

No. 18-9011

In the United States Court of Appeals
Tenth Circuit

RESERVE MECHANICAL CORP.,
Petitioner-Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

**Motion of Reserve Mechanical Corp. for Leave to File
Supplemental Letter Brief**

Appellant Reserve Mechanical Corp. (“Reserve”) asks this Court for leave to submit the supplemental letter brief attached as Exhibit A.

Reserve submits this letter brief based upon this Court’s invitation, at oral argument, for the parties to submit supplemental briefing to answer several questions this Court had regarding pertinent parts of the record (and the applicable law).

This Court denominated the proposed supplemental brief as a Rule 28(j) letter, though this Court did not so much invite supplemental *authority*, as that rule contemplates, but rather specifics regarding the record relating

to matters raised at argument. Therefore, Rule 28(j) – and that rule’s 350-word limit – technically should not apply. Insofar as the Court construes the rule’s 350-word limit to apply, however, Reserve requests leave to exceed that limit and submit the attached letter brief with its 563 words.

Certificate of conference. – Counsel for Reserve has conferred on this motion and the relief requested herein with counsel for Appellee, who has advised that his client **opposes** this motion.

For the foregoing reasons, Reserve respectfully asks this Court to grant Reserve leave to exceed the 350-word limit under Rule 28(j) and submit the supplemental letter brief attached as Exhibit A with its 563 words. Should this Court require adherence to the 350-word limit, Reserve will promptly resubmit this brief with whatever word limit this Court would permit.

Respectfully submitted,

/s/ Val J. Albright

Val J. Albright
Michelle Y. Ku

Foley & Lardner, LLP
2021 McKinney, Suite 1600
Dallas, Texas 75201
Tel: 214.999.3000
valbright@foley.com
mku@foley.com

E. John Gorman
Logan R. Gremillion
Coby M. Hyman

The Feldman Law Firm LLP
Two Post Oak Central
1980 Post Oak Blvd., Suite 1900
Houston, Texas 77056
Tel: 713.850.0700
jgorman@feldlaw.com
lgremillion@feldlaw.com
chyman@feldlaw.com

Counsel for Reserve Mechanical Corp.

Certificate of Compliance

This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains **223** words, excluding the case caption, certificates of compliance, digital submission, and service, and signature blocks. This motion complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it was prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Book-Antiqua font.

/s/ Val J. Albright
Val J. Albright

Certificate of Digital Submission

With respect to the foregoing document, I certify that:

- (1) all required privacy redactions have been made per Tenth Circuit Rule 25.5;
- (2) the version of this document submitted electronically to this Court via its CM/ECF system is an exact copy of the hard copies of this document to be submitted to the Court; and
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/s/ Val J. Albright
Val J. Albright

Certificate of Service

I certify that a copy of this document was served by delivering it to counsel listed below on May 10, 2021, via this Court's CM/ECF system:

Francesca Ugolini
Arthur T. Catterall
Geoffrey J. Klimas
U.S. Department of Justice
Tax Division/ Appellate Section
P.O. Box 502
Washington, DC 20044
francesca.ugolini@usdoj.gov
arthur.t.catterall@usdoj.gov
geoffrey.j.klimas@usdoj.gov
appellate.taxcivil@usdoj.gov

/s/ Val J. Albright

Val J. Albright

Exhibit A

Appellant Reserve Mechanical Corp.'s Supplemental Letter Brief



ATTORNEYS AT LAW

2021 MCKINNEY AVENUE, SUITE 1600
DALLAS, TX 75201-3340
214.999.3000 TEL
214.999.4667 FAX
WWW.FOLEY.COM

WRITER'S DIRECT LINE
214.999.4825
valbright@foley.com

CLIENT/MATTER NUMBER
642874-1

May 10, 2021

Christopher M. Wolpert, Esquire
United States Court of Appeals for the Tenth Circuit
Office of the Clerk
Byron White Court House
1823 Stout Street
Denver, CO 80257

By CM/ECF

Re: Reserve Mechanical Corp. v. Commissioner (10th Cir. – No. 18-9011)

Dear Mr. Wolpert:

In response to the Court's invitation, at oral argument, for the parties to submit supplemental briefing to answer questions the Court had regarding pertinent parts of the record (and the applicable law), Appellant submits the following:

1. Premium Pricing Issues.
 - a. Reasonableness of Premiums. McNeel testified that the premium prices recommended to Reserve came from two sources – independent pricing indications from Mid-Continent and McNeel's own pricing model based on prior Mid-Continent indications, which the record demonstrates were reasonable. *See* Appendix References in **Attachment 1-A**.
 - b. 2008 Premium Proration. McNeel did not make an error in prorating the 2008 premiums for Reserve's direct-written policies, which were claims-made policies that covered

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claims made during the policy period and extended reporting period. Given the risks each policy covered, the proration factor on McNeel's pricing worksheet reflects his judgment of the percentage of risk of the policy remaining, and the prorated premium amounts reflected in the last column of the premium rating worksheet at Appx.Vol.13.p.3776 (Ex. 112-P, p.1) are comparable to the amounts that are reflected in the Mid-Continent pricing indications for 2008, which were pro-rated for short term policies (taking into account factors such as time of coverage, applicable extended reporting periods, and applicable retroactive dates), as stated in such pricing indication (Appx.Vol.13.p.3770). *See also* Appendix References in **Attachment 1-B**.

- c. Policy Limits. The policy limits Reserve provided ranged from \$8 million to about \$13 million, not \$1 million for \$400,000 in premiums as was suggested during oral argument. For example, during 2008, each individual policy limit was \$1 million, with individual policy premiums ranging from \$4,874 to \$82,850, and Reserve received approximately \$400,000 in premiums for providing \$13 million in total coverage. *See* Appendix References in **Attachment 1-C**.
- d. Stop-Loss Coverage Pricing. The stop loss endorsements provided coverage based upon the pricing of the underlying policies based on factors and risks applicable to the specific insured and the specific policies issued. Thus, the stop-loss coverage was not a case of one-size-fits-all, and the 18.5%/85.5% premium split with PoolRe was tied to the



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risks to which specific policies were exposed. *See* Appendix References in **Attachment 1-D**.

2. PoolRe’s License. PoolRe was a licensed insurance company during the tax years at issue – 2008 in the BVI, 2009 in the BVI initially and in Anguilla after redomiciling, and 2010 in Anguilla. *See* Appendix References in **Attachment 2**.
3. 2008 Directors and Officers (“D&O”) Liability Policy –The 2008 D&O policy was issued listing the titles of officers scheduled with further specific names to be listed on Schedule 1-A within thirty days. The 2009 D&O policy was issued less than thirty days later and removed the additional name listing requirement. The lack of a completed Schedule 1-A for the 2008 policy does not undermine the coverage afforded by the policy. *See* Appendix References in **Attachment 3**.
4. Stop-Loss/Catastrophic Losses. The panel asked about the factual foundation for stop-loss coverage being related to “catastrophic” losses that occur less frequently than the three-year period at issue. Dr. Doherty’s expert report and testimony extensively covered stop-loss coverage with respect to fortuitous catastrophic losses and the effect of pooling the high-severity losses. *See* Appx.Vol.4.pp.1193-94, Appx.Vol.13.pp.3712-15; *see also* Appendix References in **Attachment 4**.
5. Reserve’s Check for Peak’s Direct-Written Claim. Reserve’s check for Peak’s claim was not signed by Peak (the insured) but by an authorized representative for Reserve. *See* Appendix References in **Attachment 5**.



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Sincerely,

/s/ Val J. Albright

Val J. Albright
Counsel for Appellant
Reserve Mechanical Corp.

Attachment 1
Appendix References Regarding
Premium Pricing Issues

Appendix References Regarding Premium Pricing Issues

Attachment 1-A: Reasonableness of Premiums

Appx. Vol. 5, pp. 1237-45 – Lance McNeel’s Trial Testimony (at 336:8-341:4, 342:3-344:3, 346:6-366:12)

Appx. Vol. 5, pp. 1255-59, 1282-83 – Esperanza Mead’s Trial Testimony (at 407:5-424:20, 430:2-436:18)

Appx. Vol. 5, pp. 1291-97 – Michael Solomon’s Trial Testimony (at 466:11-493:16)

Appx. Vol. 2, pp. 534, 581-86 – Reserve’s Simultaneous Opening Brief (at ¶¶ 110-28)

- ¶ 110 – Appx. Vol. 5, pp. 1204, 1210, 1248 – Lance McNeel’s Trial Testimony (at 297:6-15, 323:8-324:10, 381:19-21); Appx. Vol. 5, pp. 1373-74 – Stewart Feldman’s Trial Testimony (at 636:10-637:20)

- ¶ 111 – Appx. Vol. 5, pp. 1204-05 – Lance McNeel’s Trial Testimony (at 298:16-304:9); Appx. Vol. 5, p. 1374 – Stewart Feldman’s Trial Testimony (at 637:10-638:13)

- ¶ 112 – Appx. Vol. 5, p. 1205 – Lance McNeel’s Trial Testimony (at 301:8-302:23)

- ¶ 113 – Appx. Vol. 5, pp. 1205-06 – Lance McNeel’s Trial Testimony (at 304:12-305:3); Appx. Vol. 5, p. 1373 – Stewart Feldman’s Trial Testimony (at 636:14-19)

- ¶ 114 – Appx. Vol. 5, p. 1206 – Lance McNeel’s Trial Testimony (at 305:4-12)

- ¶ 115 – Appx. Vol. 13, pp. 3770-72 – Ex. 109-P, Mid-Continent General Agency, Inc.’s Pricing Indications; Appx. Vol. 5, pp. 1209-10, 1236-39 – Lance McNeel’s Trial Testimony (at 320:11-324:10, 330:21-343:18)

- ¶¶ 116-21 – Appx.Vol.2.p.379 – Stipulation of Facts at ¶ 92; Appx.Vol.12.pp.3560-61 – Ex. 94-J, Mid-Continent General Agency, Inc.’s Letter to Lance McNeel Discussing Premium Rating Methodology for Captives; Appx.Vol.5.pp.1210, 1239, 1247, 1254 – Lance McNeel’s Trial Testimony (at 323:22-324:10, 342:3-343:18, 375:21-377:21, 404:2-19); Appx.Vol.13.pp.3712-15 – Ex. 104-P, Dr. Neil A. Doherty’s Expert Report; Appx.Vol.13.pp.3758, 3762-65 – Ex. 107-P, Dr. Neil A. Doherty’s Rebuttal Expert Report; Appx.Vol.4.p.1127 – Norm Zumbaum’s Trial Testimony (at 135:7-136:10); Appx.Vol.5.p.1374 – Stewart Feldman’s Trial Testimony (at 637:10-23)
- ¶¶ 122-25 – Appx.Vol.13.pp.3773-74 – Ex. 110-P, Capstone Associated Services, Ltd.’s Policy Rate Analysis Summary for 2010; Appx.Vol.13.p.3775 – Ex. 111-P, Capstone’s Increase Limit Factors for Pricing Policies Offered by Reserve; Appx.Vol.5.pp.1207-08, 1239-42 – Lance McNeel’s Trial Testimony (at 311:17-316:22, 345:6-349:4, 351:10-353:22, 354:18-356:23)
- ¶¶ 126-27 – Appx.Vol.13.pp.3776-78 – Ex. 112-P, Reserve’s Rating Worksheet for Peak Mechanical, Inc.; Appx.Vol.5.pp.1241-43, 1245 – Lance McNeel’s Trial Testimony (at 353:15-356:15, 359:2-15, 360:10-361:11, 366:2-12); Appx.Vol.13.pp.3770-72 – Ex. 109-P, Mid-Continent General Agency, Inc.’s Pricing Indications
- ¶ 128 – Appx.Vol.13.pp.3779-865 – Ex. 113-P, Esperanza Mead’s Expert Actuarial Report; Appx.Vol.13.pp.3885- Appx.Vol.18.pp.5327 – Ex. 117-P, Michael Solomon’s Expert Actuarial Review Report

**Appendix References Regarding
Premium Pricing Issues**

Attachment 1-B: 2008 Premium Proration

Appx.Vol.13.pp.3770-72 – Ex. 109-P, Mid-Continent General Agency, Inc.’s Pricing Indications (2008 Pricing Indication at Appx.Vol.13.p.3770)

Appx.Vol.13.pp.3776-78 – Ex. 112-P, Reserve’s Rating Worksheet for Peak Mechanical, Inc. (2008 Rating Worksheet at Appx.Vol.13.p.3776)

Appx.Vol.5.pp.1240-45 – Lance McNeel’s Trial Testimony (at 346:6-366:12)

Appx.Vol.5.pp.1255-56 – Esperanza Mead’s Trial Testimony (at 409:1-410:2)

Appx.Vol.5.p.1296 – Michael Solomon’s Trial Testimony (at 488:14-25)

**Appendix References Regarding
Premium Pricing Issues**

Attachment 1-C: Policy Limits

Appx.Vol.3.pp.865-69 – Tax Court’s Memorandum Findings of Fact & Opinion (listing 2008, 2009, and 2010 policies, premiums and policy limits; 2008 direct-written policies discussed at Appx.Vol.3.pp.865-67)

**Appendix References Regarding
Premium Pricing Issues**

Attachment 1-D: Stop-Loss Coverage Pricing

Appx.Vol.11.pp.3270-77 – Ex. 53-J, 2008 Joint Underwriting Stop Loss Endorsement between Reserve and PoolRe

Appx.Vol.12.pp.3411-20 – Ex. 73-J, 2009 Joint Underwriting Stop Loss Endorsement between Reserve and PoolRe

Appx.Vol.12.pp.3545-51 – Ex. 88-J, 2010 Joint Underwriting Stop Loss Endorsement between Reserve and PoolRe

Appx.Vol.12.pp.3560-61 – Ex. 94-J, Mid-Continent General Agency, Inc.'s Letter to Lance McNeel Discussing Premium Rating Methodology for Captives

Appx.Vol.12.pp.3562-66 – Ex. 95-J, Letter from Glicksman Consulting, LLC to Capstone Regarding Discussion of PoolRe's Coverage Options

Appx.Vol.12.pp.3567-69 – Ex. 96-J, Myron Steves Letter from Robert Snyder to PoolRe Insurance Corp. Regarding Pricing of Risks Underwritten Through PoolRe Insurance Corp. Stop Loss and Quota Share Reinsurance Structure

Attachment 2
Appendix References Regarding
PoolRe's License

Appendix References Regarding PoolRe's License

Appx. Vol.3.p.871 – Tax Court's Memorandum Findings of Fact & Opinion

Appx.Vol.5.p.1249 – Lance McNeel's Trial Testimony (at 382:12-19)

Appx.Vol.18.pp.5332-46 – Ex. 119-R, December 1, 2006 Atlas Insurance Management's Letter to Capstone Discussing Servicing Agreement (referencing PoolRe at Appx.Vol.18.p.5344)

Appx.Vol.18.pp.5364-72 – Ex. 121-R, June 30, 2009 Atlas Insurance Management's Letter to Capstone Amending Servicing Agreement (referencing PoolRe at Appx.Vol.18.p.5370)

Appx.Vol.18.pp.5376-87 – Ex. 125-P, Reserve's Audited Financial Statements and Notes from Inception to December 31, 2009 (discussing PoolRe at Appx.Vol.18.p.5383)

Appx.Vol.2.p.368 and Appx.Vol.9.pp.2463-74 – Stipulation of Facts at ¶ 38 (discussing Ex. 27-J) and Ex. 27-J, Reserve Casualty Corp. Audited Financial Statements and Notes – Statutory Basis – December 31, 2010 and the Period from Inception to December 31, 2009 (discussing PoolRe at Appx.Vol.9.p.2470)

Attachment 3
Appendix References Regarding
2008 Directors and Officers Liability Policy

**Appendix References Regarding
2008 Directors and Officers Liability Policy**

Appx.Vol.11.pp.3110-21 – Ex. 36-J, 2008 Directors and Officers Liability Insurance Policy (Schedules 1 and 1-A at Appx.Vol.11.pp.3119-20)

Appx.Vol.11.pp.3287-96 – Ex. 60-J, 2009 Directors and Officers Liability Insurance Policy

Attachment 4
Appendix References Regarding
Stop-Loss/Catastrophic Losses

**Appendix References Regarding
Stop-Loss/Catastrophic Losses**

Appx.Vol.4.pp.1193-94 – Dr. Neil A. Doherty’s Trial Testimony (at 256:15-260:20)

Appx.Vol.13.pp.3712-15 – Ex. 104-P, Dr. Neil A. Doherty’s Expert Report

Appx.Vol.5.pp.1467-68 – Stewart Feldman’s Trial Testimony (at 809:2-814:4)

Attachment 5

**Appendix References Regarding
Reserve's Check for Peak's Direct-Written Claim**

**Appendix References Regarding
Reserve's Check for Peak's Direct-Written Claim**

Appx.Vol.1.p.49 – Respondent Commissioner's Pretrial Memorandum in Tax Court (acknowledging Jill Howard as Reserve's authorized representative)

Appx.Vol.4.p.1123 – Norm Zumbaum's Trial Testimony (discussing Jill Howard at 121:21-122:9)

Appx.Vol.11.pp.3261-69 – Ex. 52-J, 2008 Credit Insurance Coinsurance Contract (showing Jill Howard's signature as authorized representative of Reserve at Appx.Vol.11.p.3267)

Appx.Vol.12.p.3401-10 – Ex. 72-J, 2009 Credit Insurance Coinsurance Contract (showing Jill Howard's signature as authorized representative of Reserve at Appx.Vol.12.pp.3408-09)

Appx.Vol.12.pp.3534-44 – Ex. 87-J, 2010 Credit Insurance Coinsurance Contract (showing Jill Howard's signature as authorized representative of Reserve at Appx.Vol.12.pp.3540, 3543-44)