

IN THE SUPREME COURT OF THE STATE OF NEVADA

COMMISSIONER OF INSURANCE
FOR THE STATE OF NEVADA AS
RECEIVER OF LEWIS AND CLARK
LTC RISK RETENTION GROUP,
INC.,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK; AND THE
HONORABLE NANCY L. ALLF,
DISTRICT JUDGE

Respondents,

and

ROBERT CHUR, STEVE FOGG,
MARK GARBER, CAROL HARTER,
ROBERT HURLBUT, BARBARA
LUMPKIN, JEFF MARSHALL, ERIC
STICKELS, UNI-TER
UNDERWRITING MANAGEMENT
CORP. UNI-TER CLAIMS SERVICES
CORP., and U.S. RE CORPORATION,
DOES 1-50, inclusive; and ROES 51-
100, inclusive,

Real Parties in Interest.

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Supreme Court Case No. 81857

**UNI-TER UNDERWRITING MANAGEMENT CORP.,
UNI-TER CLAIMS SERVICES CORP., AND U.S. RE
CORPORATION'S RESPONSE TO ORDER DIRECTING
ANSWER TO PETITION FOR EN BANC RECONSIDERATION**

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

The following Parties are represented by McDonald Carano LLP, Nelson Mullins Broad and Cassel and the Law Offices of Jon Wilson: (1) Uni-Ter Underwriting Management Corp.; (2) Uni-Ter Claims Services Corp.; and (3) U.S. Re Corporation.

Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp. and U.S. Re Corporation are all subsidiaries of U.S. Re Companies, Inc. No publicly held company owns 10% or more of U.S. Re Companies, Inc.'s stock.

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Dated this 18th day of February, 2021.

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**RESPONSE TO ORDER DIRECTING ANSWER TO
PETITION FOR EN BANC RECONSIDERATION**

Uni-Ter Underwriting Management Corp. (“Uni-Ter UMC”), Uni-Ter Claims Services Corp. (“Uni-Ter CS”), and U.S. Re Corporation (“U.S. Re”) (collectively, the “Corporate Defendants”), submit this response to the Court’s February 4, 2021 Order Directing Answer to Petition for En Banc Reconsideration. As detailed below, the Corporate Defendants submit that: 1) the “real parties in interest” for purposes of the petition for en banc reconsideration and underlying writ petition are the Director Defendants; 2) the underlying writ petition does not seek relief from the trial court’s order denying leave to amend the complaint with respect to the Corporate Defendants and Tal Piccione; 3) any decision on the petition for en banc reconsideration and underlying petition for writ of mandamus will not modify the trial court’s ruling denying leave to amend the complaint as to the Corporate Defendants and Tal Piccione; and 4) therefore, by its issuance of the Order Directing Answer to Petition for En Banc Reconsideration, this Court does not seek a substantive answer to the petition from the Corporate Defendants.

In the event that the Corporate Defendants are mistaken with respect to any of the aforementioned premises, and the Court does direct a substantive response to the petition, the Corporate Defendants will promptly respond accordingly.

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I. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

In December 2014, the Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group, Inc. (“Receiver”) initiated an action related to the financial decline and ultimate failure of the Lewis and Clark Risk Retention Group, Inc. (“L&C”). PA 000001-133.¹ The Receiver alleged claims against two groups of defendants. The first consists of several individuals—Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Erick Stickels—who served as directors of L&C (the “Director Defendants”). *See id.* The second consists of the Corporate Defendants—Uni-Ter UMC, Uni-Ter CS, and U.S. Re. *See id.* Uni-Ter UMC and Uni-Ter CS managed L&C; U.S. Re was its exclusive reinsurance broker.

The initial complaint alleged two counts against the Director Defendants: 1) gross negligence and 2) deepening of the insolvency. PA000028-31. It also alleged a claim for negligent misrepresentation against Uni-Ter UMC and claims for breach of fiduciary duty against the Corporate Defendants. PA000031-34.

Ultimately, the Director Defendants filed a motion for judgment on the pleadings directed to the Receiver’s third amended complaint, arguing that, under NRS 78.138(7), they “cannot be personally liable unless they engage in intentional misconduct, fraud or a knowing violation of the law,” and that gross negligence—

¹ Citations to “PA” are to the appendix filed with the Receiver’s writ petition.

the level of misconduct alleged—did not meet that standard. PA001956. The trial court denied the motion for judgment on the pleadings, PA002723-25, as well as a motion for reconsideration of same. PA002795-98.

The Director Defendants subsequently filed a petition for writ of mandamus (the “2019 Writ Proceeding”), seeking a writ “directing the district court to apply the plain text of NRS 78.138 and to grant the motion for judgment on the pleadings.” *Chur v. Eighth Judicial Dist. Court in & for County of Clark*, 136 Nev. 68, 70, 458 P.3d 336, 338–39 (2020). In a May 2019 order, this Court directed the Receiver to file an answer. CDRA00001-2.² In that order, this Court identified that the Receiver was the real party in interest. *Id.* As to the Corporate Defendants, the Court stated:

Although listed as real parties in interest, it does not appear that Uni-Ter Underwriting Management Corp., Uni[]-Ter Claims Services Corp., or U.S. Re Corporation have an interest in the resolution of this writ petition. If any of those entities believe they do have an interest in the resolution of this writ petition, those entities shall notify the clerk of this court within 5 days of the entry of this order. If any of those entities fail to notify the clerk within 5 days, the clerk shall remove that entity from the caption of this case.

Id. at n.1. As the Court correctly noted, the Corporate Defendants had no interest in the 2019 Writ Proceeding because it only pertained to the claims against the

² Citations to “CDRA” are to the Corporate Defendants’ Response Appendix, which is filed concurrently herewith.

Director Defendants. Accordingly, the Corporate Defendants did not file an answer in the 2019 Writ Proceeding, and the clerk removed them from the case caption.

On February 27, 2020, this Court granted the Director Defendants' petition and instructed the district court to enter an order granting the Director Defendants' motion for judgment on the pleadings. *See Chur*, 136 Nev. at 74, 458 P.3d at 341. This Court recognized that, due to its prior statements in *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640, 137 P.3d 1171, 1184 (2006), "some courts, including the district court here, have allowed claims against individual directors and officers to proceed based only on allegations of gross negligence." This Court then clarified the appropriate standard for individual liability against an officer or director, and it and held that the Receiver's pleading below failed to meet that standard. *See Chur*, 136 Nev. at 69, 458 P.3d at 338. This Court further stated: "We leave it to the discretion of the trial court whether to grant the Commissioner leave to amend the complaint. *Chur*, 136 Nev. at 75, 458 P.3d at 342."

Following that decision, the Receiver sought to amend her complaint. She represented that such amendment was simply to fix the allegations against the Director Defendants so that her pleading would comply with the ruling in *Chur*. The Receiver did not provide any indication that she intended to alter or add new claims against the Corporate Defendants. For example, in one filing, she stated:

Motion to Amend. Given the recent decision by the Nevada Supreme Court (in *Chur*), Plaintiff will be filing a Motion to

Amend its Complaint *consistent with the Chur decision*. As a result of the Nevada Supreme Court disavowing *Shoen*, Plaintiff is asserting allegations to support its Complaint and claims previously asserted therein *with respect to the Director Defendants*. This will likely result in additional motion practice and require targeted discovery.

CDRA00003-11, at 5 (emphasis added). Similarly, when the Receiver filed her motion for leave to file a fourth amended complaint, the denial of which is the subject of this writ proceeding, the Receiver represented, in that motion, that:

Other than seeking to *add [Tal] Piccione as a Defendant and asserting a new claim against him*, the Fourth Amended Complaint *does not add new claims against the Defendants*—it simply adds factual allegations to support the claims that have been pending against the Defendants for years and substitutes causes of action (i.e., breach of fiduciary duty in place of gross negligence).

PA003011 (emphasis added).

Contrary to these representations, however, the actual proposed fourth amended complaint, which the Receiver filed along with her motion for leave to amend, asserted several new claims against the Corporate Defendants in addition to the revised claims against the Director Defendants. CDRA000012-130.³ Specifically, the proposed new complaint included *two* new causes of action against

³ Notably, the Receiver did not include a copy of the proposed fourth amended complaint in her appendix to the writ petition, despite the fact that it was filed along with her motion for leave to amend in the court below. Because only the allegations of that complaint referenced above are relevant to this motion, we have not included the several hundred pages of the exhibits to the proposed new complaint.

Uni-Ter UMC, *two* new causes of action against Uni-Ter CS, and *two* new causes of action against U.S. Re. *See id.* at 111, 115-18. The Receiver also sought to substitute in Tal Piccione in place of a DOE Defendant and assert *three* causes of action against him. *See id.* The trial court denied the Receivers' motion for leave in its entirety. PA003324-25.

The Receiver then moved for partial reconsideration, which was expressly limited to the proposed amendments regarding the Director Defendants. PA003331. The motion itself noted: "This motion does not seek reconsideration regarding the Court's decision to deny leave to amend concerning Mr. Piccione, or to add causes of action for aiding and abetting or deepening the insolvency as to the Uni-Ter Defendants and U.S. RE." *Id.* The core argument was that the Receiver "could not have moved to amend to conform to the new *Chur* Opinion before the *Chur* Opinion was entered," because she could not have been "expected to anticipate a change in the law in the future which did not exist at the time of the original complaint." PA003331-32.

The Receiver also argued that the trial court erroneously found that the motion for leave to amend against the Director Defendant was untimely on the ground that she filed the motion within the time set by the scheduling order and that she had previously filed a motion to lift the stay, which the trial court denied. Accordingly, the Receiver argued that "any finding of delay or untimeliness is

erroneous” and requested that the trial court “reconsider its decision on the Motion to Amend as to the Directors.” *Id.*

On September 9, 2020, the trial court denied the motion for reconsideration. *See* PA003680-87. The Receiver’s petition for writ of mandamus, the denial of which resulted in the instant petition for en banc reconsideration, soon followed.

II. THE RECEIVER’S PETITIONS FOR WRIT OF MANDAMUS AND EN BANC RECONSIDERATION ONLY SEEK RELIEF ON THE CLAIMS AGAINST THE DIRECTOR DEFENDANTS

The basis of the Receiver’s current petition for writ of mandamus is that “*Chur* substantively altered the law in Nevada and in this case, making the district court’s prior rulings incorrect as a matter of the changed law.” Pet. for Writ of Mandamus at 1. She claims that the trial court abused its discretion when it refused to allow her to amend the complaint “to bring it into the law as amended, or at the very least as clarified to the detriment of the [Receiver].” *Id.* at 2. She seeks an order “compelling the district court to allow [the Receiver] to file an amended complaint in response to this Court’s opinion in *Chur*.” *Id.*

The writ petition is directed entirely on the Director Defendants. This makes sense, given that only the claims against Director Defendants were at issue in the 2019 Writ Proceeding that resulted in the *Chur* opinion. Indeed, the Receiver herself explicitly states: “Only the claims of the Directors are relevant to this petition.” *Id.* at 7. On the cover page of writ petition, however, the Receiver

includes a footnote, which provides: “The individual defendants are the real parties in interest who have had judgment entered in their favor, but the corporate defendants are also affected and thus are listed in the caption as real parties.”

On November 13, 2020, a three justice panel of this Court denied the 2020 Writ Petition. The Receiver then filed a petition for rehearing, which was also denied. On January 20, 2021, the Receiver filed her petition for en banc reconsideration, which is presently pending before the Court. Both the petition for rehearing and the petition for en banc reconsideration concern only the claims against the Director Defendants. However, the cover pages of both the petition for rehearing and petition for en banc reconsideration contain the same footnote regarding the Corporate Defendants that was included in the writ petition.

III. THE CORPORATE DEFENDANTS’ POSITION

The history of this case, the 2019 Writ Proceeding, and the Receiver’s briefing in this matter clearly establish that the relief the Receiver now seeks pertains only to the Director Defendants. If the Court grants the relief the Receiver seeks, the writ would modify the order denying the motion for leave to amend below *only* as to the Director Defendants. *Chur* had no impact on the claims against the Corporate Defendants. Irrespective of whether the Court grants or denies the Receiver’s petition, the trial court’s order will stand with respect to the claims the Receiver sought to add against the Corporate Defendants and Mr. Piccione.

However, due to the Receiver's prior statements in the trial court, the footnotes in her briefing in this Court stating that the Corporate Defendants are listed as "real parties" because they are "also affected," and because the order directing an answer here did not indicate otherwise, the Corporate Defendants have filed this response to the Court's February 4, 2021 Order Directing Answer to Petition for En Banc Reconsideration to articulate and affirm their position. Accordingly, the Corporate Defendants submit that:

1. The "real parties in interest" for purposes of the current proceeding before this Court are the Director Defendants.

2. The writ petition does not seek relief from the order denying leave to amend with respect to the Corporate Defendants and Tal Piccione.

3. A determination by this Court on the petition for en banc reconsideration and underlying writ petition, has no impact on, and does not alter, the denial of the Receiver's motion for leave to amend as it pertains to the Corporate Defendants and Tal Piccione. Specifically, even if this Court grants the relief the Receiver requests, the Receiver may not further amend the claims against the Corporate Defendants or again seek to add Tal Piccione as a defendant.

4. Because the Corporate Defendants are not real parties in interest for purposes of this proceeding, no substantive answer by them is required by this Court's February 4, 2021 Order Directing Answer for En Banc Reconsideration.

If the Court disagrees with any of these positions and directs a substantive response to the petition for en banc reconsideration from them, the Corporate defendants will promptly prepare a substantive answer.

Dated this 18th day of February, 2021.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, double-spaced Times New Roman font. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) and NRAP 21(d). Excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 2292 words.

I further certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 18th day of February, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 18, 2021, pursuant to NRAP Rule 25(d), I served the foregoing **UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., AND U.S. RE CORPORATION'S RESPONSE TO ORDER DIRECTING ANSWER TO PETITION FOR EN BANC RECONSIDERATION** on the following parties in the manner of service indicated below:

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