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IN THE
SUPREME COURT OF VIRGINIA

Record No. 161767

APPALACHIAN REGIONAL HEALTHCARE, *ET AL.*,

Appellants,

v.

JACQUELINE K. CUNNINGHAM, *ET AL.*,

Appellees.

OPENING BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

A. Nature of the Case

This appeal concerns straightforward contractual and statutory obligations. However, the Virginia State Corporation Commission (the "Commission") and its Commissioner of Insurance (the "Commissioner) have misconstrued and misapplied the plain and unambiguous contractual and statutory language at issue to bar Appellants' (the "Hospitals") continued participation in a receivership administered by the Commission. After fourteen years of litigation defending the Hospitals' status as policyholders of ROA and their legal rights in the receivership of the now-defunct insurer Reciprocal of America ("ROA"), the Commissioner—as Deputy Receiver for ROA, and the Commission—as Receiver for ROA, have improperly denied Appellants' legitimate claims for over $400,000 of legal fees and expenses incurred in litigation directly related to and necessitated by attacks on the Hospitals' status as policyholders of ROA and by their participation in ROA's Receivership (the "Receivership"). In so doing, the Commission misapplied plain contractual language in contravention of Virginia law. Accordingly, the Commission erred, and its order denying the Hospitals' claims in the Receivership should be reversed.

B. Material Proceedings Below

The direct proceedings in this appeal began with the Special Deputy Receiver's determination of the Hospitals' claims in the Receivership in 2014. Each of the Hospitals filed an initial proof of claim in the Receivership on September 29, 2004, and then supplemented these claims to include attorney's fees and costs for litigation related to the Receivership (collectively, "Claims"). (J.A. 768-69, 633, and 656-62). The Special Deputy Receiver for ROA denied the Hospitals' Claims on May 5, 2014. (J.A. 25-28). On June 24, 2014, the Hospitals timely filed with the Deputy Receiver an appeal from the Special Deputy Receiver's decision. (J.A. 30-31 and 44). The Hospitals had revised their Claims to reflect only the legal fees and costs directly associated with the determination of their rights and status as policyholders before the Commission and Kentucky state court between 2003 and 2005. (J.A. 657-62). On October 22, 2014, the Deputy Receiver denied the appeal and affirmed the determination issued on May 5, 2014. (J.A. 30). The Hospitals then filed a Petition for Appeal on November 20, 2014 with the Commission. (J.A. 2). The Commission docketed the appeal as case INS-2014-00244 and referred it to a Hearing Examiner. (J.A. 669).

After written discovery and other proceedings before the Hearing Examiner, the Hospitals and the Deputy Receiver filed cross-Motions for Summary Judgment. (J.A. 672 and 761). On March 18, 2016, the Hearing Examiner issued a Report recommending that the Commission grant the Deputy Receiver's Motion for Summary Judgment and deny the Hospitals' Motion—and thus their Claims—because ROA's contractual agreements with the Hospitals' predecessors did not encompass the fees sought in their Claims. (J.A. 920 and 929). The Hospitals filed Exceptions and Comments to the Hearing Examiner's Report on April 8, 2016. (J.A. 932). Then, on August 15, 2016, the Commission effectively overruled the Hospitals' Exceptions and Comments, granted the Deputy Receiver's Motion for Summary Judgment, and denied the Hospitals' Motion (the "2016 Final Order"). (J.A. 1014-1022).

The Hospitals filed with the Commission their Notice of Appeal to this Court on September 13, 2016, which was amended with leave of the Court. The Court issued a Certificate of Appeal on February 8, 2017. Because the Hospitals have been "aggrieved" by the Commission's denial of their Motion for Summary Judgment and grant of the Deputy Receiver's Motion, and because the Commission's 2016 Final Order "le[ft] nothing to be done

in the case," it is appealable to this Court. Va. Sup. Ct. R. 5:21(a); *Indiana Ins. Guar. Ass'n v. Gross*, 268 Va. 220, 220, 598 S.E.2d 322, 322 (2004).

C. Statement of Facts

ROA's liquidation and subsequent Receivership forced the Hospitals to expend hundreds of thousands of dollars defending their status as policyholders of ROA and in connection with the businesses of the Hospitals' predecessors that ROA assumed. Pursuant to the Merger Agreements and Indemnification Agreements negotiated and executed by ROA's predecessor—The Virginia Insurance Reciprocal ("TVIR")—and the Hospitals' predecessors in interest, the Deputy Receiver—acting for ROA—has failed to fulfill its contractual obligation to indemnify the Hospitals for fees and expenses incurred in litigation in two (2) lawsuits that arose directly from and were necessitated by ROA's acquisition of the Hospitals' predecessors in interest and its subsequent insolvency.

1. Underlying Merger Transactions

On November 1, 1997, two (2) self-insured trusts established under Kentucky law, the Compensation Hospital Association Trust ("CHAT") and the Kentucky Hospital Association Trust ("KHAT") (collectively, the "Trusts"), entered separate but nearly identical Merger Agreements to effectuate the assumption of all their assets and liabilities to ROA, a

Virginia insurance company (the "Agreements"). (J.A. 66ff. and 107ff). The Hospitals—albeit some through various predecessors—were the member-insureds of the Trusts. (J.A. 920-21). With the Agreements, the Trusts transferred all their assets and insurance obligations to ROA. (J.A. 71-73 and 116-18). Indeed, with the Agreements, ROA "assume[d] and exercise[d] all rights and interests of [the Trusts] under policies issued or coverages provided by [the Trusts] as of the Closing." (J.A. 73 and 118).

These large and complex Agreements contained a Master Agreement with essential terms of the merger, but also incorporated other agreements, including an Indemnification Agreement and Agreement of Assumption of Liabilities. (J.A. 66-106 and 107-110). Section 10.8 of the Master Agreements states that exhibits "shall be considered a part hereof as if set forth in body hereof in full." (J.A. 101 and 146). An Indemnification Agreement for each Trust was attached to their respective Agreements as Exhibit 1.9. (J.A. 151-57 and 334-39).

The Indemnification Agreements require ROA to indemnify each Trust and their member-insureds, the Hospitals:

> [ROA] agrees to indemnify and hold harmless [each Trust] and its member-insureds from any and all Damages arising out of or in connection with the Business, the Assumed Liabilities, the conveyance and delivery of the Transferred Assets, or related transactions, provided no such indemnification shall be provided for any and all Damages of such member-insureds

> relating to their obligations under their respective polices of insurance issued by [ROA]. The indemnification by [ROA] provided under this Section 2 shall include reasonable costs and expenses (including fees and expenses of [each Trust] or any of its member-insured's counsel) in defending itself against any claim Damages arising from or in connection with the Damages.

(J.A. 154 and 336).

In turn, the Indemnification Agreements define "Damages" as "any liability, expense, cost or obligation, however incurred or characterized, assumed by [ROA] as provided for in this Agreement." (*Id.*) "Business" is defined as having "the meaning set forth in the Recitals to this Agreement" applicable to the Trusts. (*Id.*)

The Recitals specifically state: "CHAT is a trust organized under Kentucky law and provides workers' compensation and employers [sic] liability coverages to Kentucky hospitals and other health care providers," and that "KHAT is a trust organized under Kentucky law and provides professional liability and general liability coverages to Kentucky hospitals and other health care providers." (J.A. 153 and 335). "Assumed Liabilities" are "all obligations of [the Trust] in connection with its Business except for the Excluded Liabilities." (J.A. 154 and 336). The Excluded Liabilities are defined in Exhibit 1.9 to the Indemnification Agreements as "None." (J.A. 158 and 340).

The Deputy Receiver and Commission do not dispute that the Trusts entered these Agreements with ROA, or that ROA is the party obligated by these Agreements. (J.A. 807-08). Likewise, no party disputes that the Hospitals have succeeded to the Trusts' interests under the Agreements. (J.A. 806-07). The Deputy Receiver has admitted that the Indemnification Agreements are valid and enforceable under Virginia and Kentucky law. (J.A. 810).

2. ROA Placed in Receivership

On January 29, 2003, ROA was placed into Receivership by the Circuit Court of the City of Richmond, Virginia. (J.A. 683-699). The Commission was appointed as the Receiver for ROA (the "Receiver"), and the Commissioner was appointed as Deputy Receiver for ROA (the "Deputy Receiver"). (*Id.*) The Deputy Receiver has admitted that the Indemnification Agreements are enforceable against ROA and that ROA's entrance into liquidation does not prevent enforcement of the Indemnification Agreements under Virginia law. (J.A. 811).

3. The Virginia State Corporation Commission Litigation (Case No. INS-2003-00239)

When multiple guaranty associations asserted that various self-insured trusts, including the Trusts and the Hospitals, were not considered

policyholders of the insurance contracts assumed by ROA, the Deputy Receiver applied to the Commission for an order "authorizing him to continue payment of medical and recurring partial or total disability payments for workers' compensation claims that were assumed by ROA through assumption reinsurance, or similar transactions, and denied or likely to be denied coverage" by state guaranty associations (the "Workers' Compensation Claims"). (J.A. 527). The Deputy Receiver maintained that the various insureds of the policies assumed by ROA—including the Trusts' policies—were "direct insureds of ROA" and that "continued payment" under those policies was necessary. (J.A. 528).

In response, the Commission established Virginia Corporation Case No. INS-2003-00239 (the "Virginia Litigation"). The Commission sought to determine various issues, preeminent among which was whether the Hospitals were policyholders of ROA. (J.A. 528, 535, and 545). The Commission also considered and determined other issues, including whether the self-insured trusts (including the Trusts) were entitled to distributions from the Receivership. (J.A. 528-31). The Workers' Compensation Claims considered in the Virginia Litigation were ultimately expanded to include various additional insurance agreements. (J.A. 531-

32). Due to the scope of the Virginia Litigation, "[a] number of other parties" joined the proceedings, including the Hospitals. (J.A. 529).

Thus, the Deputy Receiver and the Hospitals—among others—defended the Hospitals' right to participate in distributions from the Receivership. (J.A. 527-532). Importantly, during the Virginia Litigation, the Deputy Receiver agreed that the Workers' Compensation Claims were "claims of policyholders arising out of the insurance contracts" under the Virginia Code. (J.A. 541). The Deputy Receiver also testified the Workers' Compensation Claims were covered by various insurance guaranty association acts. (J.A. 401). Further, the Deputy Receiver testified that ROA assumed the obligations of the various self-insurance trust and group self-insurance trusts by providing direct coverage to the insureds. (J.A. 401).

Finally, the Hearing Examiner in the Virginia Litigation—who found that the Agreements were contracts of insurance—is the same Hearing Examiner who reversed course in these proceedings and found that the Agreements are not contracts of insurance. (*Compare* J.A. 396, 520 and 524 *with* J.A. 928). In 2005, the Hearing Examiner found that "the Agreements effected an assumption reinsurance transaction in which ROA assumed the then existing insurance obligations of the [Trusts]," before

holding in 2016 that the Indemnity Agreements "are not contracts of insurance." (J.A. 520 and 928). Moreover, in the Virginia Litigation, the Commission decided that the Trusts themselves were "policyholders" of "insurance contracts" with ROA. (J.A. 535).

In its Final Order in the Virginia Litigation (the "2005 Final Order"), the Commission ultimately decided several additional issues, including: that "the [self-insured trusts and the Trusts] or employers thereof constitute 'other policyholders arising out of insurance contracts' pursuant to § 38.2-1509 B 1 ii [sic] of the Code of Virginia"; that the Trusts' "coverage documents constituted 'insurance contracts'"; and that the workers' compensation claims that ROA assumed from the Trusts "are those of 'policyholders.'" (J.A. 530 and 541).

4. The Kentucky Litigation (Case No. 03-CI-1236)

Only four (4) months after ROA was placed into Receivership, and as the Hospitals were assessing the ramifications of ROA's insolvency, on May 27, 2003, the Kentucky Insurance Guaranty Association ("KIGA") informed ROA that it would not continue to administer and distribute payments regarding various Workers' Compensation Claims at issue in the 2003 Virginia Litigation. (J.A. 7 and 547). KIGA is a non-profit, unincorporated legal entity established by the Kentucky General Assembly

and is composed of authorized insurers that write direct insurance in Kentucky. (J.A. 615).

After ROA became insolvent, KIGA discontinued coverage for the Workers' Compensation Claims eventually involved in the Virginia Litigation, as well as other claims under the Hospitals' insurance policies (the "Denied Claims"). KIGA asserted that the Denied Claims were not covered under its statutory obligations and disclaimed responsibility to provide guaranty fund coverage for them. (J.A. 9, 547, 572). Although KIGA temporarily continued payment on the Denied Claims, it ultimately discontinued this payment in late 2003. (J.A. 567-68 and 574-78). Because the Commission had not yet determined whether payment on these Denied Claims could continue by ROA in the Receivership (as the Workers' Compensation Claims), and because KIGA had made clear that it would refuse to honor its statutory obligation to administer and pay the Hospitals' Denied Claims as successors to the Trusts, the Hospitals were left holding numerous insurance claims that they were not responsible for paying. (*Id.*; *see also* J.A. 396-99). Regardless of who would ultimately be responsible for these claims—the Hospitals' now-defunct insurer ROA or someone else—the Hospitals were not insurers and were not responsible for the these claims. (J.A. 614-15 and 629). The Hospitals' litigation on this issue

ultimately vindicated this position, both in the Virginia Litigation before the Commission, and before a Circuit Court in Kentucky. (J.A. 527 and 610).

Importantly, KIGA refused to participate in the ROA proceedings and Virginia Litigation. (J.A. 553-55 and 601-602). Not only did KIGA decline to voluntarily intervene in the Virginia litigation, but it also declared that it "adopts essentially the position advocated by the guaranty associations before the Commission." (J.A. 601). KIGA further asserted that, even if the Commission determined that the Trusts were considered policyholders, the Commission's ruling would not "mean that the obligations thereunder would constitute covered claims under Kentucky law." (J.A. 602).

By July 2003, the Hospitals held the untenable position of accepting KIGA's determination as to their Denied Claims and hoping for a favorable outcome in the Receivership and Virginia Litigation, or protecting the Hospitals' statutory rights with a lawsuit against KIGA. (J.A. 614). Essentially, the Hospitals were exposed to obligations assumed by ROA *and* were denied the statutory aid of KIGA. (J.A. 614 and 629). Accordingly, the Hospitals were forced to sue KIGA (the "Kentucky Litigation"), seeking a declaration (1) directing KIGA to assume control of the Denied Claims because they constituted claims of policyholders arising out of insurance contracts (the same issue contested in the Virginia Litigation), and (2)

finding that KIGA was responsible for administering and paying the Denied Claims. (J.A. 549-58). Despite joint participation in the Virginia Litigation, the Deputy Receiver refused to intervene in the Kentucky Litigation (J.A. 556-70), supplying only a letter in support of the Hospitals' position in the Kentucky litigation, and nonetheless leaving the Hospitals with no choice but to litigate simultaneously the same issues in two jurisdictions to preserve their rights.

On November 2, 2006, the Franklin Circuit Court in Kentucky court ultimately vindicated the Hospitals' position, holding:

> [T]he [Denied Claims] arise out of and are within the coverage of an insurance policy issued by [ROA]; (2) the [Denied Claims] constitute claims of policyholders arising out of insurance contracts issued by [ROA]; (3) the [Denied Claims] under the . . . Indemnification Agreement, are "covered claims" for which KIGA became obligated to administer and pay upon the liquidation of [ROA]; and (4) the Master Agreement and assumption of the Assumed Obligations by [ROA] effectuated a novation for which [ROA] is directly liable as the as the insolvent issuing insurer.

(J.A. 629). Critically, the Franklin Circuit Court held not only that KIGA had been obligated to pay the Denied Claims when ROA became insolvent, but also that the Denied Claims arose out of an insurance contract with ROA. (J.A. 629). The court also held that "as a direct result of the Master Agreement, TVIR [ROA], became directly liable as the insurer to former C-HAT policyholders." (J.A. 612).

After vindicating their rights under the Agreements with ROA in two (2) separate forums, the Hospitals filed their Claims for the fees and expenses related to both the Virginia Litigation and Kentucky Litigation pursuant to the Agreements, which the Commission denied in its 2016 Final Order, and which are now before this Court.

ASSIGNMENTS OF ERROR

1. The Commission erred in its Final Order by ruling that the Indemnification Agreements do not require the Deputy Receiver of ROA to provide indemnification for the requested legal fees and expenses incurred by the Hospitals. (Preserved at J.A. 939-941, 943, 946).

2. The Commission erred in its Final Order by ruling that the Indemnification Agreements, as part of the Merger Agreements between the Kentucky Hospital Association Trust ("KHAT"), the Compensation Health Association Trust ("CHAT") [the Trusts] and ROA were not contracts of insurance, but contracts of indemnity. (Preserved at J.A. 943, 946-47).

3. The Commission erred in its Final Order by not properly interpreting the language of the Indemnification Agreements and Merger Agreements, in requiring ROA to be liable pursuant to Section 2 of the Indemnification Agreements and the agreed upon definition of Damages. (Preserved at J.A. 939, 942-943).

4. The Commission erred in its Final Order by ruling that the Appellants were not afforded Class II priority pursuant to § 38.2-1509-B-1(ii) of the Code, as they are not claims of policyholders arising out of insurance contracts. (Preserved at J.A. 947-948).

5. The Commission erred in its Final Order by failing to require the Deputy Receiver to indemnify the Hospitals regarding the legal fees and costs expended during the INS-2003-00239 regulatory action [the Virginia Litigation] to determine if the Hospitals were policyholders of ROA and therefore the Assumed Claims (Liabilities) of KHAT and CHAT by ROA

constituted "claims of other policyholders arising out of insurance contracts." (Preserved at J.A. 943-945).

6. The Commission erred in its Final Order by failing to require ROA to indemnify the Appellants regarding the legal fees and costs expended during the pendency of the Kentucky Litigation, Franklin Circuit Court Civil Action No. 2003-CI-123, to ensure that the Assumed Claims (Liabilities) of KHAT and CHAT by ROA constituted "claims of other policyholders arising out of insurance contracts" and the Hospitals were therefore entitled to coverage by the Kentucky Insurance Guaranty Act and the Kentucky Insurance Guaranty Association. (Preserved at J.A. 942-943, 945).

7. The Commission erred in its Final Order by concluding that because the transfer of the Assumed Claims (Liabilities) did not include an obligation to seek the establishment of guaranty fund coverage in the event of insolvency of ROA, the Indemnification Agreements are not valid and therefore not enforceable by the Hospitals to obtain indemnification of legal fees and expenses. (Preserved at J.A. 945-946).

ARGUMENT

Having failed to apply the straightforward language of the Agreements as contracts of insurance, the Commission's 2016 Final Order should be reversed. The plain language of the Agreements provides that the legal fees and expenses incurred in defending the Hospitals' rights as policyholders of ROA in both the Virginia Litigation and Kentucky Litigation are reimbursable. Even if the language of the Agreements or Indemnification Agreements is ambiguous, as insurance contracts, they must be construed against ROA (and the Deputy Receiver) and in favor of the Hospitals and coverage of their Claims. Further, the Deputy Receiver's

attempts to contradict the past Orders of the same Hearing Examiner and the Commission and holdings in this Receivership are misplaced. Finally, because the Hospitals' Claims constitute "claims of policy holders arising out of insurance contracts," the Hospitals are entitled to payment of their Claims pursuant to Code § 38.2-1509(B)(1)(ii), and the Commission's order should be reversed.

I. The Hospitals' Claims Were Incurred in Litigation Defending Their Status as Policyholders under the Agreements, and Two Tribunals Have Confirmed This Status. (Assignments of Error 2, 4, 5, and 6)

Issues of contractual and statutory interpretation are subject to de novo review. *Babcock & Wilcox Co. v. Areva NP, Inc.*, 292 Va. 165, 178, 788 S.E.2d 237, 243 (2016); *Northern Virginia Real Estate, Inc. v. Martins*, 283 Va. 86, 102, 720 S.E.2d 121, 129 (2012). Therefore, the Hospitals' status as "policyholders" under the Agreements with ROA or Code § 38.2-1509(B)(1) are subject to this Court's unfettered review.

Both the Hearing Examiner and Commission erred in the proceedings below by failing to recognize the fundamental purpose of the Virginia and Kentucky Litigation and the critical underpinnings of the decisions in both cases. In both proceedings, the Hospitals were forced to litigate and defend their status as policyholders of ROA through no fault of their own.

Moreover, the tribunals in both cases decided that the Agreements with ROA were contracts of insurance. Indeed, the Agreements constitute contracts of insurance under straightforward Virginia law. Accordingly, the Hospitals' Claims for fees and expenses incurred in litigating their status as policyholders under the Agreements—coupled with the nature of the Agreements as contracts of insurance—are claims of "other policyholders arising out of insurance contracts," and are entitled to second payment priority in the Receivership under Code § 38.2-1509(B)(1).

In the Virginia Litigation, the Hospitals were forced to litigate and defend their status as policyholders of ROA through no fault of their own. That litigation was prompted by various guaranty associations' denial of coverage for insurance claims formerly paid by (solvent) ROA and the guaranty associations' concomitant denial of the Hospitals' status as policyholders of insurance policies from ROA. (J.A. 396, 456, and 527). Indeed, the Hearing Examiner framed the issue presented in the Virginia Litigation by at least one expert as "whether the members of the SITs and GSIAs [i.e., the Hospitals] were "policyholders under insurance contracts." (J.A. 456). Thus, the Hospitals were forced to litigate their status as policyholders under contracts of insurance—i.e., under the Agreements—with ROA.

Hence, in the Virginia Litigation, the Commission determined that the Workers' Compensation Claims that ROA assumed were "claims of other policyholders arising out of insurance contracts." (J.A. 545). Importantly, the Commission also held that "the language 'arising out of' [in § 32.8-1509(B)(1)] is broad enough to encompass the" claims that ROA assumed from the Trusts. (J.A. 541). These holdings necessarily involved a finding that the Trusts—and thus the Hospitals—had entered contracts of insurance with ROA. Indeed, that is the reason, as the Commission held, that the Workers' Compensation Claims—or any other claims at issue—were payable in the Receivership: they "arose out of" the Trusts' Agreements with ROA, and thus arose out of contracts of insurance with ROA. This holding is in line with Virginia law, under which the Agreements are contracts of insurance. Va. Code § 38.2-100 (defining "insurance" as "the business of transferring risk by contract wherein a person, for a consideration, undertakes (i) to indemnify another person"); *see also infra*, pp. 34-37. Consequently, the Hospitals' Claims for the legal fees and expenses incurred in the Virginia Litigation constitute "claims of other policyholders arising out of insurance contracts" and are entitled to Class 2 priority under Code § 38.2-1509(B)(1).

Likewise, in the Kentucky Litigation the Hospitals were forced to litigate and defend their status as policyholders of ROA through no fault of their own. Fundamentally, the Kentucky Litigation was necessitated by KIGA's refusal to continue coverage of claims made under insurance policies assumed by ROA. (J.A. 547 and 567-68). Further, KIGA refused to join the Virginia Litigation for a determination of its obligations vis-à-vis the Hospitals and other claimants in the Receivership. (J.A. 601-602).

Thus, the preeminent issue the Hospitals were forced to prosecute in the Kentucky Litigation was whether the Hospitals were policyholders under insurance contracts with ROA. (J.A. 557, 612, and 629) ("[A]s a direct result of the Master Agreement, TVIR [ROA], became directly liable as the insurer to former C-HAT policyholders."). Indeed, the first issue decided by the Franklin Circuit Court was that "the Assumed Obligations [including the Workers' Compensation Claims] arise out of and are within the coverage of an insurance policy issued by TVIR/ROA." (J.A. 629). Moreover, as part of that holding, the court reasoned that "the parties [the Trusts and ROA] intended and accomplished the assumption and novation of C-HAT's statutory insurance obligations by TVIR." (J.A. 623). Thus, in the Kentucky Litigation, the Hospitals again litigated the issue and the court again decided that the claims assumed by ROA "constitute[d] claims of

policyholders arising out of insurance contracts issued by TVTR/ROA," and hence that the Hospitals were policyholders of ROA. (J.A. 629).

Therefore, the Hospitals' Claims for fees and expenses directly related to and caused by litigating their status as policyholders under the Agreements with ROA in both the Virginia Litigation and Kentucky Litigation constitute "claims of other policyholders arising out of insurance contracts" under the plain language of Code § 38.2-1509(B)(1).

II. <u>The Commission Erred in Interpreting the Agreements and Indemnification Agreements. (Assignments of Error 1, 2, 3, 5, 6, and 7)</u>

"'The interpretation of a contract presents a question of law subject to de novo review." *Babcock & Wilcox Co.*, 292 Va. 165, 178, 788 S.E.2d 237, 243 (2016) (quoting *School Bd. of Newport News v. Commonwealth*, 279 Va. 460, 467, 689 S.E.2d 731, 735 (2010)). Likewise, "whether a contract is ambiguous presents an issue of law." *Pocahontas Min. Liab. Co. v. CNX Gas Co., LLC*, 276 Va. 346, 352, 666 S.E.2d 527, 530 (2008). Orders of the Commission can only stand "when they are based upon the application of correct principles of law." *Swiss Re Life Co. America v. Gross*, 253 Va. 139, 144, 479 S.E.2d 857, 860 (1997). Thus, the decision below is owed no deference, and this Court conducts a de novo review of the contractual language at issue here.

A. The Commission's 2016 Final Order Has No Basis in Law or Fact.

In its nine-page decision affirming the denial of the Hospitals' Claims, the Commission spent a scant one page—two paragraphs—explaining why it did so, but at no time presented a legal or factual basis for its denial of the Claims. In fact, in granting the Deputy Receiver's Motion for Summary Judgment and denying the Hospitals' Claims, the Commission simply embarked on a series of non-sequiturs that, even taken together, do not constitute a comprehensible legal or factual basis for its decision. But, having mis-framed the issues in this litigation as whether the Hospitals' were or are entitled to "guaranty fund coverage" under the Agreements with ROA, the Commission's erroneous holding is hardly astonishing.

Although purporting to examine the "plain language" of the Agreements, the Commission simply ignored the entirety of the Agreements (including all their incorporated parts) and focused solely on the Indemnification Agreements. (*Compare* J.A. 101 and 146 *with* J.A. 1021). Viewing the language of the Indemnification Agreements in isolation, the Commission held, "that for ROA to be liable, the 'liability, expense, cost, or obligation, however, incurred or characterized' must be 'assumed by [ROA] as provided for in this Agreement.'" (J.A. 1021). The Commission's

interpretation of the Agreements thus pronounces an *a priori* rule that, in order to "be liable" for *anything*, ROA must have explicitly assumed the liability in the Indemnification Agreement alone.

The Commission went on to hold that because "[a]t no time were CHAT and KHAT members of Kentucky Insurance Guaranty Association," "there was no guaranty fund coverage for the insurance coverage that they offered to their member hospitals," and so "if CHAT and KHAT had become insolvent, their member hospitals would not have been entitled to guaranty fund coverage." Thus, the Commission's second premise in its faulty logic was that, for the Hospitals to receive payments on their Claims, the Indemnification Agreements had to contemplate expressly guaranty fund coverage for the Trusts.

Building upon this faulty foundation, the Commission misconstrued the central issue in this appeal as whether the Hospitals are entitled to legal fees incurred in litigating the issue of guaranty fund coverage. (J.A. 1020-21; *see also* J.A. 929). In the Commission's mistakenly narrow view, the Hospitals were not entitled to this recovery, holding that "[i]n executing the agreements, ROA stepped into the shoes of CHAT and KHAT," and that the "Assumed Liabilities did not have guaranty fund coverage at the time of the assumption" or "provide for ROA to seek that coverage in insolvency,"

so the "Hospitals seek to create an obligation where none previously existed." (J.A. 1021). But the Commission had it backwards: the issue is not whether the Indemnification Agreements contemplate guaranty fund coverage or whether the Trusts had that coverage in 1997, but rather, whether the Indemnification Agreements with ROA contemplate indemnification for the *type* of expenses the Hospitals incurred in the Virginia and Kentucky Litigation and the reasons the Hospitals incurred those expenses, i.e., as policyholders whose rights were affected by others' actions and through no fault of their own.

Indeed, the central issue in this appeal is whether the Virginia and Kentucky Litigation—and their related costs—are "Damages arising out of or in connection with the Business, the Assumed Liabilities, conveyance [of the Trusts' assets to ROA], or any related transactions," not whether the Indemnification Agreement addressed "guaranty fund coverage" related to those costs.

In fact, the Virginia Litigation did not even involve the direct litigation of guaranty fund coverage. Although it may have been prompted by several guaranty associations' likely denial of coverage for various insurance claims, the obligations of those guaranty funds were not at issue in the Virginia Litigation; rather, the Receivership's obligations were. (J.A. 527). In

fact, the Virginia Litigation simply approved the Deputy Receiver's application "to continue payment of . . . workers' compensation claims that were assumed by ROA through assumption reinsurance, or similar transactions." (J.A. 527 and 545). Though the claims were "denied or likely to be denied coverage by the applicable state guaranty associations," those associations' actual obligations were not at issue. (*Id.*) The Commission determined that the claims at issue in the Virginia Litigation—assumed by ROA—"constitute[d] 'claims of other policyholders arising out of insurance contracts' pursuant to § 38.2-1509 B 1 ii of the Code." (J.A. 545).

Thus, in the Virginia Litigation, the Trusts'—or ROA's—entitlement to guaranty fund coverage was at best a separate and ancillary issue, and at no point did the Commission determine whether ROA, the Trusts, or the Hospitals were entitled to such coverage. Accordingly, the Commission's denial of the Hospitals' Claims for fees and expenses in the Virginia Litigation as related to "seeking guaranty fund coverage" finds no basis in the Commission's own reasoning.

For the same reasons, the 2016 Final Order also misapprehends and mischaracterizes the Kentucky Litigation. In his Report preceding the 2016 Final Order, the Hearing Examiner recommended denial of the Hospitals' Claims because they failed to identify language in the Indemnification

Agreements "in which ROA assumed the obligation to reimburse [them] for costs incurred to secure guaranty fund coverage . . . ." (J.A. 925). But again, that is the incorrect premise. Instead, the Hearing Examiner and Commission should have begun with an examination of the liabilities covered by the Indemnification Agreements, and then determined why the Hospitals were forced to pursue the Kentucky Litigation. Because the Kentucky Litigation was a "liability, expense, or cost" that directly "arose from" and was necessitated by ROA's insolvency, it was contemplated by and included in the Indemnification Agreements, and something for which ROA is obligated to indemnify the Hospitals.

For these reasons alone, the Commission's 2016 Final Order should be reversed. But because this appeal presents pure issues of law, this Court can and should correct the Commission's erroneous understanding of the Agreements.

B. The Plain Language of the Agreements Requires the Deputy Receiver to Indemnify the Hospitals for Their Claims Incurred in the Virginia and Kentucky Litigation.

This Court has held that the "primary focus in considering disputed contractual language is to determine the parties' intention, which should be ascertained, whenever possible, from the language the parties employed in their agreement." *Pocahontas Mining*, 276 Va. at 352, 666 S.E.2d at 531.

Put another way, "[t]he guiding light in the construction of a contract is the intention of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares." *Schuiling v. Harris*, 286 Va. 187, 193, 747 S.E.2d 833, 836 (2013).

Thus, the "guiding light" in this dispute is the Agreements between ROA and the Trusts. The Indemnification Agreements provide:

> [ROA] agrees to indemnify and hold harmless [each Trust] and its member-insureds from any and all Damages arising out of or in connection with the Business, the Assumed Liabilities, the conveyance and delivery of the Transferred Assets, or related transactions, provided no such indemnification shall be provided for any and all Damages of such member-insureds relating to their obligations under their respective polices of insurance issued by [ROA]. The indemnification by [ROA] provided under this Section 2 shall include reasonable costs and expenses (including fees and expenses of [each Trust] or any of its member-insured's counsel) in defending itself against any claim Damages arising from or in connection with the Damages.

(J.A. 154 and 336). As noted, all capitalized terms are defined in the Indemnification Agreements (e.g., "Damages," "Business," and "Assumed Liabilities"). *See supra*, pp. 5-6.

Applying this language (and the corresponding defined terms) to the instant case, the Commission should have centered its analysis on two main lines of inquiry: (1) what was the nature of the Virginia and Kentucky

Litigation and why they were instituted?; and (2) whether their nature was of the type of "Damages" for which ROA has indemnified the Hospitals.

The Virginia Litigation commenced after the Deputy Receiver applied to the Commission for authorization to continue paying the Workers' Compensation Claims and for a determination of whether the Trusts' insureds (i.e., the Hospitals) were direct insureds of ROA. (J.A. 527-529). These insurance policies were assumed by ROA in transactions like those in which ROA entered the Agreements, and the Workers' Compensation Claims were "denied or likely to be denied coverage" by state guaranty associations. (J.A. 527). ROA's insolvency was the reason that state guaranty associations—and even the Hospitals—were involved with the Workers' Compensation Claims and ensuing litigation. From the outset, the Virginia Litigation thus presented the significant issue of whether the various insureds of the policies assumed by ROA—including the Trusts' policies the Hospitals' insureds—were "direct insureds of ROA"—i.e., policyholders—and whether "continued payment" under those policies was necessary and proper in the Receivership. (J.A. 528).

At issue was whether the Hospitals, as successors to the Trusts, were entitled to distributions from the Receivership. (J.A. 528-31). In its 2005 Final Order, the Commission concluded that "the [self-insured trusts

and the Trusts] or employers thereof constitute 'other policyholders arising out of insurance contracts' pursuant to § 38.2-1509 B 1 ii [sic] of the Code of Virginia" and that the Workers' Compensation Claims that ROA assumed from the Trusts and others "are those of 'policyholders.'" (J.A. 530 and 541).

The Kentucky Litigation was spurred by the Hospitals' litigated—but then-undecided—rights in ROA's Receivership. In fact, two equal forces prompted the Kentucky Litigation: (1) the Hospitals' indeterminate rights to payment for the Workers' Compensation Claims in the Virginia Litigation and (2) KIGA's refusal to acknowledge or pay those claims. (J.A. 527, 547, and 549-55). Thus, KIGA's discontinuance of coverage for the same claims tied up in the Virginia Litigation created the Hospitals' untenable position. Waiting on a Virginia ruling on these claims, and faced with KIGA's refusal to honor its statutory obligation, the Hospitals were left holding numerous insurance claims that they had neither a contractual nor statutory obligation to pay. (*Id.*; *see also* J.A. 396-99). Regardless of who would ultimately be responsible for these claims—the Hospitals' now-defunct insurer ROA or someone else—the Hospitals were not insurers and were not responsible for the Denied Claims or Workers' Compensation Claims. (J.A. 614).

Without the Virginia and Kentucky Litigation—and resolution of the issues they presented—the Hospitals would have been liable for these claims.

With this background, the plain language of Indemnification Agreements encompasses fees and expenses incurred in both the Virginia and Kentucky Litigation. When a contract's language is "clear, unambiguous, and explicit," the reviewing court confines itself to the "four corners of the instrument." *Virginia Elec. & Power Co. v. N. Virginia Reg'l Park Auth.*, 270 Va. 309, 316, 618 S.E.2d 323, 326 (2005).

An ambiguity in a contract requiring the help external evidence only exists if "the contract's language is of doubtful import, is susceptible of being understood in more than one way . . ., or refers to two or more things at the same time." *Pocahontas Mining*, 276 Va. at 352-53, 666 S.E.2d at 531. Here, the Indemnification Agreements are not ambiguous, and their plain language is clear as to what they cover, including the legal fees and expenses the Hospitals incurred in the Virginia and Kentucky Litigation. The four corners of the Agreements bind ROA, and now the Deputy Receiver, to reimburse the Hospitals for their Claims. That the parties now disagree about what the Agreements cover does not make them ambiguous. *Robinson-Huntley v. George Washington Carver Mut. Homes Ass'n, Inc.*, 287 Va. 425, 429, 756 S.E.2d 415, 417 (2014).

First, the Indemnification Agreements include the Trusts' "member-insureds" as covered parties. Further, ROA agreed to indemnify the Trusts and the Hospitals from "any and all Damages arising out of or in connection with the Business, the Assumed Liabilities, the conveyance and delivery of the Transferred Assets, or related transactions." The Deputy Receiver does not dispute this. (J.A. 807-08). The indemnification was to explicitly include "reasonable costs and expenses (including fees and expenses of [the Trusts'] or any of its member-insured's counsel) in defending itself." (J.A. 154 and 336). Thus, the Indemnification Agreements—on their face—required ROA to indemnify and reimburse the Hospitals for any costs or expenses associated with ROA assuming the role of the Hospitals' insurer in the place of the Trusts, without regard to ROA's subsequent financial viability.

Read in conjunction with the Indemnification Agreements' defined terms, there is nothing ambiguous about scope of what is covered. *Pocahontas Mining*, 276 Va. at 353, 666 S.E.2d at 531. "Damages" include "any liability, expense, cost or obligation, however incurred or characterized" that ROA assumed in the Indemnification Agreements; in other words, "Damages" is synonymous with all of ROA's liability under the Indemnification Agreements.

Second, when ROA entered the Indemnification Agreements, it undertook the "Assumed Liabilities." (J.A. 153 and 335). Thus, ROA undertook liability for "**all obligations** of" the Trusts "arising out of or in connection with" their Businesses as organizations providing workers' compensation and liability coverage to Kentucky hospitals and other health care providers. (J.A. 153 and 335) (emphasis added). Hence, any obligation of the Trusts arising out of or in connection with their Business became a potential liability for ROA, regardless of the subsequent fate of ROA. *See St. Paul Fire & Marine Ins. Co. v. Ins. Co. of N. Am.*, 501 F. Supp. 136, 139 (W.D. Va. 1980) ("The term 'arising out of' is ordinarily understood to mean originating from, incident to, or connected with the item in question."). The Trusts' Business obligations would naturally include maintaining their insurance policies and seeking contribution from legally liable parties. Quite similarly, the Agreements make clear that ROA is on the hook for expenses incurred "in connection with" the business of the Trusts. This is expanding, not diminishing language. *See Red Roof Inns, Inc. v. Scottsdale Ins. Co.*, 419 Fed. Appx. 325, 331 (4th Cir. 2011) (quoting *Princemont Constr. Corp. v. Baltimore and Ohio R.R. Co.*, 131 A.2d 877, 877-78 (D.C.1975)) ("'in connection with' . . . the contract" is language "'broad and comprehensive' enough 'to exonerate'" an indemnitee from

liability for his own negligence.) Thus, it is well within the scope of the Trusts' Business obligations to seek payment from the Deputy Receiver or coverage from KIGA, and so the expenses associated with seeking these items—including attorney fees—are contemplated by the Indemnification Agreement.

Third, although perhaps self-evident, the Commission's 2016 Final Order failed to appreciate that "all Damages" means "ALL Damages" and "all obligations" means "ALL obligations," not just "some Damages," or a "few obligations," or only the obligations the Deputy Receiver wishes it to include. Here, because "insurance coverage" necessarily would be a part of the Trusts' business and obligations, efforts to determine policyholders' rights, pay their claims, or determine the right to insolvency coverage was contemplated by these words' broad definitions. Indeed, these aspects of the Trusts' business were the precise impetus for and central to the resolution of the Virginia and Kentucky Litigation. As such, the costs associated with this litigation "arose out of" or "in connection with" the Trusts' Businesses, and were contemplated and encompassed by the Indemnification Agreements. Indeed, attorney fees are expressly contemplated and included in the Indemnification Agreement, and thus included in the liabilities of ROA for the Hospitals' damages.

To conclude otherwise would render these provisions meaningless. Courts avoid declaring a contractual word or phrase meaningless "if a reasonable meaning can be assigned to it," and presume "that the contracting parties have not used words needlessly." *Pocahontas Mining*, 276 Va. at 353, 666 S.E.2d at 531. Thus, in this case, the Indemnification Agreements' definition of "Damages" as "*any* liability, expense, cost or obligation" assumed by ROA is broadly defined and contains no limiting language. To the contrary, the parties had the opportunity to exclude certain liabilities from this definition and chose not to. (J.A. 158 and 340). The Commission effectively amended this provision by adding language that the parties had omitted. But the omission of a covenant or term from a contract demonstrates that the parties intended to exclude that covenant or term. *Bentley Funding Group, L.L.C. v. SK & R Group, L.L.C.*, 269 Va. 315, 330, 609 S.E.2d 49, 56 (2005). Thus, the Commission had no authority to exclude the Indemnification Agreements every contingency not explicitly mentioned in the Indemnification Agreements, and the Commission's reading imposes a temporal and conceptual limitation on the plain language of the Indemnification Agreements that the language does not countenance.

The Indemnification Agreements thus expressly contemplated that ROA would indemnify the Trusts for counsel fees associated with defending the Trusts against any claims related to ROA's takeover of those obligations. This express provision thus includes attorney fees incurred in defending the Hospitals' liabilities and policyholders' rights to payment in the Virginia and Kentucky Litigation.

Simply put, the Commission's erroneous ruling was precipitated by the misguided proposition that the "Assumed Liabilities did not have guaranty fund coverage at the time of the assumption." From this false starting point, the Commission proceeded to determine that ROA would never be obligated to indemnify the Trusts for litigation that involved guaranty fund coverage. (J.A. 1021-22). Yet, this analysis begs the question, and instead should have begun by identifying the purposes of the Virginia and Kentucky Litigation: to protect the Hospitals' interests as insureds of ROA standing in the shoes of the Trusts. Under the plain and broad language of the Indemnification Agreements, these were the exact type of damages that ROA assumed and for which it is liable.

III. Even If the Agreements Are Ambiguous, Their Nature as Contracts of Insurance Commands Coverage of the Hospitals' Claims. (Assignments of Error 1, 2, 3, 5, 6, and 7)

Even if the plain language of the Agreements could be construed as ambiguous, because the Indemnification Agreements are part of insurance contracts, any ambiguities must be construed in favor of coverage and thus in favor of the Hospitals.

Virginia law defines "insurance" as "the business of transferring risk by contract wherein a person, for a consideration, undertakes (i) to indemnify another person . . . ." Va. Code § 38.2-100, and expressly recognizes contracts of indemnity as "insurance contracts." The Commission has relied on this definition in its holdings in the Receivership. (*See* J.A. 537). In fact, the Commission declared that the "essence of the definition" of insurance is "a contract by a person to *indemnify* or pay another upon the occurrence of a determinable risk contingency." (J.A. 538) (emphasis added). The Indemnification Agreements explicitly constitute ROA's consent to "indemnify and hold harmless" the Hospitals from the risk contingency of "all Damages arising out of or in connection with the Business, the Assumed Liabilities, the conveyance and delivery of the Transferred Assets, or any related transactions." (J.A. 154 and 336).

Accordingly, under the Code of Virginia, the Indemnification Agreements between ROA and the Trusts constitute insurance agreements.

Indeed, the Agreements satisfy all aspects of the traditional judicial definition of a contract of insurance. This Court has defined "'the essential terms of an insurance contract as: (1) the subject matter to be insured; (2) the risk insured against; (3) the commencement and period of the risk undertaken by the insurer; (4) the amount of insurance; and (5) the premium and time at which it is to be paid.'" *Group Hospitalization Med. Serv., Inc. v. Smith*, 236 Va. 228, 230-31, 372 S.E.2d 159, 160 (1988) (quoting *American Surety Co. v. Commonwealth*, 180 Va. 97, 105, 21 S.E.2d 748, 752 (1942)). Here, both the Agreements and Indemnification Agreements meet these criteria: (1) identifying the insured; (2) insuring the risks in the Trusts' workers' compensation and general liability policies (J.A. 73 and 118), as well as indemnifying the Hospitals against "all Damages arising out of or in connection with the Business . . . ." (J.A. 154 and 336); (3) commencing upon the November 1, 1997 effective date of Agreements; (J.A. 69 and 114); and (4) providing for the premium to be all assets of the Trusts, and payable upon the transfer of those assets on November 1, 1997. (J.A. 69-71 and 114-17).

Moreover, the Agreements indicated both that ROA "assume[d] and bec[a]me responsible for all" obligations of the Trusts in connection with their Business, and that ROA would issue insurance policies to the Hospitals. (J.A. 72-73 and 118-19). Accordingly, the Hospitals became directly insured by ROA pursuant to the Agreements.[1] Not only did the Deputy Receiver testify during the Virginia Litigation that the Workers' Compensation Claims at issue were claims of policyholders arising out of insurance contracts under the Virginia Code, but the Commission expressly adopted this holding in its 2005 Final Order. (J.A. 401 and 535). Indeed, the Commission held: "We agree with the hearing examiner that the Assumed Claims [by ROA], and thus the claims of [the Trusts] or employers thereof, constitute 'claims of other policyholders arising out of insurance contracts,' pursuant to § 38.2-1509 B 1 ii [sic] of the Code." (J.A. 535). Accordingly, both the Agreements themselves and the Commission's consistent interpretation of them demonstrate that through the Agreements, ROA undertook contracts of insurance with the Trusts and the Hospitals.

Remarkably, however, the Commission simply disregarded the settled determinations of these issues eleven years ago in the Virginia

[1] As exhibits expressly incorporated into the Agreements, the Indemnification Agreements are part of and construed with the Agreements. *Pocahontas Mining*, 276 Va. at 353, 666 S.E.2d at 531; (J.A. 101 and 146, Section 10.8 of the Agreements).

Litigation. (J.A. 530 and 535). In fact, the Commission reversed course a decade later without any change in the fundamental underlying facts. In the Virginia Litigation, the Commission considered and determined the nature of the Hospitals' coverage documents (transferred to ROA), as well as the assumption of those obligations, and held that (1) the claims at issue were those of policyholders, and (2) the Hospitals had the same insurance contracts with ROA. (J.A. 527-30 and 535). Thus, in determining whether the Hospitals' Claims—including fees associated with the Virginia Litigation—were covered under their Agreements with ROA and thus payable in the Receivership, the Deputy Receiver should have looked to the 2005 Final Order to acknowledge the Commission's determination the Hospitals—as employers in the Trusts—constituted policyholders with insurance contracts with ROA. *Bralley-Willett Tank Lines, Inc. v. Holtzman Oil Corp.*, 216 Va. 888, 891, 223 S.E.2d 892, 895 (1976) (holding Commission's factual determinations based on correct law are not reversed unless contrary to or without evidence).

As contracts of insurance, any "ambiguous and doubtful language must be interpreted most strongly against the insurer." *Ayres v. Harleysville Mut. Cas. Co.*, 172 Va. 383, 389, 2 S.E.2d 303, 305 (1939). Accordingly, all ambiguities in the Indemnification Agreements, the indemnification clause

itself, or the definitions of the words used in that clause should be construed in favor of the Hospitals.

Thus, as a threshold matter, the Trusts' "Business" as self-insured Kentucky insurance trusts should be construed broadly to include any aspect of operations that a self-insured organization might undertake, including engaging in litigation to establish policyholders' rights, the extent of coverage, or contribution and payment of insureds policies. Likewise, ROA's "Assumed Liabilities" under the Indemnification Agreements, as "all obligations of [the Trusts] in connection with [their] Business[es]," would encompass the same obligations of the Trusts: to protect policyholders' rights and to establish the status of their insureds or the legitimacy of those insureds' claims. Thus, "Damages in connection with the Business [or] Assumed Liabilities" would encompass the Hospitals' eventual litigation before the Commission to determine whether ROA was obligated to pay the various Workers' Compensation Claims, the Virginia Litigation. This clause would also encompass the Kentucky Litigation in which the Hospitals—standing in the shoes of the Trusts and insureds of ROA—sought and obtained coverage from KIGA.

Finally, to the extent the definition of "all Damages" itself is ambiguous, its ambiguities should be resolved against ROA and the

Deputy Receiver and in the favor of the Hospitals. Thus, "any liability, expense, cost or obligation, however incurred or characterized, assumed by [ROA]" in the Indemnification Agreement should not be limited by time or type of damage. Thus, when the Commission held that because "[t]he Assumed Liabilities did not *have* guaranty fund coverage at the time of the assumption, and the agreement did not provide for ROA to seek such coverage in the event of insolvency," "the [Hospitals] seek to create an obligation where none previously existed," it erred by resolving ambiguities in the definition of "Damages" against the Hospitals rather than against ROA. (J.A. 1021) (emphasis added). The Commission should not have examined whether the Assumed Liabilities "had" guaranty fund coverage at the time of the Agreements' execution, but rather whether "all obligations of [the Trusts] in connection with [their] Business" could reasonably be read to include the Virginia and Kentucky Litigation. Then, the Commission should have reviewed that litigation and its basis: the establishment of policyholders' right to continued payment of workers' compensation claims, the nature of all ROA's assumed obligations, and state fund coverage for those obligations. In so doing, the Commission should have resolved potential ambiguities in the definitions of "Assumed Liabilities" and "Damages" in favor of encompassing the expenses in the Virginia and

Kentucky Litigation. *Ayres*, 172 Va. at 391, 2 S.E.2d at 306 ("The law makes every rational intendment to the end that the purpose of insurance, which is that of indemnity to the insured.")

Thus, even if the Agreements or Indemnification Agreements are ambiguous, their nature as insurance contracts militates in favor of resolving those ambiguities against ROA and the Deputy Receiver and in favor of coverage. Hence, the Deputy Receiver and Commission bear the burden to prove there is an exception to the coverage afforded by the Agreements or Indemnification Agreements. *TravCo Ins. Co. v. Ward*, 284 Va. 547, 553, 736 S.E.2d 321, 325 (2012). But, because no such excepting language or evidence exists—apart from the Deputy Receiver and Commission's baseless theory regarding guaranty fund coverage—the Indemnification Agreements extend to and embrace the Hospitals' Claims for fees and costs incurred in the Virginia and Kentucky Litigation.

IV. <u>The Commission Erred in Holding That the Hospitals' Claims Are Not Entitled to Class 2 Priority under Code § 38.2-1509(B). (Assignment of Error 4)</u>

Issues of statutory interpretation are pure issues of law, which this Court review de novo. *Northern Virginia Real Estate*, 283 Va. 86, 102, 720 S.E.2d 121, 129 (2012). When the Commission interprets a statute, its interpretation is entitled to no deference. *Office of Atty. Gen., Div. of*

Consumer Counsel v. State Corp. Comm'n, 288 Va. 183, 191, 762 S.E.2d 774, 778 (2014).

In its 2016 Final Order, because the Commission erroneously decided that the Hospitals' Claims were not covered by the Indemnity Agreements, it failed to reach the issue of the priority of the Hospitals' Claims in the Receivership. (J.A. 1021-22). However, because the Hospitals' are entitled to indemnification for their Claims under the Agreements and Indemnification Agreements as contracts of insurance, they are also entitled to payment of these Claims with second priority in the Receivership under Code § 38.2-1509(B)(1). This statute commands the Commission to "disburse the assets of an insolvent insurer," after reserving money for the expenses of administration, first to perfected secured creditors and then to "claims of other policyholders arising out of insurance contracts apportioned without preference."

The Indemnification Agreements are both part of and themselves constitute insurance contracts under Code § 38.2-100 because they "transfer[red] risk by contract wherein [ROA] undert[ook] to indemnify" them, under the Commission's own holdings, and under this Court's holdings. Va. Code § 38.2-100; (J.A. 538); *Group Hospitalization*, 236 Va. at 230-31, 372 S.E.2d at 160.

Because the Agreements and Indemnification Agreements are insurance contracts, and because the Hospitals' Claims for fees incurred in the Virginia and Kentucky Litigation are covered by those contracts, their Claims plainly constitute "claims of other policyholders arising out of insurance contracts." Thus, their Claims under the Agreements and Indemnification Agreements are entitled to second priority under Code § 38.2-1509(B)(1). "Arising out of" means "originating from, incident to, or connected with the item in question." *St. Paul Fire & Marine Ins. Co.*, 501 F. Supp. at 139. Accordingly, because the Hospitals' Claims originate from the Agreements and Indemnification Agreements—contracts of insurance—the Claims "arise out of" contracts of insurance for purposes of the statute.

Even the Commission has agreed, in deciding the Virginia Litigation, that the other claims ROA assumed, including the claims of the Trusts, meet this statutory requirement as "claims of other policyholders arising out of insurance contracts." (J.A. 535). Virginia law states that "[t]he Commission shall disburse the assets of an insolvent insurer [for] claims of other policyholders arising out of insurance contracts apportioned without preference." Va. Code § 38.2-1509-B-1(ii). Accordingly, the Hospitals are entitled to have their Claims included with all other "claims of other

policyholders arising out of insurance contracts" and to receive a pro rata distribution from the Receivership on these Claims.[2]

CONCLUSION

The Commission's erroneous interpretation and application of the plain contractual language and Virginia law at issue in this case necessitate reversal of its 2016 Final Order. As a threshold issue, the Commission simply ignored the cause of, issues, and decisions in the Virginia and Kentucky Litigation—litigation spurred by the Hospitals' defense of their status as policyholders of ROA. Further, not only does the Commission's summary order lack any basis in law or fact, it directly ignores the plain language of the Agreements and Indemnification Agreements that ROA voluntarily entered in 1997. No party disputes the legal standing of the entities under those Agreements; the only issue is whether the Commission is permitted impose artificial restrictions not included in or contemplated by the Agreements. Under Virginia law, it may not do so. Thus, construing the plain language of the Agreements, even the Indemnification Agreements in isolation, their straightforward interpretation encompasses the Hospitals' Claims for fees and expenses incurred in the Virginia and Kentucky

[2] In the event the Court determines the Hospitals' claims are not entitled to second priority under the statute, they are nonetheless entitled to the priority under subsection (B)(1)(v) afforded to claims of "other creditors."

Litigation. Even assuming any part of the Agreements is ambiguous, their nature as insurance contracts militates in favor of coverage of the Hospitals' Claims. Likewise, for this reason, the Hospitals' Claims should be afforded second-priority status in the Receivership and paid accordingly. For these reasons, the Court should reverse the Commission's 2016 Final Order and order that the Hospitals' Claims be allowed in the Receivership.

Respectfully submitted,

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* Admitted *pro hac vice* by Virginia State Corporation Commission in Order of June 4, 2003, in Case No. INS-2003-00024

CERTIFICATE OF SERVICE AND FILING

In compliance with Rule 5:26 of the Rules of the Supreme Court of Virginia, I hereby certify that on March 30, 2017, the correct number of true and accurate copies of this Opening Brief were hand-filed with the Supreme Court of Virginia and an electronic copy filed via VACES in PDF format, and an electronic copy via email in PDF format was served upon counsel for the Appellees:

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