

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

ORDER ON DISCOVERY MOTIONS

RECEIVED
May 31 2022
SC Court of Appeals

This matter is before the Court on various discovery disputes between the Receivership for Covil Corporation (“Covil”) and Pennsylvania National Mutual Casualty Insurance Company (“Penn National”). There are numerous matters before the Court at this time, including Ellis & Winters LLP’s March 22, 2022 letter report on its inquiry into the existence and storage of certain historic policy documents pursuant to this Court’s November 5, 2021 Discovery Order;¹ the Receiver’s February 24, 2022 Motion to Compel and April 1, 2022 Supplemental Motion to Compel; the Receiver’s March 17, 2022 Motion to Challenge the Confidentiality of Certain Documents; Penn National’s December 22, 2021 Motions to Quash; and Penn National’s April 7, 2022 Motion to Seal.²

¹ The Court also considered the prior letter reports filed by Penn National in response to the Court’s November 5, 2021 Discovery Order.

² Also before the Court is the Receiver’s motion to compel Penn National in the non-Covil Receiverships. Specifically, the Receiver seeks insurance policies and policy-related documents from Penn National for 14 other entities for which Mr. Protopapas is currently the receiver. In response to the Receiver’s Subpoenas *Duces Tecum*, Penn National produced boiler plate objections and zero documents. *See* March 1, 2022 Motion to Compel filed against Penn National on behalf of the Receiver for Flame Refractories, Inc. and United Construction Co. of Rome, Inc., General Boiler Casing Company, Inc., Payne & Keller Company, Piedmont Insulation, Inc. and Reynolds Insulation, Pipe & Boiler Insulation, Inc. and Carolina Industrial Insulating Co., Presnell Insulation, Co., Standard Insulation Company of N.C.

BACKGROUND

Peter D. Protopapas was appointed by this Court in 2018 as the Receiver for Covil, a defunct South Carolina corporate entity. Covil engaged in the business of installing, removing and sometimes selling insulation made with asbestos materials in the State of South Carolina and in other places in the Southeast for many years between the 1960s and the 1990s. Covil has been sued in many asbestos lawsuits, and this Court was appointed to manage the asbestos docket at the direction of the Chief Justice of the Supreme Court of South Carolina. This Court therefore charged the Receiver with marshalling Covil's assets, including all occurrence-based liability insurance policies, that may respond to the asbestos suits pending against Covil.

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

This Court learned subsequently that, after letting its charter lapse from the State of South Carolina, Covil had been effectively managed by the attorneys for certain insurance companies that covered Covil.³ The strategic litigation approach adopted on Covil's behalf by other insurers was to not participate in discovery. Rather, it was to accept the pleadings on Covil's behalf and then engage in a course of conduct of waiting until the last moment and then settling the cases at a nuisance value. The other insurers appeared to want to be as minimally responsive as possible

Inc., Davis Mechanical Contractors, Inc., Great Barrier Insulation Co., HEFCO, Inc., J. & L. Insulation, Inc., and J.R. Deans Company, Inc., in Case Numbers 2020-CP-40-04475, 2021-CP-40-03484, 2020-CP-40-01821, 2020-CP-40-05526, 2021-CP-40-01364, and 2020-CP-40-01952. Penn National takes the position that it cannot reasonably search its historic policies contained on microfiche cards unless the Receiver provides a specific policy number.

³ Penn National was not providing a defense in the underlying asbestos cases for Covil at that time.

to avoid discovery of the occurrence-based general liability policies covering Covil. When this Court learned of certain Covil insurers' conduct, it appointed a receiver to manage Covil's assets. And the only assets Covil had at that time, and has to this day, are the coverage provided by the "legacy" occurrence-based general liability insurance policies covering Covil that were issued during the time it was an active asbestos insulation company.⁴

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

Penn National is now the company with which the Receiver is seeking information and documents related to the "legacy" occurrence-based liability policies it issued covering Covil as a primary or additional insured. Penn National first came to this Court's attention in connection with the *Finch* case, which was an asbestos case tried in federal court in North Carolina resulting in a \$32.7 million judgment against Covil. Specifically, certain general liability insurance policies issued by Penn National that covered Covil were located by Penn National in response to an asbestos claimant subpoena in the *Finch* case that provided specific policy numbers for certain policies issued by Penn National to Covil. After his appointment, the Receiver subsequently requested insurance policy information from Penn National as well.

⁴ In PCS Nitrogen, Inc. v. Continental Casualty Company, et al., the SC Supreme Court adopted "the post-loss exception and [held] insurer consent is not required for an assignment of liability insurance coverage rights made after a loss." No. 28093, 2022 WL 1101704, at *4 (S.C. April 13, 2022).

Throughout the Covil litigation, Penn National has taken the position that it is unable to access any possible historic occurrence-based liability coverage, from its Iron Mountain, Inc. storage facility⁵ or any other storage facility, for Covil or any other policyholder it may have insured in the past unless it is provided with a policy number. It was then developed that Penn National has stored a significant amount of historic policy-related material on microfiche cards. But, again, Penn National has repeatedly taken the position that given that its historic policy related documents are stored on microfiche by policy number, and due to the fact that the material is so voluminous, it cannot search its historic policy related documents on microfiche unless it is given a policy number.

Covil diligently pursued discovery of all insurance policies issued by Penn National that cover Covil, in any way, through written requests for information as well as multiple depositions. This Court has now gone through several hearings with Penn National and the Receiver on motions to compel relating to the ability to locate policies in Penn National's historic repositories to discover whether any of them relate to Covil or to other receiverships that have been established in this state, of which Mr. Protopapas is the Receiver. No material has been forthcoming from Penn National's historic or "legacy" microfiche archives unless it was provided with a policy number. That is still where the Court finds itself today.

It is axiomatic that insurers, such as Penn National, have a duty to cooperate with the Receiver in the search for historic liability policies by complying with their discovery obligations. Failure to do so increases expenses and wastes this Court's time. This Court fully expects that an insurance company served with discovery requests from a receiver in this state, seeking the

⁵ Iron Mountain Inc. is a national document management firm which provides storage and information management services, including information management, digital transformation, secure storage, secure destruction, data centers, cloud services, and art storage and logistics. It is highly likely this firm could provide services that would digitize and make searchable all policies and documents that Penn National stores with it.

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

Penn National has totally and completely failed to meet this most basic discovery obligation here. Penn National's discovery conduct has created considerable burdens for Covil and this Court. The Receiver has diligently sought discovery of Covil insurance policies and related documentation from Penn National for several years. However, Penn National refused to review its own microfiche and paper policy related historical documents unless it was provided with a policy number for the specific policy requested. Covil was therefore forced to file numerous motions to compel. This Court conducted multiple hearings on Penn National's discovery intransigence and issued multiple discovery orders compelling Penn National to meaningfully participate in discovery. A brief summary follows:

- At the January 25, 2021 discovery hearing, the Court ordered the Receiver for Covil to develop a specific inquiry and issue a new subpoena, if necessary, providing a list of job sites and owners to Penn National and ordered Penn National to conduct the searches and to respond with its findings promptly.
- On April 22, 2021, Covil filed a second motion to compel when Penn National refused to comply with its discovery obligations. Following a hearing, the Court granted the motion, finding that "Penn National has a duty to fully, completely, and thoroughly search both its electronic records and its hard copy paper records for the information and documents sought by the Receiver." July 1, 2021 Order at 6. The Court ordered Penn National to "thoroughly search its paper records using the list

of contractors and facilities provided by the Receiver in connection with [Covil's] February 8, 2021, subpoena to Penn National." *Id.*

- On August 20, 2021 and September 8, 2021, Covil filed additional motions to compel in which Covil informed the Court that, among other things, Penn National, despite the Court's previous orders, continued to take the position that it could only search its historic policies contained on microfiche cards by policy number. On October 28, 2021, the Court held a motions hearing, and on November 5, 2021, the Court granted Covil's motions to compel, ordering that Covil's defense counsel in underlying asbestos cases, Ellis & Winters LLP, use its professional judgment to develop and implement an effective scope of document review to identify any additional Penn National policies that may provide coverage for Covil as either a primary or additional insured and make "suggestions for meeting Covil's needs to identify responsive coverage" while "not wasting Penn National's resources".
- Most recently, in light of Penn National's failure to issue a litigation hold to prevent the routine or automatic destruction of documents related to the Covil litigation, on February 11, 2022 the Court granted Covil's motion for a protective order, prohibiting Penn National from destroying its historic-policy related documents until the Court holds otherwise.

Despite this Court's prior orders, as of November 5, 2021, Penn National had not performed a complete manual search of its historic insurance policies contained on microfiche cards. Nor had it processed the microfiche cards so that the information could be searched electronically. It had not even sought estimates to do such work from vendors with experience imaging microfiche. This information is critical and discoverable not only in this coverage action, but also in the numerous underlying asbestos lawsuits in which Covil is a defendant. Covil has been sued in asbestos liability cases in South Carolina state courts and federal courts, and Covil needs its insurance policies to respond to routine discovery.⁶

⁶ See Rule 26(b)(2), SCRCP ("A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfying the judgment."); Rule 33(b)(4), SCRCP standard interrogatory (4) ("Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of policies involved and the amount or amounts of liability coverage provided in each policy); see also Fed. R. Civ. P. 26(a)(1)(A)(iv) ("a party must . . . provide to the other parties . . . for inspection and copying . . . any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment").

Ellis & Winters LLP was appointed by Covil's insurers to defend Covil in the underlying asbestos cases. Ellis & Winters' defense costs have been funded by Covil's insurers, including Penn National. This Court therefore ordered Penn National to open its repository of insurance policies and to facilitate a review performed by Covil's insurer-appointed defense counsel, Ellis & Winters. The Court directed the firm to perform this review using its own sound professional judgment and to report back to the Court with suggestions for meeting Covil's needs to identify responsive coverage while not wasting Penn National's resources. This Court entrusted Ellis & Winters with responsibility for this search because the insurance information is important and discoverable in its work as Covil's underlying asbestos defense counsel.

Approximately 120 days later, Ellis & Winters filed its March 22, 2022 report with this Court ("the Report"). After years of assurances from Penn National that it could not locate historic policies without a policy number, the Report provided an array of options for imaging and review of Penn National's policies, even in the absence of a policy number. As is relevant here, the "third option" involves imaging commercial line policy microfiche cards, eliminating certain cards solely by policy prefix. Specifically, Ellis & Winters selects a subset of commercial line microfiche cards to image by eliminating cards bearing prefixes that correspond to certain non-commercial liability policy types. The Report also explained that, after one day of in-person searching within microfiche cards at Penn National's headquarters, Ellis & Winters located three newly discovered policies covering Covil that Penn National had not produced to Covil, which all spanned the relevant timeframe of 1984 to 1986 and consisted of one inland marine policy, one boiler machinery policy, and one auto policy. Penn National's failure to independently identify and produce these additional insurance policies to Covil, which were requested years ago, is cause for great concern not only here but also in other Receivership litigation involving Penn National.

This Court has now lost all confidence in Penn National's willingness and ability to independently participate in discovery. The Court finds that Penn National's conduct with respect to its searches for historic Covil insurance policies (as well as non-Covil Receivership policies) amounts to a total and complete refusal to comply with its discovery obligations. It could well have done exactly what Ellis & Winters has proposed here. Penn National could have selected a vendor, processed the information on its microfiche cards, and conducted a review. It did not. Instead, Penn National took the defiant stance that it could not search for historic policies on its microfiche cards without being provided a policy number. That position turns out not to be so. This Court is left with no choice but to allow the Receiver to examine the records.

RULINGS AND ORDERS

1. Ellis & Winters' Report and Recommendations

A. Imaging and Review of Penn National's Microfiche Cards

After careful consideration, the Court is persuaded that the third option recommended by Ellis & Winters in its March 22 report will meet Covil's needs to identify responsive coverage while conserving Penn National's resources.

The Court finds that Ellis & Winters has effectively narrowed the universe of potentially responsive documents down to a set of microfiche cards containing historic insurance policies and policy-related information issued prior to 1992 and maintained by Penn National. The Court finds that Ellis & Winters' third option provides a reasonable and intentional process for further reducing that universe by policy number prefix to identify types of policies that are not relevant and can be excluded from scanning.

The Court therefore adopts the “third option” recommended by Ellis & Winters and DIRECTS Ellis & Winters to use its professional judgment⁷ to develop a methodology to select a subset of commercial line microfiche cards to image by eliminating certain cards bearing prefixes that correspond to certain non-commercial liability policy types.⁸ The methodology will be shared with both the Receiver and Penn National. However, Ellis & Winters is not required to receive the approval of either the Receiver or Penn National in developing its methodology.

The Court also DIRECTS Ellis & Winters to use its professional judgment to solicit bids from two or more vendors with experience imaging microfiche, to select an appropriate vendor (the “selected vendor”), to award the bid, and to supervise the selected vendor’s imaging of the microfiche cards into a format that is in a searchable database. Ellis & Winters will advise the Court and the parties as to the identity of the selected vendor and the terms of the selection.

Once the universe of records to image is determined by Ellis & Winters, images are scanned by the selected vendor, and information is available in a searchable database, the Court DIRECTS Ellis & Winters to provide Penn National and the Receiver with full access, on a rolling basis, to the database to conduct document reviews in order to search for responsive information for the Covil Receivership as well as the other Receiverships for which Peter D. Protopapas has been appointed Receiver.

To be clear, Ellis & Winters is not charged with reviewing the policies in the final database for responsiveness to the Receiver’s discovery requests. Ellis & Winters and its selected vendor are the vehicles to get the policies into a database where the information can be reviewed for responsiveness by the Receiver and his outside counsel. The Receiver and his outside counsel

⁷ Both the Receiver for Covil and Penn National have expressed confidence in the professional judgment of Ellis & Winters. *See* November 5, 2021 Discovery Order at 2.

⁸ The non-commercial liability policy types include business owner, fidelity bond, surety bond, and personal umbrella policies.

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

The Receiver will be entitled to review the policy records uploaded to the database to identify potentially responsive documents. The Receiver will be entitled to examine each and every policy to understand whether it is a policy that in any way, shape, or form covers Covil's asbestos responsibilities and liabilities. Because of Penn National's intransigence, the Court will not limit the Receiver's access to any of the information in the microfiche database. Ellis & Winters, however, should continue to make itself available to assist the Receiver search the records for the information that is needed to provide Covil with knowledge about its assets, including information concerning Penn National's policy prefixes and the identification of prefixes with policy lines of business identified in Ellis & Winters' report.

This Court DIRECTS Ellis & Winters to initiate and facilitate the above-referenced process immediately and to report back to the Court, on an interim basis, regarding progress made and any impediments to its progress. Time is of the essence.

Penn National is ORDERED to make all of its microfiche cards immediately available for review and imaging by Ellis & Winters and its selected vendor.

Penn National is also ORDERED to produce immediately to Covil all code keys for its policy prefixes, including but not limited to the documentation identifying prefixes with policy lines of business identified in Ellis & Winters' report.⁹

⁹ Ellis & Winters explained to the Court at the April 11, 2022 hearing that it learned during its inquiry that Penn National policy numbers are constructed typically to have a numeric or an alpha prefix that indicates the type of policy. The Receiver is entitled to all information Penn National provided to Ellis & Winters regarding its policy prefixes. *See, e.g.*, Ellis & Winters' Report at 2.

Penn National is further ORDERED to produce immediately to Covil all information that was disclosed to Ellis & Winters and used as a basis for identifying policy numbers for the three newly discovered Covil insurance policies located by Ellis & Winters on March 17, 2022. *See* Report at 3. This Court is deeply troubled that Penn National had access to these policy numbers in its underwriting files but did not disclose the existence of this information to the Court or bother to produce the three policies to Covil for several years.

Finally, Penn National is ORDERED to produce immediately all underwriting documentation in its possession, custody, or control for all the Receiverships for which Mr. Protopapas is the court-appointed Receiver.

B. Ellis & Winters Fees – Work to Date

Ellis & Winters reported at the April 11, 2022 hearing that all of its invoices for work to date, totaling approximately \$67,000, have been submitted to Penn National and/or Penn National's outside counsel at Goldberg Segalla LLP for payment but that those invoices have not been paid.

The Court finds that the fees and costs incurred by Ellis & Winters to date are reasonable for the tasks that were performed.

The Court hereby ORDERS Penn National to pay all outstanding invoices submitted by Ellis & Winters to Penn National and/or Penn National's outside counsel at Goldberg Segalla LLP in connection with this Court's November 5, 2021 Order within ten business days from the date of this Order.

C. Ellis & Winters and Selected Vendor Fees – Work Going Forward

This Court DIRECTS Ellis & Winters to set up a system of periodic billing to Penn National through Penn National's outside counsel at Goldberg Segalla for its work and its selected vendor's work in accordance with this Order.

This Court ORDERS that Penn National will pay all reasonable fees and costs invoiced by Ellis & Winters and its selected vendor for the work undertaken in accordance with this Order within thirty calendar days of receipt of the invoice.

This Court finds that the reasonable fees and costs that will be paid by Penn National are proportional to the needs of this case as well as the numerous other Receiverships for which this Court has appointed Mr. Protopapas. The Court is also in agreement with Ellis & Winters' well-reasoned evaluation at the April 11 hearing that its "third option" proposal constitutes "fairly typical discovery" in the context of the microfiche cards that are stored at Penn National.

This Court DIRECTS Ellis & Winters to advise the Receiver and the Court, on a periodic basis, of the expenses incurred for the work performed in accordance with this Order.

D. Confidentiality

This Court ORDERS Ellis & Winters and its selected vendor to keep confidential all insurance policies and policy-related documents processed from the microfiche cards and uploaded to the database.

This Court ORDERS the Receiver and his outside counsel to keep confidential all insurance policy or policy-related documents processed from the microfiche cards and uploaded to the database, and information obtained from those documents, that provide coverage to Covil or any other entities under Receiverships for which Mr. Protopapas is the court-appointed Receiver, except to the extent that such policies or information need to be disclosed in connection with mediation or any other court-supervised activity, including litigation.

This Court further ORDERS the Receiver to keep confidential all non-Covil and non- Receivership policies and policy related documents processed from the microfiche cards and uploaded to the database.

2. **Covil's Motion to Challenge Confidentiality and Penn National's Motion to Seal**

Covil moves to lift the confidential designation on the Document Retention Policies and Litigation Hold Procedure that Penn National produced to the Receiver on March 9, 2022 as "confidential material." This Court GRANTS the motion.

Penn National has not demonstrated that the documents contain propriety or commercially sensitive information worthy of protection under South Carolina law. The Court is also persuaded that Penn National has waived its argument that its document retention policies are confidential given that it made its retention document publicly available in other coverage litigation.¹⁰ Penn National's arguments to the contrary are unpersuasive and border on being specious.

Penn National is therefore ORDERED to remove the confidential designation from its Document Retention Policies and Litigation Hold Procedures and to produce all of them to Covil within five business days.

Penn National also filed a Motion to Seal Exhibit 12 to its opposition to Covil's Motion and Supplemental Motion to Compel. Covil has no objection to the motion. The motion is GRANTED, and Exhibit 12, which is a spreadsheet that purportedly shows information regarding non-workers compensation insurance policies issued by Penn National, is SEALED.

3. **Penn National's Motion to Quash Deposition(s) and Covil's Motions to Compel**

¹⁰ See, e.g., *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Tate Andale, Inc.*, No. 1:17-cv-00670 (D. Md.), ECF No. 50-32.

During the January 11, 2022 motions hearing, this Court noted that it would hold Penn National's motion to quash Covil's Rule 30(b)(6) deposition in abeyance until the Receiver has had an opportunity to develop the record more thoroughly through written discovery.

On January 18, the Receiver served requests for admission, requests for production, and interrogatories on Penn National. On February 17, Penn National produced its written responses to the Receiver's discovery requests and, on March 9, it produced certain documents.

Covil argues that Penn National failed to produce all responsive documents and failed to disclose all relevant information in response to its discovery requests. Covil also argues that Penn National, in certain instances, provided evasive answers. Covil therefore moved for an order compelling Penn National to provide revised and complete discovery responses.

This Court DENIES Penn National's motion to quash and DIRECTS Covil to serve a Rule 30(b)(6) deposition notice on Penn National for a deposition to take place as soon as practicable based on the date of this Order. With respect to at least one of the topics at the Rule 30(b)(6) deposition, this Court further ORDERS Penn National to provide a corporate representative to testify as to why Penn National uses the terminal digit filing system to store its historic occurrence-based liability policies.¹¹

Finally, the Court will HOLD IN ABEYANCE Covil's Motion to Compel and Supplemental Motion to Compel until the Receiver has had an opportunity to conduct the Rule 30(b)(6) deposition. If, after the deposition, the parties still cannot resolve any outstanding disputes, then they are ordered to report back to this Court to identify any remaining issues.

¹¹ This Court learned from Ellis & Winters during the April 11 hearing that Penn National used a terminal digit system to file its historic insurance policies and policy-related documents. That is, Penn National used approximately eight- or nine-digit policy numbers and filed the policies not by the numbers on the left side but by the numbers on the right side. Ellis & Winters' IT professional, Brian Flatley, could not speak to why a corporate entity, such as Penn National, would utilize such a system. However, this Court observes that such a system appears to make it much harder to find historic insurance policies when requested by their insureds.

CONCLUSION

This Court has serious concerns that Penn National's systemic failure to search for and produce insurance policy information to its insured in this case, unless it is given a specific policy number, may impact other South Carolina consumers who no longer have access to their policy numbers as well. The Court therefore DIRECTS the Receiver to transmit a copy of this order to the South Carolina Department of Insurance, Office of Consumer Services, for its review and information, at the following address: P.O. Box 100105, Columbia, South Carolina 29202-3105.

This Order applies in this case as well as in any other matters in which Mr. Protopapas is appointed the Receiver.

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Richland Common Pleas

Case Caption: Covil Corporation By And Through Its Receiver , plaintiff, et al vs
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al
Case Number: 2020CP4002098
Type: Order/Other

So Ordered

Jean H. Toal