

IN THE SUPREME COURT OF MISSOURI

MSEJ, L.L.C.,)
)
 Appellant,)
)
 v.) No. SC89663
)
 TRANSIT CASUALTY COMPANY)
 IN RECEIVERSHIP,)
)
 Respondent.)

Appeal from the Cole County Circuit Court
Nineteenth Judicial Circuit
Court-Appointed Referee Joseph E. Maxwell

BRIEF OF *AMICUS CURIAE*
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TABLE OF CONTENTS

	Page
Table of Authorities	5
Jurisdictional Statement	10
Statement of Interest	11
Statement of Facts	14
A. Missouri Receivership Statutes	14
B. The Transit Casualty Receivership	15
C. Claim Determinations by the Transit Special Deputy Receiver	16
D. Claim Adjudications by the Circuit Court of Cole County	17
E. Administrative Order No. 49	18
F. The MSEJ Claim Adjudication	20
G. The Missouri Court of Appeals Decision	21
Points Relied On	24
I – The court-appointed Referee erred in denying appellant MSEJ’s receivership claim based on Administrative Order No. 49 (“AO 49”) because AO 49, by its express terms, does not create any limitation or bar to evidence in the adjudication of disputed claims by the circuit court or court-appointed referee in that AO 49 contains no statement or suggestion that evidence will be	24

barred at the circuit court level.

II – The court-appointed Referee erred in denying appellant MSEJ’s 25
receivership claim based on Administrative Order No. 49
because AO 49 does not create a limitation or bar to evidence in
the adjudication of disputed claims by the circuit court or court-
appointed referee in that the Transit Rules expressly permit the
submission of additional evidence during the *de novo*
evidentiary adjudication before the circuit court or court-
appointed referee.

III - The court-appointed Referee erred in denying appellant MSEJ’s 26
receivership claim based on Administrative Order No. 49
because AO 49 does not create a limitation or bar to evidence in
the adjudication of disputed claims by the circuit court or court-
appointed referee in that interpretation of AO 49 as a bar to
evidence would create an invalid order in violation of
claimants’ rights under the Missouri Constitution and United
States Constitution.

Argument 27

Point I 27

1. Standard of Review 27

2.	AO 49 contains no statement or suggestion that evidence will be barred at the circuit court level, and therefore does not create any bar to evidence at the circuit court level.	28
3.	Transit's arguments that AO 49 operates as an evidentiary bar at the circuit court level contradict the plain language of AO 49.	31
a.	AO 49 does not necessarily limit the evidence that may be presented to the circuit court.	31
b.	This Court need not defer to the court-appointed referee's erroneous interpretation of AO 49.	32
c.	AO 49, as interpreted, is not unfair to claimants or to Transit.	33
d.	AO 49, as interpreted, will not require the court to act as claims adjuster nor will it open claim floodgates.	34
	Point II	36
1.	Standard of Review	36
2.	The Transit Rules expressly permit the submission of additional evidence to the court or court-appointed referee.	36

3.	Transit’s interpretation ignores Rule 75.	40
a.	Transit ignores the plain language of Rule 75.17(a).	40
b.	AO 49 does not control as last in time.	41
c.	The changes between the Second Amended Transit Rules and Third Amended Transit Rules do not support Transit’s interpretation of AO 49.	41
4.	Limitation of evidence at the circuit court level is not supported by the Missouri case law cited by the referee.	43
	Point III	45
1.	Standard of Review	45
2.	Interpretation of AO 49 as a bar to evidence would create an invalid order in violation of claimants’ constitutional rights.	45
	Conclusion	49
	Certificate of Compliance	50
	Certificate of Service	51
	Appendix	bound and filed separately

TABLE OF AUTHORITIES

Cases

<i>Angoff v. Holland-America Insurance Co. Trust</i> , 937 S.W.2d 213 (Mo. App. W.D. 1996)	43
<i>Dabin v. Director of Revenue</i> , 9 S.W.3d 610 (Mo. 2000)	47
<i>Dunn v. Security Financial Advisors, Inc.</i> , 151 S.W.3d 140 (Mo. App. W.D. 2004)	28
<i>Ennis v. McLaggan</i> , 608 S.W.2d 557 (Mo. App. S.D. 1980)	29
<i>Estate of Rogers v. Battista</i> , 125 S.W.3d 334 (Mo. App. E.D. 2004)	27
<i>Furlong Cos. v. City of Kansas City</i> , 189 S.W.3d 157 (Mo. 2006)	31
<i>Giessow Restaurants, Inc. v. Richmond Restaurants, Inc.</i> , 232 S.W.3d 576 (Mo. App. E.D. 2007)	31
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970)	46
<i>In re S--M--W--</i> , 485 S.W.2d 158 (Mo. App. 1972)	47
<i>In re Transit Casualty Co.</i> , 900 S.W.2d 671 (Mo. App. W.D. 1995)	32, 48
<i>Jamison v. State Div. of Family Services</i> , 218 S.W.3d 399 (Mo. 2007)	39, 46

<i>Liberte Capital Group, LLC v. Capwill</i> , 421 F.3d 377 (6th Cir. 2005)	46
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	46
<i>Mikel v. Pott Industries/Saint Louis Ship</i> , 910 S.W.2d 323 (Mo. App. E.D. 1995)	46
<i>Missourians for Tax Justice Educ. Project v. Holden</i> , 959 S.W.2d 100 (Mo. 1997)	47
<i>Murphy v. Carron</i> , 536 S.W.2d 30 (Mo. 1976)	27
<i>Painter v. Missouri Com'n on Human Rights</i> , 251 S.W.3d 408 (Mo. App. W.D. 2008)	30
<i>Papachristou v. City of Jacksonville</i> , 405 U.S. 156 (1972)	48
<i>Schneider v. U.S.</i> , 27 F.3d 1327 (8th Cir. 1994)	46
<i>Sonoma Management Co., Inc. v. Boessen</i> , 70 S.W.3d 475 (Mo. App. W.D. 2002)	39
<i>State ex rel. Chaney v. Brown</i> , 673 S.W.2d 510 (Mo. App. S.D. 1984)	36
<i>State ex rel. Public Counsel v. Public Service Com'n</i> , 210 S.W.3d 344 (Mo. App. W.D. 2006)	39
<i>State ex rel. Rice v. Bishop</i> , 858 S.W.2d 732 (Mo. App. W.D. 1993)	39

<i>State ex rel. School District of Kansas City v. Williamson,</i> 141 S.W.3d 418 (Mo. App. W.D. 2004)	30
<i>State ex rel. Spratley v. Maries County,</i> 98 S.W.2d 623 (Mo. 1936)	29
<i>United States v. Harriss,</i> 347 U.S. 612 (1954)	48
<i>Viacom, Inc. v. Transit Casualty Co.,</i> 138 S.W.3d 723 (Mo. 2004)	27
<i>Yakus v. U. S.,</i> 321 U.S. 414 (1944)	46
Constitution, Statutes and Regulations	
U.S. Constitution, Amendment XIV, section 1	45
Missouri Constitution, Article I, section 10	45
Missouri Constitution, Article V, section 3	10
Missouri Constitution, Article V, section 10	10
MO. REV. STAT. § 375.650 (2000)	14
MO. REV. STAT. § 375.660 (2000)	14
MO. REV. STAT. § 375.670 (2000)	14-17
MO. REV. STAT. § 375.954 (2000)	14
MO. REV. STAT. § 375.1174 (2000)	14
MO. REV. STAT. § 375.1175 (2000)	14
MO. REV. STAT. § 375.1176 (2000)	14

MO. REV. STAT. § 375.1206 (2000)	14
MO. REV. STAT. § 375.1212 (2000)	15, 35
MO. REV. STAT. § 375.1214 (2000)	17, 18, 21
MO. REV. STAT. § 375.1218 (2000)	15, 35
MO. REV. STAT. § 375.1220 (2000)	15, 35
MO. REV. STAT. § 375.1224 (2000)	15, 35
MO. REV. STAT. § 375.1225 (2000)	15, 35
MO. REV. STAT. § 477.070 (2000)	10

Other Authorities

Third Amended Rule 75 (Transit Rules - excerpts)

Third Amended Rule 75.6	16
Third Amended Rule 75.7	16, 17, 37, 38, 42, 43
Third Amended Rule 75.13	17
Third Amended Rule 75.17	18, 37, 38, 40, 41, 42
Third Amended Rule 75.20	18
Third Amended Rule 75.22	18, 38
Third Amended Rule 75.23	18
Third Amended Rule 75.24	18, 21
Third Amended Rule 75.32	18

Second Amended Rule 75 (Transit Rules - excerpts)

Second Amended Rule 75.7	42, 43
Second Amended Rule 75.14	42
Second Amended Rule 75.15	42

JURISDICTIONAL STATEMENT

This is an appeal of a *Referee's Findings of Fact, Conclusions of Law and Recommendations* entered by a court-appointed Referee in the Circuit Court of Cole County, Missouri in favor of respondent Transit Casualty Company in Receivership (hereinafter "Transit") relating to certain claims under insurance policies filed in the receivership by appellant MSEJ, L.L.C. (hereinafter "MSEJ").

Appellant MSEJ filed a notice of appeal to the Missouri Court of Appeals, Western District. Jurisdiction was vested in the Court of Appeals by Article V section 3, of the Missouri Constitution, as amended, and section 477.070, RSMo,¹ because none of the issues raised on appeal are within the exclusive jurisdiction of the Missouri Supreme Court, and the Circuit Court of Cole County is within the territorial jurisdiction of the Missouri Court of Appeals, Western District.

On July 1, 2008, the Court of Appeals issued an opinion in this appeal, case no. WD68945. Upon application of respondent Transit, this Court entered its order granting transfer on December 16, 2008. This Court has jurisdiction pursuant to Article V, section 10, of the Missouri Constitution to consider cases on transfer from the Missouri Court of Appeals.

¹ All references herein are to Missouri Revised Statutes (2000).

STATEMENT OF INTEREST

This appeal concerns interpretation of a certain Administrative Order No. 49 (“AO 49”) entered in the Transit Receivership by the Circuit Court of Cole County, Missouri (the “Receivership Court”) in October 2000. Respondent Transit seeks to use AO 49 as a defense to the claim of appellant MSEJ. *Amicus curiae* PricewaterhouseCoopers LLP (“PwC” or “*Amicus PwC*”) has its own claim pending in the Transit Receivership in which Transit has asserted AO 49 as its sole defense to PwC’s claim. PwC therefore has a strong interest in this Court’s decision regarding the interpretation of AO 49.

The final decision appealed herein is the Referee’s Findings of Fact, Conclusions of Law and Recommendations, dated July 2, 2007 (“FOF/COL”), in which a court-appointed Referee denied MSEJ’s claim based, in part, on AO 49. Specifically, the Referee agreed with Transit that AO 49 restricts the evidence that may be presented during the *de novo* evidentiary hearing before the circuit court in a disputed claim proceeding to only that evidence which had been provided to the Transit Special Deputy Receiver (“SDR”) on or before March 15, 2001.

On appeal by MSEJ, the Missouri Court of Appeals, Western District, case no. WD68945, reversed the Referee’s denial. In its Opinion, dated July 1, 2008 (“Opinion”), the Court of Appeals held that AO 49 did not operate as a bar to the submission of evidence during the *de novo* evidentiary hearing permitted at the

circuit court level following a unilateral claim determination by Transit. The Court further held that AO 49 applied only to the SDR and was not applicable at the circuit court level.

PwC has a substantial interest in the presentation of a comprehensive analysis and discussion of AO 49 to this Court. PwC's primary concern as *amicus curiae* is that the proper balance (as contemplated by the applicable statutes, rules and law governing the Transit Receivership) be maintained between (1) the interests of Transit in the efficient management and expeditious closure of its estate; and (2) the interests of claimants in having claims determined after a full and fair hearing on the evidence. For the reasons set forth herein, PwC asserts that the Court of Appeals correctly determined that the Referee erred by relying on AO 49 as a bar to the introduction of evidence to the circuit court at a *de novo* evidentiary hearing on a disputed claim. PwC respectfully submits that the application of an improper evidence bar at the circuit court level threatens to deprive policyholders of valuable statutorily and constitutionally protected rights.

There exist significant factual differences between PwC's and MSEJ's claims, and PwC does not take a position on the complex factual issues presented by this appeal. Notably, unlike the MSEJ claim and others that were the apparent intended focus of AO 49, PwC's claim is very different from the classic mass toxic tort, "long-tail" or IBNR (incurred but not reported) claims presented by MSEJ and

possibly other remaining claimants in the Transit Receivership. One principal difference is that PwC's claim is a single, known, existing claim.

Consequently, the record on appeal may not allow the Court to address issues pertinent to the proper interpretation and application of AO 49 to PwC's unique factual circumstances. Therefore, PwC respectfully submits that any decision issued by this Court relating to AO 49 be limited to the specific facts presented by the MSEJ claim. PwC nonetheless agrees with the Missouri Court of Appeals that AO 49 does not operate to limit or bar evidence during disputed claim proceedings in the Transit Receivership at the circuit court level.

STATEMENT OF FACTS

A. Missouri Receivership Statutes

The Missouri receivership statutes, codified at sections 375.570-375.750, 375.950-375.990, 375.1150-135.1246, RSMo, establish a framework for liquidating insolvent insurance companies. Under current Missouri law, an insurance company is declared insolvent and placed under state control after it has been found “in such condition that further transaction of business would be hazardous, financially or otherwise, to its policyholders, its creditors or the public,” MO. REV. STAT. § 375.1175, or if “further attempts to rehabilitate . . . would substantially increase the risk of loss to creditors, policyholders or the public.” MO. REV. STAT. § 375.1174.

Once an insurance company has been declared insolvent, the state director of insurance, under the supervision of the receivership court, takes possession of the insurance company’s assets to “hold and dispose” of such assets “for the use and benefit of the creditors and policyholders.” MO. REV. STAT. §§ 375.650(1), 375.660, 375.954(1) & 375.1176(1).

In addition to collecting assets, a primary task of the receivership is the fair and expeditious administration of policyholders’ claims. *See* Mo. Rev. Stat. §§ 375.670(1), 375.1176 & 375.1206. The receiver, acting under court supervision, reviews all duly filed claims and may “make such further investigation as . . .

deem[ed] necessary” in order to “compound, compromise or in any other manner negotiate the amount for which claims will be allowed.” MO. REV. STAT. § 375.1220(1). To ensure that the liquidation not be unduly delayed, specific statutory provisions also allow claims based upon estimates and probable outcomes, subject to direct supervision and oversight by the circuit court. *See* MO. REV. STAT. §§ 375.1212, .1218, .1220, .1224 & .1225.

The Missouri receivership statutes contemplate a two-tiered structure for the administration and adjudication of policyholder's claims. The first phase involves a “determination” by the receiver (or “SDR”) for allowance or disallowance of the claim in whole or in part. MO. REV. STAT. § 375.670.2. Following a unilateral claim determination by the receiver or SDR, an unsatisfied claimant may file objections and request further review by the SDR; if the dispute remains unresolved, the claim is referred to the court or court-appointed referee and placed on the disputed claims docket for an evidentiary adjudication. *See* MO. REV. STAT. §§ 375.670(2) & 375.1214.

B. The Transit Casualty Receivership

On December 3, 1985, the Circuit Court of Cole County, Missouri, Judge Byron L. Kinder, entered an *Amended Order of Liquidation and Appointment of Permanent Receiver*, which declared Transit Casualty Company to be insolvent,

appointed the Director of the Missouri Division of Insurance as permanent receiver and appointed a Special Deputy Receiver. (A1-A3).

In January 2000, the Circuit Court of Cole County, Missouri adopted its Third Amended Rule 75 entitled *Rules Governing the Practice and Procedure Regarding the Transit Casualty Company Receivership*. These Third Amended Rules replaced the Second Amended version that had been revised in 1992. Copies of the particular rules discussed in the present brief are contained in the Appendix filed herewith (A4-A41).

C. Claim Determinations by the Transit Special Deputy Receiver

Initial claim determinations by the Transit SDR are governed by Missouri statute generally and, more specifically, by Cole County Local Rule 75, referred to herein as the “Transit Rules.” Under the authority of section 375.670.1, RSMo, permitting the court to establish claim procedures, Transit Rule 75.6 proscribes, *inter alia*, the use of a claim form and references the claim bar date of December 31, 1987. (A7).

Once a claim is filed, section 375.670.2, RSMo, directs the SDR to review the claim and to either consent to or contest the claim. Transit Rule 75.7(a) more fully describes the process of the SDR’s claim consideration, and Rule 75.7(b) directs the SDR to make a claim determination, either allowing or disallowing the claim. (A8-A10). Rule 75.7(c) further directs the SDR to issue a Notice of

Determination on the claim. (A10). The SDR's claim determination is a unilateral decision of the SDR, and the claimant is afforded no contested hearing on the record or other trial-type proceeding.

D. Claim Adjudications by the Circuit Court of Cole County

If a claimant disagrees with the SDR's determination, the claim is placed on the circuit court's disputed claims docket, and the claimant is entitled to a hearing and judicial process under the Missouri receivership statutes and the Transit Rules. Section 375.670.2, RSMo, states that a claim denied by the SDR is subject to section 375.1214, RSMo, which permits the claimant to file objections to the denial within sixty (60) days in order to seek further review. Transit Rule 75.7(d) contains a similar provision, referring to the claimant's objections as its "Request for Review." (A10-A11). Under 375.1214, RSMo, and Transit Rule 75.7(f), if the SDR does not change its determination, the matter is referred to the circuit court or its court-appointed referee for hearing and adjudication. (A11). This is referred to in the Transit Rules as a "Disputed Claim" or "Disputed Claim proceeding."

Section 375.1214.2, RSMo, states that the "[h]earing before court-appointed referees shall be conducted in an informal manner and the formal rules of evidence shall not apply." The Transit Rules also set forth detailed provisions relating to claim adjudication (the "Disputed Claim" proceeding) before the circuit court or court-appointed referee. *See* Transit Rule 75.13 *Method of Claim Disposition*;

75.17 Case Management; 75.20 Briefing - Disputed Claim With An Evidentiary Hearing; and 75.22 Evidentiary Hearing Procedures (A12-A24). These Transit Rules provide for mandatory document disclosures, submission of additional claim information, written discovery, depositions, subpoenae, discovery supplements, live witness testimony, expert witnesses and ultimately an evidentiary trial-type hearing on the record before the circuit court or court-appointed Referee.

Following a hearing, a court-appointed Referee issues written findings of fact, conclusions of law and a recommended disposition of the claim. MO. REV. STAT. § 375.1214 (2000); Transit Rule 75.23 (A24). Thereafter, either party may file a motion for reconsideration of a referee's decision with the circuit court, but the referee's findings become the decision of the circuit court if no motion is filed, if the motion is denied or if the motion is not ruled upon within ninety (90) days. MO. REV. STAT. § 375.1214 (2000); Transit Rule 75.24 (A25-A27).

E. Administrative Order No. 49

As permitted by Transit Rule 75.32 (A28), from time to time, the Circuit Court of Cole County has issued administrative orders governing the Transit Receivership. On October 31, 2000, the court entered a certain Administrative Order No. 49 ("AO 49"), which states, in pertinent part:

Pursuant to the statutes governing this Receivership, specifically including §§ 375.650 to 375.750, 375.950 to 375.990 and

375.1150 to 375.1246, RSMo 1996, this Court must periodically review the status of the Receivership. Based upon reports from the Special Deputy Receiver, it is apparent that this Receivership is now in its final stages. In order to expedite the closure of the Receivership, this Court has determined that it is necessary that all Class III claimants, as defined by § 375.700 (policyholders, state guaranty funds, third-party claimants, etc.) must present evidence of all unresolved claims, whether existing or contingent, to the Special Deputy Receiver so that he can make final determinations on such claims.

In order to effectuate this strategy all claimants, including those that have already filed policyholder protection proof of claim forms, must file the existing evidence of their current unresolved claims and any actuarial evidence (or another accepted method of valuing claims with reasonable certainty), at their present value, of future claims that may be covered by a Transit policy or other contract by 3/15/2001. After that date no new claims or evidence of claims shall be accepted or reviewed by the Special Deputy Receiver.

(L.F. 196-97; A42-A43).

F. The MSEJ Claim Adjudication

On July 2, 2007, following the referral of the MSEJ claim to the Receivership Court as a disputed claim, the court-appointed Referee, Joseph E. Maxwell, entered the *Referee's Findings of Fact, Conclusions of Law and Recommendations* (hereinafter "FOF/COL") in a disputed claim proceeding between MSEJ and Transit within Cole County, Missouri case no. CV185-1206CC. (L.F. 631-61; A47-A74). The FOF/COL denied MSEJ's claim and contained the following findings, pertinent to the present brief:

- "Pursuant to the order [AO 49] it is not enough to simply file your claim but you must file evidence of all unresolved claims by March 15, 2001. The order also required either actuarial evidence or another accepted method of valuing claims with reasonable certainty." (L.F. 655; A68).
- "The purpose of Administrative Order 49 was to expedite the closure of the estate by setting a cut off date for which evidence on existing or future claims could be presented." (L.F. 657; A70).
- "The Referee agrees with Transit's argument that Administrative Order 49 is determinative in this disputed claim" (L.F. 658; A71).

- “Based on the review of the evidence, it is the Referee’s determination that the information filed on March 1, 2001 was not sufficient to make a claim.” (L.F. 660; A73).
- “MSEJ, LLC has failed to meet their burden . . . to provide sufficient evidence to establish a claim and therefore the Referee’s recommendation is to deny the claims filed on March 1, 2001.” (L.F. 660; A73).

Appellant MSEJ filed a Motion for Reconsideration that was not ruled upon by the circuit court; therefore, the Referee’s decision became final by operation of law. MO. REV. STAT. § 375.1214 (2000); Transit Rule 75.24 (A27).

G. The Missouri Court of Appeals Decision

Appellant MSEJ appealed the FOF/COL to the Missouri Court of Appeals, Western District. On July 1, 2008, the Court issued its Opinion (A75-A85), holding that the circuit court should have allowed MSEJ to provide additional information on appeal that was not provided to the SDR on or before March 15, 2001. The Opinion contained the following findings, pertinent to the present brief:

- “We agree that Administrative Order No. 49 was not the governing instrument. By the order’s express language, the March 15, 2001, deadline applied only to the receiver and did not pertain to whether or not a claimant could submit supplemental evidence on appeal to the referee.” (A81).

- “The governing instrument was Rule 75.” (A81).
- “These rules required a claimant to submit a written claim in which it could rely on documents that were in the case file and ‘documents produced in mandatory disclosure.’” (A82).
- “According to Rule 75.17, these documents would include any additional documents or evidentiary materials that the claimant believed supported his or her position. Hence, although Administrative Order No. 49 prohibited the receiver from examining any evidence after March 15, 2001, Rule 75.19 and Rule 75.15 set out no such limitations.” (A82-A83).
- “These rules required the referee to examine MSEJ’s written submission to determine whether or not it cited to supplemental evidence that would cure the deficiencies in MSEJ’s original claims request.” (A83).
- “[W]e find it plausible that the court would set a deadline for submitting new claims to the receiver but would permit additional evidence for those claims already in the process and to be submitted to the referee.” (A83).
- “MSEJ met the order’s deadline for submitting its claims to the receiver. Having met that deadline, Rule 75 provides that the referee

could, on appeal, consider supplemental information. Hence, the referee erred in not examining MSEJ's supplemental evidence to determine whether or not it established that Transit owed MSEJ money." (A83).

This Court granted Transit's Application for Transfer ("Transit App.") (A86-A101) on December 16, 2008. MSEJ still appeals herein the decision of the court-appointed Referee in his FOF/COL, dated July 2, 2007.

POINTS RELIED ON

I

THE COURT-APPOINTED REFEREE ERRED IN DENYING APPELLANT MSEJ’S RECEIVERSHIP CLAIM BASED ON ADMINISTRATIVE ORDER NO. 49 (“AO 49”) BECAUSE AO 49, BY ITS EXPRESS TERMS, DOES NOT CREATE ANY LIMITATION OR BAR TO EVIDENCE IN THE ADJUDICATION OF DISPUTED CLAIMS BY THE CIRCUIT COURT OR COURT-APPOINTED REFEREE IN THAT AO 49 CONTAINS NO STATEMENT OR SUGGESTION THAT EVIDENCE WILL BE BARRED AT THE CIRCUIT COURT LEVEL.

<i>Dunn v. Security Financial Advisors, Inc.</i> , 151 S.W.3d 140 (Mo. App. W.D. 2004)	28
<i>Ennis v. McLaggan</i> , 608 S.W.2d 557 (Mo. App. S.D. 1980)	29
<i>Painter v. Missouri Com’n on Human Rights</i> , 251 S.W.3d 408 (Mo. App. W.D. 2008)	30
<i>Giessow Restaurants, Inc. v. Richmond Restaurants, Inc.</i> , 232 S.W.3d 576 (Mo. App. E.D. 2007)	31

II

THE COURT-APPOINTED REFEREE ERRED IN DENYING APPELLANT MSEJ'S RECEIVERSHIP CLAIM BASED ON ADMINISTRATIVE ORDER NO. 49 BECAUSE AO 49 DOES NOT CREATE A LIMITATION OR BAR TO EVIDENCE IN THE ADJUDICATION OF DISPUTED CLAIMS BY THE CIRCUIT COURT OR COURT-APPOINTED REFEREE IN THAT THE TRANSIT RULES EXPRESSLY PERMIT THE SUBMISSION OF ADDITIONAL EVIDENCE DURING THE *DE NOVO* EVIDENTIARY ADJUDICATION BEFORE THE CIRCUIT COURT OR COURT-APPOINTED REFEREE.

<i>State ex rel. Rice v. Bishop</i> , 858 S.W.2d 732 (Mo. App. W.D. 1993)	39
<i>State ex rel. Public Counsel v. Public Service Com'n</i> , 210 S.W.3d 344 (Mo. App. W.D. 2006)	39
<i>Jamison v. State Div. of Family Services</i> , 218 S.W.3d 399 (Mo. 2007)	39
<i>Sonoma Management Co., Inc. v. Boessen</i> , 70 S.W.3d 475 (Mo. App. W.D. 2002)	39
Third Amended Rule 75.7	16, 17, 37, 38, 42, 43
Third Amended Rule 75.17	18, 37, 38, 40, 41, 42

III

THE COURT-APPOINTED REFEREE ERRED IN DENYING APPELLANT MSEJ'S RECEIVERSHIP CLAIM BASED ON ADMINISTRATIVE ORDER NO. 49 BECAUSE AO 49 DOES NOT CREATE A LIMITATION OR BAR TO EVIDENCE IN THE ADJUDICATION OF DISPUTED CLAIMS BY THE CIRCUIT COURT OR COURT-APPOINTED REFEREE IN THAT INTERPRETATION OF AO 49 AS A BAR TO EVIDENCE WOULD CREATE AN INVALID ORDER IN VIOLATION OF CLAIMANTS' RIGHTS UNDER THE MISSOURI CONSTITUTION AND UNITED STATES CONSTITUTION.

<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	46
<i>Jamison v. State Div. of Family Services</i> , 218 S.W.3d 399 (Mo. 2007)	46
<i>Missourians for Tax Justice Educ. Project v. Holden</i> , 959 S.W.2d 100 (Mo. 1997)	47
<i>In re Transit Casualty Co.</i> , 900 S.W.2d 671 (Mo. App. W.D. 1995)	48
U.S. Constitution, Amendment XIV, section 1	45
Missouri Constitution, Article I, section 10	45

ARGUMENT

Point I – The court-appointed Referee erred in denying appellant MSEJ’s receivership claim based on Administrative Order No. 49 (“AO 49”) because AO 49, by its express terms, does not create any limitation or bar to evidence in the adjudication of disputed claims by the circuit court or court-appointed referee in that AO 49 contains no statement or suggestion that evidence will be barred at the circuit court level.

1. Standard of Review

The standard of review is set forth in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. 1976). “[T]he decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Id.* at 32; *see also Viacom Inc. v. Transit Cas. Co.*, 138 S.W.3d 723, 724 (Mo. Banc 2004). The issues before the Court involve interpretation of Administrative Order No. 49, which is a court order. “The construction of a court order is a question of law,” and this Court’s review is *de novo*. *Estate of Rogers v. Battista*, 125 S.W.3d 334, 340 (Mo. App. E.D. 2004) (citations omitted) .

2. **AO 49 contains no statement or suggestion that evidence will be barred at the circuit court level, and therefore does not create any bar to evidence at the circuit court level.**

Here, the Referee erred in denying MSEJ’s claim based upon its purported failure to meet the requirements of AO 49. By barring the admission of evidence offered by MSEJ that had not been submitted to the SDR on or before March 15, 2001,² the Referee imposed an improper penalty upon MSEJ unauthorized by the statutes, rules and orders governing the Transit Receivership. This ruling was an error of law and should be reversed.

First and foremost, the text of AO 49 governs its meaning and effect. *Dunn v. Security Financial Advisors, Inc.*, 151 S.W.3d 140, 143 (Mo. App. W.D. 2004) (a “procedural rule must be interpreted according to the plain and ordinary

² The Referee stated in his FOF/COL, in pertinent part: “The purpose of Administrative Order 49 was to expedite the closure of the estate by setting a cut off date for which evidence on existing or future claims could be presented. . . . The Referee agrees with Transit’s argument that Administrative Order 49 is determinative in this disputed claim MSEJ, LLC has failed to meet their burden . . . to provide sufficient evidence to establish a claim and therefore the Referee’s recommendation is to deny the claims filed on March 1, 2001.” (L.F. 657, 658, 660; A71, A71, A73).

meaning of the words used.”). As this Court has acknowledged, “[i]f there is any proposition of law that is fundamental and settled, it is that a court of record can speak only by its records [T]his rule applies not alone to final judgments, but to every order made in the course of a judicial proceeding.” *State ex rel. Spratley v. Maries County*, 98 S.W.2d 623, 624 (Mo. 1936) (quotation marks and citations omitted). Hence, this Court “must determine [AO 49] by what it says, not by what it might have said, and [it] should not by implication enlarge or extend [AO 49].” *Ennis v. McLaggan*, 608 S.W.2d 557, 563 (Mo. App. S.D. 1980) (citation omitted).

AO 49 plainly states its effect: “After [March 15, 2001] no new claims or evidence of claims shall be accepted or reviewed by the Special Deputy Receiver.” (A42) (Emphasis added). AO 49 also explicitly states its purpose: “In order to expedite the closure of the [Transit] Receivership,” claimants submit evidence “so that [the SDR] can make final determinations on such claims.” (A42) (Emphasis added). There is a complete and noticeable absence of any language in AO 49 that extends its reach beyond determinations made by the SDR to the adjudication of disputed claims by the Receivership Court.

In the Transit Receivership, the SDR makes a unilateral decision to allow or deny a claim. There is no impartial arbiter involved, and the claimant is not afforded a hearing in connection with the SDR’s determination. Thereafter, if the SDR’s determination is challenged by the claimant and the claim makes it to the

court's disputed claims docket, a trial *de novo* occurs in which both Transit and the claimant may engage in discovery and present evidence, such as fact and expert testimony, to the receivership court.

Transit stated in its Application for Transfer that “a review of all applicable statutes, revised local rules and administrative orders shows that the Receivership Court wanted to decide appeals in a method similar to an administrative agency review.” (Transit App., p. 6; A94). Taking Transit's lead, under Missouri administrative law, the SDR's unilateral claim determination without a hearing would be subject to “noncontested” case review³ similar to a unilateral decision of a state agency without a hearing.

In *noncontested* cases, following the unilateral agency decision, “the circuit court conducts a *de novo* review in which it hears evidence on the merits of a case, makes a record, determines the facts” and renders a decision regarding the lawfulness of the agency decision. *Painter v. Missouri Com'n on Human Rights*, 251 S.W.3d 408, 413 (Mo. App. W.D. 2008) (citations omitted). Thus, the SDR's unilateral claim determination is akin to a state agency decision subject to

³ The decision of an administrative body is subject to noncontested case review for the purposes of Missouri administrative law if no hearing at the agency level was required by law. *State ex rel. School Dist. of Kansas City v. Williamson*, 141 S.W.3d 418, 426 (Mo. App. W.D. 2004).

noncontested judicial review involving trial *de novo* at the circuit court level with no limitation of the evidence to the agency record. As this Court recently stated: “In review of a non-contested decision, the circuit court does not review the administrative record, but hears evidence, determines facts, and adjudges the validity of the agency action.” *Furlong Cos. v. City of Kansas City*, 189 S.W.3d 157, 165 (Mo. 2006).

3. Transit's arguments that AO 49 operates as an evidentiary bar at the circuit court level contradict the plain language of AO 49.

In order to present a more comprehensive analysis and discussion of AO 49, *Amicus* PwC responds here to some of the arguments raised by Transit in its Application for Transfer.

a. AO 49 does not necessarily limit the evidence that may be presented to the circuit court.

When a court order is reduced to writing, the Court should not imply additional provisions that are unnecessary to effectuate the circuit court’s clear intentions. *See Giessow Restaurants, Inc. v. Richmond Restaurants, Inc.*, 232 S.W.3d 576, 579 (Mo. App. E.D. 2007). Here, AO 49 served the purpose of expediting the closure of the receivership by facilitating final claims decisions and moving claims past the stage of unilateral SDR determination. Extending AO 49 to constrain the adjudication of disputed claims, as suggested by Transit, does not

follow from this purpose as a matter of necessity. Moreover, as discussed in greater detail in Point II, the Transit Rules expressly state the contrary. If such a limitation had been intended, AO 49 (or the Transit Rules) could have been amended to say that "Evidence submitted to the court for adjudication in disputed claim proceedings shall be limited to that accepted or reviewed by the Special Deputy Receiver on or before March 15, 2001."⁴ Such evidentiary limitation may not be read into the Transit receivership rules by judicial fiat.

b. This Court need not defer to the court-appointed referee's erroneous interpretation of AO 49.

Contrary to Transit's assertion (Transit App., p. 7; A94), any deference typically afforded circuit court decisions is not required where, as here, error is apparent. *In re Transit*, 900 S.W.2d 671, 674-75 (Mo. App. W.D. 1995) (suggesting that deference is appropriate provided the "interpretation is in accordance with the procedures in effect at the time . . . [,] is a reasonable one [and] . . . [does] not violate the plain terms of the rule or of any statutory law."). The lack of express adoption of the Referee's FOF/COL by the circuit court further undermines any deference this Court should give to that ruling, which was case-specific and did not take into account facts pertinent to claimants other than MSEJ

⁴ PwC does not, however, concede the legal validity of such an evidentiary limitation.

or, even, certain arguments first raised by Transit on appeal. Moreover, remand to the circuit court for an explicit interpretation of AO 49 is not appropriate, would contradict every notion of judicial economy and is wholly unnecessary given the plain language of AO 49.

c. AO 49, as interpreted, is not unfair to claimants or to Transit.

Transit argues that the Opinion “punishes all of the claimants who ‘followed the rules’ that existed because this loophole was created by the Decision and finally resolved their claims over the past seven years with full policy releases that cannot be undone.” (Transit App., p. 2; A89). Transit’s assertions of unfairness are wholly irrelevant to a proper interpretation of AO 49. *Amicus* PwC does not agree that the Opinion created a “loophole” and respectfully objects to Transit’s unsupported assertions of prejudice. Most importantly, however, no known legal authority exists to support the suggestion that this Court must adhere to an erroneous interpretation of law simply because no claimant has ever attempted to challenge it. No one knows how many claimants opted for a commercially reasonable settlement instead of challenging Transit’s interpretation of AO 49.

The record also offers no support for Transit’s assertions regarding the prejudice it will suffer for having already settled or “commuted” its reinsurance. (Transit App., p. 3; A90). There is no direct correlation, and just as a policyholder

is not entitled to receive the full benefits of reinsurance obtained by Transit on its claim, Transit may not assert prejudice based on its commercially reasonable settlements with reinsurers involving details that are not even part of the record on appeal.

Finally, one can imagine a case where Transit might benefit from the introduction of additional evidence at a disputed claim adjudication, such as evidence of a post-March 15, 2001 judgment covered by a Transit policy for an amount of damages less than what had been determined by the SDR.

d. AO 49, as interpreted, will not require the court to act as claims adjuster nor will it open claim floodgates.

Transit argues, inexplicably, that the Court of Appeals' Opinion will require the circuit court and its appointed referees to act as "claims adjusters' on complex mass tort claims without the ability or budget to hire the needed experts to handle this task." (Transit App., p. 1; A88). Yet, there is no reason to conclude that the Opinion will change the process of adjudging disputed claims in the Transit Receivership to require anything more from the court than to hear evidence presented by both parties, issue findings of fact and conclusions of law based upon such evidence and, in some cases, consider motions for reconsideration.

Likewise, Transit's argument that the Opinion will open the door to a floodgate of new claims (Transit App., p. 4, n. 2; A91) is unsupported because the

Opinion does not permit claimants to file new claims in the Receivership. As for allegedly “dormant” claims (Transit App., p. 7; A94), there is nothing in the record to suggest why such claims are dormant; however, *Amicus PwC* submits that Transit’s argument is irrelevant, especially if dormancy is the result of the fact that the SDR has not yet issued final claims determinations based on information received on or before March 15, 2001, or that the SDR has not taken advantage of statutory provisions that permit the determination of claims based upon estimates and probable outcomes. *See* MO. REV. STAT. §§ 375.1212, .1218, .1220, .1224 & .1225.

In sum, by its plain language, AO 49 is expressly limited to the determination of claims by the SDR and does not suggest any limitation upon the subsequent *de novo* evidentiary hearings of disputed claims by the court or court-appointed referee. Consequently, the Referee erred by ruling that AO 49 barred MSEJ from offering certain evidence to the court during its *de novo* evidentiary hearing.

Point II – The court-appointed Referee erred in denying appellant MSEJ’s receivership claim based on Administrative Order No. 49 because AO 49 does not create a limitation or bar to evidence in the adjudication of disputed claims by the circuit court or court-appointed referee in that the Transit Rules expressly permit the submission of additional evidence during the *de novo* evidentiary adjudication before the circuit court or court-appointed referee.

1. Standard of Review

The standard of review articulated in connection with PwC’s Point I is incorporated herein by reference.

2. The Transit Rules expressly permit the submission of additional evidence to the court or court-appointed referee.

Fundamental rules of construction require that AO 49 be read in harmony with the Transit Rules. “Statutes and court rules affecting [an order] become a part of it and must be read into the [order] as if an express provision to that effect were inserted in it.” *State ex rel. Chaney v. Brown*, 673 S.W.2d 510, 511 (Mo. App. S.D. 1984). Nothing in the Transit Rules indicates that the circuit court must limit itself to the evidence submitted to the SDR prior to March 15, 2001 when ruling on disputed claims. Indeed, the Transit Rules are replete with provisions directly to the contrary.

For example, Rule 75.7(a) states that “[i]f the Claim becomes a Disputed Claim, . . . additional evidence and submissions may be considered and become part of [the Case File] as provided by this Rule.” (A8-A9). Similarly, Transit Rule 75.17(a) provides:

Within thirty (30) days after the date on which the SDR mails the Case File to the Claimant and Clerk, the Claimant shall provide the SDR . . . with a written submission stating the amount the Claimant asserts is due under the Transit policy or policies, the method of calculation of the amounts owed and the allocation methodology (if applicable), along with any additional documents or other evidentiary material that the Claimant contends support the amount claimed due .

...

(A14) (Emphasis added).

In addition, subsections (b) and (c) of Rule 75.17 articulate the possibility of discovery in connection with the disputed claim process, which could result in the submission of additional evidence beyond that which was submitted to the SDR. (A14-A15). Rule 75.17(e) also requires supplementation by the Claimant of its mandatory disclosures up to thirty (30) days before the hearing in the disputed claim proceeding. (A16). Under certain circumstances, this same subpart permits the presentation of additional evidence beyond this discovery cut off.

Further, Transit Rule 75.22(a) and (b) permit the introduction of affidavit testimony as well as live testimony at the disputed claim hearing (A21), which logically could include evidence not necessarily presented to the SDR at the time of the initial claim determination. Rule 75.22(f) also describes the scope of evidence that may be presented during a disputed claim hearing:

In presenting evidence and legal arguments, the Participants will not be allowed to refer to any evidence or rely on any legal theories which have not been previously disclosed to the other Participants in the initial Proof of Claim or during the claim determination proceeding before the SDR or in the discovery process provided in this Rule.

(A22).

Interpretation of AO 49 as a bar to the submission of evidence at the level of the circuit court's *de novo* evidentiary adjudication directly contradicts Transit Rules 75.7, 75.17, and 75.22, which permit (and in some cases require) the claimant to adduce additional evidence in support of its claim beyond that presented to the SDR for the initial claim determination. Ironically, Transit criticizes the Court of Appeals' decision for failing to read AO 49 in *pari materia* with these Rules, when it is Transit's own interpretation that fails to do justice to the Rules, taken as a whole. (Transit App., p. 1, 8-9; A88, A95-A96).

The Transit Rules proscribe procedures at the trial court level that ensure a *de novo* evidentiary hearing on the merits (often referred to as trial *de novo*). As Transit itself recognizes, the management of claims in the receivership is akin to the process of administrative review. (Transit App., p. 7; A94). Under Missouri law, it is well settled that a *de novo* review of a lower-level administrative-type decision by the circuit court is not restricted to the record before the lower-level decision-maker. *See State ex rel. Rice v. Bishop*, 858 S.W.2d 732, 736 (Mo. App. W.D. 1993) (acknowledging that circuit court “reaches judgment without reference to the adjudicative information on which the administrative decision issued, it owes no deference of credibility to that decision.”). *See also, State ex rel. Public Counsel v. Public Service Com'n*, 210 S.W.3d 344, 352 (Mo. App. W.D. 2006) (stating that “in a noncontested case, the circuit court . . . makes the record by hearing evidence, and, based on the facts that it finds, adjudges the validity of the administrative agency's decision.”). The requirement of a *de novo* evidentiary hearing at the circuit court level is necessary to ensure due process of law. *See Jamison v. State Div. of Family Services*, 218 S.W.3d 399, 405 (Mo. 2007).

Furthermore, AO 49 must be interpreted and construed so as not to produce an absurd or illusory result. *See Sonoma Management Co., Inc. v. Boessen*, 70 S.W.3d 475, 481 (Mo. App. W.D. 2002) (contradictions should be harmonized, and interpretation should not create absurd or unreasonable result). An

interpretation of AO 49 that precludes consideration by the circuit court of any evidence not presented to the SDR before March 15, 2001 produces an absurd result, and renders entire sections of the Transit Rules without meaning or purpose. The method of claim adjudication under the Transit Rules — the evidentiary hearing — would be eliminated in one fell swoop. Such a comprehensive dismantling of the claim procedures set forth in the Transit Rules could not have been intended by AO 49. As a result, the Referee’s interpretation of AO 49 is an error of law, and should be reversed.

3. Transit’s interpretation ignores Rule 75.

In order to present a more comprehensive analysis and discussion of AO 49, *Amicus* PwC responds here to some of the arguments raised by Transit regarding Rule 75 in its Application for Transfer.

a. Transit ignores the plain language of Rule 75.17(a).

Transit argues, against the plain language of Rule 75.17, that “the additional evidence permitted with the Mandatory Disclosures under Local Rule 75.17(a) was a rule designed only to supplement the record before the referee from the documents previously submitted to the SDR for his consideration and which the SDR had overlooked or failed to submit in 'the Case File' as defined by Local Rule 75.7.” (Transit App., p. 10; A97). This interpretation is wholly unsupported. Moreover, it overlooks the multiple other references in the Transit Rules to

submission of additional evidence, such as those set forth in Rules 75.7 and 75.22 outlined above.

b. AO 49 does not control as last in time.

Transit argues that because AO49 was issued after the Third Amended Local Rules, it should control. (Transit App., p. 11-12; A98-A99). However, AO 49 concerns a different phase of the receivership, the SDR's unilateral claim determinations, not the circuit court's *de novo* evidentiary adjudications of disputed claims. Consequently, AO 49 cannot be extended to limit the evidence submitted to the circuit court or court-appointed referee.

c. The changes between the Second Amended Transit Rules and Third Amended Transit Rules do not support Transit's interpretation of AO 49.

Transit contends that changes to the Transit Rules in January 2000, ten months before the adoption of AO 49, are somehow indicative of AO 49's purpose or meaning. (Transit App., p. 9-10; A97-A98). Yet, the changes between the Second and Third Amended versions of Rule 75 contradict Transit's assessment that AO 49 limits the evidence that may be submitted for claims adjudication at the circuit court level. Specifically, the changes incorporated into Third Amended Rule 75.17 contemplate the submission of additional evidence for adjudication of disputed claims.

For example, under the prior Second Amended Rule 75.7(a)-(c), the Special Deputy Receiver would consider the claim, make a claim determination and give the claimant a Notice of Determination. (A31-A33). If disallowed, the claimant could file under Second Amended Rule 75.7(d) a Request for Review within sixty (60) days, and the claim became a “disputed claim” subject to hearing under Rule 75.7(e) by the circuit court or its court-appointed referee. (A33-A34). Second Amended Rule 75 contained relatively few provisions regarding management of disputed claims, though it clearly provided for discovery and contested evidentiary hearings. (Second Amended Rules 75.14-.15; A35-A41).

The revised Third Amended Transit Rules changed very little regarding the SDR’s claim determination process. Third Amended Rule 75.7 keeps intact the provisions regarding the SDR’s claim consideration, determination, notice of determination and request for review. (A8-A11). The most notable change between the Second and Third Amended Transit Rules of consequence to this appeal is the creation of Rule 75.17, which governs case management of the disputed claim proceeding before the circuit court. (A14-A18). After a claim becomes a “disputed claim,” the new Rule 75.17 imposes deadlines for the filing of the SDR’s “case file” and the claimant’s “mandatory disclosures,” and institutes procedures for a formal case management conference, a formal case management order, discovery and supplementation requirements.

Neither the Second nor the Third Amended Transit Rules, however, contain any express or implied limitation of evidence in disputed claim proceedings before the circuit court to only that which was provided to the SDR during his unilateral claim determination. Specifically, Second Amended Rule 75.7(a) stated: “If the claim becomes a Disputed Claim, additional evidence and submissions will be considered and become a part of [the claim] file.” (A32). Similarly, Third Amended Rule 75.7(a) states: “If the Claim becomes a Disputed Claim, . . . additional evidence and submissions may be considered and become part of [the Case] [F]ile as provided by this Rule.” (A9). Both the Second and Third Amended Transit Rules provided for discovery and the presentation of live testimony. As discussed earlier in this Point II, the Third Amended Transit Rules are replete with references to opportunities for additional evidentiary submissions during the circuit court’s *de novo* evidentiary hearing of a disputed claim.

4. Limitation of evidence at the circuit court level is not supported by the Missouri case law cited by the referee.

The Referee’s reliance on *Angoff v. Holland-America Insurance Co. Trust*, 937 S.W.2d 213 (Mo. App. W.D. 1996) as support for the imposition of an evidentiary penalty in this case is misplaced. (L.F. 658; A-51). *Angoff* involved a dispute with reinsurers (not a claimant) and merely confirmed that a receivership court may enact a method of allowing (but not denying) estimates of claims in a

receivership. Specifically, the *Angoff* court ruled that estimates of incurred-but-not-reported (“IBNR”) claims provided the “reasonable certainty” for claims estimation as explicitly required by Section 375.1220.2, such that an insolvent insurance company may collect reinsurance on IBNR claims. *Id.* at 218-19. The *Angoff* court did not address any issue pertinent to this appeal such as the denial of claims for the claimant's failure to adduce sufficient evidence by a deadline for determining claims. Consequently, *Angoff* is inapposite.

In sum, the Referee’s ruling that AO 49 barred MSEJ from offering certain evidence to the Court during its *de novo* evidentiary hearing contradicts the Transit Rules.

Point III – The court-appointed Referee erred in denying appellant MSEJ’s receivership claim based on Administrative Order No. 49 because AO 49 does not create a limitation or bar to evidence in the adjudication of disputed claims by the circuit court or court-appointed referee in that interpretation of AO 49 as a bar to evidence would create an invalid order in violation of claimants’ rights under the Missouri Constitution and United States Constitution.

1. Standard of Review

The standard of review articulated in connection with PwC’s Point I is incorporated herein by reference.

2. Interpretation of AO 49 as a bar to evidence would create an invalid order in violation of claimants’ constitutional rights.

To the extent that AO 49 is interpreted as limiting the consideration of evidence at the circuit court level solely to that submitted to the SDR on or before March 15, 2001, AO 49 violates the Missouri Constitution and the United States Constitution in multiple respects. Therefore, any such interpretation must be rejected as an impermissible violation of claimants’ rights.

First, the Referee’s interpretation of AO 49 as an evidentiary bar violates the requirements of due process under the 14th Amendment to the United States Constitution, section 1, and Article I, section 10 of the Missouri Constitution. A

claimant in the Transit receivership has a constitutionally protected property interest both in its cause of action against Transit and in its right to receive proceeds under its policy of insurance. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-33 (1982) (holding that a cause of action is a property interest protected by the Due Process Clause); *Schneider v. U.S.*, 27 F.3d 1327, 1333 (8th Cir. 1994) (“a cause of action is a property interest protected by the Due Process Clause.”); *Liberte Capital Group, LLC v. Capwill*, 421 F.3d 377, 383 (6th Cir. 2005) (finding insurance policy benefits to be a due process property interest). Therefore, a claimant in the Transit receivership is entitled to due process before a claim may be denied.

Under both the Missouri and United States Constitutions, the fundamental due process requirement is “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Jamison v. State, Dept. of Social Services, Div. of Family Services*, 218 S.W.3d 399, 405 (Mo. 2007) (quotation marks and citations omitted); *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). The “meaningful manner” requirement includes “a reasonable opportunity to be heard and present evidence.” *See, e.g., Yakus v. U. S.*, 321 U.S. 414, 433 (1944) (citations omitted). It includes “knowing the opponent's claims, hearing the evidence submitted, confronting and cross examining witnesses, and submitting one's own witnesses.” *Mikel v. Pott Industries/Saint Louis Ship*, 910 S.W.2d 323, 327 (Mo. App. E.D.

1995) (citation omitted). “Under the protection of due process it is the fundamental right of a party to know the claims of his opponent, to hear evidence submitted against him, to confront and cross-examine witnesses who depose against him, and to rebut the testimony of such witnesses by evidence on his own behalf.” *In re S--M--W--*, 485 S.W.2d 158, 163-64 (Mo. App. 1972). In addition, due process requires a hearing at which “all elements essential to the decision” are considered. *Dabin v. Director of Revenue*, 9 S.W.3d 610, 615 (Mo. 2000). The Referee’s interpretation of AO 49 curtailed MSEJ’s right to present evidence at the contested hearing at the circuit court level, deprived MSEJ of its “meaningful hearing,” and violated MSEJ’s right to due process of law.

Second, to the extent AO 49 is interpreted as an evidentiary bar at the circuit court level, it is unconstitutionally vague and, therefore, void. The Missouri Supreme Court stated in *Missourians for Tax Justice Education Project v. Holden*, 959 S.W.2d 100 (Mo. 1997):

Vagueness that violates due process exists where a law speaks with such uncertainty that it permits arbitrary and discriminatory enforcement, or in such a way that a person of ordinary intelligence does not receive fair notice from the language employed in the law what conduct that law requires or forbids.

Id. at 105 (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) and *United States v. Harriss*, 347 U.S. 612, 617 (1954)). As set forth in Point I above, AO 49 contains no express statement that any claimant will be barred at the circuit court level from presenting evidence that had not been submitted to the SDR on or before March 15, 2001; therefore, any interpretation to that effect renders AO 49 unconstitutionally vague, violative of due process and unenforceable.

Third, relying on AO 49 as an evidentiary bar at the circuit court level effectively requires that the circuit court violate its own rules which, as set forth in Point II above, undeniably permit and provide for the submission of additional evidence. As this Court has recognized: “Fundamental fairness and due process require that a trial court is not allowed to dispense with a procedural rule of its own making. Second Amended Rule 75 defines a procedure for the court's exercise of its inherent power, and if the rule was applicable, it was required to be followed.” *In re Transit Cas. Co.*, 900 S.W.2d 671, 674 (Mo. App. W.D. 1995) (citation omitted). Therefore, because the Referee’s interpretation of AO 49 contradicted the provisions of Transit Rule 75, including those rules that permit the submission of further claim evidence by either party at the *de novo* evidentiary hearing on disputed claims, the Referee deprived MSEJ of its constitutional right to due process.

CONCLUSION

Based on the foregoing, this Court should reverse the *Referee's Findings of Fact, Conclusions of Law and Recommendations* and award such other and further relief as the Court deems just and proper.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief complies with the provisions of Rule 84.06(b) and (c) and that:

- (A) This Brief contains 9,333 words, as calculated by Microsoft Word;
 - (B) A copy of this Brief is on the attached CD-ROM; and
 - (C) This disk has been scanned for viruses by counsel's anti-virus program and is free of any viruses.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Brief of *Amicus Curiae*, of its Appendix and one CD-ROM containing this Brief were sent via first-class mail, postage prepaid on this 5th day of January, 2009, to:

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