

IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT

MSEJ, L.L.C., )  
)  
Appellant, )  
)  
vs. ) **WD No. 68945**  
)  
TRANSIT CASUALTY COMPANY )  
IN RECEIVERSHIP, )  
)  
Respondent. )

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**APPELLANT'S AMENDED BRIEF ON APPEAL**

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<b>Respondent.</b>	)	

**APPELLANT’S AMENDED BRIEF ON APPEAL**

Appellant, MSEJ, LLC, by its counsel, English & Monaco, hereby submits its amended brief pursuant to Supreme Court Rule 84.04 in support of its appeal, and respectfully states as follows:

**JURISDICTION**

This is an appeal of a final order of the Circuit Court of Cole County, the court responsible for the liquidation of Transit Insurance Company, ("Transit") in a proceeding under Mo. Rev. Stat. § 375.1214. Appellant, MSEJ, LLC ("MSEJ") appeals from the partial denial of its claim for payment under six insurance policies issued by Transit. MSEJ's request for reconsideration of the Referee's denial of its objection to Transit's determination of its claims was not acted on by the Circuit Court and is therefore deemed final for purposes of appeal pursuant to RSMo 375.1214.

None of the issues raised on appeal is within the exclusive jurisdiction of the Missouri Supreme Court. Therefore, this matter falls under the general appellate jurisdiction of this court pursuant to Article V, Section 3 of the Missouri Constitution.

## **STATEMENT OF FACTS**

### **Background**

1. MSEJ, LLC ("MSEJ") is the purchaser of the uncollected insurance assets of Johns-Manville Corporation ("Manville"). Manville was one of a number of American businesses overwhelmed by the flood of claims for damage caused by asbestos. These claims developed first in the form of occupational disease claims by workers who developed illnesses because they had come into contact with the substance in Manville products they manufactured and installed. Users of Manville products chimed in, resulting in claims against the company's product liability coverages. As those resources were exhausted, plaintiffs framed claims in terms which brought them under the company's general commercial liability coverages as well. Later in the game, owners of property in which asbestos-containing products were installed asserted claims for the cost of removing the asbestos in order to render their buildings suitable for habitation. This meant that Manville's property damage coverages were also impacted.

2. Well before that last stage, Manville, as one of the country's leading providers of asbestos materials, had sought protection of the bankruptcy courts in order to find an orderly mechanism for the resolution of the tens of thousands

of claims being asserted against it.<sup>1</sup> Manville used the bankruptcy court to marshal its assets, including its insurance coverages, and established a mechanism by which claimants could submit claims and receive partial payment. LF 632<sup>2</sup>. Its effort was complicated by the long-term nature of asbestos claims: injury from asbestos may take years to manifest itself, and every initial estimate of the number and size of the asbestos claims has proven too small. In Manville's case, the bankruptcy court initially approved a plan under which Manville's assets, including the proceeds of its insurance, would be shared by a series of trusts established for different classes of injured creditors. Years later, it was realized that claims had so far exceeded the estimates that the original structure was collapsing. After a five-year freeze on claims, the bankruptcy court relaunched the trusts under a new plan. In 1997, once they had collected most of their insurance and paid it to claimants, the trusts sought to factor their unpaid claims against insolvent insurers, including Transit, to generate cash to continue to pay asbestos victims. MSEJ was the successful bidder for Manville's remaining insurance assets.

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1 Ultimately, Manville dealt with over 600,000 claims, far more than even the worst projections made when it filed for protection.

2 Hereinafter, pages in the Legal File are referred to as "LF;" the Appendix is designated "A".

3. Like Manville's bankruptcy, the liquidation of Transit Insurance Company followed a long and winding path. Transit was recognized early on as potentially the largest and certainly one of the most complex insurance insolvencies in the world. If anything, that understated the problem. Like Manville, Transit's Receiver has used the Court's resources to marshal its assets and organize the presentation of its claims. More than 20 years later, the Receiver has dealt with mass torts, complex claims, puzzling records, hostile reinsurers, Congressional inquiries, and novel questions of international law. Legal positions have been staked out, assaulted, reformed, and assaulted once more. Projections of the probable payout to creditors and the time when it would be paid have been built, adjusted, and built again. The end of the road is finally in sight, more than 20 years later, with only a few hurdles remaining. The claims of Johns-Manville present one of them.

#### **1980-1983: Manville's Transit Policies**

4. Transit sold six policies of commercial excess umbrella insurance to Johns-Manville Corporation ("Manville") which covered the period from 1980 through 1983. LF 632. Each of these policies protected Manville against general liability, product liability, and occupational disease claims. The six policies had stated policy limits that totaled \$24,416,667. Each provided limits in those amounts and "separate[ly] for products liability and separate for occupational disease claims of Manville employees". Copies of the Declarations pages for

each policy are included in Exhibit 1 to MSEJ's Legal File at page 2, paragraphs 2(b) and (d) for each policy, and for the convenience of the Court, copies of the relevant excerpts are also set forth on pages A379-A383 of the Appendix submitted herewith pursuant to Rule 84.04(h).

5. Transit now concedes that coverage existed under the policies for \$24,416,667 for product liability claims and \$24,416,667 for occupational injury claims of Manville workers, or a total of \$48,833, 334. See A384 (Transcript) and A385-A387 (testimony of William Barbagallo). Large as that number is, it is dwarfed by the claims that have actually been made against Manville, litigated before the Bankruptcy Court, and, to a large extent, paid -- \$14 billion by 2000, and \$30 billion by 2005.

6. MSEJ now claims that the policies provided a third set of limits for general liability, which would make a total potential coverage of \$73,250,000. The correctness of this assertion has not been litigated due to the Referee's disposition of the Manville claim. LF335-343 (Report of R.M. Cass)

7. In the early stages of the Manville claim against Transit, both Transit's Receiver and Manville's Trustee believed, wrongly, that only a single limit of \$24,416,667 was available under the Transit policies to cover Manville's claims, whether they arose from general, product, or occupational disease exposures.

### **1987: Manville Submits Claims To The Transit Receivership**

8. Manville entered Chapter 11 bankruptcy in 1982. LF 632. Transit was placed into receivership proceedings in 1985.

9. The court overseeing the Transit receivership fixed December 31, 1987 as the final date for the filing of claims against Transit's estate (the "Bar Date"). LF 633.

10. Manville timely filed proofs of claim under each of the six Transit insurance policies. LF 633 (Referee's Findings).

11. In making its claim filings against Transit, Manville utilized the Official Claim Form issued by Transit for this purpose. LF 179-194; See LF 643.

12. The Transit receivership court promulgated a number of rules for the handling of claims against Transit, including the one known as Third Amended Rule 75 ("Transit Rule 75") (A231). Transit Rule 75.2(s) allows the filing of "policyholder protection claims," defined as "*any Claim filed by a policyholder, on or before the December 31, 1987 bar date, wherein the policyholder sought to protect its rights under a policy issued to the policyholder by Transit for all future claims arising under the policy, as opposed to a specific claim or loss*".

13. Manville's claims were primarily policyholder protection claims and properly filed as such. LF 633. Consistent with the filing for policyholder protection status, on each proof of claim form, the "Amount Claimed" was left blank.

14. Transit's proof of claim form, under the headings "*FACTS*" required claimants to "*briefly explain the facts which serve as a basis of your claim,*" Manville attached a one-page sheet asserting (i) the dates of loss, (ii) that notice of potential claims had been made regularly to Transit, (iii) that Transit had had numerous claims made against it for bodily injury and property damage losses, (iv) a statement of policy limits per occurrence and in the aggregate where applicable, quoting the policies, and (v) that Manville was not submitting a specific request for funds under the policy but believed that Transit's policy would be called upon in the future. LF 179-194.

15. Transit's Receiver conceded that in order to protect Manville's rights to future claims up to the limits of its policies, nothing further needed to be filed by any party. See May 1, 2007 transcript, page 49, lines 7-25, page 50, lines 1-3, and page 51, line 1, A388-A390. See also LF 657 (describing testimony of Mr. Barbagallo).

#### **1990-1995: Transit's Review of The Manville Claims**

16. By mid-1990, Manville had provided Transit

(i) 400 boxes of comprehensive and detailed information substantiating over \$1.1 billion in paid claims for asbestos injury falling within the coverage of the Transit policies, including \$935 million in bodily injury losses and \$202 million in property damage losses,

(ii) a listing of payments made by Manville, broken down by claimant and by state of bodily injury claims, with first diagnosis after 7/1/80 totaling \$85,884,336,

(iii) a listing by state of unpaid bodily injury claims totaling \$395,105,748,

(iv) a listing of payments made by Manville, broken down by state, of property damage claims equaling \$75,384,644 and unpaid liability of \$217,042,483,

(v) settlement documentation, sorted by date of diagnosis and date of payment, payments and policy settlements of other carriers (which establishes exhaustion of underlying insurance coverage, triggering application of Transit's umbrella coverage), and

(vi) a listing of claims not yet settled and not yet ready for settlement.

LF 646-647, Referee's findings, ¶¶ 18-21.

In other words, by mid-1990, Manville had supplied Transit with documentation establishing claims which exceeded its policy limits by anyone's measure.

17. Transit's staff audited these claims. In general, they found that the audited claims submitted would, but for the policy limits, have been covered by the Transit/Manville policies. The Receiver has pointed to no reason why the Manville proofs of loss were otherwise insufficient to claim full coverage under the policies for the full limits due for products liability, occupational disease and general liability. In fact, internal Transit memoranda confirm that the Manville

losses fell within the coverage parameters of the Transit policies. LF 646-7, Referee's report at paragraphs 18-23.

18. In 1990, Transit's staff decided that it should allow claims to the Manville Property Damage Trust in the amount of \$24,416,667. LF 647.

19. The allowance of a claim for what both parties thought was the upper limit of the Transit coverage was amply justified. Internal Transit memoranda describe the claims data showing more than \$1.1 billion in losses paid by Manville from 1988-1990 (\$935 million in bodily injury losses and \$202 million in property damage losses) which Transit had audited and noticed to Transit's reinsurers. The memoranda also reference the submission of other information by Johns-Manville, including proof of satisfaction, by payment or settlement, of the underlying insurance policies (i.e., policies for lower limits of insurance protection whose exhaustion was necessary to trigger Transit's upper-level umbrella coverage of Manville losses), a listing of claims asserted against Manville that were not yet settled or ready for settlement, and statements made by the Manville Property Damage Trust that losses were continuing to come in monthly for both bodily injury and property damage losses. Bodily injury claims were being received by Manville at the rate of 2,000 a month, with no end in sight. Transit staff noted that property damage claims against Manville were subject to a bar date but that new structures could be added to existing claims and the Manville Property Damage Trust projected a total of 30,000 property

damage claims although only 10,000 had been submitted as of that date. LF 457-463.

20. The Referee found that in 1990 Transit calculated that claims per insured year would be \$56.8 million, based upon Manville losses already paid (and without regard to the pending and future claims advised to Transit). The same Transit staff recommended that Manville's claim should be allowed in the amount of \$24.250 million, a single limit. The 1990 memorandum did not state whether Transit categorized these claims as products liability, occupational disease claims or general liability, nor did the writer allocate the amount among the various types of risk protected under the policies. LF 457-463.

21. Although the decision had apparently been made years earlier, it was not until April 12, 1995 that Transit issued Notices of Determination to the Manville Property Damage Settlement Trust, recognizing claims totaling \$24,416,667 under the six policies. Of this sum, \$17,071,241.62 was allocated to Manville and \$7,345,225.10 was allocated to the state insurance guaranty associations. LF 649.

22. The Notices of Determination issued to Manville allowed amounts for each policy but did not specify that any claims were disallowed. The Notices added a statement that *"You may receive additional Notices of Determination on other claims on this or other policies"*. The instruction page delivered with the Notices of Determination also stated that Transit had either allowed or disallowed the claim in whole or in part, and that: *"If the claim has been allowed in whole or*

*in part and you agree with the determination, sign and date the enclosed acknowledgement of receipt of the Notice of Determination.”* A402-A408 (Copies of the Notices of Determination).

23. The Manville Trust signed and returned the acknowledgements on Transit's form. LF 649.

24. Although they appeared to exhaust the Transit coverage as both parties then understood it, the Notices of Determination did not close the door on further Manville claims against Transit. In fact, they expressly left open the possibility that additional claims might still be allowed. A402-408. See LF 807 first full paragraph (Transit's pleading). Thus, under the umbrella of its policyholder protection claim, Manville was entitled to assert more claims when and if it had them.

25. Juggling scores of policies issued by carriers who were actually capable of paying claims once they were proven, Manville's staff can perhaps be forgiven for failing to note that Transit's policies provided not one set of insurance limits but two or even three. Whether Transit allowed claims for 24, 48 or even 72 million dollars made little difference when none of those claims yielded any ready currency to pay clamoring claimants with.

26. Once all of its readier assets had been liquidated, Manville sought to realize what value remained in its portfolio of overdue insurance recoverables by putting them up for sale. MSEJ was the successful bidder. In the course of due diligence for its purchase and the Manville Trustee's application for approval of

the sale by the Bankruptcy Court, MSEJ and Manville sought from Transit, and received, affirmations from Transit that it believed all of the Manville policy limits had been exhausted by valid claims.

### **1986-1997: Restructuring Manville**

27. In 1986, the bankruptcy court approved the Manville plan of reorganization, which provided for the establishment of trusts for the benefit of claimants for bodily injury and property damage. LF 632-633

28. The Manville Personal Injury Settlement Trust inherited all of Manville's rights to insurance coverage for Manville losses (whether for property or personal injury), including the insurance coverage issued by Transit. LF 632. Once recoveries to the Personal Injury Trust reached a specified amount, all remaining insurance rights of Manville were transferred to the Manville Property Damage Settlement Trust. While this must have made sense to the bankruptcy court, to whom an asset is an asset, it had the confusing effect that payments arising from insurance coverage for personal injury were recoverable by the Manville Property Damage Settlement Trust, and personal injury claims were paid with recoveries on property damages insurance policies. LF 632.

29. In December of 1990, the administrator of the Manville Property Damage Trust asked Transit for a formal statement of amount the Receiver intended to allow for the Manville claims. Transit's claims manager responded with a letter informing Manville that the claims totaled \$24,416,667. LF 648. Although the claim had been administratively decided upon by that time, for

some reason the estate did not issue a formal Notice of Determination until much later.

30. One of the reasons for the request was that during this period, Manville was working to reach a settlement with the 52 State Guaranty Funds involved in the Manville bankruptcy. LF 648. The State Guaranty Funds were liable to pay for part of the claims against Manville that Transit did not timely pay. When they did, the Guaranty Associations would have stepped into Manville's shoes with respect to insurance recoveries for those losses. Manville settled with the Guaranty Funds on the assumption that the amount allowed under the Transit policies would be \$24 million. LF 648. While that settlement resulted in finality as to the State Guaranty Associations' responsibility for Manville losses and provided one-stop access to compensation for the claimants, it left Manville at risk if claims were larger than projected, or if the recovery from Transit was disappointingly small. In hindsight, Manville lost this bet; the claims have greatly exceeded projections, and even the recoveries in dispute here would not have been enough to rebalance the scale.

31. In 1998, the Manville Property Trust sold MSEJ its rights to collect on the Transit insurance policies based upon the Manville losses, including with respect to the original 1987 proofs of claim. LF 633.

32. In connection with the negotiation of that sale, MSEJ and Manville corresponded with Transit. MSEJ's and the Manville Trust's understanding of

that correspondence is described in affidavits at LF 114-117, 118-121, 479-484 and 486-490.

**2000-2007: Administrative Order 49, MSEJ's Response And Transit's  
Decision**

33. As noted above, Transit accepted "policyholder protection" claims pursuant to Transit Rule 75.2(s). This meant that the amount claimed by a policyholder could continue to increase long after the claims bar date. That had to end sometime, or the estate would never be able to wind down. In October 2000, as part of a process meant to finalize all claims against Transit so that the estate could be concluded, the Circuit Court issued Administrative Order 49 (Order 49"). LF 196-7 and 633. In that order, the court directed that all Claimants, including creditors holding policyholder protection claims, must file evidence of their unresolved claims by March 15, 2001.

34. Because it demanded that creditors report claims before they had actually matured, Order 49 relaxed the standards of proof for claims. The "evidence" used to support claim notices could include projections and estimates. The technique of allowing estimated claims in order to accelerate the conclusion of insolvent estates is established by Missouri statute, Mo. Rev. Stat. § 375.1220.2, and was recognized in another estate by *Angoff v. Holland-America Insurance Company Trust*, 937 S.W.2d 213 (Mo. App. W.D. 1996)

35. This order created a quandry for MSEJ. While it had recently realized that Manvilles' right to its second set of insurance limits had not been

addressed by the Transit Receiver, it was at a disadvantage in trying to submit details of asbestos claimants' injuries. It needed to obtain that information from the Manville Personal Injury Trust rather than its own assignor, and the Manville Personal Injury Trust was hamstrung by privacy concerns. On March 1, 2001, MSEJ timely submitted to Transit claims for \$19,416,667 million in bodily injury losses under the six policies of insurance covered by the original 1987 proofs of claim, over and above the \$24,416,667 already allowed by Transit in 1990-1995. LF 633. In further support of the amount of those claims, it also submitted a copy of the financial statements of the Manville Personal Injury Settlement Trust showing that as of the end of 2000, the Trust had paid over \$14 billion in personal injury claims of beneficiaries of the Manville Trust. MSEJ made a \$5 million error in calculating the coverage under the policies. LF 199-230. MSEJ later claimed the correct total of \$24,416,667. the second policy limit. MSEJ still did not recognize that Manville was entitled to a third set of limits.

36. MSEJ's March 1, 2001 submission asserted that the original allowance in 1990 had been for property damage claims and that this submission was for the personal injury claims covered by the policies. LF 641. This was MSEJ's understanding at the time as well as the understanding of MSEJ's assignor, the Manville Property Damage Settlement Trust, (See affidavits at LF 445-448, 449-452 (and in particular, paragraph 4 at page 450), and pages 453-455), but it was incorrect. Although the claims belonged to Manville's Property

Damage Trust, they were actually made against Manville's general liability policies and included personal injury claims.

37. The claims submitted by MSEJ in March 2001 were not estimates or projected losses. They were actual bodily injury losses and claims against Manville, which had already been litigated before the Manville Bankruptcy Court, allowed in that forum, and administered and paid by the Manville Personal Injury Settlement Trust. LF 237-312. They represented additional developments on asbestos claims which had been predicted when Manville submitted the 400 boxes of claims material in 1990. However, because of the Trust's privacy concerns, MSEJ was not able to submit as much detailed information about individual claims as it would have liked in time for the March, 2001 deadline.

38. On May 1, 2001, Transit issued its formal Notice of Determination denying MSEJ's claim for \$24, 416,667. LF 633. Transit's Notice of Determination did not disagree with MSEJ's understanding that the original \$24,416,667 allowance had been directed toward property damage claims. Instead it rejected MSEJ's claims on other grounds. It was not until a year later that Transit informed MSEJ that the original 1990 claim had included personal injury claims. LF 899.

#### **2001-2007: Fits and Starts In The Disputed Claim Procedure**

39. On June 22, 2001, MSEJ requested review of its position, as provided by Transit Rule 75.7(d). LF 633. On May 17, 2002, counsel to Transit notified MSEJ's counsel that since the parties had been unable to resolve the

matter, the case would be processed through the Disputed Claims proceedings.  
LF 899.

40. Transit Rule 75.7(f) requires the Receiver to transmit a Disputed Claim to the Receivership Court. However, the Receiver took no such action for MSEJ's claim, which languished for two years. In January 2003, instead of submitting the matter to the Court as a disputed claim, the Receiver filed a motion to certify two questions to the Special Master who had been appointed to hear such matters. LF 44-45 and 634.

41. Transit Rule 75.8(a) provides that while a claim is still under consideration by the Receiver, the Receiver may certify questions to the Receivership Court to expedite the determination of claims prior to the formal allowance or disallowance of the claims. The Rule further provides that after a claim has become a Disputed Claim, the Referee may certify questions to the Receivership Court in order to expedite the Disputed Claims proceedings. Transit Rule 75.8(b) provides that if a question is certified to the Receivership Court by the Receiver or by the Referee, the Court may refer the certified questions to a Special Master.

42. The two questions presented by Transit to the Special Master in January 2003 were:

*(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?*

LF 44-45.

43. Believing that the first question trespassed on the territory of the Bankruptcy Court which had authorized the original assignment, MSEJ filed its opposition to Transit's Motion, but simultaneously filed a motion with the federal Bankruptcy Court for the Southern District of New York seeking a declaration regarding the scope of the assignment. LF 634, 50-124.

44. Transit conceded the authority of the Bankruptcy court to decide the scope of MSEJ's assignment, and proceeded to litigate the question before the bankruptcy judge. LF 585.

45. On March 26, 2003, the Bankruptcy Court decreed that under the Deed of Assignment between MSEJ and the Manville Trust, MSEJ was assigned all rights of the Manville Trust under the Transit policies, and not just the right to claims that had already been allowed. LF 588. Transit did not appeal.

46. Transit Rule 75.23 provides that the Receivership Court, Referee or Special Master shall rule on the certified questions within 60 days after the completion of the filing of the written submissions and oral argument, and that if such ruling is not made, that the matter shall be referred back to the Receivership Court for determination. However, after the bankruptcy court

decision, the Referee/Master neither decided the reference or referred it back to the Receivership Court, nor did Transit take any other action in the matter for more than two years.

### **2005: Transit's "Re-Determined" Claim**

47. Two years later, Transit changed horses once again. Abandoning its certified questions, and pretending that the detour to bankruptcy court had never occurred, it issued a "Notice of Re-Determination." This determination allowed MSEJ's additional claims, but only in the amount of \$100,000. LF 635 and 923-927. The Notice of Re-Determination does not explain the rationale for the \$100,000 award. However, the stated reasons for the denial of the rest of claim were substantially identical to those in the original May 1, 2001 Notice of Determination, including a statement that, "*[i]n 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*". LF 930-952.

48. On September 7, 2005, MSEJ once again filed its request for review of Transit's Notice of Re-Determination as required by Transit Rule 75.7(d). LF 932-952.

49. On October 24, 2005, Transit finally transmitted the "Disputed Claim" to the Court as required by Transit Rule 75.7(f). LF 953-956. In explaining the reasons for its denial, Transit stated:

*Johns Manville Corporation has submitted various personal injury, property damage and asbestos-related claims. Transit Casualty Company in Receivership has denied said claims for the following reasons: (1) Johns Manville Corporation's failure to comply with Administrative Order 49; (2) the claims are either post-bar date or filed late and, therefore, not covered under the policies; (3) the policies are exhausted or Transit Casualty Company in Receivership was led to believe that Johns-Manville Corporation and/or its assignee had exhausted the policies and would file no further claims; and (4) insufficient documentation to support the claims submitted.*

LF 953-956.

50. MSEJ responded to the Receiver's new assertions. LF 492-510.

51. Transit thereafter filed a motion to amend or clarify issues in dispute and asserted that the dispute with MSEJ also encompassed all of the issues set forth in Transit's July 13, 2005 Notice of Re-Determination, (including the issues relating to the scope of the Deed of Assignment).

52. Over the next two years, MSEJ filed various motions and requests which were never heard and never ruled on by either the Referee or the Court. They included numerous motions by MSEJ requesting that the Court afford res judicata effect to the Bankruptcy Court's determination regarding the scope of the assignment, and that it permit MSEJ to supplement the claims information

previously provided to Transit by Manville. The filings are set out in the Legal File, including at pages 171-343, 344-352, 514-525, 527-530, 532-535, 537-546, 548-597, 598-604, and 610-614, among other places.

53. On November 9, 2006, Transit filed a motion to dismiss its three-year-old motion to certify questions. MSEJ objected. LF 615-618.

**2006-2007: The Disputed Claim Is Decided By The Referee**

54. The court appointed a new Referee and Special Master, Mr. James Maxwell, in late 2006. After a status conference (LF 1129-63), the parties were directed to provide written submissions in support of their positions, and the case was submitted without evidentiary hearing.

55. On July 2, 2007, the Referee, (also Mr. Maxwell) filed his Findings of Fact, Conclusions of Law and Recommendations regarding MSEJ's claim. LF 631-661.<sup>3</sup>

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<sup>3</sup> This document was apparently filed in the Circuit Court without exhibits. The Referee's report refers to various documents that are not part of the Legal File because they were part of the parties' original case files or were filed as pleadings with the Disputed Claims Clerk of the court. The Disputed Claims Docket is kept separate from the Circuit Court Docket, so the many documents and pleadings filed with the Disputed Claims Clerk as per local rules as part of this dispute are not a part of the record on appeal unless they have been included as exhibits to other documents. But to the extent they are addressed by

56. MSEJ again objected and sought reconsideration of the Referee's Findings. LF 662-691. Transit filed a response and MSEJ filed a reply. LF 722-726. The court again did not rule on MSEJ's Motion for Reconsideration of the Referee's report, and those decisions became final for purposes of appeal pursuant to section Mo. Rev. Stat. § 375.1214 . The result of this deemer procedure is that none of MSEJ's claims have ever been subjected to actual judicial review.

### **POINTS RELIED ON**

**I. The Trial Court Erred in Ruling That MSEJ Is Estopped from Claiming the Balance of the Manville Policyholder Limits Remaining Under the Transit Policies Because Estoppel Is An Affirmative Defense Whose Elements Must Be Expressly Alleged By Its Proponent, In That Transit Never Specifically Pled Facts Establishing Any Of The Elements Of Equitable Estoppel.**

*Hoag v. McBride & Son Inv. Co., Inc.*, 967 S.W. 2d 157 (Mo.App. E.D. 1998)

*St. Louis Perfection Tire Co. v. McKinney*, 213 S.W. 1100, 212 Mo. App. 355 (1922)

*Etheridge v. TierOne Bank*, 226 S.W.3d 127 (Mo. Banc 2007)

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the Referee but not certified by the Circuit Court, and necessary to MSEJ's Brief, they are included as Exhibits in the Appendix.

**II. The Trial Court Erred in Holding MSEJ Estopped from Making Claim For the Balance of the Manville Policyholder Limits Because Each One of the Elements of Equitable Estoppel Must Be Satisfied In Order for Such A Defense To Apply Against MSEJ, In That The Referee Did Not Find That Any Of The Necessary Elements Had Been Proven And In Fact They Were Not.**

*Van Kampen v. Kauffman*, 685 S.W.2d 619, 625 (Mo. App. 1985)

*Thompson v. Chase Manhattan Mortgage Corp.*, 90 S.W.3d 194 (Mo. App. S.D. 2002)

*Taylor v. Farmers Bank of Chariton County*, 135 S.W.2d 1108 (Mo. App. 1940)

*Whitney v. Aetna Cas. & Surety Co.*, 16 S.W.3d 729 (Mo. App. E.D. 2000)

**III. The Trial Court Erred in Refusing, On The Basis Of Order 49, To Consider Detailed Evidence of Manville Claims Submitted By MSEJ after March 15, 2001, Because RSMo 375.1214 Permits Claimants To Provide Supplemental Information To The Court When The Denial Of Their Claims Is Reviewed, and Order 49 Could Not Have Over-Ridden The Requirements Of RSMo 375.1214, In That The Evidence MSEJ Sought To Submit Had Not Previously Been Available To It In the Exercise Of Reasonable Diligence, And Conclusively Demonstrated The Validity Of Its Claim.**

*Angoff v. Holland-America Insurance Company Trust*, 937 S.W. 2d 213 (Mo. App. 1996)

*Estate of Rogers v. Battista*, 125 S.W.3d 334, 340 (Mo.App. E.D. 2004).

Mo. Rev. Stat. § 1208.3, 1214, 1220.2

Transit Third Amended Rule 75

**IV. The Referee Erred In Determining That MSEJ's Claim Support Was Not "Sufficient" because MSEJ Met Its Burden To Prove Its Case By A Preponderance Of the Evidence, In That The Claim Information Which Manville Had Submitted In 1990, And The Additional Information That MSEJ Submitted In 2001, Was Sufficient To Support The Claims, And Because In Any Event Transit Was Bound By The Determinations Of The Bankruptcy Court With Respect To Claims Presented To It, In That Transit Did Not Make Any Specific Challenge To The Sufficiency Of The Claim Support Or To The Bankruptcy Court's Authority, And The Referee Did Not Attempt To Review Any Specific Claims.**

*Murphy v. Carron*, 536 S.W.2d 30 (Mo. 1976).

Mo. Rev. Stat. § 375.1220

## ARGUMENT

**I. The Trial Court Erred in Ruling That MSEJ Is Estopped from Claiming the Balance of the Manville Policyholder Limits Remaining Under the Transit Policies Because Estoppel Is An Affirmative Defense Whose Elements Must Be Expressly Alleged By Its Proponent, In That Transit Never Pled Facts Establishing Any Of The Elements Of Equitable Estoppel.**

**1. Standard of Review**

This point involves a question of law. The Court's review of questions of law is *de novo*. *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 (Mo. 2007).

**2. Transit Failed To Plead The Essential Elements Of Estoppel**

The procedure for the determination of claims against a receivership estate is informal and somewhat *ad hoc*. Nevertheless, Missouri statutes, as well as ordinary notions of due process, demand that a claimant be formally advised of the legal and factual reasons why his claim has been rejected so that, on review, it is clear what defenses and objections he must meet. Transit made several attempts to justify its denial and re-denial of MSEJ's claims, and each time the grounds for the denial shifted. But its articulation of the "estoppel" defense never became any better than what its stated in its 2005 Notice of Re-Determination, when it pointed to

"representations from MSEJ to TCCR that MSEJ did not intend to pursue claims other than the already allowed asbestos property damage claims."

LF 923-927.

Reformulating its position before the Referee, Transit later alleged that it had been

"led to believe that Johns-Manville Corporation and/or its assignee had exhausted the policies and would file no further claims."

LF953-6, without even identifying who had so led it.

Estoppel requires substantially more than a mutual misunderstanding of fact. The elements of estoppel are variously described in the caselaw, but one useful formulation is that recently used by the Supreme Court *en banc*:

(1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;

(2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and

(3) knowledge, actual or constructive, of the real facts.

*Board of Education of City of St. Louis v. St. Louis County*, 347 Mo. 1014, 149 S.W.2d 878, 880 (Mo.1941), *cited in Etheridge v. TierOne Bank*, 226 S.W.3d 127 (Mo. Banc 2007. *Weber v. Interstate Motor Freight System*, 205 S.W.2d 291 (Mo. Ct.App. 1947). Equitable estoppel is an affirmative defense and must be

pleaded as such. *Hoag v. McBride & Son Inv. Co., Inc.*, 967 S.W. 2d 157 (Mo.App. E.D. 1998). If estoppel has not been pleaded, evidence designed to establish it must be excluded. *St. Louis Perfection Tire Co. v. McKinney*, 213 S.W. 1100, 212 Mo. App. 355 (1922).

If the Notice of Re-Determination letter was a surrogate pleading, it is ambiguous at best and does not assert the elements of estoppel or even use the word. The Notice of Determination ("NOD") referred to a "representation," supposedly made by MSEJ, but did not explain why it "amounted to a false representation" or was "calculated to convey" a false impression. The later reformulation in the court referral was worse, in that it did not even allege whether the representation relied on by Transit had come from MSEJ or Manville. Neither document made any attempt at all to address the second and third elements of estoppel.

In spite of the failure of the case papers to assert the defense, the Referee concluded that MSEJ should be estopped from pursuing its claims, and maintained his conclusion in the face of MSEJ's request for reconsideration. The supervising court likewise failed to correct the error.

Pleadings, even informal ones, are useful not only to warn the other party what claims it should be prepared to meet, but to assist the court by highlighting the findings whose existence, or not, is critical to its decision. When the pleadings do not set out the elements of a case properly, they invite exactly the

error the Referee committed here. Transit's inability to plead the essential elements of estoppel led the Referee into error and prejudiced MSEJ.

**II. The Trial Court Erred in Holding MSEJ Estopped from Making Claim For the Balance of the Manville Policyholder Limits Because Each One of the Elements of Equitable Estoppel Must Be Satisfied In Order for Such A Defense To Apply Against MSEJ, In That The Referee Did Not Find That Any Of The Necessary Elements Had Been Proven And In Fact They Were Not**

**1. Standard of Review**

Identification of the elements of an affirmative defense is a question of law. An appellate court must review determinations of questions of law *de novo*. Where a case is submitted to the court on stipulated or agreed facts, the reviewing court must determine for itself whether the trial court drew the proper legal conclusions from the facts stipulated. *Schroeder v. Horack*, 592 S.W.2d 742 (Mo. 1979).

**2. The representation on which Transit bases its claim is not sufficient to support estoppel.**

The standard of proof for the facts creating an estoppel is high. "Every fact essential to create [an estoppel] must be established by clear and satisfactory

evidence." *Van Kampen v. Kauffman*, 685 S.W.2d 619, 625 (Mo. App. 1985). The Referee not only failed to apply this standard to the vague assertions of misrepresentation which were the best Transit could propose; he also failed to require that Transit establish the second and third elements at all.

To find the first element, (a false representation or concealment of material fact by Manville/MSEJ inconsistent with its later claims) the Referee primarily relied on one episode in the voluminous correspondence between the parties. As we have seen, it was Transit who, in 1990 and again in 1995, informed Manville that its limits were for \$24 million and that it would be allowed claims for that amount. In the course of due diligence for the sale of rights to MSEJ, Manville asked Transit to sign a letter of representation confirming that all the Manville policies had been fully exhausted. MSEJ and Manville sought Transit's affirmation on this point because the Manville trustee had to demonstrate to its own supervising court that accepting MSEJ's offer was in the best interest of the Manville estate. After some ducking and dodging, Transit, through its attorney Mr. Owen, made the requested representation. LF 479-490. This is, of course, a representation from Transit to Manville, not the other way around. If anything, it would estop Transit, not Manville. The Manville Trust and MSEJ requested information from the Transit Receiver because they believed that the Receiver was in the best position to know the answer. The Receiver gave the wrong information, and the Manville Trust relied upon that information. It is preposterous for the Referee to conclude that Transit was hurt by that activity.

Perplexingly, the Referee found that, merely by asking Transit to confirm the extent of its coverage, Manville had somehow represented to Transit what its coverage was. LF 648 (Report ¶ 24) Insurers sometimes are held to "coverage by estoppel" when they represent to their insured that their policy covers more than its terms actually include – the assumption being that insurers are expected to know what their policies cover, whereas insureds may not. If upheld, the Referee's holding may be the only instance in insurance jurisprudence where an insurer successfully claimed to have been misled about the terms of its own policies because the policyholder asked questions about them. Neither the Owen representation letter, or Manville's request for it, qualifies as an affirmative statement by Manville that coverage had been exhausted.

Moreover, no one may set up a statement, however plain and unambiguous, as an estoppel "where he knew or had the same means of knowledge as the other to the truth." *Thompson v. Chase Manhattan Mortgage Corp.*, 90 S.W.3d 194 (Mo. App. S.D. 2002). Transit was in the business of selling its insurance policies and resolving its exposures under such policies for 40 years before it ever entered receivership proceedings. Manville had a right to expect Transit to be knowledgeable about its policies and the coverage they provided; Transit cannot credibly claim to have been excusably ignorant.

The Referee also pointed to the fact that Manville acknowledged and accepted both the 1990 and 1995 Notices of Determination. LF 649, ¶¶ 30, 32. But his inference that, by acknowledging these notices, Manville gave up its right

to seek more coverage, is untenable in light of the Notices' plain statement that "other claims" against the policies might still be outstanding. A402-408. At these, and indeed at several other points in the long history of the Transit/Manville relationship, Manville made it clear that, although its policyholder protection claim theoretically allowed for them, Manville had no idea it was entitled to make any further claims. Generally, statements of intent as to future events are not actionable as fraud, although a misrepresentation of present state of mind may be. *Grossoehme v. Cordell*, 904 S.W.2d 392, 396 (Mo. Ct. App. 1995).

The Referee also relied (LF 644, ¶ 15) on statements contained in an exchange of correspondence between Manville and the Oregon Guaranty Fund, made in connection with an effort by those two entities to resolve their relationship. While that correspondence demonstrated that Manville believed it had no more insurance (which no one disputes) and relied on the Transit representations in dealing with the Guaranty Funds, the statements were not made to Transit, and thus could not be the basis of an estoppel between Manville and Transit.

Nor does another document the Referee relied on, (LF 649-50 ¶ 33) a letter dated July 22, 1997 from the Manville Trust to Transit, in which the Trust advised Transit that the assignment to MSEJ does not seek to augment any rights. This was true, and still is. MSEJ seeks only to do what Manville could have done had the claims not been assigned.

Thus, the Referee's conclusion that MSEJ and Manville had made representations that created an estoppel fails on several grounds:

- neither made any representation, but merely accepted representations made by Transit
- to the extent their actions evidenced a present intent not to make further claim on Transit, the representation was correct as to their present intent, but it made no promise for the future, and Transit's policyholder protections system deliberately provided for late-asserted claims.
- there is no evidence that Manville waived its right to make further claims; waiver is the deliberate relinquishment of a known right, and Manville was unaware it had any rights to relinquish.

**3. There was no plausible evidence of either detrimental reliance by Transit on any representation by Manville, or loss resulting to Transit from such reliance.**

The second element of estoppel is likewise missing: Transit's reliance and resulting detriment. Estoppel requires that the party claiming estoppel must act on the representation "in a manner changing his position for the worse." *Taylor v. Farmers Bank of Chariton County*, 135 S.W.2d 1108 (Mo. App. 1940). The Referee identifies only one step Transit allegedly took which it might not have taken if it had expected more claims from Manville: "at some time before 2001" it

settled with the reinsurers who would have had to pay part of those extra claims if they materialized. Referee's Report p. 21. But neither Transit or the Referee have connected the dots to show the sort of detrimental reliance necessary to support estoppel. Transit settled reinsurance throughout its lifespan, from its failure in 1984 through the present. The only commutations of reinsurance that could have been negatively affected by the statements on which Transit relies would be those taking place after 1997 and before 2001. The record is conspicuously silent as to the dates when the supposed commutations took place. The record is equally silent about which reinsurers were supposedly commuted with. The Manville claim, purely because of its size, would have affected different insurance than Transit's run-of-the-mill claims and surely would have been identified by name. If the Manville claim, or reinsurance calculations including it, had really been part of the reinsurance settlement calculus, surely the Liquidator could have resurrected some record of it. On the contrary, however, Transit did not provide the Referee, and the Referee did not demand, the identity of the reinsurers Transit settled with and for how much, which treaties it settled, when the settlements took place, which layers of reinsurance would have been affected by expanded Manville claims, how the settlements would have been different if Transit had recognized the potential for more Manville claims, and what role the Manville claims played in the negotiations that took place.

The Referee did find, however, that both Transit and its reinsurers were well informed that the Manville claims were colossal. He determined, for instance, that in mid-1990, Manville had supplied Transit with evidence of over \$1.1 billion in paid bodily injury and property damage claims, that Transit had reviewed and audited them, and had notified Transit's reinsurers about them. In addition, the Referee found that Manville had provided a listing of claims not yet settled and not yet ready for settlement. As of mid-1990, Transit had the policies, the policyholder protection proofs of claim, audited evidence of over \$1.1 billion in claims already paid, further evidence of pending claims as well as specific warnings of future claims, and certainly by 1997, industry knowledge of the flood of asbestos claims hitting the market. LF 646-7. Transit held all of the cards to negotiate with its reinsurers and book reserves based upon its total exposure under its policies.

Finally Transit and the Referee have failed to identify any injury to Transit that would result if it had to live up to the full terms of the policy it voluntarily wrote. If MSEJ is correct that the proper limits of the policy were \$72 million, Transit would receive a windfall if it had only had to allow a \$24 million claim. If Transit had recognized the correct amount of its obligation in the first place, its liabilities would have been exactly what they are now. Transit's only "loss" is in being deprived of the illusion that its liabilities were \$25 or 50 million less than they really are.

The fact that allowing MSEJ's claim will necessarily reduce the amounts paid to other deserving creditors is not an "injury" that can be considered in determining estoppel. Creditors holding claims that were previously allowed do not hold a superior right to the remaining assets and their claims do not carry a greater legitimacy than MSEJ's claims under the policies issued by Transit.

In summary, the Referee failed to find facts supporting even one of the essential elements of estoppel. "Estoppel will not be lightly invoked; it should be applied with care and caution and only when all elements constituting estoppel clearly appear." *Whitney v. Aetna Cas. & Surety Co.*, 16 S.W.3d 729 (Mo. App. E.D. 2000). The Referee's decision that MSEJ was estopped to claim additional insurance limits must therefore be reversed.

**4. There is no evidence that Manville made "representations" to Transit that it would renounce further claims against the Transit estate.**

**a) Standard of Review**

Where a case is submitted to the court on stipulated or agreed facts, the reviewing court must determine for itself whether the trial court drew the proper legal conclusions from the facts stipulated. *Schroeder v. Horack*, 592 S.W.2d 742 (Mo. 1979).

**b) The evidence relied on by the Referee consists of fragments of communication, taken out of context, and cannot support his conclusion.**

The evidence before the Referee was not in dispute; the parties disagree about whether it supported a finding of estoppel. On appeal, the question is therefore the legal one of whether the court properly applied the law to the facts presented.

The Referee determined that MSEJ should be equitably estopped from collecting on more than one limited amount based upon one paragraph of the brief statement of facts attached to the proofs of claim submitted by Manville against Transit, a selection of correspondence, not all of which was from either Manville or Transit, and internal Transit memoranda which Manville never saw.

The Referee's conclusions can only be supported by taking portions of the evidence out of context and ignoring others. For example, in the case of the proofs of claim, the Referee discusses only the third and fourth paragraphs of the brief statement of facts that was attached to the official form and omits the first, second and fifth paragraphs of that document which also bear on the issue and show that Manville did not know the total amount of its policyholder protection claims at the time but was preserving its rights for the future. The Referee fails to refer to the fact that the "amount claimed" on the official form was left blank and the brief statement of facts asserts that Manville does not know the amount but believes that the policies would be impacted in the future. Selective quotation

from the evidence, ignoring its context, cannot support the application of equitable estoppel.

The same selective analysis of the evidence applies to the Referee's treatment of the 1995 Notices of Determination. The Referee ignored the fact that the NOD's specifically state that the allowance may be in whole or in part and that additional claims may be allowed on those and other policies. Likewise, in citing the correspondence between MSEJ and Transit, and between the Manville Trust and Transit, the Referee omits the language which ask Transit to confirm the truth and accuracy of the statements made therein. This is particularly critical with respect to the December 19, 1997 letter that was, as noted by the Referee, commented upon and marked up by Transit before being finalized, because Manville's request for the accuracy of such information was never changed by Transit. That letter included the request by Manville for Transit to confirm whether the policies had been exhausted. LF 479-490. Nor does the Referee's interpretation make any practical sense. There would have been no good reason for Manville to agree to the exhaustion of the policies if they were not in fact exhausted.

The reviewing court is not confined to the Referee's selection of portions of the evidence that were helpful to the Receiver. The whole record, and not just the snippets on which the Referee relied, must be considered by the Court of Appeals. *Look v. French, et al.*, 144 S.W.2d 128 (Mo. 1940). So considered, the

record demonstrates that the essential elements of estoppel against MSEJ simply did not exist.

**III. The Trial Court Erred in Refusing, On The Basis Of Order 49, To Consider Detailed Evidence of Manville Claims Submitted By MSEJ after March 15, 2001, Because RSMo 375.1214 Permits Claimants To Provide Supplemental Information To The Court When The Denial Of Their Claims Is Reviewed, and Order 49 Could Not Have Over-Ridden The Requirements Of RSMo 375.1214, In That The Evidence MSEJ Sought To Submit Had Not Previously Been Available To It In the Exercise Of Reasonable Diligence, And Conclusively Demonstrated The Validity Of Its Claim.**

**1. Standard of Review:**

This issue involves the construction and correctness of an order of the receivership court, Order 49, and the interpretation of a statute, RSMo 375.1214. The review of or construction of a court's order on appeal is *de novo*. *Estate of Rogers v. Battista*, 125 S.W.3d 334, 340 (Mo.App. E.D. 2004).

**2. Relying on Order 49, the Referee refused to accept MSEJ's claims evidence developed after the March 15, 2001 deadline, although he accepted evidence developed by the Receiver after that date.**

As noted, Transit's longstanding practice was to permit the filing of "policyholder protection" claims, under which the policyholder could continue to submit new claim information as claims against them were resolved, rather than

being restricted by a rigid bar date. Manville timely filed its policyholder protection claim and, over the years, submitted quantities of claim information to the Receiver. Final distributions from the Transit estate, however, needed to be based on the amounts that policyholders would ultimately be entitled to from their policies, not the amounts that were already due. Order 49 was a "last call" for the submission of information from which the Receiver could not only determine the amounts that were already due, but also could estimate the amounts that would be due in the future.

Order 49 substantially changed the level of proof required for policyholders to prove their claims. Whereas previous practice had required policyholders to meet the same level of proof an insured would meet in dealing with a solvent insurer, under Order 49, a policyholder could submit "actuarial evidence" to obtain recognition of claims for "unresolved" and "future" losses – losses no solvent insurer could have been required to pay. Under Order 49, the estate would allow claims if the policyholder could supply evidence, by way or estimate or otherwise, that it was likely to incur insured loss in the future. However, Order 49 also provided that no evidence, submitted after March 15, 2001, would be considered by the Receiver. LF 196-7, A279.

The Receiver did not allow creditors much time to respond to this new call for information: The order approving it was entered in October of 2000, and all information had to be provided by March 15, 2001. Having abruptly realized that large claims against the Manville policies remained unasserted, MSEJ did its

best to substantiate them in the very limited time it had. Fortunately, the information originally submitted by Manville to Transit in 1990 would have been enough to have supported much larger claims than the \$24 million allowed on the basis of a single policy limit, and indeed would have been sufficient to support the entire \$72 million claim now being made. But that information was old, and the claims which had been reported to Transit as "unsettled" had largely been settled in the interim.

It was difficult for MSEJ to document what had become of those claims, because the Manville Personal Injury Trust was reluctant to release specific information about its claimants, due to privacy concerns. All MSEJ could accomplish by the March 15, 2001 deadline set by the Transit court was the submission of summary information, including the fact that claims against Transit had reached \$14 billion (as compared to Transit's \$75.25 million in insured limits). But those figures, combined with the material Manville had submitted 10 years earlier (which already showed claims in excess of a billion dollars) made it clear that the chance that Transit's second and third limits would not have been exhausted was infinitesimal.

MSEJ was finally able to obtain complete and detailed information from the Manville Trusts concerning 600,000 individual claims against Manville which it had adjudicated since its original 1990 claim submission. The dollar value of the claims had risen to \$30 billion by 2005. MSEJ sought to submit this information

to the Receiver, but the Receiver refused to consider it, pointing to the limitations in Order 49.

It then sought to submit the new information to the Referee. But while the Referee was willing to consider much evidence developed after the deadline by the Receiver, including Manville's records of its negotiations with the guaranty funds, and depositions of former Transit claim staff, it refused to accept additional evidence from MSEJ to support its actual claims. LF 658.

Transit had rejected MSEJ's claims for two reasons:<sup>4</sup> because of Manville's supposed commitment not to make any more claims, (which has already been discussed) and because the claims submitted by MSEJ were not "sufficiently" documented. By anybody's standards, MSEJ's claims would have been sufficiently documented if the Receiver or the Referee, or for that matter the Court, had considered the Manville claim information provided in 2005, but both the Receiver and the Referee refused that information on the basis of Order 49.

**3. Order 49 should not have been applied to the review proceedings at all.**

Order 49 provides deadlines for the submission of evidence of claims which, at the time of the submission, were "unresolved" or "future." LF 196-7,

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<sup>4</sup> Additional reasons asserted by Transit did not feature in the Referee's decision and are not in issue here.

A279. MSEJ's claims, in contrast, had all been resolved by the Manville Trustee. Thus, it is not at all clear that Order 49 should have been applied to MSEJ's claim in the first place.

More important, however, Order 49 purported only to control review of claims submissions *by the Receiver*. Order 49, of course, is merely an ordinary court order with an impressive title; its purpose is to implement the requirements of the statute, not to replace it. A separate set of rules, of which Order 49 forms no part, governs the review of disputed claims by the courts. The primary rule governing review of the Receiver's claim determinations is Mo. Rev. Stat. § 375.1214. This statute allows initial review of disputed claims determinations to be made by a court-appointed referee. If unobjected to, the Referee's recommendations become final without court intervention. But either the claimant or the Receiver may seek "Reconsideration" from the court, if they can point to either an error of law by the Referee, or "the existence of new facts which could not, with reasonable diligence, have been discovered and presented before the referee."

If the Referee was correct that Order 49 barred his consideration of MSEJ's new claims data, that information plainly fell within the terms of §1214, because it was unavailable to MSEJ before 3/15/2001. MSEJ obtained the information in September of 2005, but the Receiver refused to accept it and instead filed the matter as a disputed claim the following month. MSEJ filed the disputed material (under seal, because of concerns for the privacy of the victims

involved) in October of 2005, so that it would have been available if the Referee had chosen to examine it. It was also referred to in MSEJ's request for reconsideration, and thus available to the reviewing court. That court, at the least should have examined the new information to see whether it satisfied MSEJ's obligation to document its claims, and whether it had exercised reasonable diligence in obtaining it. Instead, it did nothing, and the motion for reconsideration was deemed denied. For purposes of appellate review, the decision of the Referee should be considered to have been adopted *verbatim* by the Circuit Court, and reviewed by the same standard as would have applied to the Court's own decision.

Mo. Rev. Stat. § 375.1214 clearly requires the Court to entertain "new facts" in support of a claim if the claimant has been diligent in presenting them. It may not ignore those facts without making a finding regarding the claimant's diligence. Order 49, which applied to the Receiver, and conceivably applied to the Referee, plainly does not apply to the Court. It was error for the Court to have allowed the Referee's determination to become final without intervening to consider the new evidence provided by MSEJ.

The application of Order 49 to block MSEJ's evidence of claims contradicts the provisions of Mo. Rev. Stat. § 375.1208.3 as well. That section provides that "*At any time the liquidator may request the claimants 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.”*

Transit relied on *Angoff v. Holland-America Insurance Company Trust*, 937 S.W. 2d 213 (Mo. App. 1996) for the proposition that a receivership court has broad powers to expedite the closure of the estate and that restrictions on the submission of claim material are a valid use of those powers. *Holland-America*, was correctly decided, but has no application to this problem. That case addressed the application of rules established to implement the special procedure created by Mo. Rev. Stat. § 375.1220.2 to fix or liquidate “IBNR” claims. Those procedures were fully consistent with the statute. In contrast, the Referee's application of Order 49 to the review of a disputed claim contradicts the statute rather than applying it.

But the rest of the *Holland America* case is instructive and is in MSEJ's favor. The case stands for the proposition that the liquidator should be doing his best to fully recognize and allow legitimate claims against the insolvent estate. In *Holland-America*, the dispute was between the receivership estate and its reinsurers, not by the liquidator against the claimants of the estate. In *Holland America*, the receiver was working to allow claims against the estate, not fighting legitimate claims as Transit is doing. The court further stated that with respect to the reinsurers, the court was just holding them to the reinsurance that they contracted to provide and nothing more. MSEJ is only trying to hold Transit to the contracts it issued to Manville, and nothing more.

It is quite possible to read Order 49 so as to avoid any conflict with the governing statute, simply by applying it only to claim review conducted by the Receiver. If, as Transit argues, it was meant to apply to procedure before the supervising court, it considerably exceeds the authority of the receivership court. In the case of a timely filed claim, for which relevant information is, in the exercise of reasonable diligence, not available until after the filing date, the application of Order 49 in the manner advocated by Transit and adopted by the Referee had the effect of denying MSEJ the benefit of the governing statute.

**IV. The Referee Erred In Determining That MSEJ's Claim Support Was Not "Sufficient" Because MSEJ Met Its Burden To Prove Its Case By A Preponderance Of the Evidence, In That The Claim Information Which Manville Had Submitted In 1990, And The Additional Information That MSEJ Submitted In 2001, Was Sufficient To Support The Claims, And Because In Any Event Transit Was Bound By The Determinations Of The Bankruptcy Court With Respect To Claims Presented To It, And Transit Did Not Make Any Specific Challenge To The Sufficiency Of The Claim Support Or The Bankruptcy Court's Authority, And The Referee Did Not Attempt To Review Any Specific Claims.**

**1. Standard of Review:**

The determination of the "sufficiency" of evidence to support a claim is a question of fact, which may be overturned by an appellate court if it is not supported by substantial evidence. *Murphy v. Carron*, 536 S.W.2d 30 (Mo. 1976).

## **2. The Referee ignored substantial evidence regarding the Manville Claims.**

The Referee found that comprehensive claim support had been submitted to Transit by Manville as of 1990. Although the Referee did not review it, that evidence, combined with what MSEJ submitted in March of 2001, showed that Manville had become liable for claims which would exhaust, not only the \$24 million dollar limit Transit initially assumed applied, but also the \$48 million dollars in coverage it now concedes existed, and even the \$73.25 million claimed by MSEJ.

The claims information which Manville had submitted in 1990, and which Transit audited, would have supported a much larger claim allowance at that time if Transit and Manville had realized that the policies provided separate limits for product liability and occupational disease, as well as the general liability limits. Even without the detailed claim information it received from Manville in 2005, MSEJ was able to show that, by December, 2000, the Manville Personal Injury Trust had paid more than \$14 *billion* in personal injury claims to employees and other injured persons. LF 633. Analyzing the available claims data, MSEJ was

able, even then, to provide a spreadsheet identifying the years and coverages to which these claims applied, and showing that it was highly probable that all of the Transit policy limits should be exhausted. LF 199-230.

At that stage, MSEJ could not provide information, such as the names of the claimants or the types of disease they suffered from, because of the Trust's privacy concerns. But as a practical matter, that information would have made no difference. Although 375.1220 affords the liquidator discretion to determine claim amounts, 375.1220.1 binds him to final determinations properly made in other fori. The claims determined by the Bankruptcy Court and paid by the Manville Personal Injury Trust fall into this basket. So when MSEJ made its timely March 1, 2001 submission to Transit in support of the balance of coverage under the policies, Transit may not have been provided with the detail behind all \$14 billion in losses paid by the Manville Trust to people suffering bodily injury claims from Manville products, but it was served with evidence of the definitive amount of the court-ordered losses.

The Referee simply ignored both the 1990 data provided to Transit, and the additional claim information provided in 2001. No argument was made, nor was any evidence presented, to the Referee that cast the accuracy of that evidence in any doubt, and indeed, the Receiver's staff had extensively reviewed the 1990 evidence and found it persuasive. The Referee did not identify how the claims information submitted by MSEJ was not "sufficient," but it is clear from the context of his report and the brevity of his treatment that he did not review or

consider the 1990 or 2001 material in any detail. Even if it had been proper for the Referee to ignore the supplemental claim information provided in 2005, the Referee clearly erred in disregarding the other information Transit already had on hand.

The Referee concluded that in order to be entitled to the claims they asserted on March 1, 2001, MSEJ (1) must rely upon the original proofs of claim made by Manville in 1987, (2) must have complied with Order 49, and (3) the information filed on March 1, 2001 must be sufficient to support their claims. MSEJ asserts that it does rely upon the original proofs of claim made by Manville in 1987, that it did comply with Order 49, and that the information filed from 1990 through March 1, 2001 was sufficient to support its claims, and that if it were not, it was entitled under 375.1214 to supplement its materials in the course of the circuit court review. The Referee's refusal to consider the timely-filed information, and his refusal to permit the filing of supplemental material, deprived MSEJ of a fair review of its claim.

"[T] decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it....." *Murphy v. Carron*, 536 S.W.2d 30 (Mo. 1976). The Referee's conclusion that the MSEJ claims were insufficiently documented ignored the substantial evidence to the contrary. It must be reversed.

## CONCLUSION

The Transit Receiver's rejection of Manville's claim for the additional limits of its policies had a single credible reason: the claim had an unexpected and inconvenient effect on the Receiver's plans. But MSEJ's claim is fully authorized by the rules under which Transit has operated by for over 20 years. It is supported by governing statute. The effort to deny it, willy-nilly, required the Receiver to concoct an elaborate, and false, claim of estoppel and prejudice, and to apply legitimate orders of the receivership court in a fashion which contravened Missouri law. Inconvenient or no, MSEJ's claims must be allowed and granted their rightful share of Transit's assets.

The Trial Court erred in adopting the Referee's recommendations regarding estoppel, because Transit's assertions were insufficient as a matter of law and not supported by substantial evidence. It erred further in adopting the Referee's recommendations that the MSEJ claims be denied for lack of sufficient evidence, in that substantial evidence was presented to the Receiver and to the Referee, and not contradicted by the Receiver, which supported MSEJ's claims. Finally, it erred in declining to hold a hearing on MSEJ's Motion for Reconsideration, although that Motion included compelling, and substantially undisputed, evidence which was not available to MSEJ when it submitted its claims under Order 49 to the Receiver.

Based on the foregoing, this Court should reverse the decision of the Trial Court and remand this case to the Court with instructions to enter an order allowing MSEJ's claim in the amount of \$48,833,334.

Respectfully Submitted,  
INGLISH & MONACO, P.C.  
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A handwritten signature in cursive script, reading "Nicholas M. Monaco". The signature is written in black ink and is positioned above a horizontal line.

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## CERTIFICATE OF COMPLIANCE

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

- (A) This Brief contains \_\_\_\_\_ words, as calculated by Microsoft Word;
- (B) A copy of this Brief is on the attached 3.5" disk; and
- (C) This disk has been scanned for viruses by counsel's anti-virus program and is free of any viruses.



*Nicholas M. Monaco*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two (2) copies of the foregoing Appellant's Amended Brief On Appeal and of its Appendix, and one 3.5" disk containing this Brief were sent via first-class mail, postage prepaid on this \_\_\_\_ day of January, 2008 to:

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