legal
12 obligation to preserve documents when there
13 was an anticipation of litigation, starting
14 with the subpoena they received in May of
15 2018. Now, why is that subpoena important?
16 As Sharla Frost testified, asbestos
17 litigation is very well-developed now. It is
18 very well-developed.

19 When an insurance company receives a
20 subpoena from an asbestos plaintiff and they
21 find responsive coverage, they are surely on
22 notice that this is not a one-off problem
23 that's going away anytime soon. So there was
24 certainly imputed knowledge to Penn National
25 that they had a duty to preserve any Covil

1 document they had.

2 Now, the defense to that seems to be,
3 well, they only asked for a couple of
4 specific policies in that subpoena, and we
5 found them and we sent them off. But that,
6 of course, is not what the subpoena asked
7 for. There were three parts to the subpoena.
8 The first part of the subpoena said, Give us
9 all liability policies from 1965 to 1989.
10 Right there, you have an asbestos plaintiff
11 asking you for all of your responsive
12 coverage going back to 1965. From that day
13 on, you could not destroy it. There should
14 be no question about that. But what did Penn
15 National do? They focused on the last part
16 of the subpoena which just identified what
17 the Covil defense lawyers had at the time,
18 which was two policy numbers.

19 But this was not the only time that
20 Penn National was asked for all policies.
21 Repeatedly throughout the years, in 2019,
22 first the Receiver sends a tender in August
23 of '19 with the very first tender of an
24 asbestos claim. And in that tender letter,
25 the Receiver asks for coverage under the two

1 known policies and any other policies, not
2 limited to these policies. Penn National
3 should have issued a litigation hold.

4 October, Penn National is sued as a
5 Defendant in the North Carolina coverage
6 litigation. And in that case, in the
7 Complaint, it is identified that there are at
8 least two policies. That was the language,
9 at least two policies.

10 On the heels of that Complaint being
11 filed, the Receiver serves a subpoena. Then
12 there are document requests that go out. And
13 again, those document requests and subpoenas
14 ask for all insurance policies.

15 It doesn't stop. In April of 2020, the
16 Receiver files this action, immediately
17 serves discovery requests asking for all
18 insurance policies covering Covil.

19 And finally, after all of this, we find
20 out that a litigation hold isn't actually
21 issued until '21, which is very odd. When
22 you heard the testimony today, you heard
23 Mr. Heinze say the most remarkable thing for
24 a lawyer. He said that it's industry
25 standard not to issue litigation holds for

1 insurance companies. Well, first of all, our
2 expert, Mr. Miller, completely has a
3 different opinion. His opinion was that,
4 yes, it's industry standard when an insurance
5 company is notified of litigation, they put a
6 litigation hold, but you didn't even have to
7 take Mr. Miller at his word, he cited to you
8 where he was getting that from. So there's
9 secondary evidence in the record that he
10 pointed to why he was of that opinion.

11 But then Mr. Heinze comes along today
12 and he says, Oh, yeah, it's industry standard
13 you don't issue litigation holds. No -- no,
14 explanation at all. But then he said, Oh,
15 yeah, and they did issue a litigation hold.
16 So there's no explanation. This is the right
17 hold. It just should have been down here
18 (indicating).

19 So the question is why did they not
20 issue a litigation hold until December 17th,
21 2021? Well, we know the answer to that,
22 because I was on a call with Mr. Reifsnyder
23 and Ellis & Winters, and he revealed that he
24 was about to destroy documents. That is the
25 only reason this litigation hold exists.

1 There's been no testimony in the record
2 as to why Penn National did that. And Penn
3 National was very, very clear in this case.
4 They did not bring a corporate representative
5 to testify about any of this. They have had
6 depositions taken, they have hired experts at
7 enormous costs to teleport in, but there's
8 been no corporate representative that came
9 down here and took the stand and explained
10 any of this conduct.

11 So who was the architect of all of
12 this? A gentleman named Brent Reifsnyder.
13 Brent Reifsnyder's testimony in all this is
14 critical. He testified as the corporate
15 representative that he destroyed microfiche.

16 When Mr. Wright took the stand today at
17 the Court's request, the Court did not ask
18 him, Did you purge documents? But Mr. Wright
19 volunteered that Penn National never
20 destroyed documents, which as a corporate
21 representative was unconscionable. I asked
22 him if he had even read Brent Reifsnyder's
23 deposition testimony, and you heard him, he
24 said "no." So let's hear what the
25 corporation testified to just a year ago.

1 Page 45, line 10, Mr. Reifsnyder as the
2 corporate rep: (Reading)

3 As part of the pulling process
4 in 2019, was any microfiche destroyed?

5 Answer: Yes.

6 You can't get clearer than that. But I
7 couldn't believe my ears so I kept asking him
8 in different ways just to make sure I
9 understood.

10 Page 47, line 2: (Reading)

11 Are policies -- how are
12 policies destroyed?

13 Answer: (Reading)

14 So paper is shredded. That is
15 done at Iron Mountain. Microfiche is
16 also shredded by Iron Mountain.

17 I ask him again. Page 68, line 13:
18 (Reading)

19 Have you purged any microfiche
20 with policies with a nonrenewal date
21 prior to 1992?

22 Answer: (Reading)

23 So the answer is yes, we would
24 have destroyed them.

25 I keep asking. Page 71, line 17:

1 (Reading)

2 Do you know of any policy at
3 Penn National that would prohibit you
4 from destroying policies that are on
5 microfiche cards?

6 Answer: (Reading)

7 No. Subject to litigation
8 hold, that's the only time I would
9 pause.

10 So again, this guy is testifying that
11 they are destroying documents on an annual
12 basis all the way up until 2021 when he gets
13 a litigation hold, and then Mr. Wright takes
14 the stand today and tells you that -- as a
15 corporate representative, that they didn't
16 destroy any microfiche. And he didn't even
17 bother to read what the corporation's
18 position was.

19 Now, why is it that Mr. Wright is here
20 and not Mr. Reifsnyder? I don't have an
21 answer to that, but I think I know what it
22 is.

23 Finally, on page 97, line 13:

24 (Reading)

25 To your recollection,

1 microfiche cards were destroyed as
2 part of the 2018 purge, correct?

3 Answer: "Correct."

4 Question -- then he says:

5 (Reading)

6 Yes, yes, correct.

7 And microfiche cards were
8 destroyed as part of the purge in
9 2019?

10 I believe so, correct.

11 And it goes on.

12 This is the corporate testimony of Penn
13 National. And I do appreciate, to some
14 extent, Mr. Wright's position. He is in the
15 claims handling department. He is not the
16 director of corporate services and
17 facilities. This is not Mr. Wright's job.
18 He has no idea what is going on here. But
19 when he took the stand, he just kind of
20 started saying how unbelievable this would
21 be.

22 But this is what's happened. This is
23 an insurance company that is destroying
24 policies, is admitting to it, and their
25 corporate rep can't come to bear to be here

1 to admit it.

2 So what else did we learn? We learned
3 that there's no record of what was destroyed.
4 So here he is, destroying these policies and
5 they don't keep records on the back end, so
6 there's no way to know what was destroyed.
7 There were mistakes made given the nature of
8 the microfiche. And I also thought this was
9 really interesting testimony when Mr. Heinze
10 was testifying because he's the expert who
11 said he went and visited the facility, he saw
12 these microfiche cards. Well, Mr. Reifsnyder
13 said, which is completely plausible, these
14 are sticky cards. They're hard to get apart.
15 They're -- a lot of problems can happen. One
16 of the problems he was identifying in his
17 deposition is someone would go and pull a
18 policy and they would find out, oh, I was
19 only supposed to pull this number, but
20 actually, I have two of them, and I just
21 realized it so I pulled them apart. Well,
22 that's kind of scary considering how much
23 money is at stake. So I asked
24 Mr. Reifsnyder, who are these individuals who
25 are doing this? It's his secretary, it's the

1 guy in the mailroom, it is anyone he can
2 find. Why? Because let's think about what
3 Mr. Reifsnnyder's job is. He is the -- he has
4 the responsibility for the entire building at
5 Penn National in Harrisburg. He has
6 responsibility for the entire fleet of cars.
7 He has responsibility for the janitorial
8 services. It was like two pages of testimony
9 as to what he does. At the very end of it,
10 it's maintaining the microfiche, which is not
11 exactly high priority, so he gives it to
12 whomever he can.

13 So they bring him back these cards to
14 destroy, and I said, "What's your QC
15 process?" There is none, they QC themselves.
16 So here you have untrained employees at a
17 major insurance company destroying historic
18 general liability policies on an annual
19 basis, not keeping a record of it, knowing
20 that problems can be created because of how
21 old and how sticky they are, and the person
22 responsible for it is not quality control at
23 all.

24 To make matters worse, there's no
25 search for "Covil." So if Covil is appearing

1 on these documents, nobody knows because
2 they're just sending them out.

3 And then finally, he's sending them out
4 to be -- excuse me, he's sending them out to
5 be destroyed at Iron Mountain. That's who is
6 actually doing the shredding.

7 So then the question becomes, well, was
8 there any Covil documents in any of that?
9 What is the evidence that Covil had any
10 policies prior to 1986, '87? And they
11 haven't said it, but Penn National's formal
12 position appears to be, okay, we destroyed
13 all this stuff, but it's kind of a no harm,
14 no foul because there were no Covil
15 documents, right. The problem with that is,
16 is that there's lots of evidence of Covil
17 documents, including the most important
18 document, I think, in the entire case, which
19 is this change endorsement in the very first
20 policy that they produced, which is the '86,
21 '87 policy.

22 What is a change endorsement, just so
23 that we're all clear? A change endorsement
24 means there was a problem on the declarations
25 page and we need to fix it. And this is an

1 endorsement, a formal part of the insurance
2 policy.

3 So the first -- what this endorsement
4 says is, it's amending policy to delete
5 products form GL0031 and add 2104. 2104 is
6 the exclusion for products and completed
7 operations. But this change endorsement is
8 doing one other thing. It's telling you when
9 that problem occurred, and it's saying it was
10 left off at renewal. I don't know how many
11 letters are in the record, Your Honor, of
12 Mr. Wright sending letters to people where
13 he's telling everyone in the world would
14 hear, these policies only cover operations,
15 not completed operations. He tells the
16 asbestos defense counsel. He tells the
17 Receiver. Anyone.

18 But this second part is just as
19 important as this part (indicating). Yes, it
20 was left off, but when? At renewal. So when
21 we actually look, and this is, again, the
22 form that was -- the exclusion is 2104 that
23 they have added to the policy. But when we
24 look at the dec page, they just want to say,
25 Oh, that should be added here, 2104, but up

1 here (indicating), leave that, let's just
2 keep that saying it's new. Don't change that
3 to say renewal.

4 But again, you can't read the policy,
5 and this is policy language, you can't just
6 read "left off" and say I'm not going to pay
7 attention to this. Mr. Brown during his
8 examination of one of the witnesses referred
9 to this as a comment. He said "the comment."
10 I've heard a lot of things from insurance
11 companies, but I've never heard a term of the
12 policy referred to as "a comment." These are
13 the actual terms of the insurance policy.
14 They are unambiguous. And even if it was
15 ambiguous, Your Honor, that's interpreted in
16 favor of the policy.

17 So now we know this is a renewal
18 policy. What do we know about what was
19 before? '86 and '87 and '87 and '88 are also
20 both renewal policies. If that's the case,
21 then the evidence in the record, both from
22 the policies themselves as well as the
23 witnesses' testimony, is that these terms and
24 conditions are the same.

25 And it's very hard to see this, and I

1 should have highlighted, I'm sorry, but
2 what's interesting in the '88 form is that
3 GL2104 is actually there. It's popped up.
4 But you know what's also popped up? The
5 renewal number. So it shows you these are
6 the two problems that existed on this form
7 (indicating). 2104 was missing and the
8 renewal number was missing. And that's what
9 they were changing in the policy form.

10 So we've also heard a lot of testimony
11 about this chart (indicating). This chart is
12 created by lawyers at the direction of the
13 Receiver based on the evidence that was known
14 back in 2019. It is good faith at the time,
15 but this is just a piece of work product.
16 This is not an insurance policy. This is not
17 evidence of anything other than what the
18 Receiver thought coverage looked like at a
19 certain time.

20 And if you want to see how worthless
21 this is, just try to get Travelers to pay on
22 any of these policies. As Mr. Protopapas
23 said, They don't recognize any of those
24 policies despite my beautiful chart. They
25 always said, and I think this is important

1 too, Penn National in their brief, in their
2 findings of fact and conclusions of law that
3 they submitted a year ago, there's a section
4 of that brief that says how hard it is to
5 prove missing policy cases. And I certainly
6 agree with that, which is why it is going to
7 be really hard to prove that any of this
8 stuff existed, particularly if a Penn
9 National policy was actually supposed to be
10 there. And again, the plain terms of the
11 Penn National policy say that they were.

12 So this (indicating) is what the
13 coverage chart should look like today. We're
14 looking at Penn National's coverage. The
15 first policy is missing, and we know it's
16 missing because of the '86 policy.

17 There's even more evidence, though,
18 that this is the correct reading. What else
19 was Covil buying and Penn National selling at
20 the same time? Inland marine coverage, auto
21 coverage. Same dates overlap.

22 On the document retention issue as
23 well, no one has testified on behalf of Penn
24 National as to why some Covil documents
25 exist, but some Covil documents don't exist.

1 There was lots of testimony about how it's
2 fine to have a 25-year document retention.
3 And we don't dispute that. I mean, it is
4 true, there are a lot of insurance companies
5 that have a 25-year document retention. The
6 issue is the selective retention, when you're
7 only keeping certain documents and you're not
8 keeping other documents.

9 Another issue that has not been
10 addressed by the defense in any way is the
11 issue of additional insured. During my
12 opening statement, which was yesterday, I
13 brought up the fact that on the same very
14 first policy that we have, Covil is
15 identified as a special-named insured in an
16 endorsement, and that there is evidence that
17 Covil can be identified in other places of
18 the policy.

19 We also put their own interrogatory
20 response where they said that there may be
21 responsive documents related to our request
22 for additional insured. They just didn't
23 think there was a reasonable method of
24 finding it.

25 So both with the '85, '86 renewal, as