STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
PETER D. PROTOPAPAS, as Receiver for STARR DAVIS COMPANY, INC. and STARR DAVIS COMPANY OF S.C., INC., Plaintiff, vs. TRAVELERS CASUALTY AND SURETY COMPANY f/k/a THE AETNA CASUALTY AND SURETY COMPANY; THE STANDARD FIRE INSURANCE COMPANY; ST. PAUL FIRE AND MARINE INSURANCE COMPANY; THE EMPLOYERS' FIRE INSURANCE COMPANY; SOUTHEASTERN AGENCY GROUP and M.I.A. COMPANY, INC. individually and as successors to or f/k/a MERRIMON INSURANCE AGENCY, INC.; ROBERT E. ASPRAY; NELL ASHWORTH, individually and as personal representative of the Estate of ROBERT J. ASHWORTH; BETTY C. D'AMICO, individually and as Executor of the Estate of JULIAN D'AMICO, JR.; KAYLA KEITH, individually and as the personal representative of the Estate of JERRY W. ARCHER, SR.; RICHARD L. KNIGHT II, as personal representative of the Estate of TEDDY L. KNIGHT, SR., and LINDA KNIGHT, individually; DAVID D. ROLIINS; JAMES W. SMITH and FRANCES R. SMITH; and LINDA J. WHITE, individually and as Personal Representative of the Estate of LUBERT F. WHITE, JR., Defendants.	Case Number: 2019-CP-40-06243 In Re: Asbestos Personal Injury Litigation Coordinated Docket RECEIVED **Jun 18 2021** SC Court of Appeals **ORDER**

INTRODUCTION

This matter is before the Court on the motion of Starr Davis Company, Inc. and Starr Davis Company of South Carolina, Inc. (Starr Davis Company, Inc. is referred to as "Starr Davis Co.", Starr Davis of South Carolina, Inc. is referred to as "Starr Davis of South Carolina," and the two companies are collectively referred to as "Starr Davis"), by and through their duly-appointed Receiver, Peter D. Protopapas (the "Receiver"), for partial summary judgment (the "Motion") as to their claims for declaratory judgment against defendants Travelers Casualty and Surety Company, formerly known as The Aetna Casualty and Surety Company and referred to herein individually as "Aetna," and The Standard Fire Insurance Company, referred to individually as "Standard Fire" (collectively "Travelers").

Having considered all of the papers filed by the parties, as well as the arguments of counsel presented at the extensive January 25, 2021, hearing by video conference to which all parties consented, the Court **Grants** the Receiver's Motion for Partial Summary Judgment and issues a declaratory judgment as follows:

BACKGROUND

The South Carolina Supreme Court appointed the undersigned to serve as the Chief Judge for Administrative Purposes over all asbestosis and asbestos litigation filed within the state court system. The asbestos litigation in South Carolina constitutes a significant number of complex multi-party cases. A typical case will include an injured plaintiff alleging that an asbestos-related cancer was caused by dozens of different defendants. The Asbestos cases on my docket are predominantly brought by claimants who allege they have contracted mesothelioma by reason of exposure to asbestos containing products sold or installed or used by defendants. Mesothelioma has a long latency period before the disease manifests. These cases usually involve exposures 20 plus years ago, which have been discovered recently within the statute of limitations period. The

insurance policies which cover liability claims against the defendants are typically "per occurrence coverage" rather than the more modern "claims made policies." It sometimes happens that a defendant will be a company not currently in operation. Nevertheless, the older "legacy" policies which cover "occurrences" during the policy period, rather than "claims made" during the policy period, will still be liable for coverage of these mesothelioma claims. Where a defendant is no longer operating, I have been appointing a Receiver to pursue coverage to provide for the defense and payment of claims on behalf of these companies.

This Court has worked diligently to manage this docket and to organize this complicated statewide litigation into an orderly process whereby cases are assigned for trial in a predictable fashion. This process is designed to allow the litigants to participate in discovery in an orderly fashion to facilitate the evaluation of litigation positions well before trial and to try the cases as necessary.

This Court appointed Peter Protopapas as the Receiver of Starr Davis on February 22, 2019. The Court vested the Receiver with the "power and authority to fully administer all assets of Starr Davis," which is "inclusive of, but not limited to, the right and obligation to administer any insurance assets of Starr Davis as well as any claims related to the actions or failure to act of Starr Davis' insurance carriers." Order Granting Motion to Appoint a Receiver and Appointing Receiver at 1, *Hopper v. Air & Liquid Sys.*, No. 2019-CP-40-00076 (S.C. Com. Pl. Feb. 22, 2019).

NATURE OF THE CASE AND THE MOTION

Starr Davis began business operations as an insulation contractor in the 1940s. Over the course of the next forty years, the company grew to become a major regional insulation contractor—installing, removing, replacing and repairing insulation, including at pertinent times asbestos-containing insulation—in a variety of industrial facilities throughout the southeastern United States, principally in South Carolina, North Carolina, Georgia, Alabama, Virginia and

Tennessee. Over the course of the company's existence, Starr Davis paid premiums to purchase significant amounts of liability insurance from Travelers.

Following substantial and unexcused delay in complying with its basic discovery obligations under South Carolina law, Travelers ultimately produced liability insurance policies and evidence of liability insurance policies issued to Starr Davis. The Motion seeks resolution of a number of issues concerning the existence and terms of the Travelers policies, and Starr Davis' request that the Court issue the following declarations concerning the interpretation and application of the Travelers' policies to the asbestos suits that have been filed, continue to be filed, and likely will be filed against Starr Davis into the future:

1. Multiple-year policies and policies that were subject to annual renewal provide for a full separate limit of liability for product liability and completed operations claims and a full per occurrence limit for premises and operations claims separately for each annual period or portion thereof;
2. Primary insurance policies issued by Travelers have an unlimited supplemental duty to pay or reimburse defense costs;
3. The duty to pay or reimburse defense costs is "triggered" whenever there is any obligation that could potentially involve the policy coverage;
4. The duty to pay or reimburse defense costs is triggered by the allegations of a complaint asserted against Starr Davis;
5. In the unique case of Starr Davis, where multiple primary policies were issued for the same policy year, and these multiple policies provide coverage for the same claim, Starr Davis may select one or both of the policies to respond to the claim and may also "stack" the limits of such policies for each and every such claim;

6. The burden of proving any limitation or exclusion to coverage is on the insurer, here Travelers;

7. All of the Travelers liability insurance policies in effect from a person's first exposure to asbestos through manifestation of an asbestos-related disease or condition, and, ultimately, to death, cover the asbestos cases unless coverage is otherwise excluded under a policy;

8. The "completed operations hazard" described in the Travelers policies, and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos products *after* Starr Davis completed its installation or removal operations or work at a particular jobsite;

9. As to any individual asbestos lawsuit, it is Travelers' burden to prove that the suit seeks the recovery of damages that are subject to any aggregate limits of liability applicable to the "products" or "completed operations" provisions in its policies;

10. The asbestos insulation contracting, or "operations," claims against Starr Davis have resulted from multiple "occurrences" under the Travelers policies, thus entitling Starr Davis to multiple "per occurrence" limits of liability to satisfy its asbestos liabilities;

11. As to the asbestos "operations" claims against Starr Davis, Travelers is obligated to pay those claims "in full" up to its "per occurrence" limit of liability; and

12. While product liability or completed operations losses are subject to allocation on a "time-on-the-risk" pro rata allocation method, "operations" claims are allocated on an "all sums" basis, and, in either case, in light of its non-operating defunct status, no loss may be allocated to Starr Davis as part of any "time-on-the-risk"

allocation scheme.

Based on this Court's review of the evidence and arguments of the parties, this Court will grant the Motion in its entirety and enter partial summary judgment in favor of Starr Davis.

UNDISPUTED FACTS

Starr Davis began operations in the 1940s, and engaged in the installation, removal, replacement and repair of insulation in various facilities across South Carolina and in the neighboring states of North Carolina, Tennessee and Georgia, as well as Alabama and Virginia, for over four decades. Starr Davis' operations involved the installation, removal, replacement, repair and disturbance of insulation materials, typically supplied, required, or acquired by other parties. At pertinent times, insulation materials contained asbestos, and Starr Davis' operations allegedly resulted in bodily injury to South Carolina citizens.

The State of North Carolina rescinded Starr Davis Company, Inc.'s corporate charter in 1996, and the State of South Carolina rescinded Starr Davis Company of South Carolina, Inc.'s corporate charter in 1997, for failure to file the appropriate documentation with their respective Secretaries of State. *See* Exhibit 3 to the Motion.

Travelers has always been, and continues to be, aware of the nature of Starr Davis' prior operations.[1] Travelers also understands that many of the asbestos contracting claims against Starr

[1] For example, as late as the policy issued for the period January 1, 1978, through January 1, 1979, Standard Fire listed Starr Davis's business as including:

> "Steam Pipe or Boiler Insulation –
> Applying Cork, Asbestos or Other
> Non Conducting Materials"

See policy materials attached as Exhibit 5 to the Motion, comprising an "Incomplete Policy" for Policy No. 25 AL 802 646 CNS 8, issued for the policy period January 1, 1978 to January 1, 1979 by The Standard Fire Insurance Company, and Exhibit 4 to the Motion, comprising an "Incomplete Policy" for Policy No. 25 AL 801 362 CMA 8 for the same policy period issued by The Aetna Casualty and Surety Company.

Davis invoke the "operations" coverage portion of their policies because the claims did not result from Starr Davis' "completed operations" or from Starr Davis' "products" after the company relinquished possession of those products into the stream of commerce, as discussed further below.

In its authority as the Receivership Court for Starr Davis, this Court issued a subpoena to Travelers pursuant to a request by the Receiver, seeking copies of insurance policies issued by Aetna and Standard Fire (both Travelers companies) to Starr Davis, as well as multiple other categories of documents, including underwriting and claims documents. *See* Exhibits 6 and 7 to the Motion. Initially, Travelers categorically refused to produce the requested documents on the ground that it did not believe the subpoena was served properly: "A subpoena *duces tecum* to Travelers is only proper if issued by the Connecticut Superior Court in the judicial district in which Travelers is located." *See* Exhibit 8 to the Motion.

Travelers' failure to comply with this Court's subpoena came despite the fact that Travelers had previously admitted that it issued liability insurance coverage to Starr Davis for the period 1959 to 1985. A document entitled "Interim Agreement" between Starr Davis and Aetna, dated November 19, 1985, shows that Travelers issued coverage to Starr Davis continuously from 1959 to 1985. *See* Exhibit 9 to the Motion at 5-8.

Paragraph 1 of the Interim Agreement specifies, however: "Neither this Interim Agreement nor any part thereof shall be offered in evidence or used for any purpose in any court of law as support for the position being asserted by either party hereto in connection with the meaning, intent or construction of any insurance policy or policies issued by Aetna or purchased by Starr Davis." Travelers nevertheless relies *substantially* on the Interim Agreement in support of its opposition to the Motion—something Travelers' counsel repeated *several times* at the hearing on the Motion—concerning the "meaning, intent or construction" of the insurance policies memorialized

by the Interim Agreement. These arguments violate the specific terms of the Interim Agreement prohibiting the parties from using the document for this very purpose, and the Court admonishes Travelers and its counsel for reliance on admittedly inadmissible material in opposing the Motion. By contrast, Starr Davis uses the document only as evidence of the existence of the insurance policies, an appropriate use of the Interim Agreement.

While most of the policy documentation concerning the Travelers coverage has apparently been destroyed—at this point something this Court has grown accustomed to seeing when Travelers and its many affiliated and subsidiary insurance companies are involved—there is sufficient secondary evidence, including partial or incomplete policies, to prove the existence of a multi-decade relationship between Travelers and Starr Davis. The undisputed evidence presented by Starr Davis in connection with the Motion shows a 40-year uninterrupted relationship between the parties from January 1, 1946 to April 30, 1986, during which Travelers issued liability insurance coverage under which it agreed to defend and indemnify Starr Davis against, among other things, asbestos-related bodily injury suits.

Because essentially all of the Travelers policies were destroyed by Travelers,[2] this Court has been called upon by Starr Davis to render partial summary judgment on several issues relating to policy issuance by Travelers. Partial summary judgment is appropriate based on discovery to date, Travelers' admissions, and legal principles implied or imposed by law. The documents and admissions by Travelers demonstrate the following as a matter of undisputed fact:

[2] As has become customary over the course of several cases pending in this Court, Travelers seeks to be absolved from its destruction of insurance policies and related insurance documentation because Starr Davis, itself, is also unable to locate copies of its historic insurance policies. Travelers, however, is in the business of insurance; Starr Davis was not. Travelers is, and was, responsible to maintain documentation integral to its business operations. Its behavior is not excused because its insured, a defunct regional insulation contractor, did not maintain its own copies of Travelers' insurance documentation.

A. The Aetna Casualty and Surety Asbestos Coverage

The Aetna Casualty and Surety Company ("Aetna") issued primary coverage that was renewed annually on an uninterrupted basis for 40 years which provides defense and indemnity coverage for asbestos-related bodily injury suits. These policies were issued from January 1, 1946 through April 30, 1986.

The Aetna primary coverage indemnifies Starr Davis against damages for bodily injury for operations claims that are subject only to a per occurrence limit ("premises/operations claims"), and for products and completed operations claims which are also subject to an aggregate limit of liability. There is no aggregate limit of liability as respects premises/operations claims. The primary coverage issued by Aetna provides $11,900,000 in products/completed operations limits and $11,900,000 per occurrence in premises/operations limits. There is no limit to the number of occurrences to which the Aetna policies respond.

Aetna also issued umbrella liability coverage to Starr Davis for 11 policy years, from January 1, 1974 to May 1, 1983.

With the exception of the primary policies from January 1, 1974 to May 1, 1980, which do not cover North Carolina claims, the Aetna policies, which are also summarized in the policy schedule that appears below, cover all asbestos-related suits asserted against Starr Davis Co. or Starr Davis of South Carolina.[3]

B. The Standard Fire Insurance Company Asbestos Coverage

Standard Fire issued primary policies to Starr Davis Co. and Starr Davis of South Carolina with an unlimited supplemental defense obligation and separate annual products/completed

[3] An incomplete Aetna policy produced by Travelers appears as Exhibit 4 to the Motion. Travelers and Aetna routinely destroyed policies such as those issued to Starr Davis and Starr Davis of South Carolina.

operations limits for each of the two annual periods January 7, 1974 to January 7, 1976 with separate annual limits of $300,000 per occurrence and in the aggregate. Standard Fire also issued primary policies to Starr Davis Co. and Starr Davis of South Carolina for five annual periods between January 7, 1976 and May 1, 1980, each affording $500,000 in coverage per occurrence and in the aggregate. The aggregate limit of liability does not apply to "operations" claims. There is no limit to the number of occurrences the Standard policies pay. These Standard Fire policies were issued to Starr Davis Co. and Starr Davis of South Carolina but cover operations only in North Carolina. They are also summarized in the policy schedule that appears below.

C. Rulings Concerning Policy Provisions

There is no evidence, or any other indication, that the Travelers policies were issued on anything other than standard policy forms used during the pertinent time periods. Based on this fact, and based on the policy evidence produced by Travelers, the Court issues the following rulings concerning the policy provisions in the Travelers policies:

1. All of the Travelers policies summarized in the policy schedule below are either multiple-year policies or policies that were subject to annual renewal and all such policies issued by Travelers provide for a full separate limit of liability for product liability and completed operations claims and for premises/operations claims on a per occurrence basis for each annual period or portion thereof;
2. All of the primary insurance policies issued by Travelers have an unlimited supplemental duty to pay or reimburse defense costs;
3. The duty to pay or reimburse defense costs in these policies is "triggered" whenever there is any obligation that could potentially involve the policy coverage;
4. The duty to pay or reimburse defense costs is triggered by the allegations of a complaint asserted against Starr Davis;

5. In the unique case of Starr Davis, where multiple primary policies were issued for the same policy year, and multiple policies provide coverage for the same claim, Starr Davis may select one or both of the policies to respond to the claim and may "stack" the limits of such policies for each and every such claim;

6. The policy limits of successive Travelers primary or umbrella policies that respond to an asbestos suit may also be stacked to the extent necessary for the claimant to be paid in full for a Starr Davis liability;

7. The burden of proving any limitation or exclusion to coverage is on the insurer, here Travelers;

8. All of the Travelers liability insurance policies in effect from a person's first exposure to asbestos through manifestation of an asbestos-related disease or condition, and, ultimately, to death, cover the asbestos cases unless coverage is otherwise excluded under a policy;

9. The "completed operations hazard" described in Travelers' policies, and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos attributed to Starr Davis *after* Starr Davis completed its installation or removal operations or work at a particular jobsite;

10. The "products hazard" described in Travelers' policies, and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos attributed to Starr Davis *after* Starr Davis relinquished possession of the products and placed them into the stream of commerce;

11. As to any individual asbestos lawsuit, it is Travelers' burden to prove that the suit seeks the recovery of damages that are subject to the aggregate limits of liability

applicable to the "completed operations hazard" or "products hazard" provisions in its policies;

12. The asbestos insulation contracting, or "operations," claims against Starr Davis have resulted from multiple "occurrences" under the Travelers policies, thus entitling Starr Davis to multiple "per occurrence" limits of liability to satisfy its asbestos liabilities;

13. As to the asbestos "operations" claims against Starr Davis, Travelers is obligated to pay those claims "in full" up to its "per occurrence" limit of liability; and

14. While product liability or completed operations losses are subject to allocation on a "time-on-the-risk" pro rata allocation method, in light of its non-operating defunct status, no loss may be allocated to Starr Davis as part of any "time-on-the-risk" allocation scheme.

* * *

Travelers represents that the documents it produced comprise all that Travelers has in terms of the Starr Davis policies. Travelers has admitted its insuring relationship with Starr Davis Co. and Starr Davis of South Carolina. Starr Davis Co. and Starr Davis of South Carolina submit that, as to the foregoing, it has met its burden and, accordingly, Travelers' response "must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial." *Moody v. McLellan*, 295 S.C. 157, 163, 367 S.E.2d 449, 454 (Ct. App. 1988). Travelers cannot do so. The foregoing rulings are based on Travelers' own documents. It destroyed all of the remaining evidence.

Travelers also makes a number of arguments why the Court's rulings on missing policy issues are "premature" based on its asserted need to conduct discovery. The Court rejects these arguments for several reasons.

First, Travelers asserts that an open issue exists as to whether the parties have "already agreed which alleged or missing policies provide coverage for the asbestos claims, and which do not." This appears to be an argument concerning the construction or application of the Travelers policies based on the Interim Agreement. As noted above, the Court finds that this type of argument is precluded by the Interim Agreement.

Second, Travelers claims that it needs discovery from Starr Davis' former insurance brokers or agents which it asserts may have copies of the missing Travelers policies. This is not necessary since the documents that Travelers produced are sufficient for the Court to make rulings as to the existence of the Travelers policies and the substance of the material terms and conditions of the policies that are relevant to the asbestos suits against Starr Davis.

Third, Travelers asserts that it needs to know from the insurance brokers or agent for Starr Davis about the circumstances under which the Travelers policies were lost or destroyed. Beneath this argument is an assumption by Travelers that a symmetry of interest and responsibility exists between an insurer and its insured concerning the maintenance of insurance-related documentation. Insurance documentation is integral to the functioning of an insurance organization. It is not integral to the functioning of an insulation contractor. The Court has been presented with sufficient policy evidence, produced by Travelers, to reach conclusions concerning the existence and scope of the Travelers policies issued to Starr Davis. There is no contrary evidence.

Fourth, Travelers asserts it needs to discover whether Starr Davis purchased primary or excess liability insurance coverage from other insurers such that it may have potential contribution claims against those insurers. This is not a good faith argument in opposition to an assertion by an insured that it has unearthed sufficient evidence of policy terms and conditions to obtain declarations that the insurer, in fact, issued coverage under policies that the insured cannot presently locate. Whether Travelers has contribution claims against other insurers has nothing to do with whether sufficient evidence of the Travelers coverage presently exists for the Court to grant the Motion. Travelers is free to continue searching for insurance coverage issued to Starr Davis by other insurers in support of potential contribution claims. This is immaterial, however, as to whether the Court can, and should, grant the Motion.

Consequently, it is not premature for the Court to rule on the missing Travelers policy issues framed by the Motion. The Court therefore finds, based on a compilation of policy dates, insurer, policy number, and occurrence and aggregate limits provided by defendants, that Travelers issued liability insurance coverage to Starr Davis as is depicted in the following Policy Schedule:

Policy Begin Date	**Policy End Date**	**Insurer**	**Policy No.**	**Bodily Injury Occurrence Limits**	**Bodily Injury Aggregate Limits**
01/01/1946	01/01/1947	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1947	01/01/1948	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1948	01/01/1949	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1949	01/01/1950	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1950	01/01/1951	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1951	01/01/1952	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1952	01/01/1953	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1953	01/01/1954	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000

01/01/1954	01/01/1955	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
10/14/1954	01/02/1955	Aetna Casualty & Surety Co.	25 LC 120	300,000	300,000
01/01/1955	01/01/1956	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1956	01/01/1957	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1957	01/01/1958	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1958	01/01/1959	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	100,000	100,000
01/01/1960	01/01/1961	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1961	01/01/1962	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	100,000	100,000
01/01/1962	01/01/1963	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1963	01/01/1964	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000

Policy Begin Date	**Policy End Date**	**Insurer**	**Policy No.**	**Bodily Injury Occurrence Limits**	**Bodily Injury Aggregate Limits**
01/01/1964	01/01/1965	Aetna Casualty & Surety Co.	25 AL 6996 CM	300,000	300,000
01/01/1964	01/01/1965	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	300,000	300,000
01/01/1965	01/01/1966	Aetna Casualty & Surety Co.	25 AL 8026 CM	300,000	300,000
01/01/1966	01/01/1967	Aetna Casualty & Surety Co.	25 AL 009308 CM	300,000	300,000
01/01/1967	01/01/1968	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	300,000	300,000
01/01/1968	01/01/1969	Aetna Casualty & Surety Co.	25 AL 106258 CMA	300,000	300,000
01/01/1969	01/01/1970	Aetna Casualty & Surety Co.	25 AL 108793 CMA	300,000	300,000
01/01/1970	01/01/1971	Aetna Casualty & Surety Co.	25 AL 111525 CMA	300,000	300,000
01/01/1970	01/01/1971	Aetna Casualty & Surety Co.	25 AL 106258 CMA	300,000	300,000
01/01/1971	01/01/1972	Aetna Casualty & Surety Co.	25 AL 114022 CMA	300,000	300,000
01/01/1972	01/01/1973	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	300,000	300,000
01/01/1973	01/01/1974	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	300,000	300,000
01/01/1974	01/01/1975	Aetna Casualty & Surety Co.	25 AL 214134 CMA	300,000	300,000

01/01/1974	01/01/1975	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	300,000	300,000
01/01/1975	01/01/1976	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	300,000	300,000

Policy Begin Date	**Policy End Date**	**Insurer**	**Policy No.**	**Bodily Injury Occurrence Limits**	**Bodily Injury Aggregate Limits**
01/01/1976	01/01/1977	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	500,000	500,000
01/01/1977	01/01/1978	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	500,000	500,000
01/01/1978	01/01/1979	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	500,000	500,000
01/07/1979	05/01/1979	Aetna Casualty & Surety Co.	25 GL 802 646 CMA 9	500,000	500,000
05/01/1979	05/01/1980	Aetna Casualty & Surety Co.	25 GL 802 646 CMA 9	500,000	500,000
05/01/1980	4/31/81	Aetna Casualty & Surety Co.	25 GL 56819 CCA	500,000	500,000
05/01/1981	05/01/1982	Aetna Casualty & Surety Co.	25 GL 269082 CCA	500,000	500,000
05/01/1982	05/01/1983	Aetna Casualty & Surety Co.	25 GL 355800 CCA	500,000	500,000
05/01/1982	05/01/1983	Aetna Casualty & Surety Co.	25 GL 56819 CCA	500,000	500,000
05/01/1983	05/01/1984	Aetna Casualty & Surety Co.	25 GL 456932 CCA	500,000	500,000
04/30/1984	04/30/1985	Aetna Casualty & Surety Co.	25 GL 541203 CCA	500,000	500,000
04/30/1985	04/30/1986	Aetna Casualty & Surety Co.	25 GL 601412 CCA	500,000	500,000

Policy Begin Date	**Policy End Date**	**Insurer**	**Policy No.**	**Bodily Injury Occurrence Limits**	**Bodily Injury Aggregate Limits**
01/07/1974	01/07/1975	Aetna Casualty & Surety Co.	25 XS 1344 WCA	1,000,000	1,000,000
01/07/1975	08/04/1975	Aetna Casualty & Surety Co.	25 XS 802646 WCA	1,000,000	1,000,000

Policy Begin Date	**Policy End Date**	**Insurer**	**Policy No.**	**Bodily Injury Occurrence Limits**	**Bodily Injury Aggregate Limits**
08/04/1975	01/07/1976	Aetna Casualty & Surety Co.	25 XS 802646 WCA	2,000,000	2,000,000

01/07/1976	01/07/1977	Aetna Casualty & Surety Co.	25 XS 802646 WCA	2,000,000	2,000,000
01/07/1977	01/07/1978	Aetna Casualty & Surety Co.	25 XS 802646 WCA	2,000,000	2,000,000
01/07/1978	01/07/1979	Aetna Casualty & Surety Co.	25 XS 802646 WCA	2,000,000	2,000,000
01/07/1979	05/01/1979	Aetna Casualty & Surety Co.	25 XS 802 646 WCA	2,000,000	2,000,000
05/01/1979	05/01/1980	Aetna Casualty & Surety Co.	25 XS 802646 WCA	2,000,000	2,000,000
05/01/1980	05/01/1981	Aetna Casualty & Surety Co.	25 XS 7245 WCA	2,000,000	2,000,000
05/01/1981	05/01/1982	Aetna Casualty & Surety Co.	25 XS 54578 WCA	2,000,000	2,000,000
05/01/1982	05/01/1983	Aetna Casualty & Surety Co.	25 XS 102709 WCA	2,000,000	2,000,000

Policy Begin Date	**Policy End Date**	**Insurer**	**Policy No.**	**Bodily Injury Occurrence Limits**	**Bodily Injury Aggregate Limits**
01/07/1974	01/07/1975	Standard Fire Ins. Co.	25 SM 802 646 FPS	300,000	300,000
01/07/1975	01/07/1976	Standard Fire Ins. Co.	25 AL 802 646 CNS 8	300,000	300,000

Policy Begin Date	**Policy End Date**	**Insurer**	**Policy No.**	**Bodily Injury Occurrence Limits**	**Bodily Injury Aggregate Limits**
01/07/1976	01/07/1977	Standard Fire Ins. Co.	25 AL 802 646 CNS 8 (North Carolina)	500,000	500,000
01/07/1977	01/07/1978	Standard Fire Ins. Co.	25 AL 802 646 CNS 8 (North Carolina)	500,000	500,000
01/07/1978	01/07/1979	Standard Fire Ins. Co.	25 AL 802 646 CNS 8 (North Carolina)	500,000	500,000
01/07/1979	05/01/1979	Standard Fire Ins. Co.	25 AL 802 646 CNS 8 (North Carolina)	500,000	500,000
05/01/1979	05/01/1980	Standard Fire Ins. Co.	25 AL 802 646 CMA (North Carolina)	500,000	500,000

SUMMARY JUDGMENT STANDARD

"[S]ummary judgment is proper when there is no genuine issue as to [any] material fact and the moving party is entitled to judgment as a matter of law." *S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 117, 804 S.E.2d 854, 858 (2017) (citing Rule 56(c), SCRCP). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine

issue of material fact." *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 558, 671 S.E.2d 79, 85 (Ct. App. 2009). However, once that party carries its initial burden, the "opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts,' but 'must come forward with specific facts showing that there is a genuine issue for trial.'" *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (emphasis in original)); *See also Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 390, 701 S.E.2d 776, 780 (Ct. App. 2010) (non-moving party may not rely on speculation to survive summary judgment) (citations omitted); *McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 389, 684 S.E.2d 566, 570 (Ct. App. 2009) ("[E]vidence must amount to more than speculation and conjecture to submit a case to the jury.") (citations omitted).

AUTHORITY OF THIS COURT TO INTERPRET POLICIES

On November 27, 2018, the Receiver filed an action styled *Covil Corporation by its duly appointed Receiver, Peter D. Protopapas v. Zurich, Sentry, USF&G, and others*, in the South Carolina Circuit Court. This action sought a determination of the insurance coverage provided by the various defendant insurance companies to Covil Corporation. Shortly thereafter, this matter was removed to the United States District Court for the District of South Carolina, Spartanburg Division. U.S. District Court Judge Bruce Howe Hendricks describes the course of this litigation as follows:

> This is an insurance coverage action in which the parties dispute the relative rights and obligations of Covil, its Receiver, and certain of Covil's insurers under policies issued or allegedly issued to Covil. Among other issues, the parties dispute the manner in which it should be determined whether injuries in underlying asbestos actions are within the products and completed operations hazard of the policies

> (rendering them subject to an aggregate limit), or outside the products and completed operations hazard (in which case no aggregate limit would apply), as well as the proper method for allocating injury across multiple policy years. Opinion and Order at 2, *Covil Corporation by its duly appointed Receiver, Peter D. Protopapas v. Zurich, Sentry, USF&G, and others*, CA No.: 7:18-3291-BHH (U.S.D.C.S.C. Mar. 1, 2021) (internal citation omitted).

South Carolina District Court Judge Bruce Howe Hendricks denied motions to remand to state court and issued an injunction against determination of these issues in State Court pending further rulings by the federal court. Judge Hendricks has now reconsidered her original order, withdrawn her injunction as improvidently granted and made it clear that this Court is fully empowered to determine asbestos coverage matters in cases in which the Receiver is involved on behalf of non-operational companies such as Starr Davis. Thus, there is no impediment to this Court's determination of this motion in this case. *See infra Covil Corp. by Protopapas v. Zurich, et al.*

POLICY INTERPRETATION ISSUES

As to the matters of insurance policy construction, this Court notes that South Carolina law applies to matters before South Carolina courts unless a material difference exists between the law of South Carolina and the law of another state. Travelers asserts that North Carolina law *might* have something to say on these issues, but it has not identified any material conflict between the law of South Carolina and the law North Carolina on these issues. Opp. at 4 n.2, 6, 25. Travelers might have a better argument regarding North Carolina law as to the five primary policies issues by Standard Fire Insurance Company from January 7, 1976 to May 1, 1980, which cover North Carolina occurrences (the "Standard Fire Policies"), *see* Motion at 11, but Travelers did not even mention these policies in its opposition, or attempt to make a demonstration regarding North

Carolina law. Opp. at 6, 25. In the absence of any arguable conflict, even as to these policies, reliance on South Carolina law is appropriate, including under the "false conflict" doctrine. The Court therefore does not need to engage in a conflicts of law analysis to rule on the Motion.

Travelers asserts that contract interpretation rulings are also premature because it needs to conduct discovery. Opp. at 19–22. It asserts that fact issues exist on a number of topics, including that it believes that "very little of Starr Davis' revenues—approximately 10%—involved contracting work." The other 90%, according to Travelers, involved product fabrication work or product distribution. Travelers asserts that this means that resulting fabrication-related claims would involve "classic 'products hazard' injuries." If that is a true statement—and the Court makes no ruling one way or the other since the issue is not before it—then perhaps certain asbestos suits against Starr Davis will involve "classic 'product hazard' injuries." Or, perhaps, only those plaintiffs injured during Starr Davis' contracting work will pursue asbestos claims against Starr Davis, regardless of whether contracting was, or was not, a significant source of the company's revenue. As discussed below, Travelers' policies respond to the allegations in the underlying complaints, and to the facts proven in the underlying cases, not to "revenues" or a percentage of sales. There is nothing germane about the facts asserted by Travelers as a ground to defer ruling, especially since cases continue to be asserted against Starr Davis and this Court has been asked to make rulings regarding the responsiveness of the policies to actual lawsuits.

The Court does not need the facts behind Starr Davis' historical revenue to rule on the Motion. Starr Davis has not asked the Court to declare that some percentage of asbestos suits against Starr Davis do not involve "classic 'products hazard' injuries," or that some percentage of the asbestos cases against Starr Davis involve "operations injuries." Instead, the Motion asks this Court to declare the applicable *rules* to determine whether any particular asbestos case against

Starr Davis involves "operations injuries," "products hazard injuries" or "completed operations hazard injuries." Motion at 11–13. These rules are based on insurance contract language. Contract interpretation is a question of law.

Indeed, this Court has not been asked in the Motion to determine whether any particular asbestos suit is, or is not, an "operations" claim under the Travelers policies. Nor is the Court being called upon to rule that a claim pursued by a theoretical asbestos plaintiff exposed to asbestos after 1972—allegedly the final year in which Starr Davis may have "touched" asbestos according to Travelers, *see* Opp. at 24—is or is not an "operations" claim under the Travelers policies. The Court can only make coverage rulings on *particular asbestos claims* based on the record evidence from the underlying tort cases. Although Travelers says it is "currently seeking discovery" on "fact issues" as to when Starr Davis last "touched" asbestos, *see* Opp. at 24, those issues are not germane to the contract interpretation issues framed by the Motion.

Furthermore, the Court notes that the issues for coverage will depend upon when the underlying asbestos claimants allege exposure or injury to Starr Davis operations or products. This Court is not going to pre-judge what those allegations or facts will be when brought before this and other courts in which underlying asbestos suits are adjudicated against Starr Davis. As noted earlier in this order, as late as the policy period January 1, 1978 through January 1, 1979, Travelers described Starr Davis' business as including "Steam Pipe or Boiler Insulation – Applying Cork, Asbestos or Other Non-Conducting Materials." *See* materials comprising Standard Fire Policy No. 25 AL 802 646 CNS 8. The Court finds it difficult to square this policy language with Travelers' assertion that Starr Davis last "touched" asbestos in 1972. The Court also notes that the word "applying" connotes the installation of materials, not "fabrication." The Court does not need to

make factual findings on Travelers' assertions, but it does note that the statements regarding a need for fact discovery appear to lack foundation, and they perhaps lack candor.

Travelers also asserts that the Interim Agreement resolves certain "allocation" and "reimbursement" issues between the parties. *See* Opp. at 21. That is incorrect. As noted above, the Interim Agreement states in no uncertain terms that it may not be used to resolve disputes between the parties concerning the meaning, intent or construction of the Travelers policies. As respects contract interpretation issues, the Motion seeks to resolve disputes between the parties concerning the meaning, intent and the construction of the Travelers policies. The Interim Agreement is irrelevant to the contract interpretation issues raised in the Motion. Neither Travelers nor its counsel should have attempted to rely on the agreement in a manner that is indisputably contrary to its express terms.

LEGAL RULINGS AS TO POLICY INTERPRETATION

Starr Davis was engaged for more than four decades in the insulation contracting business. Whether contracting work comprised 10%, 50% or 100% of its revenues is immaterial to the Motion. The Starr Davis business *included* installing, removing, replacing, repairing and distributing insulation materials in premises that were not owned or controlled by Starr Davis. The Travelers policies make clear that Starr Davis performed contracting work, and, given the four-decade relationship with Starr Davis, Travelers certainly was aware of Starr Davis' operations. Travelers also knew that Starr Davis was a major business with operations conducted in at least the states of South Carolina, North Carolina, Georgia, Alabama, Tennessee and the Commonwealth of Virginia.

This Court is aware from its extensive experience and briefing on these issues in other matters before this Court that Travelers (and other insurers) seek to rely on the decision of the United States Court of Appeals for the Fourth Circuit in *In re Wallace & Gale Co.*, 385 F.3d 820

(4th Cir. 2004), which purported to apply Maryland law. More specifically, *Wallace & Gale* adopted the view that operations claims transform into completed operations claims where there is continuing injury post-dating completion of the installation. *Id.*, 385 F.3d at 833-34.

This is a South Carolina case. Because *Wallace & Gale* purported to interpret only Maryland law, under basic principles of federalism, it established no state law precedent relevant to the outcome of this South Carolina case. The insurance issues present here turn on the interpretation of South Carolina law, which requires an independent analysis.

A. Continuous Trigger of Coverage

There is no real dispute between the parties as to the "trigger of coverage" for the asbestos suits against Starr Davis.

The term "trigger of coverage" describes the necessary events for a liability policy to respond to a suit seeking damage because of bodily injury. The South Carolina Supreme Court adopted an "injury-in-fact" trigger of coverage for progressively deteriorating property damage in the defective construction arena:

> Under this theory, coverage is triggered whenever the damage can be shown in fact to have first occurred, even if it is before the damage became apparent, and the policy in effect at the time of the injury-in-fact covers all the ensuing damages.

Joe Harden Builders, Inc. v. Aetna Cas. and Sur. Co., 326 S.C. 231, 236 (1997).

The Court therefore rules that the policies at issue respond to the asbestos suits against Starr Davis when exposure resulting in bodily injury takes place during the policy period, regardless of when the injury becomes known or knowable. All of an insured's policies in effect from a person's first exposure to asbestos through manifestation of an asbestos disease and, ultimately, to death cover the asbestos cases against Starr Davis unless coverage is otherwise excluded. This approach is also called a "continuous trigger of coverage" inasmuch as medical science established long ago that asbestos injuries begin upon first inhalation of asbestos fibers

and continue progressively thereafter. As respects asbestos injury and death suits, the "continuous trigger of coverage" and the "injury in fact trigger of coverage" yield the same result such that the court need not choose between these conceptually similar approaches. *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co*., 45 Cal. App. 4th 1, 45 (1996) ("We find no error in the trial court's use of an injury-in-fact analysis to apply a continuous trigger.").

Consequently, all of Starr Davis' policies in effect from a person's first exposure to asbestos through death cover the asbestos claims against Starr Davis unless coverage is otherwise excluded.

B. The Distinction between "Operations" and "Products" and "Completed Operations."

It has been long-established that the risk insured by the "products hazard" and the "completed operations hazard" is "the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than the product or completed work itself." Roger C. Henderson, *Insurance Protection For Products Liability And Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971). By contrast, "[w]here an insured begins an operation and the evidence shows it is still in progress" when an injury or damage occurs, the applicable hazard is "premises-operations" and not "completed operations." *Id.* at 434–35.

Case law issued while Travelers insured Starr Davis, and shortly after it no longer insured the company, agrees with this basic formulation. For example, in *Boyer Metal Fab, Inc. v. Maryland Casualty Co*., 750 P.2d 1195, 1197 n.2 (Or. Ct. App. 1988), the court noted that:

> the purpose of the product hazard and completed operations hazard coverage is to insure against the risk that the product or work, if defective, will cause bodily injury or damage to property of others after it leaves the insured's hands

Earlier, in *Friestad v. Travelers Indemnity Co*., 393 A.2d 1212 (Pa. Super. Ct. 1978), the court

held:

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

See also CPS Chemical Co. v. Cont'l Ins. Co., 489 A.2d 1265, 1270 (N.J. Super. Ct. Law Div. 1984), reversed on other grounds by 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985) ("Commentators are in complete agreement that [the completed operations hazard] refers to accidents caused by defective workmanship which arise after completion of work by the insured on construction or service contracts.").

Despite this historical understanding, the *Wallace & Gale* court adopted the view that operations claims somehow are transmuted into completed operations claims where there is continuing injury post-dating completion of the installation. Under *Wallace & Gale*, a single continuing injury claim could be within the "operations" hazard of one of the insured's policies, but within the "completed operations hazard" of all of the insured's other policies.[4] This is antithetical to the nature of a "hazard" against which insurance policies cover insureds.

At its most fundamental level, a "hazard" in an insurance policy "is the source from which an accident may arise, or 'a danger or risk lurking in a situation which by chance or fortuity develops into an active agency of harm.'" *Ketona Chem. Corp. v. Globe Indem. Co*., 404 F.2d 181, 185 (5th Cir. 1968) (quoting *Hough v. Contributory Ret. Appeal Bd*., 36 N.E.2d 415, 418 (Mass. 1941)); *see also Serv. Welding & Mach. Co. v. Mich. Mut. Liab. Co. of Detroit*, 311 F.2d 612, 617

[4] Travelers asserts that "[e]ven the State of California, often a bastion of pro-policyholder law, agrees" with *Wallace & Gale*. Opp. at 31. Travelers' lone citation for this bold assertion is an unpublished decision of a California trial court in a long-dismissed case. *Id.* Travelers has cited no published appellate authority *from any state* agreeing with *Wallace & Gale*.

(6th Cir. 1962) ("The word 'hazard' as used in the policy must mean 'the source of a risk.'" Thus, a 'hazard' is a danger or risk lurking in a situation or place."). "Along with other meanings, the standard dictionary defines the noun 'hazard' as exposure to the chance of loss or injury." *Caminetti v. Guaranty Union Life Ins. Co.*, 52 Cal. App. 2d 330, 334 (1942). The Merriam-Webster Online Dictionary defines "hazard" to include "a source of danger." *Hazard*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/hazard (last visited Jan. 17, 2020); *see also Travelers Cas. & Sur. Co. v. Emp'rs Ins. of Wausau*, 130 Cal. App. 4th 99, 114 n.6 (2005) ("Examples of injuries covered under the premises-operations coverage include injuries suffered by a shipyard worker while installing insulation at the insured's facility and injuries caused by a subcontractor's negligent construction of a wall that fell on a worker while the job was in progress."). Or, in other words, the "completed operations hazard" protects Starr Davis from the risk of loss caused by its *completed* operations. The source of the "danger" against which this particular coverage protects Starr Davis is its *completed* insulation work, not its ongoing insulation work. That risk of injury caused by Starr Davis' ongoing work is covered under the "operations" hazard in the policies. The source of a claimant's harm—the insured's work-in-progress or its completed work—does not change over time, even if the claimant's bodily injury persists and progresses throughout several policy periods after injurious contact with the insured's work.

Consequently, the "completed operations hazard," and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos *after* Starr Davis completed its installation or removal operations or work at a particular jobsite. The Court rejects Travelers' assertion that that aggregate limits of liability in its policy apply to *any* third party's claim against Starr Davis involving exposure to asbestos that took place before the *inception date* of a particular

policy. The policies are not written in that manner, however. There is nothing in the definition of "completed operations" that focuses on the *inception* date of a policy.

In short, no aggregate limits of liability apply to suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos while Starr Davis was performing work at a particular jobsite. As discussed above, the distinctions between "operations" on the one hand, and "products" and "completed operations" have been well-established for many decades. No contract interpretative rule justifies applying one approach to claims of instantaneous injury resulting from an accident, and a different approach to claims of long-term injury resulting from injurious exposures to toxic conditions. Rules of contract interpretation are uniformly applied. The "completed operations hazard" is so named because it protects the insured against liability "caused by" or "arising out" of its "completed operations"—not its un-completed operations. Bodily injury caused by Starr Davis' ongoing operations or ongoing work is an "operations" claim. Bodily injury caused by Starr Davis' completed operations or completed work is a "completed operations" claim. Bodily injury caused by Starr Davis' products after Star Davis relinquished possession of the products and place them into the stream of commerce is a "products" claim.

C. Travelers Must Show the Applicability of a Contract Limitation or Exclusion

Travelers bears the burden of proving any exclusion or limitation of coverage, including the application of aggregate limits to particular suits and the "exhaustion" of the aggregate limits of liability in their policies.

The South Carolina Supreme Court has recognized that insurers bear the burden of proving the applicability of a coverage provision that limits their liability to their insured: "Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2004) (citing *Boggs v. Aetna Cas. and Sur. Co.*, 272 S.C. 460, 252 S.E.2d 565

(1979)); *see also Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 144–48, 781 S.E.2d 137, 141–44 (2015) (upholding circuit court decision to construe ambiguous terms in favor of coverage, and noting that "ambiguous terms are to be construed strictly against the insurer"). Courts have held that this basic principle also applies to "limitations" on coverage. *Ins. Co. of N. Am. v. Kayser-Roth Corp*., 770 A.2d 403 (R.I. 2001) ("[o]nce the insured makes a prima facie showing of coverage, 'the insurer then bears the burden of proving the applicability of policy exclusions and limitations in order to avoid an adverse judgment.'" (quoting *Gen. Accident Ins. Co. v. Am. Nat'l Fireproofing, Inc*., 770 A.2d 403, 416 (R.I. 1998))); *Koppers Co. v. Aetna Cas. & Sur. Co*., 98 F.3d 1440, 1446 (3d Cir. 1996) ("[T]he insurer bears the burden of proving the applicability of any exclusions or limitations on coverage, since disclaiming coverage on the basis of an exclusion is an affirmative defense").

Travelers seems to be arguing that Starr Davis has the burden of showing that a particular asbestos claimant's injury is not subject to the aggregate limits of liability in its policies. This is an odd proposition because it would require Starr Davis to prove two negative propositions for an asbestos claim not to be subject to an aggregate limit of liability, e.g., that an asbestos claim is not a "completed operations" claim, and that it also is not a "products" claim. However, the Travelers policies do not define a "premises-operations hazard" or an "operations hazard." They define the "products hazard" and the "completed operations hazard." Consequently, claims seeking the recovery of damages for bodily injury are "operations" claims unless they are shown to satisfy the definition of the "products hazard" or the "completed operations hazard" in the policies.

A party seeking to show that an asbestos claim is within the "products hazard" or the "completed operations hazard"—here, Travelers seeking to impose an aggregate limit of liability onto Starr Davis—naturally should have the burden of proving that the definition of the "products

hazard" or the "completed operations hazard" has been satisfied. Otherwise, Starr Davis would be in the unenviable position of "proving" negatives. The law generally does not impose this type of burden.

Consequently, as to any individual asbestos lawsuit, it is Travelers' burden to prove that the suit seeks the recovery of damages that are subject to the aggregate limits of liability, if any, applicable to the "completed operations hazard" or "products hazard" in its policies, where such aggregate limits have been proven by Travelers as to each specific policy or policy period. By definition, aggregate limits restrict coverage. Accordingly, Travelers bears the burden of demonstrating that aggregate limits in its policies, if any, apply to any particular asbestos suits.[5]

D. Number of Occurrences

The Travelers policies at issue provide coverage for legal liabilities resulting from an "occurrence." An "occurrence" is typically defined as an accident, including continuous or repeated exposure to substantially similar conditions, that results in bodily injury during the policy period. *See, e.g.*, *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 47–48, 717 S.E.2d 589, 592–93 (2011). The Court understands Starr Davis' motion to be seeking a multiple occurrence ruling only as respects "operations" claims, and not "completed operations" claims or "products" claims.

Nevertheless, Travelers asserts that all "operations" asbestos cases against Starr Davis must result from a single "occurrence" under its policies by citing to several asbestos *products* cases where the evidence against the product-manufacturer insureds were the same in every case—they manufactured and/or sold a defective product that resulted in injury or death. Opp. at 34–37. The single "cause" in each of those cases was the manufacture of a harmful product. *Id.* (citing *Liberty*

[5] Travelers again cites to the unpublished decision of a California trial court in support of its contrary view. Opp. at 31. The Court does not find this decision persuasive. *See also* n. 8, above.

Mut. Ins. Co. v. Treesdale, Inc., 418 F.3d 330 (3d Cir. 2005); *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254 (Del. 2010); *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, 597 F. Supp. 1515 (D.D.C. 1984); *Owners Ins. Co. v. Salmonsen*, 622 S.E.2d 525 (S.C. 2005) (all addressing products coverage rather than ongoing operations coverage)).

This is not the same thing as cases arising from Starr Davis' installation, disturbance and/or removal of asbestos-containing materials. Those cases do not involve liability simply for placing defective products into the "stream of commerce." They are cases arising from Starr Davis' alleged negligence and its failure to warn and protect bystanders of harm arising from its insulation contracting work. The evidence against Starr Davis is different in each one of these types of cases because the asbestos plaintiff's contact with Starr Davis is unique to his or her particular circumstances. The cause of injury in all of the Starr Davis insulation contracting cases is not uniform like it is in manufacturer asbestos products cases, and it is not uninterrupted. Travelers' reliance on insurance coverage decisions concerning manufacturers of asbestos products—not at issue here—is therefore misplaced.

Indeed, the asbestos insulation operations suits against Starr Davis are not repetitive products liability suits alleging exposure to asbestos from the same defective product. Instead, these suits allege that Starr Davis' operations exposed workers and other bystanders to asbestos. Courts have held that the type of asbestos operations claims against Starr Davis resulted from multiple 'occurrences' under the standard definition of 'occurrence' used during the time of the insurers' policies. See, e.g. *Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of Am.*, 419 F.3d 181, 184 (2d Cir. 2005) 184 ("[I]f claims arising from multiple occurrences triggered [operations] coverage, then Travelers was exposed to unlimited liability; each occurrence was subject to a $1 million limit on liability, but there was no cap on total liability. Regardless of how

much Travelers had paid for previous non-products occurrences under a single policy, each additional non-products occurrence under that policy subjected Travelers to liability anew.").

Travelers has not provided a persuasive argument as to why the Court should come to a different conclusion in connection with asbestos operations claims against Starr Davis. The Court will not do so.

E. Allocation of Losses to the Travelers' Policies

Exposure to asbestos results in progressive injury spanning many years, thereby triggering coverage under multiple policies. Exposure to asbestos during the conduct of operations that results in bodily injury during the policy period or periods during which the operations were conducted also presents an allocation issue.

The issue is somewhat theoretical in this case, as opposed to other cases, since Travelers alone issued forty years of uninterrupted liability insurance coverage to Starr Davis. Equally important is that Starr Davis is in a Receivership, with no assets other than its insurance policies and proceeds, which also affects any allocation of loss to the insured since Starr Davis cannot absorb any allocation of loss. Finally, the Court notes that the language of the policies typically requires the insurers to pay "all sums" —meaning everything—for which the insured is legally obligated to pay if a claimant sustains bodily injury during the period of the policy.

The Court remains quite mindful of the South Carolina Supreme Court's decision in *Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), and notes that it speaks generally to allocation of loss in a continuing construction property loss case, but does not address the particular circumstances presented by this Receivership, i.e., the applicability of operations coverage and the impracticability of allocation of loss to Starr Davis itself.

Therefore, the Court will apply the rule of *Crossmann Communities of N.C., Inc.*, except

in the case of operations claims where the policies in effect during the conduct of the operations will apply on an "all sums" basis. The Court also interprets *Crossmann* such that allocation of loss will not be made to policy years after 1986, when Starr Davis does not have any available or responsive coverage. Starr Davis lacks the ability to absorb loss allocations from Travelers, its liability insurer over a forty-year period. Allocation of loss from a judgment or settlement to an insured which cannot pay any portion of the judgment or settlement —especially when there is abundant insurance to pay for the loss but for a judicially-created allocation formula—is unproductive, as well as inequitable. The reason for a "time on the risk" allocation is to accomplish an "equitable" allocation. However, there is no "equity" in either driving an insured further into insolvency through a formulistic allocation method or by leaving a portion of a settlement or judgment unpaid. Nor is it "equitable" to apportion any loss to an insured in receivership when there is any responsive insurance.[6]

Finally, the Court notes one additional allocation aspect, which is unique to this case. As set forth, the Standard Fire policies apply to North Carolina occurrences for the policy years 1976 to May 1980 and there are Aetna policies for the same policy periods that apply to other occurrences. If a claimant alleges exposure or injury that invoke or implicate both the Standard

[6] Travelers notes that a federal court in North Carolina allegedly applied the *Crossman* rule in the context of a defunct insured receivership and therefore allocated proportionate responsibility to the defunct insured during the time in which asbestos liability was not insurable. Opp.. at 42 (citing *Zurich-Am. Ins. Co. v. Covil Corp*., No. 1:18-CV-932, 2020 WL 4483236, at *11 (M.D.N.C. Aug. 4, 2020). However, at issue in the *Covil* decision upon which Travelers relies was coverage for the judgment entered in the *Finch* lawsuit, which was indisputably a "products" case under the policies before the court. Here, Starr Davis seeks contract interpretation rulings applicable to asbestos "operations" suits that continue to be asserted against the company. The *Covil* decision thus is based on distinguishing factual circumstances that neither determine nor suggest an outcome here.

Fire policies and Aetna policies for the same policy period, Starr Davis can "stack" the limits of such policies. This declaration is a reasonable construction of these policies.

Conclusion

This Court Grants Receiver's Motion for Partial Summary Judgement and issues a declaratory judgment as above set forth.

AND IT IS SO ORDERED!

_____
Jean H. Toal, Chief Justice of the Supreme Court, Retired, acting as Circuit Court Judge

_____, 2021
Columbia, South Carolina

Richland Common Pleas

Case Caption:	Starr Davis Company Inc , plaintiff, et al vs Hartford Accident And Indemnity Company , defendant, et al
Case Number:	2019CP4006243
Type:	Order/Summary Judgment

So Ordered

Jean H. Toal