

IN THE MISSOURI SUPREME COURT

MSEJ, L.L.C.

Appellant,

v.

TRANSIT CASUALTY COMPANY IN RECEIVERSHIP,

Respondent.

Appeal No. SC89663

RESPONDENT'S SUBSTITUTE BRIEF

**Appeal From the Circuit Court of Cole County
The Honorable Richard G. Callahan, Circuit Judge**

**Thomas W. McCarthy, #24163
James C. Owen, #29604
Katherine S. Walsh, #37255
McCARTHY, LEONARD & KAEMMERER, L.C.
400 South Woods Mill Rd., Suite 250
Chesterfield, MO 63017
Telephone: 314-392-5200
Facsimile: 314-392-5221**

**Attorneys for Respondent
Transit Casualty Company in Receivership**

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JURISDICTIONAL STATEMENT

Respondent Transit Casualty Company in Receivership (Transit) agrees with *amicus curiae* PricewaterhouseCoopers LLP (“*amicus*”) that there is jurisdiction in this Court, but writes separately to correct errors in the Jurisdictional Statement of the *amicus*.

This appeal began when Transit’s Special Deputy Receiver issued a Notice of Determination that denied the claims of Appellant MSEJ, LLC (MSEJ), successor-in-interest to Johns Manville Corporation who was a Transit insured. MSEJ filed a timely Request for Review objecting to the denial. The claims were, thereafter, referred to the Circuit Court of Cole County to be determined pursuant to Missouri statutes, Third Amended Local Rule 75 and Administrative Order No. 49, which supplemented Third Amended Rule 75.

The Receivership Court entered an order referring the dispute to a court-appointed Referee who held a non-evidentiary hearing and then issued his “Findings of Fact, Conclusions of Law and Recommendations” to the Receivership Court, which found in favor of Transit. MSEJ filed a timely Motion for Reconsideration that was not ruled upon within ninety days. It was, therefore, deemed denied and the Referee’s recommendations became the Receivership Court’s order for purposes of appeal. § 375.1214.2, RSMo 2000.

MSEJ filed a timely notice of appeal to the Missouri Court of Appeals, Western District. Jurisdiction was vested in the Court of Appeals by Mo. Const. Art. V, § 3 and § 477.070, RSMo 2000 as this was not a case within the exclusive jurisdiction of the

Supreme Court and the Court of Appeals has “general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.”

The Court of Appeals issued its opinion in Case No. WD68945 reversing the Receivership Court’s decision and remanding for further proceedings. Transit filed an application for transfer that was granted by this Court on December 16, 2008. This Court has jurisdiction pursuant to Mo. Const. Art. V, § 10.

Transit notes that *amicus* believes this to be an appeal from the Referee’s recommendation. If that were true, there would not be jurisdiction for either the Court of Appeals or this Court to hear the appeal. Only judges comprising the courts designated in Mo. Const. Art. V, § 1 may constitutionally exercise judicial power. *Transit Cas. Co. in Receivership v. Certain Underwriters at Lloyd’s of London*, 995 S.W.2d 32, 34 (Mo. App. 1999). The Court may not delegate this judicial decision-making authority to a Referee. *Id.* Jurisdiction is, however, proper because the Receivership Court adopted the Referee’s findings pursuant to § 375.1214.2, RSMo 2000.

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STATEMENT OF FACTS

I. History of Transit's Receivership and General Claims Administration

Transit Casualty Company in Receivership ("Transit") is a Missouri corporation incorporated in 1945 as an insurance company. Since that time it has engaged in the business of insurance. (L.F. 632)¹ On December 3, 1985, Transit was declared insolvent by the Circuit Court of Cole County, the Honorable Byron L. Kinder (the "Receivership Court"). All of Transit's insurance policies were thereafter cancelled effective at midnight December 20, 1985.

The Receivership Court established a general deadline of December 31, 1987 for the filing of claims against Transit (the "Bar Date"). (T-App. 026-031) The receivership proceeded with the business of collecting assets, administering claims and generally performing tasks that were necessary to ultimately close down the estate. In 1994, Transit approved the first distribution of assets to Class III claimants (policyholders and others with claims against a Transit policy) with allowed claims. Since that time, the Receivership Court has allowed a total of thirteen distributions and Class III claimants with allowed claims are currently receiving a distribution of 80 cents on the dollar for their claims. (L.F. 20-21)

¹ The following abbreviations will be used: "L.F." - Legal File (MSEJ filed below); "Supp. L.F." - Supplemental Legal File (Transit filed below); "MSEJ App." - MSEJ's Appendix to its Court of Appeals' brief; "R-App" - Transit's Appendix to its Court of Appeals' brief; "T-App." - Transit's Appendix to this Supreme Court brief.

The Receivership Court created a method for administering the receivership in its very first Administrative Order on September 4, 1986, which decreed, in part:

1. The Court hereby adopts a policy of from time to time issuing serially numbered Administrative Orders relative to administration, procedures, systems, goals and actions to be taken by the Receivership and those involved in the Receivership, with this Order being designated as No. 001.

(T-App. 016-025) The Receivership Court, thereafter, approved the original Rule 75 (Administrative Order No. 13) in early 1989 to govern practice and procedure in all proceedings with respect to claims against the Receivership. (T-App. 033-062; Rule 75.3)

Rule 75 was amended on December 6, 1990 (Administrative Order No. 25). (T-App. 063) Amended Rule 75 was amended by Administrative Order No. 31 to delete Amended Rule 75.5(c) because it was duplicative of Amended Rule 75.7. (T-App. 064) It was amended again on April 24, 1992 (Administrative Order No. 36) to change the language in several places in Amended Rule 75. (T-App. 065-071) This occurred on a number of other occasions in later renditions of Second and Third Amended Rule 75, i.e., the Court would modify certain sections of the rule by means of Administrative Orders rather than issue an entirely new revised Rule.

On March 31, 1992, the Receivership Court adopted Second Amended Rule 75 (“Second Rule 75”) pursuant to (Administrative Order No. 38). (T-App. 072-112)

Second Rule 75 was thereafter amended by Amended Administrative Order No. 41 and Administrative Order No. 44 to change various terms in that rule.

Third Amended Rule 75 (“Third Rule 75”) was adopted on January 14, 2000 (Administrative Order No. 45-A). Third Rule 75 made extensive changes to Second Rule 75 related to expediting the disputed claims proceedings. Therefore, pursuant to Administrative Order 45, the Receivership Court directed the Special Deputy Receiver to send an initial draft of this new Rule to Transit’s “most significant policyholders, State Guaranty Funds and reinsurers” for their input. (T-App. 113-114) Third Rule 75 has been amended by Administrative Order Nos. 46, 47, 48, 49 (the order at issue in this appeal), 51, 52 and 54. Of these orders affecting Third Rule 75, four amended “claims procedures” without referring to specific provisions of Third Rule 75. (T-App. 115-122)²

The fourth of those orders, AO 49, entered on October 31, 2000, will be discussed in extensive detail below. In short, it amended Third Rule 75 to expedite the closing of the receivership by providing a cut-off date for the filing of new claims or any evidence on pending claims in the receivership. (T-App. 117-120)

These are only some of the local rules and administrative orders that set the framework specifically related to the administration of claims within Transit’s receivership. They have been used consistently by Transit to administer the receivership.

² Administrative Order Nos. 46 and 51 related to Fourth Class Claims; Administrative Order No. 47 concerned the language on the Notice of Determination.

In 2002, Transit submitted a “Closure Plan” to then Director of the Department of Insurance and statutory Receiver Scott Lakin that set forth the basic facts supporting the reasons for Transit’s imminent closure. In short, it set forth how Transit had settled almost all of the billions of dollars of originally filed claims for \$7.375 billion in “established claims.” (L.F. 20) It further set forth how the Los Angeles office was to be closed and only a small office in Jefferson City would remain open. (*Id.* at 34-35) It also stated that only a small amount of the reinsurance assets remained to be recovered through litigation (approximately \$6 million out of almost \$1 billion in reinsurance recoveries to date). (*Id.* at 12, 14) The remaining reinsurance recoveries at that time were simply continuing payments on prior agreements. (*Id.* at 12-19) It also set forth the “case reserves” and “extra margins” for cases such as this case and others that have almost all since been resolved.³

II. Transit’s “Allowance” of “the Manville Property Damage Trust’s Personal Injury Claims

One of Transit’s insureds was the Johns Manville Corporation (“Manville”), to which Transit issued the following six excess umbrella liability policies (“the Transit policies”):

³ The term “case reserve” is well known in the insurance industry. The term “extra margin” was unique to Transit and represented a margin used in Transit’s distribution of assets calculation that generally represented a sum, when added to the case reserve, that was demanded by the claimant.

1. SCU955540 5/7/80-7/1/80 \$2.5 million each occurrence and/or in the aggregate part of \$15 million excess of \$35 million excess of the SIR⁴ per Endorsement No. 1.
(Supp. L.F. 246-249)
2. SCU955601 7/1/80-7/1/81 \$8 million each occurrence and/or in the aggregate part of \$10 million excess of \$25 million excess of the underlying.
(Supp. L.F. 250-251)
3. SCU955985 7/1/81-7/1/82 \$5 million each occurrence and/or in the aggregate part of \$15 million excess of \$10 million excess of underlying.
(Supp. L.F. 252-257)

⁴ An “SIR” is a self-insured retention. It is similar to a deductible. As an example, for this policy, when a loss reached \$50 million above the SIR (or deductible), Transit would have to pay a \$2.5 million share of a valid claim along with several other insurers. That \$2.5 million share was then reinsured in small percentages by Transit to many reinsurers in the United States, United Kingdom and other countries. Reinsurance collections constituted Transit’s primary asset during the life of the receivership. (L.F. 12)

4. SCU955986 7/1/81-7/1/82 \$1 million each occurrence and/or in the aggregate part of \$21.05 million excess of \$25 million excess of underlying.
(Supp. L.F. 258-264)
5. SCU956266 7/1/82-7/1/83 \$6.3 million each occurrence and/or in the aggregate part of \$15 million excess of \$10 million excess of underlying.
(Supp. L.F. 265-272)
6. SCU956267 7/1/82-7/1/83 \$3.7 million each occurrence and/or in the aggregate part of \$23.75 million excess of \$25 million excess of underlying.
(Supp. L.F. 273-285)

The Transits policies “followed form” (*i.e.*, followed the same terms and conditions) to Underwriters at Lloyd’s of London and British Insurance Cos. (collectively referred to herein as the “Lloyd’s Policies”). (Supp. L.F. 286-325) The Transit policies’ “Limit of Liability” was such that it would agree to “indemnify [Manville] for all sums which [Manville] shall be obliged to pay by reason of the liability imposed upon [Manville] by law, or assumed under contract or agreement” by [Manville] for damages, direct or consequential and expenses on account of: (a) Personal Injuries, including death at any time resulting therefrom or (b) Property Damage...as defined in the underlying “Lloyd’s Policies.”

Transit's liability "attached" "only after the Underlying Umbrella Insurers had paid or had been held liable to pay the full amount of" either "\$35,000,000 ultimate net loss in respect of each occurrence" or "in the aggregate for each annual period during the currency of this Policy separately in respect of Products Liability and separately in respect of Personal Injury." After the "underlying limits were "exhausted," Transit would "then be liable to pay only the excess thereof up to" the limits of each of its policies as set forth above. (*See e.g.*, Supp. L.F. 247)

Pursuant to § 375.670, RSMo 2000⁵, counsel for "Manville Corporation" filed six (6) Proofs of Claim (POCs) on April 20, 1987 for each of the six (6) policies set forth above which asserted amounts totaling \$24 million in coverage "per occurrence" and "in the aggregate" for five of the policies and then asked for "limits" "per occurrence" and "in the aggregate" for the sixth so-called "stub policy" that was only in force from May 2, 1980 until July 1, 1980 on which an allowance was later made for \$416,667.00. (L.F. 179-194)⁶ Manville's POCs did not assert any amount was due at that time but asserted that "Manville has had numerous claims made against it by individuals alleging bodily injury.... Manville has also had numerous claims made against it by individuals alleging property damage." (*See e.g.* L.F. 194)

⁵ All citations are to RSMo 2000 unless otherwise indicated.

⁶ It should be noted that the original POCs filed by the original policyholder asserted that the "limits of liability of Transit policy no. ____" were the amounts allowed by Transit on each of the six listed policies. (L.F. 178, 182, 188, 190, 192, 194)

Before Transit's Special Deputy Receiver (SDR) could make any "allowances" on the POCs under § 375.700,⁷ Manville went into bankruptcy.⁸ Thereafter, based on documentation of asbestos personal injury and property damage losses then submitted by Theodore Mayer, counsel for "the Manville Property Damage Settlement Trust" ("Property Damage Trust"), Transit "allowed" the "products liability" limits of liability of the Transit policies to the Property Damage Trust on August 27, 1990. (MSEJ App. A306-308; Supp. L.F. 191-192) However, Transit's assets were not being distributed to claimants at that time and the procedure was simply to advise the claimants of the allowances by letter. (Referee's Report ¶ 25, letter of V. Affinito of Transit to Theodore Mayer of October 3, 1990 regarding allowance; Supp. L.F. 191-193 - letter of V. Affinito of Transit to Theodore Mayer of December 19, 1990.)

⁷ An "allowance" is the amount that all distributions of assets to policyholders are based pursuant to § 375.700. It is similar to a "payment" from a solvent insurer but, in the case of an allowance, the claimant receives a percentage of the allowance amount depending on what the receivership is then able to pay. Section 375.700 governed Transit for most of its history and distributions until it was repealed in 2007 (L. 2007 SB 613, sec.A). Currently, § 375.1218 arguably governs distributions and classification of claims.

⁸ Manville filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on August 26, 1982 in the U. S. Bankruptcy Court, Southern District of New York. The court confirmed a second amended reorganization plan filed in 1986. (L.F. 292-293)

The documents supporting the August 27, 1990 total allowance set forth that the claims that were allowed were (1) allowed to the Property Damage Trust; and (2) the total allowance was for personal injury claims. There are several support memoranda attached to the one-page allowance document signed by then-SDR J. Burleigh Arnold. (MSEJ App. A307-308; 299-305) The first memorandum is of the same date (August 27, 1990) and sets out how “the Property Damage Trust has provided a listing with eight reports listing claims resolved along with the amount paid and amount still owing.” The memorandum refers to the listing as a “listing of all bodily injury.” It goes on to describe the “settlement documentation by date of diagnosis.” There is no mention of property damage claims in the memorandum. *Id.* at 307-308. The earlier, more detailed memorandum is from May 18, 1990 and it sets forth the fact that of the \$1,137,404,992 in claims that had been submitted by Manville from 1988 -1990, only \$202,000,000 were property damage claims. It describes how the great majority of future claims were personal injury claims, which explains why the later allowance was for the personal injury claims. *Id.* at 304-305.⁹

Subsequently, on about April 12, 1995, when Transit was preparing its first distribution of assets (for 10% of allowed claims), it issued formal Notices of

⁹ By reason of the assignment, these allowance documents were available to MSEJ since 1997. In MSEJ’s sworn Post Bar Date POCs filed in March 2001, set forth in more detail *infra*, it asserts that the prior NODs were for “property damage claims only” and the new claims are “personal injury claims only.” (*See e.g.* L.F. 216)

Determination (NODs) indicating allowances totaling \$24,416,466.67 to the Property Damage Trust. The allowances were made to the Property Damage Trust based on direction from Manville's Trustee because the bankruptcy court had ordered that no further assets be paid into the "Johns Manville Personal Injury Damage Settlement Trust" ("Personal Injury Trust") notwithstanding the fact that the claims that were being paid arose from personal injury, not property damage. (MSEJ App. A391-397)

The Property Damage Trust had previously received \$7,345,224.40 in payments from State Guaranty Funds (SGFs) on behalf of Transit's policies. Therefore, the SGFs were subrogated by §375.778.5(1) to receive that same amount they had paid to the Property Damage Trust from Transit.¹⁰ Thus, Transit's allowance entitled the Property Damage Trust to receive the one immediate 10% distribution payment and future distribution payments on the \$17,071,242.27 total allowance and the SGFs to receive the one immediate 10% distribution payment and future distribution payments on \$7,345,224.40. (Supp. L.F. 194-206) After these allowances were made, Transit received no additional information from the Manville Trusts on any additional claims.

¹⁰ In other words, if a SGF had previously paid \$100 to a claimant and Transit thereafter made a \$500 allowance to that same claimant, the SGF is assigned the right to distributions on the first \$100 of the allowance from Transit and the claimant would have the right to distributions on the remaining \$400.

III. Facts relating to Manville's Assignment to MSEJ (Estoppel Issue)

On January 26, 1997, Theodore Mayer, counsel for the Property Damage Trust, sent a letter to James Owen, general counsel for Transit, asking him to execute an attached "Notice of Assignment" and return it to him as soon as possible. The letter stated that: "We need this urgently in order to close our transaction [with MSEJ]." The Notice of Assignment states that Assignor, which was the Property Damage Trust only, "has irrevocably assigned and transferred to Assignee all of Assignor's rights title and interest in and to the Assignor's Established and Adjudicated Liabilities...." In an included schedule, all of Manville's policies with Transit are specifically listed by policy number and there is a line that states "Amount of Established Liability: \$17,071,242.27". (R. App. 1-3)

On July 22, 1997, Mr. Mayer wrote to James Hamilton of Transit's Claims Department and Mr. Owen stating that the Property Damage Trust had an agreement in principle to assign its "established" claims against the Transit estate in exchange for cash. (R. App. 5-6.) In addition, Mr. Mayer stated that the sale was subject to "completion of the buyer's due diligence" which "centered on verification of the final, fixed and allowed amount of the claims being purchased." (*Id.* at 5) He further stated, "We ask your indulgence in helping us to conclude this buyer's due diligence so that the transaction can close and cash can be accumulated for our beneficiaries." (*Id.*) He went on to say, "Our records indicate that the PD Trust holds settled, fixed and/or established claims against your estate in the face amount of \$17,071,241.62." (*Id.*) Further, in his penultimate paragraph, Mr. Mayer stated: "We hope it is clear that this assignment does not seek to

augment any rights that the PD Trust has against your estate or otherwise to create new obligations or liabilities on the part of the Liquidator. The proposed assignment simply constitutes the transfer to another party of the PD Trusts existing and established rights to collect on those claims together with all rights of the PD Trust with respect to those collections.” (*Id.* at 6; emphasis added.)

On September 8, 1997, Ms. Deena K. Feller, also an attorney for the Property Damage Trust, sent a facsimile to Messrs. Hamilton and Owen a copy of the July 22, 1997 Mayer letter with her initials along side his signature and a copy of the proposed assignment which purported to assign “Assignor’s Established and Adjudicated Liabilities.” Later in the same document, under a separate schedule of the policies, it read, “Amount of Established Liability: \$17,071,071.62.” This document also contained a space where Manville’s attorney sought a signature from a representative of Transit. (R. App. 4-9)

On September 12, 1997, Ms. Feller sent a letter to Mr. Steven Wunderlich of Transit where she stated, *inter alia*, that “What we (Manville) seek is a statement acknowledging the face amount of Manville’s total claims against Transit.” (R. App. 10-12) On February 12, 1998, after some discussion concerning the “Established and Adjudicated Liabilities” sought by Manville and MSEJ, these documents were confirmed by Mr. Owen on behalf of Transit and returned to Mr. Mayer. (R. App. 13-14)

On October 27, 1997, Marcia Ruskin, attorney for MSEJ, wrote to Stephen E. Wunderlich, Executive Claims Analyst for Transit, seeking certain representations from Transit. Among those was, “Based on claims previously submitted to Transit, the policy

limits of each of the policies have been exhausted, the maximum amounts payable under the Policies have already been issued, and no additional claims can be asserted under the Policies.” (MSEJ App. A67; T-App. 014-015; emphasis added.)

On November 26, 1997 Mr. Mayer again wrote Mr. Owen and asked that Transit make representations that “[b]ased on claims previously submitted to Transit, the policy limits of each of the Policies have been exhausted.” (MSEJ App. A67-68; emphasis added.)

IV. Facts Relating to Administrative Order No. 49 (Claims Cut-Off Issue)

On October 31, 2000, pursuant to Third Rule 75.32(b), and §375.670, the Receivership Court entered AO 49, *sua sponte*, which read, in pertinent part:

[I]t 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 claims 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.

(Supp. L.F. 330-331; emphasis added.)

On March 1, 2001, Joseph F. Scognamiglio of Quantum Consulting, Inc. (on behalf of MSEJ) filed additional proofs of claims against Transit and making a new demand of \$19,416,667 in addition to the amount allowed to Manville under the previous NODs. (L.F. 199-233) Thereafter, on March 8, 2001, Mr. Scognamiglio sent a facsimile to Bill Barbagallo (claims manager at Transit) and Carol Bates (with Transit's Jefferson City's office), which stated in pertinent part:

I have since contacted the Manville Personal Injury Settlement Trust which now administers all Manville personal injury and property damage claims. In accordance with the voice mail message I left for Bill yesterday, I have been told that approximately 10% (if not more) of the \$14 billion in Johns-Manville's paid claims represent losses paid to Manville employees for work-related asbestos injuries. No claims for these losses have previously been made to Transit. Therefore, the claims that I recently submitted to Transit should be covered under the Manville/Transit policies and should be added to MSEJ's overall account.

(L.F. 235)

No further support for these additional claims was filed by MSEJ prior to the March 15, 2001 cut-off date required by AO 49. MSEJ's AO 49 submission did not

contain an explanation for why it had not asserted these personal injury claims at the time of or since the 1997 Deed of Assignment when Transit still had significant amounts of reinsurance available to collect on claims.

V. Facts Relating to the Certified Questions and the Dispute

The SDR determined that the evidence submitted by MSEJ prior to March 15, 2001 was insufficient to allow additional claims. On May 1, 2001, Transit mailed its Notice of Determination or NOD to MSEJ (attention to Mr. Scognamiglio), which disallowed the new demand for additional claims that MSEJ filed on March 1, 2001. (MSEJ App. A412-416) On or about June 22, 2001, MSEJ returned the Acknowledgment of Receipt of the NOD in a timely manner, rejecting the disallowance and filing a Request for Review (“RFR”).

On January 29, 2003 Transit attempted to certify certain legal questions in order to resolve what it believed were legal issues quickly and avoid a protracted evidentiary dispute. (L.F. 44-45) Transit sought to have the following questions answered:

1. In regard to MSEJ’s claims in Transit’s Receivership, what was the extent of the 1997 assignment to MSEJ by the Manville Trust - - is it limited to the \$17,071,241.62 in claims allowances that were made to the Manville Trust in April 1995, as Transit contends, or is it open to additional claims by assignee MSEJ?
2. Was MSEJ’s notice of additional claims in 1999 “late notice” under the policies or case law?

(*Id.*) On February 14, 2003, MSEJ filed its Suggestions in Opposition to the Motion to Certify Questions. The day before, on February 13, 2003, MSEJ filed its Motion to Determine the Scope of Assignment of Claims from the Manville Property Damage Settlement Trust to MSEJ, LLC with the Bankruptcy Court for the Southern District of New York. (L.F. 70-124) On March 26, 2003, the Bankruptcy Court held: “that the Movant [MSEJ] was assigned all rights, title and interest in and to claims against [Transit] formerly held by the Property Damage Trust under the policies (as defined in the Motion)” and “that the Assignment to Movant is not limited to amounts previously allowed by Transit.” (L.F. 898) The Bankruptcy Court’s ruling did not state that Transit was obliged to allow further claims to MSEJ. (*Id.*) Transit’s position at the hearing was that the Bankruptcy Court had no jurisdiction over the assets of a Missouri insurance insolvency court pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1011-15 (1945).¹¹

Transit then made an attempt to settle the case by means of a “Notice of Re-Determination” to MSEJ in response to MSEJ’s RFR, which offered \$100,000.00 to MSEJ but disallowed all other claims submitted. (L.F. 923-927) On September 7, 2005, MSEJ filed a RFR to the Notice of Re-Determination (L.F. 933-952) attaching: (1) Petition for Application to File Post-Bar Date Claims and Objection to Denial by Liquidator and (3) the Appendix to that Petition, which contained Exhibits A through

¹¹ No “Act of Congress” may impair or supersede state law governing the most integral part of the business of insurance, i.e. the collection of assets to pay the claims of policyholders and third-party claimants of an insolvent insurer.

Q.¹² MSEJ stated that it “had understood that this motion to certify would proceed to determine the rights of the parties. Now it appears that this separate response is required to the Notice of Re-Determination and that this matter will supersede the pending Motion to Certify.” (L.F.. 950.)

In MSEJ’s RFR, MSEJ objected to the \$100,000.00 offer of settlement and explained why it had not filed information in support of its claims at an earlier date. It stated as follows:

- “In the spring of 2001, MSEJ was served with the court’s Administrative Order 49 providing that all policyholders must present evidence to the Special Deputy Receiver by March 15, 2001 of all unresolved claims, whether existing or contingent.” (L.F. 939-940)
- “MSEJ reviewed Transit’s aggregate policy limits of \$24.25 million and saw that they apply separately to products liability and occupational disease claims.” (L.F. 940)¹³
- “In 1997 when the assignment was completed, MSEJ had no knowledge of the availability of coverage for additional claims under the Transit policies.” (L.F.

¹² These exhibits were unsolicited evidence of the MSEJ’s claims submission and were not considered by the Special Deputy Receiver pursuant to AO 49.

¹³ Transit contests the date on which MSEJ determined that the “second policy limit” was “occupational disease” as set forth in the Argument section. Transit asserts it was long after 2001.

948)

- “Allowance of MSEJ’s claim will not prejudice the orderly liquidation of this estate. ... Also, we believe that as a legal matter, the inability to collect reinsurance claims is not a defense to payment of the underlying claims.” (L.F. 949)

- “Despite the report produced for us in 2001 and delivered to Transit showing \$38 million in the paid amount of employee claims, the Trust informs us that it no longer has in its database the ability to indicate claimants were Manville employees.” (L.F. 951)

Pursuant to Rule 75.7(f), a “Notice of Dispute Transmittal” was mailed to the Receivership Court and the Disputed Claims Office on October 24, 2005. (L.F. 953) The Receivership Court originally assigned this dispute to Referee James P. Dalton. (R. App. 15 to R. App. 16) On November 23, 2005, MSEJ filed its Further Suggestions in Opposition to Transit’s Motion to Certify Coverage Questions. (L.F. 959)

A status conference with the parties was held, via teleconference, on January 9, 2006. The case proceeded with the parties attempting to stipulate to the facts but unable to come to any agreement, as such no stipulation was ever filed with the Referee or the Receivership Court. Thereafter, Mr. Dalton was taken ill and was no longer able to continue as Referee. The Receivership Court appointed Joe Maxwell as Special Master on August 24, 2006 in regard to the Certified Questions issue and, on November 1, 2007, Referee in regard to the actual dispute. (Supp. L.F. 47-48; 71-72)

A Final Case Management Conference was held on December 22, 2006 at which time MSEJ withdrew its request for an evidentiary hearing. (T-App. 012-013) The Referee ordered that only very specific discovery related to the Certified Questions be completed within ninety days pursuant to Rule 75. Transit was the only party to take discovery as it issued Requests for Admissions and took the depositions of its former employees Bill Barbagallo and Andrew Stuehrk in relation to the prejudice issue on estoppel and the history of MSEJ's conduct on its AO 49 submissions. No additional evidence related to the support of MSEJ's claims was requested or permitted to be presented by MSEJ as part of the discovery process. In that "Final Case Management Order," a briefing schedule was entered and a hearing was subsequently scheduled for May 1, 2007. *Id.*

Referee Maxwell then issued two different sets of findings: (1) the Special Master's Findings of Fact, Conclusions of Law and Recommendations (on the Certified Question issues) were filed on May 30, 2007, (MSEJ App. A1-47) and (2) the Referee's Findings of Fact, Conclusions of Law and Recommendations (on the disputed claim issues) were filed on July 2, 2007. (MSEJ App. A48-78) The Referee made the following factual findings of note:

- Transit relied on the information provided by Manville and allowed claims at the policy limits as set out by Manville totaling \$24, 250,000.00. (MSEJ App. A63).
- The reinsurers behind the claims of Manville had been notified of the Manville allowance in the amount of \$24,250,000.00. (MSEJ App. A64).
- The allowance on Transit's SCU955540, which had originally been filed for

“policy limits” should have been allowed at \$416,466.67 instead of \$250,000.00 and the upward change was made by Transit. (*Id.*)

- On December 14, 1990, Manville asked for formal notification of Transit’s “allowance in full of the PD Trust’s claim in an amount certain”. (MSEJ App. A65)
- Transit’s claims manager did as requested by letter dated December 19, 1990 listing the allowance per policy and the total allowance of \$24,416,466.67. (*Id.*)
- Jim Hamilton of Transit sent a facsimile to Theodore Mayer, attorney for the Manville Property Damage Trust confirming that Manville’s share of the \$24,416,466.67 allowance after compensating the SGFs for amounts previously paid to Manville was \$17,071,241.62, which Mayer confirmed in a facsimile to Hamilton stating, “I acknowledge the Trust’s understanding and acceptance of the allowances reflected in your letter. (MSEJ App. A66)
- On April 12, 1995, NODs confirming the \$17,071,241.62 allowance to Manville and the \$7,345,225.10 allocation to the SGFs were sent to the Property Damage Trust, and on April 20, 1995 Mayer acknowledged the receipt and accepted the allowance and forwarded his acceptance to Transit. (*Id.*)
- Mr. Mayer wrote to reassure Transit that the “assignment does not augment any rights that the PD Trust has against your estate or otherwise to create new obligations or liabilities on the part of the Liquidator. The proposed assignment simply constitutes the transfer to another party of the PD Trust’s existing and established rights to collect on those claims together with all rights of the PD Trust

with respect to those collections.” (*Id.*)

- A series of letters were exchanged between the parties, which now included MSEJ as the proposed assignee. (MSEJ App. A67)
- On October 27, 1997, Marcia Ruskin, attorney for MSEJ, sought representations from Transit including the fact that “based on claims previously submitted to Transit, the policy limits of each of the policies have been exhausted, the maximum amounts payable under the Policies have already been issued, and no additional claims can be asserted under the Policies.” (*Id.*)
- Mr. Mayer asked Mr. Owen to execute a letter that outlined the representations that the Property Damage Trust “needed Transit to make.” The final representations included representations that “[b]ased on claims previously submitted to Transit, the policy limits of each of the Policies have been exhausted.” (MSEJ App. A68)
- Transit relied on the representations made as to the policy limits and filed claims with reinsurers based on those limits. Transit commuted with reinsurers on the Manville claims and did not carry additional reserves on the Manville claims. Transit could not collect reinsurance on the new claims of MSEJ and on May 17, 2002, Mr. Owen wrote to attorneys for MSEJ stating, “No matter how you look at it, this means that other creditors would be prejudiced by an allowance of any new claims to MSEJ under these circumstances.” (*Id.*)
- Contained in a copy of the May 17, 2002 letter to Ms. Gallozzi, attorney for MSEJ, which was sent by facsimile to Bill Barbagallo of Transit, Owen said in

handwritten remarks to Barbagallo that if the Property Damage Trust still had the claims that Mr. Mayer would “never make the claim because its lawyer knew that the claims were released.” (MSEJ App. A69)

- Mr. Owen wrote to Ms. Ruskin, another attorney for MSEJ on January 15, 2003 reiterating his arguments as to why the claims should be denied and “clearly stated that the reinsurance commutations were entered into with the understanding that there were no further claims to be asserted.” (*Id.*)

MSEJ filed its Objection to the Special Master’s Report on July 10, 2007 pursuant to Rule 68.01. It then filed its Motion for Reconsideration to the Referee’s Report on July 13, 2007 pursuant to § 375.1214 and Rule 75. (L.F. 1189-1218)

The Receivership Court did not rule separately on the Objections or the Motion for Reconsideration and, therefore, the Referee’s Report became the final judgment of the Receivership Court by operation of law for purposes of appeal pursuant to § 375.1214.2.

VI. MSEJ’s Appeal

An appeal was taken to the Missouri Court of Appeals, Western District, which entered its decision on July 1, 2008. The Court of Appeals reversed the decision of the Receivership Court. The Court of Appeals agreed with the lower court that MSEJ did fail to provide sufficient evidence to support its claims by the cut-off date, March 15, 2001. (T-App. 005-006) It also confirmed that the trial court had the discretion to issue AO 49. However, it held that AO 49 is not the “governing instrument” and cannot be used to amend the provisions of Third Rule 75. (T-App. 007) The Court further found that there was insufficient evidence of damage to support the holding on estoppel. (T-App. 010)

The Court remanded the case to determine whether MSEJ's additional submissions cited to supplemental evidence that cured deficiencies in MSEJ's original submission pursuant to AO 49 and to allow Transit to present additional evidence in support of the estoppel argument. (T-App. 010-011)

Transit filed a timely Motion for Rehearing and/or Transfer to the Missouri Court of Appeals, which was denied. Thereafter, Transit filed its Application for Transfer to this Court which was sustained on December 16, 2008.

POINTS RELIED ON

POINT I

(Responds to Appellant’s Court of Appeals’ Brief Point III)

THE TRIAL COURT DID NOT ERR IN HOLDING THAT ADMINISTRATIVE ORDER 49 WAS AUTHORIZED BY THE INSURANCE LIQUIDATION CODE, WAS NOT VIOLATIVE OF DUE PROCESS AND WAS A VALID EXERCISE OF THE STATE’S POLICE POWER. FURTHER, ADMINISTRATIVE ORDER 49 IS AN INTEGRAL PART OF, AND MUST BE READ *IN PARI MATERIA* WITH, ALL PARTS OF THIRD AMENDED LOCAL RULE 75 AND MISSOURI INSOLVENCY STATUTES AND, UNDER APPLICABLE RULES OF CONSTRUCTION, SUPERCEDES ANY INCONSISTENT PROVISIONS THAT WERE ISSUED AT AN EARLIER DATE.

CASES:

In re Transit Casualty Co., 900 S.W.2d 671 (Mo. App. 1995)

Angoff v. Holland-America Ins. Co. Trust, 937 S.W.2d 213 (Mo. App. 1996)

Heslop v. Sanderson, 123 S.W.3d 214 (Mo. App. 2003)

Cub Cadet Corp. v. MOPEC, Inc., 78 S.W.3d 205 (Mo. App. 2002)

STATUTES:

§ 375.670, RSMo 2000

§ 375.1220, RSMo 2000

LOCAL COURT RULES:

Third Amended Rule 75.7(a)

Third Amended Rule 75.17,

Third Amended Rule 75.19

Administrative Order No. 49 (as authorized by Third Rule 75.32(b))

POINT II

(Responds to Appellant's Court of Appeals' Brief Point IV)

THE TRIAL COURT DID NOT ERR IN HOLDING THAT MSEJ'S CLAIM SUPPORT WAS "NOT SUFFICIENT," IN THAT ASSIGNEE MSEJ DID NOT CARRY ITS BURDEN OF PROOF UNDER THE RULE OR THE CASE LAW BECAUSE ITS ALLEGED "PROOF" WAS FILED IN MARCH 2001, FOUR YEARS AFTER THE ASSIGNMENT, IN THE FORM OF: (1) A TWO-PAGE FACSIMILE LETTER, (2) WEB SITE ATTACHMENTS AND (3) MERE REFERENCE TO DOCUMENTS AT TRANSIT SUPPORTING THE PRIOR ALLOWANCE TO THE ASSIGNOR, ALONG WITH A BLANKET ASSERTION THAT MSEJ HAD A NEW THEORY OF RECOVERY UNDER A "SEPARATE LIMIT OF LIABILITY" IN SUPORT OF ALMOST \$20 MILLION IN NEW CLAIMS. THIS IS CLEARLY INSUFFICIENT TO CARRY THE BURDEN OF PROOF AS BOTH THE NEW THEORY AND MSEJ'S ALLEGED INABILITY TO OBTAIN BACKUP INFORMATION TO SUPPORT ITS THEORY MAY NOT BE EXCUSED, AS IT DID NOT ADEQUATELY PROVE THAT THE NEW THEORY AND INFORMATION WAS NOT AVAILABLE TO MSEJ FROM 1997 THROUGH MARCH 2001.

CASES:

Southeast Baker Feeds, Inc. v. Ranger Ins. Co., 974 S.W.2d 635 (Mo. App. 1998)

Freeman v. Leader Nat'l Ins. Co., 58 S.W.3d 590 (Mo. App. 2001)

Lucas v. Manufacturing Lumbermen's Underwriters, 349 Mo. 835, 163 S.W.2d 750,
(1942)

Continental Casualty Co. v. Employers Ins. Co. of Wausau, --- N.Y.S.2d ----, 2008 WL
5396869 (N.Y.A.D. 1 Dept.), 2008 N.Y. Slip Op. 10227

LOCAL COURT RULES:

Third Amended Rule 75.19(c)

POINT III

(Responds to Appellant's Court of Appeals' Brief Points I and II)

THE TRIAL COURT DID NOT ERR IN RULING THAT APPELLANT MSEJ IS ESTOPPED FROM MAKING FURTHER CLAIMS AGAINST TRANSIT BECAUSE: (1) THE TRIAL COURT CORRECTLY FOUND THAT EACH ELEMENT OF ESTOPPEL EXISTED AND WAS SUPPORTED BY COMPETENT EVIDENCE, INCLUDING SPECIFIC EVIDENCE THAT TRANSIT WAS PREJUDICED IN THAT IT DID NOT COLLECT ANY REINSURANCE THAT IT COULD HAVE COLLECTED IF IT HAD KNOWN OF THE ALLEGED "NEW" CLAIMS ASSERTED BY MSEJ AT THE TIME OF THE ASSIGNMENT; (2) TRANSIT'S ALLEGED FAILURE TO SPECIFICALLY PLEAD ESTOPPEL, IF TRUE, IS OF NO MOMENT SINCE TRANSIT'S

CLAIMS PROCEDURES ARE NOT COVERED BY THE FORMAL RULES OF PLEADING BUT, RATHER, ARE SUBJECT TO § 375.1214, WHICH REQUIRES ONLY THAT CLAIMS DISPUTE PROCEEDINGS BE CONDUCTED IN AN INFORMAL MANNER; AND (3) A COURT MAY RELY ON EVIDENCE THAT COMES INTO THE RECORD WITHOUT OBJECTION TO SUPPORT A FINDING OF ESTOPPEL.

CASES:

Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384 (Mo. banc 1989)

Barancik v. Meade, 106 S.W.3d 582 (Mo. App. W.D. 2003)

In re Transit Casualty Co., 900 S.W. 2d 671 (Mo. App. W.D. 1995)

STATUTES:

§ 375.650, RSMo 2000

§ 375.670, RSMo 2000

§ 375.1214, RSMo 2000

Rule 55.33(b)

LOCAL COURT RULES:

Third Amended Rule 75

ARGUMENT

POINT I

(Responds to Appellant's Court of Appeals' Brief Point III)

THE TRIAL COURT DID NOT ERR IN HOLDING THAT ADMINISTRATIVE ORDER 49 WAS AUTHORIZED BY THE INSURANCE LIQUIDATION CODE, WAS NOT VIOLATIVE OF DUE PROCESS AND WAS A VALID EXERCISE OF THE STATE'S POLICE POWER. FURTHER, ADMINISTRATIVE ORDER 49 IS AN INTEGRAL PART OF, AND MUST BE READ *IN PARI MATERIA* WITH, ALL PARTS OF THIRD AMENDED LOCAL RULE 75 AND MISSOURI INSOLVENCY STATUTES AND, UNDER APPLICABLE RULES OF CONSTRUCTION, SUPERCEDES ANY INCONSISTENT PROVISIONS THAT WERE ISSUED AT AN EARLIER DATE.

A. Standard of Review

In reviewing a receivership court, this Court affirms the judgment unless there is no substantial evidence to support it, it is against the weight of the evidence or it erroneously declares or applies the law. *Viacom, Inc. v. Transit Cas. Co. in Receivership*, 138 S.W.3d 723, 724 (Mo. banc 2004), *citing* *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). “Missouri courts may adopt rules governing the administration of judicial business provided such rules are not inconsistent with Missouri Supreme Court rules, the Missouri Constitution, and Missouri statutes in force.” *Midwest Materials Co. v. Village Development Co.*, 806 S.W.2d 477, 484 (Mo. App. 1991). The court that enunciates a rule is the best judge of how to interpret that rule. *Id.*; *See also* *State ex rel. Burns v.*

Gillis, 102 S.W.3d 66, 70 (Mo App. 2003); *In re Transit Cas. Co. in Receivership*, 900 S.W.2d 671, 674 (Mo. App. 1995); *State ex rel. Mo. Hwy. and Transp. Comm'n v. McCann*, 685 S.W.2d 880, 884 (Mo. App. 1984). “[A] higher court is reluctant to interfere with a court’s construction of its own rule.” *Id.*

AO 49 is a local rule enacted by the Cole County Circuit Court as a necessary adjunct to the efficient operation of Transit’s liquidation proceedings. Using the general rules of statutory construction, both Supreme Court rules and court orders have been held to be interpreted in same fashion as statutes. *Dynamic Computer Solutions, Inc. v. Midwest Marketing Ins. Agency, L.L.C.*, 91 S.W.3d 708, 713 (Mo. App. 2002), *Vogt v. Emmons*, 181 S.W.3d 87, 93 (Mo. App. 2005). The general rules of statutory construction apply to an order issued by a court and the words and clauses must be construed “in accordance with their natural import.” *Vogt v. Emmons*, 181 S.W.3d at 93, citing *Estate of Ingram v. Rollins*, 864 S.W.2d 400, 403 (Mo. App. 1993). “The order should be examined in its entirety, with an eye to making sense of the language used.” *Id.* The goal is to read the rules as a whole and *in pari materia* with related sections so as not to render an illogical or absurd result. *Heslop v. Sanderson*, 123 S.W.3d 214, 222 (Mo. App. 2003).

B. Potential Effect of the Decision

The decision of the Western District Court of Appeals (the “Decision”) in this case misinterpreted the Receivership Court’s local court rules by: (1) not affording that court deference in the interpretation of its own local rules pursuant to established case law; (2) relying on the wording of a single local rule (Third Rule 75.17(a)) in isolation rather than

reading it *in pari materia* with the other local rules enacted at the same time and subsequently (AO 49), contrary to case law; and (3) ignoring existing case law that provides the trial court discretion in closing a receivership.

The effect of these errors, among others, could be to indefinitely extend Transit's Receivership, which was ready to close, and possibly delay final asset distributions to all allowed creditors while Transit determines exactly how many more claims need to be resolved under the Decision's "loophole." On any such claims, the referees and the Receivership Court could become "claims adjusters" on complex mass tort claims without the ability or budget to hire the needed experts to handle this task. If the Decision remains law, the concept of "new evidence" would only be deemed admissible at the referee or Receivership Court level. Thus, the receiver or his court-appointed SDR would never have seen the evidence in support of the alleged claims or offered any opinion on the complex evidence prior to the time it is placed before the "reviewing" referee or the Receivership Court.

The reason that a claim can still arise in this scenario is that the Receivership has no way to verify that it denied all "claims" in the receivership prior to the AO 49 bar date, because the term "claim" is so broadly defined under Third Rule 75.¹⁴ Therefore, if

¹⁴ **"Claim"** shall mean any Official Claim Form or any other writing received by the Receivership the content of which would cause an ordinarily and reasonably prudent person to conclude, based upon reasonable and identifiable evidence, that monies may be owed to a Claimant." Third Rule 75.2(d).

a “claim” now surfaces that was never formally denied before any applicable bar date, and is now denied pursuant to AO 49 based on insufficient evidence, the claimant may file its “new evidence” on appeal to the referee or Receivership Court based on the Decision. The Decision is, in short, a nightmare, however unintended.

Since the Decision has been handed down, Transit has already begun to receive appeals from major policyholders with large toxic tort claims that seek to find refuge in the “loophole” that the Decision has opened in a claims cut-off date that has otherwise stood impregnable since 2001. Policyholders who followed the Receivership’s application of AO 49 are now requesting to reopen their claims so that they too can offer evidence of additional losses. If the Decision stands there is no reason to believe that these policyholders will not file an action directly with the Receivership Court seeking to introduce their “new evidence” of additional claims which had been lost due to their original compliance with AO 49. This could happen because the Decision punishes all of the claimants who “followed the rules” that existed before this loophole was created by the Decision, all those who finally resolved their claims over the past seven years with full policy releases that cannot be undone without an appeal to the Receivership Court and ultimately to this Court. This Court must act swiftly to rule that there was *never* a loophole in the local court rules.

C. The Court of Appeals Failed to Interpret all of the Rules and Missouri Statutes and to Interpret them *In Pari Materia*

The Western District Court of Appeals has previously reviewed Rule 75 and held that an appellate court should give “due deference to the court that enacted and

interpreted the local court rule.” *In re Transit*, 900 S.W.2d at 674. However, the Decision adopted a method for resolving claims wholly at odds with the Receivership Court’s overall intent as reflected in the revisions it made to Second Rule 75 in 2000. In short, the Decision either disregarded or misinterpreted the combination of provisions in Third Rules 75.7(a), 75.17, 75.19 and AO 49 (as authorized by Third Rule 75.32(b)), when properly read *in pari materia* and in the context of the significant changes to Third Rule 75 made by the Receivership Court in 2000 when it repealed Second Rule 75.

The result of the Decision places the Receivership Court, or a referee if one is appointed,¹⁵ in the position of adjusting claims in place of the SDR. In fact, a claimant need only ignore the AO 49 cut-off date (March 15, 2001) and wait until it is before the Receivership Court to present its additional evidence, allowing it to completely circumvent the intent of the order. This is a position which the Receivership Court has neither the budget nor the expertise to carry out since it would require the handling of complex mass tort claims and the impact of those claims upon numerous layers of insurance coverage.

Under Second Rule 75, there was no control over what documents were presented to the referee or court and, as a result, parties submitted whatever they desired to the referees or Receivership Court. In 2000, with much of Transit’s reinsurance settled or “commuted” and the claims winding down after 15 years of liquidation proceedings, the

¹⁵ The Receivership Court has the discretion to hear cases directly without the use of a Referee. *See* Rule 75.13.

Receivership Court decided that it was necessary to amend Second Rule 75 “to reflect changes in the Receivership since 1992 and to address the continuous desire to expedite the final determination of claims.” (T-App. 117; AO 45-A) These changes, reflected in Third Rule 75, were specifically designed to tighten and expedite the appeals/dispute process.

Subsequently, the Receivership Court enacted AO 49 to shut down what was an open-ended process for both the record and the evidence submitted. The overriding purpose of all of these rule changes was clearly set out in AO 45, AO 49 and Third Rule 75 – to close the estate as soon as possible and require all parties to follow strict procedures to bring the SDR all evidence by a date certain for a quick and final resolution of all claims.¹⁶

D. The “Mandatory Disclosures” Only Allowed the Claimant to Produce Evidence that the SDR Failed to Include in the “Case File”

The Mandatory Disclosures under Third Rule 75.17(a) is part of a case management procedure designed to streamline the dispute process. Under Rule 75.7(a), the SDR is required to produce the initial “Case File” by submitting the documents that he relied upon in making his determination of the claim. These documents are the ones that the claimant filed to support its claim with the SDR. (Surprisingly, the “Case File”

¹⁶ The statutes provide that the receiver may appoint, with the court’s approval, special deputy receivers to act for him in the management of the receivership with all his powers and duties. §§ 375.650.2 and 375.954.3.

under this important Rule 75.7(a) is only mentioned once but never discussed in the Decision even though it is of key importance to this case.) Third Rule 75.17(a), when read *in pari materia* with the other rules, allows the claimant to supplement the record before the referee or trial court with documents that the SDR failed to include and the claimant felt should be considered. These are documents that were already submitted to the SDR for his consideration and which, the claimant believes, the SDR overlooked or disregarded in making his determination of the claim.

The manner in which a claims determination is originally made by the SDR weighs heavily in the way Third Rule 75 was structured. The SDR initially receives and reviews all evidence offered by the claimant and issues an NOD from which the claimant may object by filing an RFR. If the SDR does not accede to the RFR, the claim is placed in dispute and the SDR, not the claimant, prepares and forwards the “Case File” to the Disputed Claims Clerk. The “Case File” at that point contains only the documents that the SDR considered relevant in arriving at his decision to allow or disallow the policyholder’s claim. (Third Rule 75.7(a)) The claimant then has the opportunity to supplement the “Case File” with additional documents, which were in the possession of the SDR but were not included in the “Case File” for any of several reasons, e.g. the SDR did not feel those documents were pertinent to the disposition of the claim. Rule 75.17(a).

It is significant that the Decision fails to cite to Third Rule 75.7(a) and only cites to part of Third Rule 75.17(a), *i.e.* that part which pertained to the “Mandatory Disclosures” and the fact that claimants could file additional evidence with the referee or

court. The failure of the Decision to fully cite and explain the relevance of the remainder of Third Rule 75.17(a) and its reference to 75.7(a) caused the Court of Appeals to misinterpret the Third Rule and take it out of the context of all of the local rules referred to above. In its entirety, Third Rule 75.17 was aptly titled “Case Management” by the Receivership Court. Subsection (a) of the rule provides:

75.17 Case Management

a. Within thirty (30) days of the date on which the Notice of Disputed Claim or Certified Question was mailed to the Claimant whose Claim is currently under consideration, the SDR shall provide the Claimant and the Clerk (but not the Receivership Court) with a copy of the “**Case File**” as referred to in paragraph 75.7. 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 and the Clerk (but not the Receivership Court) 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 evidentiary material that the Claimant contends support the amount claimed due or are relevant to the subject of

the Certified Question.¹⁷ These document submissions will be considered “mandatory disclosures.” (Emphasis added.)

The reference to the “Case File” in Third Rule 75.7(a) is extremely significant. In 2000, the Receivership Court decided that in order to expedite the dispute process and close the estate, the SDR should start using an appeal process similar to those in the Supreme Court rules and the Federal Court rules that contained strict timelines. It called for the SDR to file only the most pertinent documents relied upon by “the trier of fact” below, *i.e.* the SDR, within thirty (30) days of the dispute. The Case File was defined to include “all of the most pertinent non-privileged information considered by the SDR in rendering the Notice of Determination, including a copy of the policy upon which a policy claim is based, a copy of the claim, copies of pertinent correspondence from Claimant’s counsel and/or Claimant and the SDR’s responses thereto and a copy of the Notice of Determination for the Claim.” Third Rule 75.7(a).

Of course, since the claimant was the party appealing, the Receivership Court was well aware that the claimant might not agree with the documents the SDR selected to include in the Case File from among those documents relied on by the SDR. In other words, unlike the ordinary appeal, where the aggrieved party was the party that put together the “Legal File” (the equivalent to the “Case File”), the non-aggrieved party was

¹⁷ The references in these rules to Certified Questions are not relevant as this was a disputed claim pursuant to paragraph 75.7 and not a Certified Question proceeding pursuant to paragraph 75.8.

the party that selected the documents that went into the de-facto Legal File in this disputed claims process. And, the definition of “Case File” limited the scope of those documents.

For these reasons, Third Rule 75.17(a) states that, within thirty (30) days after the SDR has filed the Case File (60 days after the dispute), the claimant must file its Mandatory Disclosures, which consist of “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....” (Emphasis added.) The gist of the new Third Rule, taken as a whole, was that, by the time all of the documents are filed (Case File and Mandatory Disclosures), the Receivership Court and/or the referee should have all of the documents considered relevant by both sides and thus everything necessary to make his determination on whether the SDR was in error. Importantly, there was no provision in Second Rule 75 for a Case File or Mandatory Disclosures. (T-App. 072-112) More importantly, there was no intent that the Court or Referee was going to receive new evidence never reviewed by the SDR in the first instance.

The 2000 changes to Second Rule 75 also included the Receivership Court’s intent to cut back on the amount of discovery which had previously been allowed, as additional discovery is now only “as allowed by the Court.” Third Rule 75.19. The lower appellate court failed to read all of these provisions from Third Rule 75 *in pari materia* with AO 49 or in the context of the rules and practices then in place. In so doing, the Decision

misinterpreted the meaning of these local rules and orders and only placed emphasis on the language of one section of the rule, wholly out of the context with the rest. The purpose of these rules, read together, was to force both claimants and the SDR to put together all of the documents that supported their claims from the record below at the beginning of the dispute in order to expedite the disputed claims process. This was not a requirement in Second Rule 75, which merely provided for a prehearing conference. (T-App. 090)¹⁸

The Decision failed to consider the important interplay between Third Rules 75.17(a) and 75.7(a). Again, the Decision inexplicably ignored Third Rule 75.7(a). Third Rule 75.17 was not intended to add new evidence that was never submitted to the SDR. As such, the record of evidence in support of the claim before the referee and the Receivership Court should not include more than was initially submitted to the SDR below unless specifically permitted by the referee or Receivership Court, which the Third Rule permits by discovery (Third Rule 75.19).

However, it should be pointed out that the reference to the fact that Third Rule 75 continued to permit discovery is another red herring. It is absurd to believe that the trial court that changed the local rules to (a) expedite the disputed claims process in Third

¹⁸ Transit could not resolve all of its many claims after the AO 49 deadline. In the proceedings with *amicus* PwC, the record shows that Transit received over \$700 million in demands on the March 15, 2001 deadline and has had to resolve all of these since that time by negotiation or litigation. Some of the final ones are set out at L.F. 6-8.

Rule 75.7, 75.17 and 75.19 and (b) to expedite closure of the estate by means of AO 49, was going to permit discovery that was going to allow a party to violate those local rules. Instead, the Transit docket will reflect in all of the prior disputed claims proceedings that the court has only allowed such discovery on points such as evidence that relates to the proper “choice of law” determination after this Court’s decision that required proof on that issue in *Viacom, Inc. v. Transit Cas. Co. in Receivership*, 138 S.W.3d 723 (Mo. banc 2004). Similarly, the court allowed evidence on the issue of “agency” in the reported decision in *H.K. Porter Co., Inc. v. Transit Casualty Company in Receivership*, 215 S.W.3d 134, 141-142 (Mo. App. 2006).¹⁹ Indeed, in this case and in the dispute involving *amicus*, there has been significant discovery on the meaning and enforcement of AO 49 or estoppel issues. However, the discovery has not been used for the purpose of bringing in new substantive claim evidence not previously supplied to the SDR. Again, that is why the Receivership Court added the provision that discovery is only “as allowed by the Court.” Third Rule 75.19

¹⁹ The *H.K. Porter* decision cites to the testimony of a non-party that the trial court permitted the parties to depose on a key issue of agency. Both parties asserted a broker was the sole agent of the other. It was key to resolving the case. 215 S.W.3d at 141-142. This case also shows how the \$19 million in “extra margin” that MSEJ points to for its own policies are only listed, for its intended purposes - - a worst case scenario for distribution purposes to protect all of Transit’s other creditors. Porter’s total “case reserves” and “extra margin” was \$20,170,000 and it lost on appeal. 215 S.W.3d at 145.

E. AO 49 Modified Third Amended Rule 75

On October 31, 2000, the Receivership Court issued AO 49 and the SDR sent it out with its “Notice of Claims Cut-Off” to all of Transit’s Creditors. (Supp. L.F. 59-62) The purpose of these documents was clearly stated. “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 ... must present evidence of all unresolved claims, whether existing or contingent, to the [SDR] so that he can make final determinations on such claims.” (Supp. L.F. 59) The Receivership Court affirmatively stated that AO 49 was “necessary so as not to unduly delay the administration of the Receivership.” (Supp. L.F. 61)

More specifically, when AO 49 was issued by the Receivership Court there was no need for that Court to modify any of the Local Rules governing the appeals process because the scope of what could be submitted on appeal was, by necessity, limited to what was submitted to the SDR, *i.e.* documents and other information presented before the March 15, 2001 cut-off date. At pages 3-4 of the Decision, the Court of Appeals cited AO 49’s language requiring the submission of new claims or evidence of existing claims by March 15, 2001. “After that date no new claims or evidence of claims shall be accepted by the Special Deputy Receiver.” The Court of Appeals emphasized that the evidence would not be accepted by the SDR. Transit does not challenge the fact that AO 49 only limited the SDR, because that is all that was practically necessary. Section 375.1220.1 makes it the SDR’s sole duty to “compound, compromise or in any other manner negotiate the amount for which claims will be allowed.” Transit’s claims

allowance practices followed this statute in that all claims information went to the SDR's staff and ultimately to the SDR for sign-off on all claims decisions. In light of § 375.1220.1 and Transit's actual claims practices, the Receivership Court intended AO 49 to limit the SDR, because the SDR is the only one statutorily permitted to decide claims.

However, Transit does challenge the Court of Appeals' holding that AO 49 "was not the governing instrument" because 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." (T-App. 007; emphasis added.) AO 49 was issued pursuant to Rule 75.32(b), which allows such orders as are "reasonable and necessary for the administration of the Receivership and the administration of the Disputed Claims office." (Emphasis added.) In that light, neither AO 49, Third Rule 75.17, 75.19 nor 75.7, was the "governing instrument;" -- they all were the governing instruments when taken together and read as a whole. The more specific, current and overriding order (which has the effect of a Rule per Third Rule 75.32(b)), at least with respect to submission of new claims and new evidence in support of Proofs of Claim however, was the final Order issued in that sequence – AO 49. That order, therefore, modified those enactments preceding it, because Missouri law is clear that a change or amendment is intended to have an effect on the rule as there is no presumption that, in this case, the Receivership Court engaged in a useless act in enacting its administrative order. *Cox v. Collins*, 184 S.W.3d 590, 594 (Mo. App. 2006).

Using the general rules of statutory construction, both Supreme Court rules and court orders have been held to be interpreted in same fashion as statutes. *Dynamic Computer Solutions*, 91 S.W.3d at 713; *Vogt v. Emmons*, 181 S.W.3d at 93. It is also well-established that an appellate court must ascertain the intent of the rules that have been promulgated and give effect to that intent. *Cub Cadet Corp. v. MOPEC, Inc.*, 78 S.W.3d 205, 214 (Mo. App. 2002), *citing Sermchief v. Gonzales*, 660 S.W.2d 683, 688-89 (Mo. banc 1983). This is accomplished by giving the words their plain and ordinary meaning. *Id.* Further insight into the object of the rules “can be gained by identifying the problem sought to be remedied and the circumstances and conditions existing at the time of enactment.” *Id.* See also *State ex rel. School Dist. of Kansas City v. Williamson*, 141 S.W.3d 418, 424 (Mo. App. 2004). An appellate court is to read the rules as a whole and *in pari materia* with related sections. *Heslop v. Sanderson*, 123 S.W.3d 214, 222 (Mo. App. 2003). The provisions of these rules must not be read in isolation but construed together and, if reasonably possible, harmonized with each other. *Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799, 801 (Mo. banc 2003).

If these statutory rules of construction are followed then it is clear that none of the local rules currently before this Court, including AO 49, which again is a Rule as provided by Third Rule 75.32(b) is, standing alone, the “governing instrument.” Rather, they all must be read together and harmonized. If anything, AO 49, which was issued as “reasonable and necessary for the administration of the Receivership and the administration of the Disputed Claims office” under Rule 75.32(b) in October 2000, must

be seen as superseding any right permitted under Rule 75.17(a) that is inconsistent. *Cox v. Collins*, 184 S.W.3d at 594.

The concept of permitting the claimant to present voluminous new evidence for the first time to the referee or Receivership Court misinterprets the intent of the Receivership Court's rules and orders issued throughout 2000. These rules were wholly intended to streamline the disputed claims process and better focus the legal issues for the Referee and Court. It is clear from these rules and orders of the Receivership Court in 2000 that the record on any appeal from a claims determination of the SDR should be based upon the SDR's decision.

The consequences of the Decision could cause this Receivership to remain open for many more years than should otherwise be necessary as claimants may assert that they are entitled to one last chance to raise further evidence on their claims in front of the Receivership Court. If so, the Receivership Court could be faced with evidence that the SDR has never seen and, rather than functioning as a reviewing as Third Rule 75 envisions, that court could be forced to determine claims in the first instance. Moreover, it will have to do so without any assistance from the SDR or the use of experts that were used to analyze the complex asbestos and environmental claims in question and whether the evidence supports the claims that have been asserted. This type of complex claims analysis would, by necessity, require the expertise of talented individuals that come at no small cost. The Receivership Court or referee will have to retain actuaries, allocation experts and claims experts to determine if the claims submitted have exhausted underlying layers, are not duplicative and actually impair Transit's policies.

Furthermore, there is currently no requirement that Transit pay this cost as it is not a cost of the SDR or a cost administration of the estate per the Court of Appeal's holding.

The Court of Appeals found that the Receivership Court had the authority to promulgate AO 49, holding:

According to well-established law, the circuit court has wide discretion to expedite closure of an estate. *Angoff v. Holland-America Insurance Company Trust*, 937 S.W.2d 213, 217 (Mo. App. 1996). Transit had been in receivership since 1985, and the original deadline for claims was December 31, 1987. Setting March 15, 2001, as the date to close the estate seems reasonable. We do not discern a basis for concluding that the circuit court abused its discretion in setting the deadline in Administrative Order No. 49.

Both MSEJ and *amicus* have made multiple arguments to the effect that the SDR has many statutorily conferred powers for determining claims that cannot be curtailed by court order because they are statutory. They conclude that AO 49 cannot be a valid exercise of the court's authority because a court order cannot override a statute. The problem with these arguments is that they fail to read the insolvency statutes *in pari materia* but, instead pick and choose convenient references to support their arguments.

The Missouri insolvency statutes are contained in Chapter 375 at §§ 375.570 to 375.750, 375.950 to 375.990 and 375.1150 to 375.1246. These statutes have been found by the courts to be a comprehensive scheme for dealing with the liquidation of insolvent insurance carriers. *Viacom*, 138 S.W.3d at 725. Since these statutes have been found to be a comprehensive scheme it only makes sense to read the scheme together. "All

consistent statutes relating to the same subject are construed together as though constituting one act, and ‘[t]he rule of construction in such instances proceeds upon the supposition that the statutes in question are intended to be read consistently and harmoniously in their several parts and provisions.’” *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991). This scheme was designed by the legislature to be a flexible program combining the efforts of the Director of the Department of Insurance as Receiver, any SDR and the Receivership Court, all for the benefit of the policyholders and creditors of the insolvent insurer. The legislature envisioned that the Receivership Court would play a significant role in any liquidation since it provided: “[T]he director in his capacity as receiver of such insurer, any special deputy receiver who is appointed by the director and whose appointment is approved by the court, all employees and agents of such receivership and all employees of the state of Missouri when acting with respect to the receivership shall be considered to be officers of the court when acting in such capacities and as such shall be subject to the orders and directions of the court with respect to their actions or omissions in connection with the receivership....” § 375.650.1.

In this context, it can be seen that the legislature anticipated and provided that the supervising court would play a key role in any liquidation. The legislature also anticipated that claims procedures would be established by the SDR in conjunction with the Receivership Court § 375.670. The legislature did not specify a particular claims procedure for the resolution of disputes until long after Transit’s rules had already been established. However, in § 375.670, the legislature provided: “[T]he court, upon the

application of the receiver, shall establish claims procedures and shall limit and may extend the time for the presentation of claims against the receivership, and notice thereof shall be given in such manner as said court shall direct; and any creditor neglecting to present his claim within the time so limited shall be debarred of all right to share in the assets of the insurer.” (Emphasis added.)

Amicus complains that this section does not spell out that there shall be an “evidentiary penalty” for failure to follow the claims procedure and the dates set out therein. However, the original bar date of December 31, 1987 under § 375.670, provides a much stronger penalty than a mere evidentiary prohibition. *Amicus* does not challenge the original bar date on Proofs of Claim in December 1987 which provided that, if a POC was not filed, it was a complete bar for any recovery. (T-App. 026-032) Court-ordered deadlines that “debar” a claimant from all ability to share in the assets of the estate have been common place in liquidations and bankruptcies for countless decades. This is much worse than a mere “evidentiary penalty.”

The claims cut-off provision of the insolvency law gives the Receivership Court wide discretion in restraining claims through time limitations and does not in any way limit the number of such restraints to just the original bar date. Also, AO 49’s “claims estimation” provision is not a “penalty.” In fact, if a policyholder properly complied with AO 49, which was based on §§ 375.670 and 375.1220, authorized the SDR as receiver to settle claims and to determine claims by estimate using methods based upon actuarial evaluations or other accepted methods of valuing claims with reasonable certainty. In other words, a claimant could receive a significant allowance of future claims based on

estimates of those claims. Far from a penalty, it was a virtual boon for many claimants who complied with the Order and received allowances even though they had no current claims. This is why the reinsurers in *Angoff v. Holland-America Ins. Co. Trust, supra*, were challenging the entire plan – they did not want to pay the reinsurance on these estimated claims – only current claims with the typical evidentiary support.²⁰

Other statutes provide the SDR with rights to limit the evidence that he should consider in reviewing a claim if necessary when the receivership is winding down after more than 15 years. See § 375.1182.3 (the enumerated powers of the liquidator “[s]hall not be construed as a limitation upon him, nor shall it exclude in any manner his right to do such other acts not herein specifically enumerated, or otherwise provided for, as may be necessary or appropriate for the accomplishment of or in aid of the purpose of liquidation.”).

Amicus has also argued that § 375.1208.3 allows the liquidator to request additional evidence from the claimant at any time since it states, “[a]t any time the

²⁰ *Amicus* fails to inform the Court that the reason that it is in litigation with Transit is that, unlike so many other claimants, it wholly and completely failed to comply with AO 49 and filed nothing in response to AO 49 on its estimated claims, despite warnings from Transit and other counsel to do so. It is difficult for Transit to accept the characterization of the term “penalty” for *amicus*’ benign neglect of a provision that, if they had complied with AO 49, could arguably have had a substantial estimated claims allowance.

liquidator may request the claimant to present information or evidence supplementary to that required under subsection 1 of this section and may take testimony under oath, require production of affidavits or depositions, or otherwise obtain additional information or evidence.” (Emphasis added.) *Amicus* has argued that this statutory power vested in the liquidator cannot be taken away by court order. Thus, it argues that AO 49 must be invalid in so far as it restricts the liquidator’s ability to request and receive evidence. This argument ignores § 375.650 and § 375.1176.2 (the receiver is subject to the orders and specific supervision and directions of the court) and § 375.670.1 (allowing the court to establish claims procedures). These statutes, among others, allow the Receivership Court, along with the SDR, to manage the estate in such a way that it can be wound up while protecting valid creditors. The Receivership Court has often noted over the years that the receivership is constantly changing. Missouri’s statutory scheme for the administration of insolvent estates allows the Receivership Court to adjust to these changes by providing new procedures when necessary. Again, these statutes must be read *in pari materia* and not, as *amicus* would like, in isolation.

Finally, despite the Western District’s previous ruling in *Angoff v. Holland-America*, its holding in this case has taken the decisions regarding expediting the closure of the receivership estate out of the hands of the Receivership Court. In *Angoff v. Holland-America*, this Court found that § 375.1220 authorized the receiver to settle claims and to determine claims by estimate, using methods based upon actuarial evaluations or other accepted methods of valuing claims with reasonable certainty and that the receiver had broad discretion in conducting and managing a liquidation. 937

S.W.2d at 217, citing *Lucas v. Manufacturing Lumbermen's Underwriters*, 349 Mo. 835, 163 S.W.2d 750, 757 (1942).

In this case, however, the same Court has now held that the Receivership Court's closure order (AO 49) is emasculated and that court should assume the role of being a claims adjuster, even though the Receivership Court has no expertise in this area. *Angoff v. Holland-America* found that the Receivership Court has the discretion to expedite the closure of the receivership estate. *Id.* at 218, citing *State ex rel. Hyde v. Falkenhainer*, 309 Mo. 381, 274 S.W. 722, 725-26 (1925). Additionally, as noted at the outset, the appellate court gives "due deference to the court that enacted and interpreted the local court rule." *In re Transit*, 900 S.W.2d at 674. The Decision in this case is at odds with both of these previous decisions.²¹

F. Conclusion

There was no dispute in this action that AO 49 and the Notice of Claims Cut-Off was sent to all of Transit's third class claimants or that it clearly stated that the order's intent was "to expedite the closure of the Receivership...." (Supp. L.F. 59) Contrary to the clear intent stated in these documents, the Decision will, in fact, grant this claimant

²¹ *In re Transit* recognized that the Receivership Court was effectively hearing appeals. "The rules provide that in the event an appeal is taken to the circuit court, the circuit court may either affirm the decision, modify it, enter a new determination or remand the cause to the same Commissioner [referee] for further proceedings as directed by the circuit court as the interests of justice may require." *Id.* at 674.

and others the ability to hold the estate open for several more years while they garner additional evidence to put before the Receivership Court. This holding will force Transit's receivership, Missouri's courts and, most importantly, Transit's policyholders with allowed claims who have been patiently waiting for a final dividend payment, to wait even longer.

Transit respectfully submits that this Court should keep in mind how the appellate process is designed to operate and hold to this view when interpreting Third Rule 75, including AO 49, along with the Missouri Insurance Insolvency Code. This same process controls how the referee and the Receivership Court review the SDR's decisions to allow or disallow claims, functioning more as an appellate court and, as such, neither are an appropriate forum to receive unlimited additional evidence from Transit's claimants. As stated at the outset, even the Court of Appeals admitted that Transit's argument supporting the foregoing interpretation of the statutes, the rules and the history of the case, were "reasonable and pragmatic," but it did so in a context that misconstrued one part of Third Rule 75 as separate and distinct from all of the rest:

Transit argues that this [the Decision's] interpretation of the rules is at odds with Administrative Order No. 49's stated purpose of closing up the estate. Transit reasons that setting a deadline for submitting evidence but then allowing a claimant to submit that evidence when it appeals the receiver's decision makes little sense. Although this is a reasonable and pragmatic argument, it is contrary to Rule 75, which allows the claimant to cite to additional evidence—beyond "the documents in the case file"—in the

claimant's written submissions to the referee. It also is contrary to Administrative Order No. 49, which expressly applied the March 15, 2001, deadline only to the receiver's action.

(T-App.. 009; emphasis added.)

Transit submits that the rules of statutory construction that were not followed properly by the Decision were designed to yield “reasonable and pragmatic” solutions and, if followed in this case, would do just that.

POINT II

(Responds to Appellant's Court of Appeals' Brief Point IV)

THE TRIAL COURT DID NOT ERR IN HOLDING THAT MSEJ'S CLAIM SUPPORT WAS "NOT SUFFICIENT," IN THAT ASSIGNEE MSEJ DID NOT CARRY ITS BURDEN OF PROOF UNDER THE RULE OR THE CASE LAW BECAUSE ITS ALLEGED "PROOF" WAS FILED IN MARCH 2001, FOUR YEARS AFTER THE ASSIGNMENT, IN THE FORM OF: (1) A TWO-PAGE FACSIMILE LETTER, (2) WEB SITE ATTACHMENTS AND (3) MERE REFERENCE TO DOCUMENTS AT TRANSIT SUPPORTING THE PRIOR ALLOWANCE TO THE ASSIGNOR, ALONG WITH A BLANKET ASSERTION THAT MSEJ HAD A NEW THEORY OF RECOVERY UNDER A "SEPARATE LIMIT OF LIABILITY" IN SUPORT OF ALMOST \$20 MILLION IN NEW CLAIMS. THIS IS CLEARLY INSUFFICIENT TO CARRY THE BURDEN OF PROOF AS BOTH THE NEW THEORY AND MSEJ'S ALLEGED INABILITY TO OBTAIN BACKUP INFORMATION TO SUPPORT ITS THEORY MAY NOT BE EXCUSED, AS IT DID NOT ADEQUATELY PROVE THAT THE NEW THEORY AND INFORMATION WAS NOT AVAILABLE TO MSEJ FROM 1997 THROUGH MARCH 2001.

A. Standard of Review

In the present case, there was no evidentiary hearing or stipulated facts. The Referee relied on depositions, affidavits and documentary evidence. The trial court adopted the Referee's findings, conclusions and order by operation of law. In such circumstances, "this

Court defers to the trial court as the finder of fact in determinations as to whether there is substantial evidence to support the judgment and whether that judgment is against the weight of the evidence, even where those facts are derived from pleadings, stipulations, exhibits and depositions.” *Business Men's Assur. Co. of America v. Graham*, 984 S.W.2d 501, 506 (Mo. banc 1999). *See also* Rule 84.13(d). In addition, in this instance, “appellate courts do not give any deference to a trial judge's determination regarding the credibility of witnesses in cases submitted solely upon a written record. On the other hand, the rule of ‘no deference’ regarding ‘witness credibility’ in cases where there are no *live* witnesses does not mean appellate courts are to review such cases de novo or ignore evidence and inferences favorable to the judgment.” *Jarrell v. Director of Revenue*, 41 S.W.3d 42, 45 (Mo. App. S.D. 2001), *citing* *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). (Emphasis in original.)

B. MSEJ’s Evidence in Support of Almost \$20 Million in New Claims in 2001 Did not Meet the Burden of Proof

The Referee’s Report set out the fact that MSEJ had not met the burden of proof in this proceeding, stating: “Pursuant to Rule 75.19(c), ‘the burden of proof shall be the same as the burden of proof established by the law of the State of Missouri for contested judicial claims against an insurance carrier.’ It is the insured, in this case MSEJ who stands in the shoes of the insured, who has the burden of proof to establish its claims. *See Southeast Baker Feeds, Inc. v. Ranger Ins. Co.*, 974 S.W.2d 635 (Mo. App. 1998).” (MSEJ App. A57.) Transit agrees that this is the proper burden of proof and that MSEJ has not met that burden.

The Decision also agreed on this point as it found that “MSEJ concedes that it did not submit certain information by the March 15, 2001, deadline set in [AO 49].” (T-App. 005.) The appellate court found that MSEJ “did not provide the names of the persons who had made personal injury claims against Johns-Manville, and it did not identify their specific illnesses or injuries.” *Id.* It also found that “MSEJ presented no evidence that the injuries were first diagnosed within the policy period, and it did not submit evidence of any collateral payouts from workers' compensation, unemployment compensation, or disability benefits law.” (T-App. 006.) Finally, the Decision held that “[o]n appeal, MSEJ does not dispute these findings. We do not discern a sound basis for concluding that the Referee erred in concluding that the receiver correctly determined that MSEJ failed to provide sufficient evidence for its claims by March 15, 2001.” *Id.* The Decision’s holding on the AO 49 issue rendered this ruling moot. It is separately challenged by MSEJ.

Since this court reviews the decision of the trial court, the Referee’s Report as adopted by the trial court and challenged by MSEJ on this issue must be examined. Transit submits that a primary problem with MSEJ’s case in meeting its burden of proof was that it could never settle on what it needed to prove. The Referee noted as well that “a point of confusion has been that the statements and arguments of MSEJ, LLC have changed with time making it difficult to pin down their arguments and their theory of recovery. As an example, MSEJ, LLC has changed the characterization of the March 1,

2001 filings which are the subject of the subject of this disputed claim.” (MSEJ App A58.)

Again, MSEJ is not the original policyholder, but is a “debt trader” that purchased vis-à-vis an assignment, for an unknown price, the right to receive all future distributions of assets in the place and stead of the Property Damage Trust. MSEJ attempts to use this status to claim ignorance of the nature and extent of its predecessor’s claims against Transit at the March 2001 deadline and as an excuse for not being able to comply with AO 49. However, MSEJ “stands in the shoes” of the Property Damage Trust and it is charged with that knowledge. *Freeman v. Leader Nat’l Ins. Co.*, 58 S.W.3d 590, 597 (Mo. App. 2001)(“A party making a claim through a derivative right acquires no greater rights in law or equity than the party for whom it was submitted.”). *See also Bonner v. Automobile Club Inter-Insurance Exchange*, 899 S.W.2d 925, 928 (Mo. App. 1995).

MSEJ also wants to file documents from 2006 under yet another “new theory” of another “second policy limit” now that it says it has had the time to perform its “due diligence.”²² However, in addition to this being contrary to the statutes and rules governing the receivership and fundamentally unfair to all other creditors, MSEJ simply

²² MSEJ’s action is indicative of the basic difference between normal policyholders, who file claims to attempt to “break even” on their losses, and debt traders, who purchase claims against an insurance policy and then search through the policy for additional profit. While these actions are entrepreneurial, they are not the reason insurance company receiverships were statutorily established.

failed to provide sufficient evidence for the SDR to allow almost \$20 million in claims. Also, the record is clear that MSEJ had time to do this same “due diligence” before the assignment, as Mr. Mayer wrote to Transit before the assignment and stated that the assignment was subject to “completion of the buyer’s due diligence” which “centered on verification of the final, fixed and allowed amount of the claims being purchased.” (R-App. at 5)

The confusion in MSEJ’s filings is self-evident. Long after the 1997 assignment, MSEJ’s March 2001 AO 49 submission stated, that they “were filing new claims” and that “the prior claims against Transit were only for property damage claims.” (MSEJ App. A72-73.) Then, well after the March 15, 2001 AO 49 deadline, MSEJ changed its theory of recovery again and “appears to have abandoned their belief in support of simply characterizing the filing on March 1, 2001 as not new proof of claims but rather was ‘evidence in support of unresolved claims under separate lines of coverage provided under the policies that had not been exhausted by he initial allowance in 1995.’” (*Id.* at A73.)

The Referee found that on each of the six post bar date POCs filed by MSEJ, it reiterated the fact that the prior allowances to the Property Damage Trust in 1990 and more formally in 1995 were for property damage claims and that these additional claims were for personal injury claims. (*Id.* at A73.) As noted in the Statement of Facts and by the Referee however, this is patently false. The original allowance was for personal injury claims. (*Id.* at A299-308) Also, with respect to the alleged “second policy limit,” MSEJ’s predecessor Manville filed the original POCs that stated that the “limits of

liability” for each of the Transit policies were the exact amounts that Transit allowed on each of those six policies. (L.F. 178, 182, 188, 190, 192, 194.) Thus, if MSEJ “stands in the shoes” of its predecessor, it should be bound by the statements in those original POCs and should not be able to now assert that the policy limits are more than what was originally in the sworn proofs of claim required under statute. § 375.670.

MSEJ’s argument that it did not have enough time to perform “due diligence” before the AO 49 cut-off date and other excuses are simply red herrings. As a “debt-trader” it assumes the risk that, when it purchases a claim from a policyholder, it also purchases all of the defenses and knowledge of that claim that came with the policyholder, i.e. “all right, title and interest” in the claim. (*Id.* at A231.) Any arguments that it had a difficult time obtaining documents from the Property Damage Trust (on which there is no proof other than unsubstantiated statements in a two-page facsimile), are simply proverbial “cost of doing business.” In any case, this argument is also difficult to accept for several reasons.

First, the assignment was executed in 1997. One must assume that there was indeed a great deal of “due diligence” performed by MSEJ before it purchased the \$17,071,242.27 in claims from the Property Damage Trust, as the letters from Mr. Mayer to Transit indicated. Second, its “new theory” that, even if the original allowance to the Property Damage Trust was for personal injury claims, there was still a “second policy limit” for “work-related asbestos injuries” that was not subject to the “products liability limits” of the first allowance, was simply a bald statement in a two-page March 8, 2001 facsimile from J. Scognamiglio that accompanied MSEJ’s AO 49 submission. (*See* L.F.

235-236) This statement is unsupported by facts. It is also suspect, as MSEJ asks the Court to accept the fact that the first time that anyone for the Property Damage Trust or MSEJ ever realized that it could make a claim under this second workers' compensation policy limit was on March 8, 2001.

The Referee found that, based on the AO 49 deadline, he must make a determination as to whether the sufficiency of the supporting documents filed with MSEJ's POCs in 2001 supported its claims. (MSEJ App. A75.) Transit does not dispute the fact that all documents in Transit's files at the receivership in support of the first allowance to a policyholder could also be considered in regard to additional allowances. The Referee initially found the "false assumption" that the prior allowance to the Property Damage Trust was all for property damage claims caused MSEJ to file insufficient information and documentation in support of the new theory that it now seeks to enforce. (*Id.*)

Transit agrees with the Referee's conclusion and asserts that the only support for MSEJ's "second limit" theory that was filed prior to the AO 49 deadline, i.e. the brief mention by Mr. Scognamiglio on the first page of his March 8, 2001 facsimile, and a mere reference to 10% of the \$14 billion in claims allowed in the Manville Personal Injury Trust, cannot sustain its burden of proof for an allowance in the receivership proceedings.

Transit could not and would never be able to make an allowance of almost \$20 million on an alleged "second limit" without extensive proof in its file in support of such a claim. Portions of Mr. Bill Barbagallo's deposition are set out in the Referee's report as

to what standards of proof would be necessary for a claimant to obtain an allowance under such a second limit. (MSEJ App. A76.) Moreover, the alleged “second limit” that was argued for by MSEJ at the time of the March 8, 2001 facsimile was for workers compensation claims, which later changed to a request for a second limit under the “Occupational Disease” limit of liability. (L.F. 337-341 – report dated May 10, 2006.) Thus, it was in 2001 and remains completely unclear today how and why Transit was supposed to allow any claims, or what claims, under these alleged separate limits of liability or if, on the remand ordered by the Court of Appeals, MSEJ will again change its theory of recovery.

The one point of law and fact that is abundantly clear from the record is that on or before March 15, 2001, MSEJ stood in the shoes of the Property Damage Trust and knew or should have known the full nature and extent of claims that it could bring against the Transit policies. MSEJ had many years to review these policies and yet it failed to file sufficient support for an allowance of \$19,416,667 in addition to the amount allowed to the Property Damage Trust under the previous NODs. It had no excuse not to be aware of (1) the wording in the policies that entitled it to a second limit; or (2) the listing of claims that would distinguish between the claims previously allowed and those on which it was seeking the second allowance. Mere reference to a percentage of claims in a facsimile and documents copied off a web site do not comply with the evidentiary burden in Third Rule 75 or the case law.

MSEJ’s own statements on the record in this regard are shocking. For instance, MSEJ stated in a December 2005 Motion and attached “Timeline” that it was not until

“Early 2001” that “MSEJ becomes aware that the Manville/Transit policies, which provide separate coverage for products and occupational disease claims, were never exhausted...” (L.F. 505) Again, it was MSEJ’s burden to ascertain even before the assignment when it was performing its due diligence whether the Transit policies had separate limits. After the 1997 assignment, it was charged with such knowledge as a matter of law. Further, MSEJ’s own attorney, Marcia Ruskin, sought representations from Transit in a letter of October 27, 1997, and said that “based on claims previously submitted to Transit, the policy limits of each of the policies have been exhausted, the maximum amounts payable under the Policies have already been issued, and no additional claims can be asserted under the Policies.” (MSEJ App. A67; T-App. 014-015) Mr. Mayer, counsel for the Property Damage Trust, signed a letter stating the same. The trial court adopted Findings of Fact affirming that these were true facts and there is no reason to disrupt these findings. (MSEJ App. A67)

Thus, when MSEJ makes statement that “[i]n 1997 when the assignment was completed, MSEJ had no knowledge of the availability of coverage for additional claims under the Transit policies” (L.F. 948), it must be rejected out of hand. Additionally, MSEJ has already informed the court that remand of this action will be fruitless. It stated that “[d]espite the report produced for us in 2001 and delivered to Transit showing \$38 million in the paid amount of employee claims, the Trust informs us that it no longer has in its database the ability to indicate claimants were Manville employees.” (L.F. 951) In other words, MSEJ admits that it cannot carry its burden of proof of differentiating which claims would fall within the “second limit of liability” even if this case is remanded.

Notwithstanding this paucity of proof, MSEJ wanted Transit to make an allowance of almost \$20 million based on schedules printed off the internet without any backup support or proof, including proof that it was not “double dipping,” i.e. that other insurers had not already paid these same claims. That is why Transit required audits, proof that the underlying policies to Transit’s excess policies were exhausted, proof that the claims were actually “occupational disease,” and any other substantive evidence.

The recent decision in *Continental Casualty Co. v. Employers Ins. Co. of Wausau*, --- N.Y.S.2d ----, 2008 WL 5396869 (N.Y.A.D. 1 Dept.), 2008 N.Y. Slip Op. 10227, (T-App. 123-138) exemplifies this point. There, the New York court examined a request by new parties that also sat in the original policyholder’s shoes for a “second limit” on asbestos bodily injury claims many years after over \$100 million was paid on the “products liability limits” by a group of insurers. The court ultimately held that the class action plaintiffs were barred under the theory of laches, among other reasons. The court held that in order to recover under the second, “non-products/operations coverage” limit, the party now standing in the policyholder’s shoes must prove all elements that would entitle them to coverage. *Id.* at *15-16. The court held in *Continental Casualty* that it would involve numerous “mini-trials” to resolve the asbestos claims in question there, which are very similar to the types of claims that are presented under MSEJ’s “new theory.” *Id.*

New York, like Missouri, has an “injury-in-fact trigger” and pro-rata allocation of the claims across the triggered policies. *See Nationwide Ins. Co. v. Central Missouri Elec. Coop.*, 278 F.3d 742, 748 (8th Cir. 2001) (applying Missouri law and approving an

“injury in fact” trigger and pro rata “time on the risk” allocation). The court in *Continental Casualty* said that “Not surprisingly since the burden on claimants to prove so would be insurmountable given not only the absence of evidentiary material, but the difficulty if not impossibility of pinpointing when any subclinical tissue damage tipped over into actual impairment.” *Id.* at *15. In short, the burden of showing which employees suffered the injuries and which of Transit’s six policies were “triggered” by the asbestos injuries is not the simple task that MSEJ makes it out to be. As the *Continental Casualty* case and the many cases cited therein demonstrate, any request for any amount of asbestos coverage under coverage limits other than for “products liability,” much less \$20 million in coverage, may be hotly contested on one of many grounds.

C. Conclusion

The Referee’s Report concluded that the evidence filed on March 1, 2001 was not sufficient to make a claim. Transit agrees and points out that the SDR considered not only that evidence but all evidence in the records of Transit prior to that date and up to March 15, 2001. A receiver has broad discretion in conducting and managing a liquidation. *Lucas v. Manufacturing Lumbermen's Underwriters*, 163 S.W.2d at 757. This Court should affirm that broad discretion of the SDR acting with all of the powers of the receiver as affirmed by the Referee and the trial court.

POINT III

(Responds to Appellant’s Court of Appeals’ Brief Points I and II)

THE TRIAL COURT DID NOT ERR IN RULING THAT APPELLANT MSEJ IS ESTOPPED FROM MAKING FURTHER CLAIMS AGAINST TRANSIT BECAUSE: (1) THE TRIAL COURT CORRECTLY FOUND THAT EACH ELEMENT OF ESTOPPEL EXISTED AND WAS SUPPORTED BY COMPETENT EVIDENCE, INCLUDING SPECIFIC EVIDENCE THAT TRANSIT WAS PREJUDICED IN THAT IT DID NOT COLLECT ANY REINSURANCE THAT IT COULD HAVE COLLECTED IF IT HAD KNOWN OF THE ALLEGED “NEW” CLAIMS ASSERTED BY MSEJ AT THE TIME OF THE ASSIGNMENT; (2) TRANSIT’S ALLEGED FAILURE TO SPECIFICALLY PLEAD ESTOPPEL, IF TRUE, IS OF NO MOMENT SINCE TRANSIT’S CLAIMS PROCEDURES ARE NOT COVERED BY THE FORMAL RULES OF PLEADING BUT, RATHER, ARE SUBJECT TO § 375.1214, WHICH REQUIRES ONLY THAT CLAIMS DISPUTE PROCEEDINGS BE CONDUCTED IN AN INFORMAL MANNER; AND (3) A COURT MAY RELY ON EVIDENCE THAT COMES INTO THE RECORD WITHOUT OBJECTION TO SUPPORT A FINDING OF ESTOPPEL.

A. Standard of Review

Transit adopts the Standard of Review from its Point Relied on II.

B. The Transit Disputed Claims Procedure Has, Pursuant to the Insurance Insolvency Code, Adopted Its Own Rule For Disputed Claims Procedures.

“The statutory scheme for the receivership in liquidation of an insurance company, section 375.560, et seq., sets up a self-contained and exclusive statutory scheme.” *In re Transit Cas. Co.*, 900 S.W.2d at 675, citing *State ex rel. ISC Fin. Corp. v. Kinder*, 684 S.W.2d 910, 913 (Mo. App. 1985). See also *State ex rel. Missouri State Life Ins. Co. v. Hall*, 330 Mo. 1107, 52 SW 2d 174, 178 (1932). “The statutory provisions of the Missouri insolvency law govern the administration of the assets of an insolvent insurer, and the trial court must administer the insolvent estate in accordance with these statutory provisions.” *Id.* “The provisions of the insolvency statutes prevail over any general statutes or common law because the legislature has set forth the substantive law and the procedures to be followed.” *Viacom*, 138 S.W.3d at 725 citing *In re Transit Cas. Co.*, *supra*. Section 375.670.1 provides the Receivership Court with this power by providing that it “shall establish claims procedures.” See also § 375.1208.2.

Third Rule 75 was enacted by the Receivership Court “as a necessary adjunct to the efficient operation of the liquidation proceeding.” *In re Transit Cas. Co.*, 900 S.W.2d at 674. Third Rule 75 applies to all proceedings for disputed claims before a Referee involving Transit. Third Rules 75.1 and 75.3. A referee is instructed to follow “in general” the practice of the circuit courts in the State of Missouri. Third Rule 75.22(g).

C. Estoppel Was Clearly Evident From the Record Before The Referee

The elements of estoppel are clearly defined under Missouri law. In order to show estoppel there must be: (1) an admission, statement or act inconsistent with the claim

afterwards asserted and sued upon; (2) action by the other party on the faith of such admission, statement or act, and (3) injury to such other party, resulting from allowing the first party to contradict or repudiate the admission, statement or act. *Brown v. State Farm Mut. Auto. Ins. Co.*, 776 S.W.2d 384, 388 (Mo. banc 1989). The Referee's findings, as adopted by the Receivership Court, were detailed on this issue. After thoroughly reviewing the evidence that was presented to him, the Referee found at p. 23, paragraph 46 of his Findings of Fact and Conclusions of Law:

Applying these elements to the facts at hand clearly demonstrate that MSEJ, LLC should be estopped from making their additional claim. Both the Property Damage Trust and MSEJ, LLC sent letters to Mr. Owen asking him to sign off on representations which included that the policies were exhausted. Relying on these statements and understandings, Mr. Owen did sign the letter of representations which then allowed MSEJ, LLC to purchase the rights to Transit policies for cash from Mr. Mayer and the Property Damage Trust. In an effort to help the Property Damage Trust in its efforts to settle its claims with the state guarantee associations Mr. Owen was asked to sign off on the allowance amount "dependent upon Transit being provided necessary documentation to recover said amounts from its reinsurers." MANV 696. If MSEJ, LLC is now allowed to contradict and repudiate their and or their predecessor in interest admissions and statements, then Transit's ability to efficiently manage the estate on behalf of all of the creditors will be harmed causing the creditors of the same class

who complied with the rules to receive less of an allowance. This is an unjust result. (L.F. 653-54)

This finding is supportable on the record that was before the Referee.

In regard to the first element of estoppel, both MSEJ and Manville made representations to Transit that the policies were exhausted and that the maximum amount had been paid on each. These representations were made in the context of the assignment from Manville to MSEJ. Beginning in January 1997, Mr. Mayer (counsel for the Property Damage Trust) made representations to Transit regarding the Property Damage Trust's assignment of its Transit claims to MSEJ. (R-App 1-3) Later, Mr. Mayer wrote and stated:

The Manville Property Damage Trust (the "PD Trust") has an agreement in principle to assign its established claims against the Transit estate in exchange for cash which it will distribute to its beneficiaries. The closing of this sale is subject to various conditions, including the completion of the buyer's due diligence, which is centered on verification of the final, fixed and allowed amount of the claims being purchased.

(R-App 5; emphasis added) Mr. Mayer reassured Transit that the "assignment does not seek to augment any rights that the PD Trust has against your estate or otherwise to create new obligations or liabilities on the part of the Liquidator." (R-App 6; emphasis added.)

Thereafter, in a letter dated December 19, 1997, Mr. Mayer wrote to Mr. Owen and asked him to provide written confirmation that the following statements were true:

1. The PD Trust holds an allowed, determined claim against the Transit estate in the aggregate face amount of \$17,071,242.27.
2. To date, the Transit estate has paid the PD Trust a total of \$3,072,823 on the said claim.
3. The allocation of this allowed claim was determined in accordance with information supplied by the insured and State Guaranty Associations and later acknowledged by the same as correct.
4. These state guaranty associations have been allowed claims totaling \$7,345,225.10 separate from the PD Trust's allowed claim, although they all arise under the same insurance policies, as set out on the attached Exhibit I.
5. No premium payments are outstanding with respect to any of the policies underlying the PD Trust's allowed claim (the "Policies").
6. Based on claims previously submitted to Transit, the policy limits of each of the Policies have been exhausted. To the best knowledge of the Liquidation, the amounts allowed in favor of the PD Trust represent the maximum amount payable under the Policies. The Liquidator knows of no additional claims that can be asserted under the Policies, by the PD Trust. There are outstanding issues with the State Guaranty Associations on allocated expense amounts unrelated to the PD Trust. None of these issues effects the allowance in favor of the PD Trust described in paragraph 1 hereof.

(L.F. 483-484; emphasis added.) Marcia Ruskin, counsel for MSEJ sent a similar letter to Stephen Wunderlich, a claims examiner at Transit. (MSEJ App. A67; T-App. 014-015) In that letter, Ms. Ruskin asked for confirmation of several statements, including: “Based on claims previously submitted to Transit, the policy limits of each of the Policies have been exhausted, the maximum amounts payable under the Policies have already been issued, and no additional claims can be asserted under the Policies.” (Id.)

Transit confirmed these statements because the only evidence it had at that time was the evidence provided from 1989 to 1990 by Manville of its personal injury claims. Those claims exhausted the Transit policies and, since there was no other evidence (or assertion) presented to Transit by the Property Damage Trust of different claims that could be placed under a different policy limit, the Transit policies were, in Transit’s opinion, (and apparently in the opinions of counsel for both the Property Damage Trust and MSEJ) exhausted and fully paid. As previously stated, both before and after the assignment, Transit did not receive any further evidence from Manville or MSEJ of “new” claims or a new limit until the very minimal reference to “employee claims” in the March 8, 2001 two-page facsimile from Mr. Scognamiglio on behalf of MSEJ.

In regard to the second element, Transit relied on the representations made by Manville and MSEJ, as it concluded that the policies were exhausted in the amount of the policy limits, posted no “case reserves” or “IBNR reserves” on the Transit policies and proceeded to settle all of its remaining reinsurance without any accommodation for potential liabilities against the Transit policies for Manville losses on the alleged “second limits.” In other words, if MSEJ had asserted that there were almost \$20 million in new

claims immediately before or after the assignment (instead of asserting exactly the opposite) with sufficient support, Transit may have been duty bound to its other claimants to establish case reserves or at the bare minimum IBNR for these alleged losses in 1997. Transit presented the deposition testimony of Andrew Stuehrk to support this prejudice. Mr. Stuehrk worked at Transit from January 1991 through January 2001. (Supp. L.F. 335 and 336) Mr. Stuehrk ran the reinsurance area in regard to pricing commutations. He would make recommendations as to the appropriate settlement range in a commutation so that the staff in charge of collecting reinsurance would have an objective measurement to use when negotiating. (Supp. L.F. 335)

Mr. Stuehrk testified that commutation settlement pricing consisted of the paid loss balance (paid claims) plus case reserves and IBNR. (Supp. L.F. 336-337) Case reserves were established by the Claims Department at Transit. (Supp. L.F. 337) IBNR, on the other hand, was established by the actuaries who were not Transit employees. (Id.)

A. Well, IBNR is actually established by the actuaries. Again, these were external actuaries and actuaries, of course, have their own process of accreditation and, of course, it's a true science, a very difficult science. So the actuary would look at exposure. There's a number of standardized actuarial models, pricing models you would call it. By way of example, Sander & Buhman or Huber Ferguson, using our AA factors, but they go through various cuts of the numbers to come up with what would be a range of IBNR, which

would be anticipated future, potential future liability over and above the paid loss and the case reserve that has been previously established. Actuaries usually look at this on a total reserve basis, meaning case and IBNR together, when they're doing some of their science. But at the end of the day they're coming with that piece which is not established as a case reserve and a true IBNR. An IBNR is usually defined as not just incurred and not reported, but it's usually that amount which would be not enough, frankly, on a case reserve or truly unknown future exposure, that which has never been presented or foreseen by the insurance company.

(Supp. L.F. 337-338)

Mr. Stuehrk was familiar with the allowances made to Manville as they were being processed at about the same time he started working at Transit. (Supp. L.F. 339) He, thereafter, started billing reinsurers on those allowances. It was, in fact, the first big billing he made to reinsurers. (Id.) Mr. Stuehrk remembered that after that time there was no IBNR, or very little, attached to the Manville policies:

A: Well, I don't recall any specific amount, but I would, I recall that it was nothing significant to Manville because the policy limits had already been exhausted on a paid loss basis. So it was not front and center into our analysis, let alone the actuary's analysis, because the product liability coverage was already exhausted.

Q: Was there any IBNR on those policies that you remember?

A: Yes, there would have been a small amount of IBNR on the Manville policy, but in the context of any policy, to a certain extent because we made an across-the-board allocation up until the time any policyholder withdrew their POC, their proof of claim form such that they're renouncing their claim or that a Notice of Determination had been established formally without any dispute that you could put to rest. We were concerned, actually at that point as the entire industry was, if you look at, you know, historically with the industry, of potential environmental exposure. And so there was what I would call a broad brush, a colloquial term, across just about all of the policyholders with some semblance of IBNR allocation.

Q: For environmental?

A: For environmental or any other sort of just generic kind of other bucket.

Q: Do you recall if there was any asbestos IBNR?

A: There was no asbestos IBNR because we were - -

* * *

Q: So when Johns Manville was considered in a commutation, it was mostly considered in the context of whether or not the reinsurer had paid the bills?

A: Right. We would have added that if it was part of the account receivable for whatever reason they had not paid it, that would have been the only thing that we would have gone after them for.

Q: But would not have been considered as far as IBNR?

A: No.

(Supp. L.F. 339 and 340)

This testimony shows that Transit believed that the only claims it could collect in regard to Manville's policies were the already paid claims. It had no case reserves and an insignificant amount of environmental IBNR up on those policies. Commutations were negotiated based on the information that was available – that the Manville policies had paid claims and no case reserves or IBNR. The Court of Appeals simply did not consider this evidence, that clearly was considered by the Referee, who made a specific finding of fact on this point.

Finally, in regard to the last element, Transit was prejudiced because it was unable to collect reinsurance on the “new claims” MSEJ presented for the first time in 2001 and, therefore, was unable to fulfill its statutory directive of taking “immediate possession of and to secure all of the records and property of the insurer wherever it is located, and to take all measures necessary to preserve the integrity of the insurer's records.” § 375.1176.1. Transit was potentially damaged by millions of dollars because if these claims were timely presented, covered and allowed, then Transit was unable to collect reinsurance on these potential claims.

Mr. Stuehrk testified that Manville's policies were covered by the Quota Share I treaty, which had a \$10 million limit and Transit had a ten percent retention. There were a large number of insurers on the Quota Share I treaty but most of them had commuted by the time Mr. Stuehrk left the Receivership.²³ (Supp. L.F. 340). Transit could not possibly have taken any of the "new" claims raised by MSEJ into account in its negotiations with reinsurers as they were not raised until March 2001.

The Decision held that "Transit presented no evidence of any specific reinsurance settlement that it entered in reliance on or how that settlement was impacted by the conduct purportedly establishing estoppel." While there was no "specific" reinsurance settlement put into the record, as every "commutation" or settlement has a "confidentiality" provision, Transit presented sufficient evidence to show that the majority of the Quota Share I treaty that covered Manville's policies was commuted prior to receiving information that MSEJ was planning on introducing new evidence to the SDR. That oral testimony was not rebutted by MSEJ and the Referee found it credible. There should be no issue that this was sufficient evidence that, since no information was received from MSEJ during the years that Transit was actively commuting reinsurance, Manville's policies were not taken into account with the exception of the allowed claims to the Property Damage Trust and the State Guaranty Funds.

This damage went beyond Transit and affected the Class 3 claimants who managed to produce evidence of their claims and conform to Transit's rules. If MSEJ is

²³ January 2001-Supp. L.F. 335.

allowed to recover on its additional claims while Transit is unable to recover from reinsurers, then the estate and its other policyholders and creditors will be irreparably harmed. For instance, in a case that came before this court on a choice of law issue, *Viacom, Inc. v. Transit Casualty Company in Receivership*, *supra*, Viacom did comply with AO 49 and presented all of its evidence (present and future) by the March 15, 2001 deadline. As it has turned out, for Viacom and many other policyholders, Viacom has incurred much more damage in the ensuing years. Viacom settled with Transit on its claims based on the cut-off information, not on the paid damages it has suffered since that time. If the Decision had been in force at that time, Viacom would likely not have settled. Now, both MSEJ and *amicus* want to increase their claims, without abiding by the rule and MSEJ wants to augment its claims on the strength of the misrepresentations it made in 1997, which would mean that the “pot” for distribution is smaller for other creditors and they will receive less.

The *Brown* test and all of the evidentiary elements supporting estoppel in it were met. It is clear from the foregoing that, contrary to the Appellant’s assertions, the trial court did not fail to support its finding of estoppel, but rather found each element and had substantial support in the record for doing so.

D. Transit Was Not Required to Specifically Plead Estoppel as an Affirmative Defense

MSEJ purchased Manville’s claims against Transit in 1997 but waited until March 1, 2001 to file what, it asserted, were “new” claims against Transit for bodily injury

losses.²⁴ Transit's original NOD denied MSEJ's additional claims. The Notice of Re-determination referred to estoppel issues in denying the claims, stating:

In regard to the Deed of Assignment, we have reviewed all of the applicable documentation and have concluded that the Assignment did not cover the personal injury claims you are currently asserting against TCCR. This includes representations from MSEJ to TCCR that MSEJ did not intend to pursue claims other than the already allowed asbestos property damage claims. Any assertion that these new claims were covered by the assignment would constitute both a breach of that assignment and a fraud on the Receivership Court by MSEJ, LLC. (Supp. L.F. 3)

(Emphasis added.) Indeed, MSEJ admits that the Receivership gave notice of its estoppel defense in its Court of Appeals' brief at page 49 where it states, in reference to Transit's denial of the MSEJ claim, "The effort to deny it, willy-nilly, required the Receiver to concoct an elaborate, and false, claim of estoppel and prejudice...." Thus MSEJ admits that it was the Receiver who first put forward the estoppel issue as a defense.

MSEJ cites a number of cases for the proposition that estoppel is an affirmative defense and must be strictly pleaded in order to be used. While that may be true in the

²⁴ Transit disputes that these claims were "new" but were, in fact, claims that had been known by the Property Damage Trust and, therefore, MSEJ standing in the trust's shoes, since 1990 or before. In addition to all other defenses, therefore, Transit asserts that these claims are barred because of "late notice."

normal setting of a civil trial, there were no actual pleadings in this matter.²⁵ It is a claim against an insolvent insurer and is governed by the self-contained and exclusive scheme of the State of Missouri for insolvent liquidations. *In re Transit*, 900 S.W.2d at 675. The Missouri statutes that have been enacted as part of that scheme clearly provide that the procedures be informal when a claimant objects to the determination of his claim in a receivership proceeding. § 375.1214.2. Hence, this Court should find Transit was not required to specifically plead estoppel as it was following the informal rules established by the Receivership Court.

In *St. Louis Perfection Tire Company v. McKinney*, 212 Mo. App, 355, 245 S.W. 1100 (1922), the Court held that “[t]he case law in this state, as evidenced by many decisions, is to the effect that an estoppel in pais must be specially pleaded, and that, unless it is so pleaded, evidence designed to establish such estoppel will be excluded. However, where the evidence is received without proper objection and the parties treat the case as though estoppel had been specially pleaded, such objection cannot be urged for the first time before this court.” And further in the same paragraph the court held, “If

²⁵ MSEJ conveniently omits this fact from its brief. This dispute was presented to the Referee on Transit’s Notice of Redetermination and MSEJ’s RFR. There was no complaint and answer as in a civil trial; there was no “pleading” to comply with the Missouri Rules of Civil Procedures. This is exactly why the Receivership Court adopted Rule 75. Informal procedures, pursuant to the Insolvency Code, needed to be developed to allow claims to be determined in the receivership proceedings.

no objection is made to evidence the necessity of a special plea is waived.” Also, in the case of *Ornellas v. Moynihan*, 16 S.W.2d 1007 (Mo. App. 1929) the court on rehearing held that “[i]t is true, as a general rule, estoppel, or waiver, must be pleaded, but this is not so where, as here, the estoppel, or waiver appears in the case made by the party against whom the estoppel, or waiver is invoked.” *See also* Rule 55.33(b); *Barancik v. Meade*, 106 S.W.3d 582, 592 (Mo. App. W.D. 2003).

As can be seen from a review of the Referee’s findings of fact which were adopted by the trial court all the evidence upon which the Referee relied in his finding of estoppel against MSEJ came into the record without objection. As a result, even under the strict rules of pleading if they were to apply, the evidence for estoppel against MSEJ was properly considered by the Referee.

CONCLUSION

If this Court allows the Decision to stand, particularly its interpretation of AO 49, it will have made a definite departure from its own line of cases that gives the receiver and the Receivership Court broad discretion in the administration of the receivership. It is also contrary to the law upon which the SDR and Receivership Court relied starting with *In re Transit* and continuing through *Holland-America*. Unlike those opinions, which emphasized the receiver's duty and ability to operate the estate for the benefit of the creditors and to act in his discretion to determine claims, collect the assets of the estate and wind up the estate as soon as practical, as well as the Receivership Court's ability to promulgate orders designed to hasten the wind-up of the estate and the deference due to those orders, the Decision appears to have wanted to help one creditor at an enormous cost to all.

The Decision ignores the reality that going forward, the Receivership Court will have to review additional evidence from claimants that other claimants were not permitted to present. Worse yet, the end result is that the Transit estate may not be in a position to close for many years to come. Distributions of assets to all other creditors could be delayed because the formula for determining available funds will have to be recalculated. This is not hyperbole and it is clearly avoidable if the rules of construction of both court rules and statutes are properly applied.

Respectfully submitted,

McCARTHY, LEONARD & KAEMMERER, L.C.

By: _____

Thomas W. McCarthy, #24163

James C. Owen, #29604

Katherine S. Walsh, #37255

400 South Woods Mill Rd., Suite 250

Chesterfield, MO 63017

Telephone: 314-392-5200

Facsimile: 314-392-5221

Attorneys for Respondent

Transit Casualty Company in Receivership

CERTIFICATE OF COMPLIANCE

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

(A) the Substitute Brief contains 20,162 words, as determined by the Microsoft Word program;

(B) A copy of this Substitute Brief is included on the attached 3.5" CD-Rom disc; and

(C) This disc has been scanned for viruses by counsel's anti-virus program and is free of any viruses.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 4th day of February, 2009, two copies of the foregoing Respondent's Substitute Brief, one copy of the Appendix to Respondent's Substitute Brief and one 3.5" cd-rom containing this Substitute Brief and index to the Appendix were sent via overnight mail to the following:

Nicholas M. Monaco
Inglis & Monaco, P.C.
237 East High Street
Jefferson City, MO 65101
(573) 634-2522

J. Kent Lowry
Matthew D. Turner
Armstrong Teasdale LLP
3405 West Truman Blvd., Suite 210
Jefferson City, MO 65109
(573) 636-8694
