S205889

IN THE SUPREME COURT OF CALIFORNIA

FLUOR CORPORATION,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE,
Respondent,

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE
CASE NO. G045579

FOLLOWING A GRANT OF REVIEW AND TRANSFER BY THE SUPREME COURT OF CALIFORNIA
CASE NO. S196592

PETITION FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE
CASE NO. 06CC00016, RONALD BAUER, JUDGE

HARTFORD ACCIDENT AND INDEMNITY COMPANY'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ANSWER BRIEF ON THE MERITS

HORVITZ & LEVY LLP
*JASON R. LITT (BAR NO. 163743)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
jlitt@horvitzlevy.com

GAIMS, WEIL, WEST & EPSTEIN LLP
ALAN JAY WEIL (BAR NO. 63153)
1875 CENTURY PARK EAST, SUITE 1200
LOS ANGELES, CALIFORNIA 90067
(310) 407-4500 • FAX: (310) 277-2133
ajweil@gwwe.com

SHIPMAN & GOODWIN LLP
JAMES P. RUGGERI (*PRO HAC VICE*)
1133 CONNECTICUT AVENUE, NW, SUITE 300
WASHINGTON, D.C. 20036
(202) 469-7750 • FAX: (202) 469-7751
rruggeri@goodwin.com

ATTORNEYS FOR REAL PARTY IN INTEREST
HARTFORD ACCIDENT AND INDEMNITY COMPANY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

IN THE
SUPREME COURT OF CALIFORNIA

FLUOR CORPORATION,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE,
Respondent,

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Real Party in Interest.

HARTFORD ACCIDENT AND INDEMNITY COMPANY'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ANSWER BRIEF ON THE MERITS

Pursuant to California Rule of Court, rule 8.252, and Evidence Code sections 452 and 459, Real Party In Interest Hartford Accident and Indemnity Company (Hartford) respectfully requests that this court take judicial notice of a complaint filed in Louisiana state court as well as an opinion from the California Court of Appeal, Fourth Appellate District, Division Three. True and correct copies of these documents are attached to the Declaration of James P. Ruggeri, filed concurrently herewith in support of Hartford's Answer Brief on the Merits.

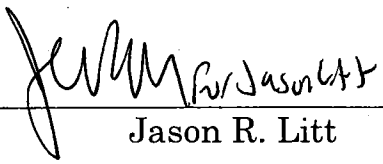
The Louisiana state court complaint is relevant because it is a suit in which Hartford was called upon to provide coverage where Fluor-1 (Massey) was named as a defendant but Fluor-2 was not. The California Court of Appeal's decision in *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2001) 88 Cal.App.4th 876 [106

Cal.Rptr.2d 341], review granted July 18, 2001, S098242, is relevant because it reflects Amchem No. 1's position that, as the original policyholder, it maintained its rights under the insurance policies at issue.

This request is based upon the attached memorandum of points and authorities, the attached Ruggeri Declaration, and the briefs and documents on file with this court.

June 10, 2013

HORVITZ & LEVY LLP
JASON R. LITT
GAIMS, WEIL, WEST & EPSTEIN LLP
ALAN JAY WEIL
SHIPMAN & GOODWIN LLP
JAMES P. RUGGERI

By: 
Jason R. Litt

Attorneys for Real Party in Interest
HARTFORD ACCIDENT AND INDEMNITY COMPANY

MEMORANDUM OF POINTS AND AUTHORITIES

The Evidence Code expressly contemplates that this court may take judicial notice of the records of any court of this state or of any other state's court. (See Evid. Code, § 452, subd. (d) ["Judicial notice may be taken of the following . . . [¶] . . . [¶] (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States"].) Both of the attached documents qualify as court records and are subject to judicial notice. (See *Henry v. Clifford* (1995) 32 Cal.App.4th 315, 322 [a complaint from another action is a proper subject of judicial notice]; *Louie v. BFS Retail & Commercial Operations, LLC* (2009) 178 Cal.App.4th 1544, 1549 [taking judicial notice of a federal complaint filed in Florida]; *Duggal v. G.E. Capital Communications Services, Inc.* (2000) 81 Cal.App.4th 81, 86 [appellate court may take judicial notice of the records of a California court]; *Day v. Sharp* (1975) 50 Cal.App.3d 904, 914 [noting that a court may take judicial notice of the existence of documents in a court file].) As the accompanying declaration sets forth, the documents for which Hartford seeks judicial notice are true and complete copies of state court records.

For the foregoing reasons, Hartford requests that the court take judicial notice of the attached documents which are relevant to responding to the issues under review here.

June 10, 2013

HORVITZ & LEVY LLP
JASON R. LITT
GAIMS, WEIL, WEST & EPSTEIN LLP
ALAN JAY WEIL
SHIPMAN & GOODWIN LLP
JAMES P. RUGGERI

By: _____
Jason R. Litt

Attorneys for Real Party in Interest
HARTFORD ACCIDENT AND INDEMNITY COMPANY

DECLARATION OF JAMES P. RUGGERI

I, James P. Ruggeri, declare as follows:

1. I am an attorney duly licensed to practice law in the New York, the District of Columbia, and am admitted *pro hac vice* in this Court. I am a partner at the law firm of Shipman & Goodwin LLP, counsel for Real Party in Interest Hartford Accident and Indemnity Company in the above-entitled case. As such, I have personal knowledge of the matters set forth herein and, if called upon to do so, could and would testify as follows.

2. Attached hereto as Exhibit 1 is a true and correct copy of the Original Petition for Damages and First Supplemental Pleading and Amending Petition, in *Schenck v. Garlock Sealing Technologies, LLC et al.*, Case No. 2008-4772, La. Civ. Dist. Ct., Orleans Parish, produced at HART041213-HART041239.

3. Attached hereto as Exhibit 2 is a true and correct copy of the Opinion in *Henkel Corporation v. Hartford Accident and Indemnity Company* (2001) 106 Cal.Rptr.2d 341 (*revd.*).

I declare under penalty of perjury under the laws of California that the foregoing is true and correct and that this declaration was executed on June 7, 2013 at Washington, D.C.

James P. Ruggeri

EXHIBIT 1

ATTORNEY'S NAME: Finkelstein Marcia 05569
AND ADDRESS: 127 Carondelet St.
New Orleans LA 70130-1102

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO: 2008 – 04772 43 SECTION: 7 – E

SCHENCK, JEANETTE versus GARLOCK SEALING TECHNOLOGIES, LLC ET AL

CITATION

TO: MASSEY ENERGY COMPANY
THROUGH:
4 NORTH 4TH STREET

RICHMOND VA

YOU HAVE BEEN SUED:

You must either comply with the demand contained in the petition
FIRST SUPPLEMENTAL AND AMENDING PETITION W/ ORIGINAL PETITION ATTACHED
A certified copy of which accompanies this citation, or file an answer or other legal pleading in the office of the Clerk of this Court, Room 402, Civil Courts Building, 421 Loyola Avenue, New Orleans, LA, within thirty (30) days after the service hereof under penalty of default

ADDITIONAL INFORMATION

Legal assistance is advisable. If you want a lawyer and can't find one, you may call the New Orleans Lawyer Referral Service at 561- 8828. This Referral Service operates in conjunction with the New Orleans Bar Association. If you qualify, you may be entitled to free legal assistance through the New Orleans Legal Assistance Corp.; you may call 529 - 1000 for more information.

COURT PERSONNEL ARE NOT PERMITTED TO GIVE LEGAL ADVICE

IN WITNESS HEREOF, I have hereunto set my hand and affix the seal of the Civil District Court for the Parish of Orleans, State of LA July 21, 2008

Clerk's Office, Room 402, Civil Courts Building,
421 Loyola Avenue
New Orleans, LA

DALEN ATKINS, Clerk of
The Civil District Court
for the Parish of Orleans
State of LA
by _____
Deputy Clerk

SHERIFF'S RETURN
(for use of process servers only)

PERSONAL SERVICE

On this ___ day of _____
_____ served a copy of the w/i petition
FIRST SUPPLEMENTAL AND AMENDING PETITION W/ ORIGINAL PETITION ATTACHED

On
MASSEY ENERGY COMPANY

THROUGH:

_____
Returned same day

_____ No _____
Deputy Sheriff of _____

Mileage: $ _____

_____ / ENTERED / _____
PAPER RETURN

_____ / _____ / _____
SERIAL NO. DEPUTY PARISH

DOMICILIARY SERVICE

On this _____ day of _____
_____ served a copy of the w/i petition
FIRST SUPPLEMENTAL AND AMENDING PETITION W/ ORIGINAL PETITION ATTACHED

On
MASSEY ENERGY COMPANY

THROUGH:

by leaving same at the dwelling house, or usual place of abode, in the hands of _____ a person of suitable age and discretion residing therein as a member of the domiciliary establishment, whose name and other facts connected with this service I learned by interrogating HIM / HER the said _____
MASSEY ENERGY COMPANY

being absent from the domicile at time of said service
Returned same day

_____ No. _____
Deputy Sheriff of _____

ATTORNEY'S NAME Finkelstein, Marcia 05569
AND ADDRESS: 127 Carondelet St.
New Orleans LA 70130-1102

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO 2008 – 04772 43 SECTION: 7 – E

SCHENCK, JEANETTE versus GARLOCK SEALING TECHNOLOGIES, LLC ET AL

CITATION

TO MASSEY ENERGY COMPANY
THROUGH:
4 NORTH 4TH STREET

RICHMOND VA

YOU HAVE BEEN SUED:

You must either comply with the demand contained in the petition
FIRST SUPPLEMENTAL AND AMENDING PETITION W/ ORIGINAL PETITION ATTACHED
a certified copy of which accompanies this citation, or file an answer or other legal pleading in the office of the Clerk of this Court, Room 402, Civil Courts Building, 421 Loyola Avenue, New Orleans, LA, within thirty (30) days after the service hereof under penalty of default

ADDITIONAL INFORMATION

Legal assistance is advisable. If you want a lawyer and can't find one, you may call the New Orleans Lawyer Referral Service at 561-8828. This Referral Service operates in conjunction with the New Orleans Bar Association. If you qualify, you may be entitled to free legal assistance through the New Orleans Legal Assistance Corp.; you may call 529-1000 for more information.

COURT PERSONNEL ARE NOT PERMITTED TO GIVE LEGAL ADVICE

IN WITNESS HEREOF, I have hereunto set my hand and affix the seal of the Civil District Court for the Parish of Orleans, State of LA July 21, 2008.

Clerk's Office, Room 402, Civil Courts Building,
421 Loyola Avenue
New Orleans, LA

DALE N. ATKINS, Clerk of
The Civil District Court
for the Parish of Orleans
State of LA
by _____
Deputy Clerk

SHERIFF'S RETURN
(for use of process servers only)

PERSONAL SERVICE

On this ____ day of _____
_____ served a copy of the w/i petition
FIRST SUPPLEMENTAL AND AMENDING PETITION W/ ORIGINAL PETITION ATTACHED

On
MASSEY ENERGY COMPANY

THROUGH

Returned same day

No.

Deputy Sheriff of _____

Mileage, $ _____

ENTERED: _____

PAPER RETURN

SERIAL NO. DEPUTY PARISH

DOMICILIARY SERVICE

On this _____ day of _____
_____ served a copy of the w/i petition
FIRST SUPPLEMENTAL AND AMENDING PETITION W/ ORIGINAL PETITION ATTACHED

On
MASSEY ENERGY COMPANY

THROUGH

by leaving same at the dwelling house, or usual place of abode, in the hands of _____
a person of suitable age and discretion residing therein as a member of the domiciliary establishment, whose name and other facts connected with this service I learned by interrogating HIM / HER the said _____
MASSEY ENERGY COMPANY

being absent from the domicile at time of said service

Returned same day

No.

Deputy Sheriff of _____

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 08-4772 DIVISION "E" DOCKET 7-1

JEANETTE SCHENCK

VERSUS

GARLOCK SEALING TECHNOLOGIES, LLC, *et al.*

FILED: _____ DEPUTY CLERK

FIRST SUPPLEMENTAL AND AMENDING PETITION

NOW INTO COURT, through undersigned counsel, comes the plaintiff, Jeanette Schenck, who desires to supplement and amend her original petition for damages in the following respects:

1.

By adding as defendants, and to reflect their addition in the caption, body of the petition and prayer for relief, the following new parties: Louisiana Insurance Guaranty Association ("LIGA"), as an entity liable for the obligations of Gabler Insulations, Inc.; Royal Insurance Company, as insurer of Abco Co., Inc.; The Travelers Indemnity Company, as insurer of B&B Engineering & Supply Co., Inc. and B&B Engineering & Supply Co. of Louisiana, Inc.(referred to collectively as "B&B"); Massey Energy Company, C.F. Braun & Co., now known as JGB, Inc.; Mechanical Insulations, Inc., and Chemtura Corporation, formerly Crompton Corporation, formerly Witco Corporation, formerly Witco Chemical Company, Inc.

2.

By adding the following paragraphs, numbered XXIX through XXXVIII, to the original petition:

"XXIX.

> LIGA is a legal entity created by virtue of the statutes of Louisiana and, by law, is contractually obligated to pay the liabilities of insurance companies which have been placed into receivership. American Mutual Insurance Company, at all material times hereto, insured Gabler Insulations for the obligations sued for in this suit. Gabler is dissolved and

insolvent. American Mutual was placed into receivership and LIGA is liable for its obligations.

XXX.

Royal Insurance Company and Travelers Indemnity Company are foreign insurers, authorized to do and doing business in Louisiana. At all times material hereto, Royal insured Aber Co., Inc. and Travelers insured B&B Engineering & Supply Co., Inc. and B&B Engineering & Supply Co. of Louisiana, Inc. for the obligations sued for hereunder. Aber and both B&B companies are dissolved. The plaintiff is entitled to sue their insurers under Louisiana Revised Statute 22:655, the Direct Action Statute.

XXXI.

Massey Energy Company is a foreign corporation, incorporated in Delaware, with its principal office in Richmond, Virginia. It did, and continues to do, business in the State of Louisiana.

XXXII.

CF Braun & Co., which merged into JGB, Inc., is domiciled in Alhambra, California. At all times material hereto, it was authorized to do and is doing business in Louisiana.

XXXIII.

Mechanical Insulations, Inc. is a corporation domiciled in East Baton Rouge Parish with its principal office in Baton Rouge, Louisiana. At all times material hereto, it was authorized to do and doing business in Louisiana.

XXXIV.

Chemtura Corporation, formerly Crompton Corporation, formerly Witco Corporation, formerly Witco Chemical Company, Inc., is a foreign corporation, incorporated in Delaware. At all times material hereto, Witco operated a plant in Gretna, Louisiana. At all times material hereto, Chemtura was and is authorized to do business in Louisiana.

XXXV.

Gabler, sued through LIGA; Aber, sued through Royal; B&B, sued through Travelers; Massey; C.F. Braun, now known as JGB, Inc.; and Mechanical Insulations, Inc. were insulation contractors which employed the plaintiff's deceased husband, Willie Schenck. The plaintiff intends to include the new defendants, Gabler Insulations, Inc., sued through LIGA; Aber Co., Inc., sued through Royal; B&B Engineering & Supply Co., Inc. and B&B Engineering & Supply Co. of Louisiana, Inc.; sued through Travelers;

Massey Energy Company; C.F. Braun & Co., now known as JGB, Inc.; and Mechanical Insulations, Inc., within the group classified in the original petition as "Asbestos Insulation Contractor Defendants." All allegations pled as to that group in the original petition are intended to apply now to Gabler Insulations, Inc., Aber Co., Inc., B&B Engineering & Supply Co., Inc., B&B Engineering & Supply Co. of Louisiana, Inc., Massey Energy Company, C.F. Braun & Co., now known as JGB, Inc., and Mechanical Insulations, Inc. and said allegations are incorporated herein by reference, as if copied *in extenso*.

XXXVI.

The plaintiff intends to include the defendant, Chemtura Corporation, formerly Crompton Corporation, formerly Witco Corporation, formerly Witco Chemical Company, Inc., within the group classified in the original petition as "Premises Liability Defendants." All allegations pled as to that group in the original petition are intended to apply now to Chemtura Corporation, formerly Crompton Corporation, formerly Witco Corporation, formerly Witco Chemical Company, Inc., and are incorporated herein by reference as if copied herein *in extenso*.

XXXVII.

Willie Schenck, the plaintiff's deceased husband, was employed by Gabler Insulations in 1953, 1955, 1956, 1957, 1958, 1959, 1960, 1962, 1963, 1964, 1965, 1966, 1967 and 1977. He was employed by Aber Co., Inc. in 1953, 1954, 1956, 1957, 1958, 1959, 1960, 1961 and 1966. He worked for B&B Engineering & Supply Co., Inc. in 1954, 1957 and 1961 and B&B Engineering & Supply Co. of Louisiana, Inc. in 1958, 1959, 1961, 1965 and 1968. Mr. Schenck worked for Massey Energy Company in 1958, 1959 and 1960 and for C.F. Braun & Co. in 1959. He worked for Mechanical Insulations, Inc. in 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975 and 1976. For all these employers, Mr. Schenck was hired from the Asbestos Workers Union, Local 53. He performed insulation work involving the application and removal of asbestos-containing products. In addition, he worked around others who were applying, removing, handling, carrying, cutting, and/or using asbestos-containing materials in close proximity to him, resulting in the deposit of asbestos dust and fibers onto Mr. Schenck's work clothes and person. Mr. Schenck worked at various industrial and/or commercial job sites in Louisiana and/or other states for said Asbestos Insulator Contractor Defendants. As a result of said employment, he brought asbestos dust and fibers into his home, thereby exposing his wife, Jeanette.

XXXVIII.

Willie Schenck worked at the Witco Chemical Plant in Gretna, Louisiana, in approximately 1965, owned and

operated by Witco Chemical Company, Inc. Witco has merged into, and/or has been re-named Crompton Corporation, which has merged into and/or been re-named Chemtura Corporation but, at any rate, Chemtura is now liable for Witco's legal obligations. At Witco, Mr. Schenck performed insulation work involving the application and removal of asbestos-containing products. In addition, he worked around others who were applying, removing, handling, carrying, cutting, and/or using asbestos-containing materials in close proximity to him, resulting in the deposit of asbestos dust and fibers onto Mr. Schenck's work clothes and person. Mr. Schenck brought home his asbestos-contaminated work clothes for his wife, Jeanette, to launder. As a result, she was exposed to asbestos-containing materials from Witco. Chemtura is liable for the reasons, or under the grounds, claims, and/or causes of action pled, in the original petition, as to the Premises Liability Defendants.

3.

The defendants do not object to the plaintiff's filing of this First Supplemental and Amending Petition. The plaintiff re-alleges and re-avers the allegations of her original petition as if pled herein *in extenso* (except to the extent they are modified herein).

WHEREFORE, the plaintiff prays that she be given leave of Court to file this First Supplemental and Amending Petition, and that, after due proceedings are had, there be judgment rendered herein in the plaintiff's favor and against all defendants jointly and *in solido*, in an amount reasonable under the premises herein, together with legal interest, as well as all costs of these proceedings and a trial by jury.

Respectfully submitted,

GERTLER, GERTLER, VINCENT & PLOTKIN, L.L.P.

M. H. GERTLER- #10956
RODNEY P. VINCENT- #13000
LOUIS L. PLOTKIN- #21821
LOUIS L. GERTLER- #23091
MARCIA FINKELSTEIN- #35809
127 Carondelet Street
New Orleans, LA 70130
Ph.: (504) 581-6411
Fax: (504) 581-6568

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 08-4772 DIVISION "E" DOCKET 5-4

JEANETTE SCHENCK

VERSUS

GARLOCK SEALING TECHNOLOGIES, LLC, *et al.*

FILED: _____ DEPUTY CLERK

ORDER

Let the foregoing First Supplemental and Amending Petition be filed as prayed for.

New Orleans, Louisiana, this 18 day of JULY, 2008.

(Sgd.) Madeleine M. Landrieu
JUDGE

PLEASE SERVE (with original and first supplemental and amending petitions):

Mechanical Insulations, Inc.
through its agent for service of process,
Thomas E. Balhoff
Roedel, Parsons, Koch & Frost
8440 Jefferson Hwy., Ste. 301,
Baton Rouge, LA 70809

Louisiana Insurance Guaranty Assn.
Through its Executive Director, John Wells
2142 Quail Run Dr.
Baton Rouge, LA 70808

Royal Insurance Company
Through the Secretary of State,
Baton Rouge, LA

Travelers Indemnity Company
Through the Secretary of State
Baton Rouge, LA

Chemtura Corporation
Through its agent,
Corporation Service Company
320 Somerulos St.
Baton Rouge, LA 70802-6129

Massey Energy Company (Through Long Arm Service)
4 North 4th Street
Richmond, VA 23219-2230

JGB, Inc. (Through Long Arm Service)
1000 S. Fremont Ave.
Alhambra, CA 91802

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been furnished to all counsel of record by FAX, hand delivery, email and/or U. S. Mail, postage prepaid and properly addressed, this 17th day of July, 2008.

Marcia Finkelstein

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 08-4772 DIVISION "E-7" DOCKET 24

JEANETTE SCHENCK

VERSUS

GARLOCK SEALING TECHNOLOGIES, LLC; O-I, INC.; RAPID-AMERICAN CORP.; BAYER CROPSCIENCE, INC.; UNIROYAL, INC.; ANCO INSULATIONS, INC.; SEVILLE, INC., F/K/A BRANTON INSULATIONS, INC.; EAGLE, INC.; THE McCARTY CORPORATION; REILLY-BENTON COMPANY, INC.; TAYLOR-SEIDENBACH, INC.; MARYLAND CASUALTY COMPANY AND FIDELITY AND CASUALTY COMPANY OF NEW YORK, INSURERS OF MARQUETTE INSULATIONS, INC.; FOSTER WHEELER CORPORATION; AIR PRODUCTS & CHEMICALS, INC.; ALLIED CHEMICAL CORPORATION; WYETH HOLDINGS CORPORATION, F/K/A AMERICAN CYANAMID COMPANY; HEXION SPECIALTY CHEMICALS, INC., F/K/A BORDEN CHEMICAL, INC.; CF INDUSTRIES, INC.; CHEVRON CHEMICAL COMPANY; EI DU PONT DE NEMOURS AND COMPANY; ENTERGY LOUISIANA, L.L.C.; ENTERGY NEW ORLEANS; GULF OIL CORPORATION; MURPHY OIL USA, INC.; OCCIDENTAL CHEMICAL CORPORATION, SUCCESSOR TO HOOKER CHEMICALS & PLASTICS CORP.; SHELL OIL COMPANY; SYNGENTA CROP PROTECTION, INC., SUCCESSOR TO NOVARTIS CROP PROTECTION, INC., SUCCESSOR TO CIBA-GEIGY CORP.; TEXACO, INC.; UNION CARBIDE CORPORATION; MONSANTO COMPANY; EL PASO ENERGY EST COMPANY, AS TRUSTEE FOR THE EPEC OIL COMPANY LIQUIDATING TRUST; BASF WYANDOTTE CORPORATION; ORMET PRIMARY ALUMINUM CORPORATION; CBS CORPORATION; GENERAL ELECTRIC COMPANY AND RILEY POWER, INC.

FILED: _____ _____
DEPUTY CLERK

PETITION FOR DAMAGES

The petition of Jeanette Schenck, a resident of St. Tammany Parish, Louisiana, and a person of the full age of majority, respectfully represents:

I.

Defendants, Garlock Sealing Technologies, LLC, O-I, Inc., Rapid-American Corp., Uniroyal, Inc., and Bayer CropScience, Inc., as successor to Rhone-Poulenc AG Company, f/k/a Amchem Products, Inc., f/k/a Benjamin Foster, (all collectively referred to hereinafter as the "Asbestos Manufacturer Defendants"), are corporations incorporated under the laws of various states of the United States, other than Louisiana, and, at all times pertinent hereto, were and are doing business in the Parish of Orleans, State of Louisiana.

II.

The defendants, Anco Insulations, Inc., Seville, Inc., f/k/a Branton Insulations, Inc., Eagle, Inc., f/k/a Eagle Asbestos & Packing Co., Inc., The McCarty Corporation, Reilly-Benton Company, Inc. and Taylor-Seidenbach, Inc. (referred to hereinafter as the "Asbestos Insulation Contractor Defendants"), are Louisiana corporations or, alternatively, are corporations domiciled in other states, licensed to do, having done, and presently doing business in the Parish of Orleans, State of Louisiana. Eagle, Inc. and Taylor-Seidenbach, Inc. are domiciled, have their registered offices, and their principal places of business, in Orleans Parish, State of Louisiana. Marquette Insulations, Inc. was a Louisiana corporation which is no longer doing business. Pursuant to Louisiana Revised Statute 22:655, the Direct Action Statute, the plaintiff sues the liability insurers of Marquette, namely Maryland Casualty Company, and Fidelity and Casualty Company of New York, which are contractually obligated for the liabilities of Marquette. The insurers of Marquette Insulations, Inc. are included within the group of "Asbestos Insulation Contractor Defendants."

III.

The defendants, Air Products and Chemicals, Inc., Allied Chemical Corporation, Wyeth Holdings Corp., f/k/a American Cyanamid Company, Hexion Specialty Chemicals, Inc., f/k/a Borden Chemical, Inc., C.F. Industries, Inc.,Chevron Chemical Company, E.I. du Pont de Nemours and Company, Entergy Louisiana, L.L.C., Entergy New Orleans, Gulf Oil Corporation, Murphy Oil USA, Inc., Occidental Chemical Corporation, f/k/a Hooker Chemicals & Plastics Corp., Shell Oil Company, Syngenta Crop Protection, Inc.,successor in interest to Novartis Crop Protection, Inc., successor in interest to Ciba-Geigy Corp., Texaco, Inc., Union Carbide Corporation, Monsanto Company, El Paso Energy E&T Company, Trustee for the EPEC Oil Company Liquidating Trust, BASF Wyandotte Corporation and Olinet Primary Aluminum Corporation(referred to hereinafter as the "Premises Liability Defendants"), are all foreign corporations (except for Entergy New Orleans which is a Louisiana corporation domiciled in Orleans Parish) incorporated or organized under the laws of various states other than Louisiana, but, at all times material hereto, were authorized to do, did, and are still doing business in Orleans Parish, Louisiana.

IV.

The defendants, Foster Wheeler Corporation, General Electric Company, CBS Corporation, successor to Viacom, Inc., f/k/a CBS Corporation, f/k/a Westinghouse Electric Corporation, and Riley Power, Inc., are foreign corporations incorporated in states other than Louisiana, but which, at all times material hereto, are authorized to do, have done and continue to do business in the Parish of Orleans, State of Louisiana. G.E., CBS and Riley Power are hereinafter referred to as the "Turbine Defendants."

V.

Petitioner, Jeanette Schenck, was diagnosed with diffuse malignant pleural mesothelioma on March 20, 2008. She files this suit within one year of the date of her diagnosis.

VI.

She developed mesothelioma as a result of being exposed to asbestos arising from her husband William Earl Schenck's employment. She was married to William Earl Schenck from June 1, 1956 until his death on July 5, 1989. William Schenck was employed as an asbestos insulator, working out of Asbestos Workers Local 53, for various employers from 1952 through 1977. He performed a substantial amount of his work in Orleans Parish, Louisiana. The Schencks lived in New Orleans from 1956 through 1967.

VII.

During William Schenck's employment as an asbestos insulator, he was not warned about the health hazards associated with exposure to asbestos dust and fibers. Said health hazards include, but are not limited to, the risk of contracting asbestosis, asbestos-related lung cancer and mesothelioma. Moreover, he was not advised to take any special precautions when handling, working with, and/or using asbestos-containing products and materials. Specifically, he was not given special work clothes which could be discarded at the end of the work day and which would not require home laundering. In addition, he was not provided with showers at the workplace.

VIII.

Because William Schenck was not warned of, nor did he realize, the dangers of asbestos, at the end of his work day, he routinely and regularly brought his work clothes home covered with asbestos dust and fibers. Further, he did not shower before coming home from work, and his person and belongings were covered with asbestos dust and fibers.

IX.

The plaintiff, Jeanette Schenck, routinely shook out and laundered her husband William Schenck's dusty, asbestos-contaminated work clothes. In addition, Mrs. Schenck was exposed to asbestos on her husband's person, when he returned home from work each day covered with dust. As a result, from the date of her marriage, June 1, 1956, until 1977, Jeanette Schenck sustained "bystander" exposure to, and regularly inhaled, asbestos dust and fibers.

X.

The defendants, Garlock Sealing Technologies, LLC, O-I, Inc., Philip-Carey (the latter sued herein through its successor in interest Rapid-American Corp.), Benjamin Foster, now Bayer Crop Science, Inc. and Uniroyal, Inc., manufactured and sold asbestos-containing building materials and insulation products. More particularly, Garlock sold packing and gaskets, Benjamin Foster sold mastics and sealants, O-I, formerly Owens-Illinois, Inc., sold Kaylo pipe covering and block, and Uniroyal sold Asbestos cloth. Rapid-American is liable for the obligations of Philip-Carey, which sold Careytemps pipe covering, block, cement and other products.

XI.

During William Schenck's employment as an asbestos insulator, he applied, removed, handled, cut, carried, and/or used and/or worked near others who applied, removed, handled, cut, carried and/or used asbestos-containing products manufactured and sold by the Asbestos Manufacturer Defendants. As a result, his work clothes, by the end of each work day, were covered with asbestos dust and fibers from the Asbestos Manufacturer Defendants' products. He returned home with his asbestos-contaminated clothes, which his wife shook out and laundered regularly. In addition, Mr. Schenck returned home covered with dust in

general. The plaintiff, Jeanette Schenck, was thereby exposed to said asbestos dust and fibers.

XII.

During the time of plaintiff's exposure, the Asbestos Manufacturer Defendants knew, should have known, or were presumed to know of the dangers involved in, or associated with, exposure to asbestos dust and fibers including, but not limited to, their capacity to cause malignant mesothelioma or other lung diseases. The Asbestos Manufacturer Defendants had a legal duty to warn users, consumers and/or other individuals, likely to be exposed to their products, of said dangers. At the time of William and Jeanette Schenck's exposure to asbestos dust and fibers, originating or released from the Asbestos Manufacturer Defendants' products, the Asbestos Manufacturer Defendants had not warned of said dangers.

XIII.

When William and Jeanette Schenck were exposed to asbestos dust and fibers originating and/or released from said asbestos- containing insulation and building products, said products were in a defective and unreasonably dangerous condition. Said asbestos-containing products were unreasonably dangerous in normal use in that the use of said products, as anticipated by the manufacturer, caused injury and harm not reasonably expected by the user. Said asbestos-containing products were used properly, as contemplated by their manufacturer, and the condition of said products was not altered by the user.

XIV.

The Asbestos Manufacturer Defendants are liable under the following causes of action and theories:

A. They are strictly liable for designing, manufacturing and selling dangerous and defective products, which are dangerous "per se," or unreasonably dangerous in normal use, or unreasonably dangerous in design and composition.

B. They are liable under a negligence or a strict liability standard for failing to warn regarding the dangers and defects of their products, when they knew or should have known or were presumed to know of said dangers.

C. They are liable for their negligence in manufacturing and selling unreasonably dangerous and defective products, which caused injury to Jeanette Schenck, when they knew or should have known of said dangers.

XV.

The defendant, Rapid-American Corporation, is a foreign corporation authorized to do and doing business in the State of Louisiana. It is a successor by merger to Glen Alden Corporation, Briggs Manufacturing Co., Philip Carey Corporation and Philip Carey Manufacturing Company. At all times material hereto, Philip Carey Corporation and/or Philip Carey Manufacturing Company manufactured and/or sold asbestos-containing pipe covering and other products to employers of William E. Schenck or to plants at which William Schenck worked. Said asbestos-containing Philip Carey products were used by, or in the immediate vicinity of, William E. Schenck thereby exposing him to asbestos fibers and dust which settled onto his clothing and person, and which were carried into his home, thereby exposing his wife, Jeanette. Rapid-American is liable for the obligations owed by Philip Carey Corporation and/or Philip Carey Manufacturing Company.

XVI.

The Asbestos Insulation Contractor Defendants, Anco Insulations, Inc., Seville, Inc., d/b/a Brunton Insulations, Inc., Eagle, Inc., formerly Eagle Asbestos & Packing Co., Inc., Marquette Insulations, Inc. (which is defunct and, pursuant to Louisiana Revised Statute 22:655, the Direct Action Statute, is sued herein through its insurers, Maryland Casualty Company and Fidelity and Casualty Company of New York), The McCarty Corporation, Reilly-Benton Company, Inc., and Taylor-Seidenbach, Inc., employed William Schenck at various times during the period 1952 through 1977. They employed him to do work involving the application, removal, handling, use, cutting and/or carrying of asbestos-containing products and materials. In addition, they assigned him to work in close physical proximity to others who were applying, removing, handling, using, cutting and/or carrying asbestos-containing products. As a result, Mr. Schenck was exposed to heavy concentrations of asbestos dust, which settled onto his work clothes and person. He carried the asbestos into his home, thereby exposing his wife, who laundered his work clothes.

XVII.

The Asbestos Insulation Contractor Defendants were negligent in failing to warn Mr Schenck about the dangers of asbestos and against bringing home asbestos-contaminated work clothes for laundering. The latter was a foreseeable risk and the Asbestos Insulation Contractor Defendants could have reasonably anticipated it and taken measures to prevent it. Said Asbestos Insulation Contractor Defendants were negligent in their acts and/or failure to act, which proximately caused Jeanette Schenck's household exposure to asbestos.

XVIII.

The Asbestos Insulation Contractor Defendants employed William Schenck at jobs requiring him to apply, remove, use, cut, carry and/or handle asbestos-containing products and materials, and/or work near other individuals doing the same. The Asbestos Insulation Contractor Defendants were negligent in the following, illustrative, but not exclusive, particulars:

A. Negligent failure to discover or recognize the dangers involved in allowing asbestos insulators to bring asbestos dust-covered work clothes home for laundering by their spouses;

B. Negligent failure to institute appropriate safety procedures and practices including, but not limited to, those required by the Occupational Safety and Health Administration, and the OSHA statute and regulations, the Walsh Healey Act and regulations, and other relevant industrial hygiene standards which preceded the OSHA statute, to eliminate or reduce William Schenck's exposure to asbestos-containing products, and eliminate the "clothes-washing hazard," such procedures and practices to include, but are not limited to:

1. use of engineering methods, and installation of proper ventilation to control or reduce the asbestos dust;

2. wetting down asbestos-containing products to reduce airborne asbestos dust;

3. isolation of employees engaged in activities involving the use of asbestos-containing products;

4. posting of signs or placards, or issuing other appropriate warnings around areas where asbestos dust and fibers were released;

5. installation of showers and requiring their use by employees in order to

prevent the employees from bringing asbestos dust home on their person;

6. providing to employees and requiring the wearing of special work clothing which could be disposed of, or left, at the work place and which would not require home laundering;

7. developing, implementing and enforcing a rule prohibiting the taking of asbestos-contaminated clothing off work premises;

8. informing employees, including William Schenck, of the hazards and dangers associated with exposure to asbestos-containing products and the hazards of bystander exposure to asbestos, specifically the danger of having wives launder asbestos-contaminated work clothes;

9. failing to use asbestos-free products.

XIX.

Eagle, Inc., Reilly-Benton Co., Inc., Anco Insulations, Inc., Marquette Insulations, Inc., The McCarty Corporation, Branton Insulations, Inc., and Taylor-Seidenbach, Inc. are also strictly liable as manufacturers for selling unreasonably dangerous products, to-wit, asbestos-containing insulation and building products, which are unreasonably dangerous in their normal use and for failing to warn regarding the dangers of those products, of which they knew, should have known or were presumed to know. Said companies are deemed to be manufacturers because they labeled and otherwise held out as their own the asbestos-containing products they sold or used. They are also strictly liable because they manufactured or fabricated asbestos-containing gaskets, fittings, blankets and other asbestos products. They are also strictly liable because they were professional vendors of asbestos-containing products. William and Jeanette Schenck came into contact with asbestos-containing products sold, fabricated and/or used (in contract work) by the Asbestos Insulation Contractor Defendants and that contact proximately caused the plaintiff's illness.

XX.

The Premises Liability Defendants, Air Products & Chemicals, Inc., Allied Chemical Corp., Wyeth Hobbings Corp., f/k/a American Cyanamid Company, Hexion Specialty Chemicals, Inc., f/k/a Borden Chemical, Inc., C.F. Industries, Inc., Chevron Chemical

Company, E.I. du Pont de Nemours and Company, Entergy, Louisiana, L.L.C., Entergy New Orleans, Gulf Oil Corporation, Murphy Oil, USA, Inc., Occidental Chemical Corporation, (successor to Hooker Chemicals & Plastic Corp.), Shell Oil Company, Syngenta Crop Protection, Inc. (successor to Novartis Crop Protection, Inc., successor to Ciba-Geigy Corp.), Texaco, Inc., Union Carbide Corporation, Monsanto Company, Tenneco (sued herein through El Paso Energy EST Company, Trustee for the EPEC Oil Company Liquidating Trust), BASF Wyandotte Corporation, and Ormet Primary Aluminum Corporation, owned and operated various plants and/or facilities in the State of Louisiana. Entergy Louisiana, L.L.C. is the successor of the corporation which owned and operated the Little Gypsy, Nine Mile Point and other power plants. Entergy New Orleans, formerly NOPSI, operated various power generating stations in New Orleans. At various times during the years 1952 through 1977, William Schenck worked as an asbestos insulator at the aforesaid plants, facilities or yards, owned and operated by the Premises Liability Defendants. William Schenck was exposed to asbestos at the plants, facilities or yards of said Premises Liability Defendants from asbestos-containing equipment, piping or other materials and things. These asbestos-containing equipment, piping or other materials and things were unreasonably dangerous or defective.

XXI.

The Premises Liability Defendants had custody or control, or maintained the *yards* over said asbestos-containing equipment, piping or other materials or things, and over the premises, in general. The Premises Liability Defendants maintained or created a dangerous environment for business invitees, including William Schenck, because of the presence and use of asbestos at their plants and facilities. They also created a particular hazard for William Schenck, and thereby Jeanette Schenck, because in various construction, repair and maintenance projects, which they hired William Schenck's employers (and therefore hired to perform, they called for, specified, required and/or approved the use of asbestos-containing products or materials. In other words, they caused William Schenck's exposure to asbestos on their premises. William Schenck worked on, in, or in close proximity to asbestos-containing equipment, piping or other material and things, or generally worked in an

asbestos-contaminated environment, on the premises of the Premises Liability Defendants. As a result, the clothing, person and belongings of William Schenck became covered with asbestos dust and fibers, which he brought into, and dispersed around, his family home. His wife, Jeanette, subsequently was exposed to said asbestos dust and fibers while laundering her husband's work clothes, or by virtue of her physical proximity to, and contact with, her husband after work. Jeanette Schenck's exposure to said asbestos ultimately led to her development of mesothelioma, and therefore the Premises Liability Defendants are strictly liable under Louisiana Civil Code Article 2317.

XXII.

The Premises Liability Defendants are also liable for their negligence in causing William Schenck's exposure to asbestos which led to his wife's exposure to asbestos. The Premises Liability Defendants knew or should have known that asbestos was dangerous, and should have warned business invitees to their premises, including William Schenck, about the dangers of asbestos. In addition, they knew or should have known about the foreseeable risk that housewives of workers on their asbestos-contaminated premises would launder asbestos-contaminated work clothes. They should have warned business invitees, such as William Schenck, about said risk and instructed on ways to avoid it. They should have provided showers at the workplace and required the use of disposable work clothes. They failed to warn William Schenck about these dangers, causing him to expose his wife to asbestos, which led to her development of mesothelioma.

XXIII.

Defendant, Foster Wheeler Corporation, at all times material hereto, designed, manufactured and sold boilers, steam generators and other equipment, on or near which William Schenck worked during his employment as an insulator. Foster Wheeler issued specifications for the assembly, erection and/or construction of its boilers, steam generators and other equipment. Its specifications for the manufacture and/or assembly of the aforesaid equipment called for the use of asbestos-containing insulation and other products. William Schenck worked on, in or near Foster Wheeler boilers or other equipment containing asbestos. Said Foster Wheeler asbestos-containing boilers and/or other equipment released

asbestos fibers and dust which settled onto the person, clothing and belongings of William Schenck during his work as an asbestos insulator. William Schenck brought his asbestos-covered work clothes home with him to be laundered by his wife, Jeanette. The asbestos on his person and other belongings was likewise introduced into, and dispersed around his home in his wife's immediate vicinity. As a consequence, Jeanette Schenck inhaled this asbestos dust and fibers, which led to her development of mesothelioma. Foster Wheeler is liable, under a strict liability or negligence standard, to petitioner for the following, non-exclusive, acts, omissions and/or reasons:

A. manufacturing asbestos-containing boilers, steam generators and other equipment, and/or products which specified the use of asbestos-containing products, and manufacturing asbestos-containing products which, when put to normal use, and being in the same condition as when originally sold, were unreasonably dangerous in normal use, or dangerous "per se," and/or unreasonably dangerous and defective in design and composition;

B. because it knew, or should have known, or was presumed to know of the hazards associated with exposure to the asbestos contained in its products and equipment and it failed to warn purchasers, users, or consumers of said dangers;

C. causing William Schenck's (and thereby Jeanette Schenck's) exposure to asbestos as a result of activities involving the use and/or handling of asbestos-containing products or materials on, in or in conjunction with Foster Wheeler boilers and/or other products;

D. issuing specifications for the boilers and other products which called for the use of asbestos-containing materials.

XXIV.

Westinghouse, now CBS Corporation, G.E. and Riley Power (the "Turbine Defendants") manufactured steam turbines, which specified the use of asbestos-containing materials and products. The fact that they contained asbestos made the turbines unreasonably dangerous in normal use, according to the legal standard of *Weber v. Fidelity & Casualty Insurance Company of New York*. William Schenck applied and/or removed asbestos-containing insulation for worked in close physical proximity to others who were doing so in or on the Turbine Defendants' products. As a result, he was exposed to asbestos, which he carried home on his work clothes and person, thereby exposing his wife. The Turbine Defendants are liable, under a strict liability or negligence standard, to petitioner for the following, non-exclusive, acts, omissions and/or reasons:

A. manufacturing asbestos-containing steam turbines or other products which, when put to normal use, and being in the same condition as when originally sold, were unreasonably dangerous in normal use, or dangerous "per se," or unreasonably dangerous and defective in design and composition;

B. because they knew, or should have known, or were presumed to know of the hazards associated with exposure to the asbestos contained in their products and equipment and they failed to warn purchasers, users, or consumers of said dangers;

C. causing William Schenck's (and thereby Jeanette Schenck's) exposure to asbestos as a result of activities involving the use and/or handling of asbestos-containing products or materials on, in or in conjunction with the Turbine Defendants' steam turbines or other products.

XXV.

The plaintiff's significant injurious exposure to asbestos occurred prior to October 1, 1976.

XXVI.

The plaintiff suffered in the past, and continues to suffer, substantial physical and mental pain and anguish from mesothelioma. Her illness has caused her to lose enjoyment in life, and in her normal recreational and social activities, as well as in routine daily living activities. She suffers a fear of dying. In addition, she has incurred and will incur substantial medical and pharmaceutical bills and expenses for the diagnosis, treatment and monitoring of her mesothelioma.

XXVII.

Plaintiff alleges that all of the defendants named herein are jointly and solidarily liable for the damages claimed herein.

XXVIII.

Plaintiff requests and is entitled to a trial by jury.

WHEREFORE, the plaintiff prays that the defendants named herein be duly cited and served and made to appear herein and that, after due proceedings are had, there be judgment rendered herein in the plaintiff's favor and against the defendants jointly and *in solido*, in an amount reasonable under the premises herein, together with legal interest, as well as all costs of these proceedings. Plaintiff further prays for all general and equitable relief and a trial by jury.

...

Respectfully submitted,

GERTLER, GERTLER, VINCENT & PLOTKIN, L.L.P.

M. H. GERTLER- 20036
RODNEY P. VINCENT- #13098
LOUIS L. PLOTKIN- #21821
LOUIS L. GERTLER- #23091
MARCIA FINKELSTEIN- #5569
127 Carondelet Street
New Orleans, LA 70130
Ph.: (504) 581-6411
Fax: (504) 581-6568

PLEASE SERVE:

Garlock Sealing Technologies, LLC.
through its agent for service of process,
C. T. Corporation Systems
5615 Corporate Blvd., Suite 400B
Baton Rouge, LA 70808

O-I, Inc. (through long arm service)
through its agent for the service of process,
O-I, Inc.
One Seagate
Toledo, OH 43666

Rapid-American Corp. (through long arm service)
through its agent for the service of process,
Prentice-Hall Corporation System, Inc.
1013 Centre Rd.
Wilmington, Delaware 19805

Uniroyal, Inc. (through long arm service)
through its agent for the service of process,
Uniroyal, Inc.
70 Great Hill Road
Naugatuck, CT 06770

Bayer CropScience, Inc.
through its agent for the service of process,
Corporation Service Company
320 Somerulos Street
Baton Rouge, LA 70802

Anco Insulations, Inc.
through its agent for service of process,
Thomas E. Balhoff
Roedel, Parsons, Koch & Frost
8440 Jefferson Hwy., Ste. 301,
Baton Rouge, LA 70809

Seville, Inc., f/k/a Branton Insulations, Inc.
through its agent for service of process,
H. T. Branton
1101 Edwards Avenue
Harahan, LA 70123

Eagle, Inc.
through its agent for service of process,
Susan B. Kohn
1100 Poydras St.
30th Floor
New Orleans, LA 70163

The McCarty Corporation
through its agent for service of process,
Paul H. Spaht
445 No. Blvd., Ste. 300
Baton Rouge, LA 70802

Reilly-Benton Company, Inc.
through its agent for the service of process,
Thomas L. Cougill
Willingham, Fultz & Cougill
8550 United Plaza Blvd., Ste. 702
Baton Rouge, LA 70809

Taylor-Seidenbach, Inc.
through its agent for the service of process,
Ralph I. Shepard
731 So. Scott Street
New Orleans, LA 70119

Maryland Casualty Company, as insurer of Marquette Insulations, Inc.
through the Secretary of State,
Baton Rouge, LA

Fidelity and Casualty Company of New York, as insurer of Marquette Insulations, Inc.
through the Secretary of State
Baton Rouge, LA

Air Products and Chemicals, Inc.
through its agent for the service of process,
CT Corporation System
5615 Corporate Blvd., Ste. 400B
Baton Rouge, LA 70806

Allied Chemical Corp. (through long arm service)
101 Columbia Rd.
Morristown, New Jersey 07962

Wyeth Holdings Corporation f/k/a American Cyanamid Company
through its agent for the service of process,
The Prentice-Hall Corp. System, Inc.
320 Somerulos Street
Baton Rouge, LA 70802

Hexion Specialty Chemicals, Inc., f/k/a Borden Chemical, Inc.
through its agent for the service of process,
Corporation Service Company
320 Somerulos St.
Baton Rouge, LA

C.F. Industries, Inc. (through long arm service)
100 S. Wacker Dr.
Chicago, IL 60606

Chevron Chemical Corp.
through its agent for the service of process,
The Prentice-Hall Corporation System, Inc.
203 Carondelet St., Ste. 811
New Orleans, LA 70130

E.I. du Pont de Nemours and Company
through its agent for the service of process,
CT Corp. Systems
5615 Corporate Blvd., Suite 400B
Baton Rouge, LA 70808

Entergy Louisiana, L.L.C.
through its agent for the service of process,
T. Michael Twomey
4809 Jefferson Highway
Jefferson, LA 70121

Entergy New Orleans
through its agent for the service of process
Marcus V. Brown
639 Loyola Ave.
New Orleans, LA 70113

Gulf Oil Corporation
through its agent for the service of process,
Prentice Hall Corporation System, Inc.
320 Somerulos St.
Baton Rouge, LA 70802

Murphy Oil USA, Inc.
through its agent for the service of process,
CT Corporation Systems
5615 Corporate Blvd., Suite 400B
Baton Rouge, LA 70808

Occidental Chemical Corporation, f/k/a Hooker Chemicals & Plastics, Corp.
through its agent for the service of process,
CT Corporation Systems
5615 Corporate Blvd., Suite 400B
Baton Rouge, LA 70808

Shell Oil Company
through its agent for the service of process,
CT Corporation Systems
5615 Corporate Blvd., Suite 400B
Baton Rouge, LA 70808

Syngenta Crop Protection, Inc.
through its agent for the service of process,
CT Corporation Systems
5615 Corporate Blvd., Suite 400B
Baton Rouge, LA 70808

Texaco, Inc. (through long arm service)
through its agent for the service of process,
Texaco, Inc.
575 Market St.
San Francisco, CA 94105

Union Carbide Corporation
through its agent for the service of process,
CT Corporation Systems
5615 Corporate Blvd., Suite 400B
Baton Rouge, LA 70808

Monsanto Company
through its agent for the service of process,
Corporation Service Company
320 Somerulos St.
Baton Rouge, LA 70802

El Paso Energy EST Company as Trustee for the EPEC Oil Company Liquidating Trust
(through long arm service)
through its agent for the service of process,
The Corporation Trust Company
Corporation Trust Center
1209 Orange Street
Wilmington, DE 19801

Foster Wheeler L.L.C. (through long arm service)
666 Fifth Ave.
N.Y., N.Y. 10019

BASF Wyandotte Corporation
through its agent for the service of process, CT Corporation System
601 Poydras Street
New Orleans, LA 70130

Ormet Primary Aluminum Corporation
through its agent for the service of process,
The Prentice-Hall Corporation System, Inc.
320 Somerulos St.
Baton Rouge, LA 70802

General Electric Company
through its agent for the service of process,
CT Corporation System
5615 Corporate Blvd., Ste. 400
Baton Rouge, LA 70802

CBS Corporation
through its agent for the service of process,
CT Corporation System
5615 Corporate Blvd., Suite 400B
Baton Rouge, LA 70808

Riley Power, Inc.
through its agent for the service of process,
Corporation Services Company
320 Somerulos St.
Baton Rouge, LA 70802

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. DIVISION " " DOCKET # 4

JEANETTE SCHENCK

VERSUS

GARLOCK SEALING TECHNOLOGIES, LLC., O-I, INC., RAPID-AMERICAN CORP., BAYER CROPSCIENCE, INC., UNIROYAL, INC., ANCO INSULATIONS, INC., SEVILLE, INC., F/K/A BRANTON INSULATIONS, INC., EAGLE, INC., THE McCARTY CORPORATION, REILLY-BENTON COMPANY, INC., TAYLOR-SEIDENBACH, INC., MARYLAND CASUALTY COMPANY AND FIDELITY AND CASUALTY COMPANY OF NEW YORK, INSURERS OF MARQUETTE INSULATIONS, INC., FOSTER WHEELER CORPORATION, AIR PRODUCTS & CHEMICALS, INC., ALLIED CHEMICAL CORPORATION, WYETH HOLDINGS CORPORATION, F/K/A AMERICAN CYANAMID COMPANY, HEXION SPECIALTY CHEMICALS, INC., F/K/A BORDEN CHEMICAL, INC., C.E. INDUSTRIES, INC., CHEVRON CHEMICAL COMPANY, E.I. DU POST DE NEMOURS AND COMPANY, ENTERGY LOUISIANA, L.L.C., ENTERGY NEW ORLEANS, GULF OIL CORPORATION, MURPHY OIL USA, INC., OCCIDENTAL CHEMICAL CORPORATION(SUCCESSOR TO HOOKER CHEMICALS & PLASTICS CORP.); SHELL OIL COMPANY, SYNGENTA CROP PROTECTION, INC. (SUCCESSOR TO NOVARTIS CROP PROTECTION, INC., SUCCESSOR TO CIBA-GEIGY CORP.), TEXACO, INC., UNION CARBIDE CORPORATION, MONSANTO COMPANY; EL PASO ENERGY EST COMPANY AS TRUSTEE FOR THE EPEC OIL COMPANY LIQUIDATING TRUST, AND BASF WYANDOTTE CORPORATION, ORMET PRIMARY ALUMINUM CORPORATION, CBS CORPORATION, GENERAL ELECTRIC COMPANY AND RILEY POWER, INC

FILED: _____

_____
DEPUTY CLERK

JURY ORDER

Let there be a trial by jury upon applicant's depositing in the registry of the court the sum of $____ for each day the court estimates the trial will last, and posting a bond in the amount of $10.00 on or before _____ __, 2008.

New Orleans, Louisiana, this __ day of _____, 2008.

_____

EXHIBIT 2

Review Granted
Previously published at: 88 Cal.App.4th 876
(Cal.Const. art. 6, s 12; Cal. Rules of
Court, Rules 8.500, 8.1105 and 8.1110,
8.1115, 8.1120 and 8.1125)
Court of Appeal, Second
District, Division 3, California.

HENKEL CORPORATION, Plaintiff and Appellant,
v.
HARTFORD ACCIDENT AND INDEMNITY
COMPANY, et al., Defendants and Respondents.

No. B134742. | April 30, 2001.
| Review Granted July 18, 2001.

Successor corporation brought action against predecessor corporation's insurers, seeking defense and indemnity benefits in mass tort litigation brought against it for bodily injuries arising from predecessor's chemical products business. Insurers added, as a necessary party, the company that owned predecessor's policies. The Superior Court, Los Angeles County, No. BC155209, S. James Otero, J., rendered summary judgment against successor corporation and it appealed. The Court of Appeal, Croskey, J., held that successor corporation was entitled to defense and indemnity as to those claims that occurred prior to the business transfer, even though predecessor's insurance policies were not assigned to it.

Reversed and remanded with directions.

Attorneys and Law Firms

***343** Bergman, Wedner & Dacey, Inc., Gregory M. Bergman and Robert M. Mason III, Los Angeles, for Plaintiff and Appellant.

Kelley, Drye & Warren, Cynthia S. Papsdorf, Los Angeles, William C. Heck and Sarah L. Reid, New York, NY, for Defendant and Respondent Rhone–Poulenc, Inc.

Hogan & Hartson, Robert E. Postawko and Patrick F. Hofer, Wash. Dist. of Columbia, for Defendant and Respondent Hartford Accident and Indemnity Company.

Berman & Aiwasian and Alan S. Berman, Los Angeles, for Defendant and Respondent Century Indemnity Company.

Mendes & Mount and Charles Carluccio, Los Angeles, for Defendant and Respondent Lloyd's of London.

Opinion

CROSKEY, J.

This case arises out of the Lockheed mass tort litigation in which employees of Lockheed sought recovery for bodily injuries caused by exposure to toxic chemical products during the course of their employment (hereafter, the Lockheed litigation). Joined as defendants in this litigation ***344** were a number of companies which had supplied such chemical products to Lockheed. In the matter before us, a successor corporation which had been sued for such bodily injuries allegedly arising from the predecessor corporation's chemical products business, seeks defense and indemnity benefits under the predecessor's liability insurance policies. Under circumstances where the predecessor effectively ceased to exist, the successor corporation had acquired all of the assets of the predecessor and had expressly assumed all of its liabilities; however, the predecessor's insurance policies had not been assigned to the successor. [1]

We are presented with the question as to whether the successor corporation is nonetheless entitled to the policy benefits of defense and indemnity as to those claims arising from bodily injuries that allegedly occurred *prior* to the transfer of the business to the successor. As we explain, under those circumstances, the successor is entitled, *by operation of law,* to claim such policy benefits. To hold otherwise would provide an unfair windfall to the insurers that had expressly underwritten these particular risks and had received premiums therefore; permitting the successor to receive the promised policy benefits would not increase the risk to any insurer and would be consistent with the objectively reasonable expectations of all parties.

The plaintiff and appellant, Henkel Corporation (Henkel), is the successor described above and it has appealed from a summary judgment on its complaint for declaratory relief granted in favor of the defendants and respondents, Hartford Accident and Indemnity Company (Hartford) and Century Indemnity Company (Century; collectively, the Insurers). The Insurers had provided, through issuance of multiple policies, liability insurance to Henkel's predecessor during the period 1959 to 1976 when the claimants in the Lockheed litigation claimed to have suffered bodily injury from exposure to the predecessor's chemical products. By its

action, Henkel sought to recoup some portion of the sums it had expended to defend and settle the Lockheed litigation. The Insurers had denied coverage and refused a defense on the ground that Henkel was not an insured under any of the policies and that, in fact, a different corporation had succeeded to the assets of the predecessor not acquired by Henkel and that corporation was the only party entitled to assert a claim for policy benefits. That other corporation was the defendant and respondent Rhone–Poulenc, Inc. (Rhone), which had also been named in Henkel's declaratory relief complaint. The trial court agreed with the claim that Rhone was the party that had succeeded to the ownership of the Insurers' policies; therefore, Rhone's motion for summary judgment on Henkel's complaint was also granted and is before us in this appeal.

Because we conclude that *ownership* of the policies is not relevant to Henkel's right to receive *policy benefits* for claims arising, and as to which a basis for coverage under the Insurers' policies had existed, *prior* to the transfer of the predecessor's business, we will reverse the summary judgments granted in favor of the Insurers and Rhone. That does not mean, however, that Henkel is thereby entitled to succeed on its recoupment claim. Contrary to the views of the parties and the trial court, we perceive a number of triable issues of material fact remaining to be resolved. All that we decide now is the predicate ***345** legal issue that, *under the circumstances presented in this case,* coverage must follow liability. The right to call upon policies of insurance covering claims which have accrued prior to the transfer of the predecessor's business will devolve, absent an express agreement to the contrary, *by operation of law* upon the successor which has assumed the liabilities of the predecessor. In reaching this result, we distinguish or reject the two California appellate decisions upon which the Insurers and Rhone rely.

FACTUAL AND PROCEDURAL BACKGROUND [2]

For a number of years prior to 1977, Amchem Products, Inc., a Pennsylvania Corporation (Amchem No. 1), [3] was engaged in the manufacture and sale of chemical products. It engaged in two separate distinct lines of business: (1) metal working chemical products and (2) agricultural chemical products. During a substantial portion of the period 1959 through 1976, Amchem No. 1 carried liability insurance with the Insurers. [4]

In 1977, Amchem No. 1 was merged into UCAR Corporation, a wholly owned subsidiary of Union Carbide Corporation which had purchased all of the stock of Amchem No. 1. UCAR Corporation then changed its name to Amchem Products, Inc. (and remained a Pennsylvania Corporation). For convenience, we continue to refer to this corporate entity as Amchem No. 1 as, for our purposes, it is still the same corporation.

This all changed, effective April 1, 1979, when Amchem No. 1 decided to reorganize its business and caused a new corporation to be formed under Delaware law, also known as Amchem Products, Inc. This corporation was a wholly owned subsidiary of Amchem No. 1 and is hereafter referred to as Amchem No. 2. [5] Amchem No. 1 caused all of the assets, liabilities and goodwill utilized in its metal working chemical products business to be transferred to Amchem No. 2, while Amchem No. 1 retained all of the assets and liabilities which existed with respect to the agricultural chemical products business. While Amchem No. 2 assumed all of the liabilities relating to the metal working chemical products business which existed as of April 1, 1979, the several policies of insurance which had theretofore been issued to Amchem No. 1 by the Insurers were not assigned to Amchem No. 2. [6] The reason for this, according ***346** to the declaration of counsel for Amchem No. 1, who handled this corporate reorganization, was that the insurance policies had been issued to Amchem No. 1 and were "not assets related to the metal-working chemicals business." [7]

Although counsel for the Insurers and Rhone assert that Amchem No. 2 expressly assumed "all liabilities" of Amchem No. 1 "utilized in its metal working chemical activities," the only evidence of such assumption cited to us is the resolution of Amchem No. 2's board of directors, dated March 30, 1979. That resolution provided: "the transfer, conveyance and assignment effective April 1, 1979 from [Amchem No. 1] to [Amchem No. 2] of all of the right title and interest of [Amchem No. 1] in and to the domestic assets, liabilities and goodwill utilized in its metalworking chemical activities ... be and the same is hereby accepted...." The generality of such language causes the transaction's documentation to be ambiguous as to whether claims for bodily injury or property damage, arising from Amchem No. 1's metal working chemical products business, which existed as of April 1, 1979, *but had not then been asserted,* could be considered claims for which insurance coverage existed and thus part of the "assets" transferred to Amchem No. 2; or were they simply liabilities for which Amchem No. 2 had accepted

sole responsibility and for which it had implicitly waived any claim to coverage under the policies issued by the Insurers. [8] Such general language does not expressly preclude coverage for unknown and unasserted claims which existed as of the date of transfer. If there is additional undisputed evidence of the parties' intent on this issue it is not disclosed by this record.

Ultimately, through various corporate mergers and transfers, Amchem No. 2 became a wholly owned subsidiary of Henkel and, in December of 1988, it was merged into Henkel. Similarly, Amchem No. 1 was ultimately sold to Rhone and, effective December 31, 1992, was merged into it. Thus, this record presents an undisputed factual picture of Henkel succeeding to all of the rights and obligations of Amchem No. 2 and Rhone to all of the rights and obligations of Amchem No. 1. [9]

In approximately 1989, the first of the civil actions for wrongful death and personal injury constituting the Lockheed litigation was filed. Henkel and "Amchem Products, Inc." were ultimately named as defendants in this litigation. These actions were filed on behalf of more than 600 current or former employees of the Lockheed Corporation (Lockheed), or one of its subsidiaries or divisions. In these complaints, ***347** it was alleged that the plaintiffs (or their decedents) suffered injury (or death) as the result of working with toxic chemical substances in the course of their employment by Lockheed. These several civil actions constituting the Lockheed litigation were ultimately coordinated in the Los Angeles Superior Court as Judicial Council Coordination Proceeding No. 2967 (JCCP No. 2967).

The plaintiffs in the Lockheed litigation alleged claims asserting manufacturing and design defects, failure to warn and negligence and claimed that their exposure to such hazardous chemicals (for which they received neither warning nor protection) took place over a period of years commencing in the "1950s and *continuously* thereafter." Among the toxic chemicals to which the plaintiffs claimed they were exposed were products manufactured by Amchem No. 1 prior to April 1, 1979 in connection with its metal working chemical product business and by Amchem No. 2 after that date. After its acquisition of the stock of Amchem No. 2, Henkel continued in this business. [10]

Following service upon it of the complaints in the Lockheed litigation, Henkel tendered them to the Insurers and they each denied coverage and refused a defense. [11] The Insurers took the position that Henkel was not entitled to coverage as it was not an insured party nor was it entitled, by virtue of its acquisition of Amchem No. 2, to claim such coverage. Henkel therefore undertook at its own expense the defense of the litigation. In the summer of 1995, it commenced settlement discussions with the Lockheed plaintiffs. A demand was made by those plaintiffs for $11 million. Henkel notified the Insurers of the negotiations and of this offer; it requested that the Insurers contribute their policy limits in order to effect a settlement. They refused to make any contribution to a settlement. After several months of further negotiation with the Lockheed plaintiffs, Henkel agreed to settle with them for the sum of $7,650,000 which it paid in exchange for a release and a dismissal of all of the actions with prejudice. Agreement on the settlement terms was reached on November 28, 1995 and a dismissal of the entire action with prejudice was filed and entered on July 19, 1996 "as to defendants Henkel Corporation *and Amchem Products, Inc.*"

Henkel then sought to recoup from the Insurers their allocable portion [12] of the settlement and defense costs. The Insurers refused to negotiate any resolution of Henkel's recoupment claims. As a result, Henkel filed this action for declaratory relief on August 7, 1996. As already noted, the Insurers took the position that ***348** Henkel was not an insured party (nor an assignee or successor to one) and therefore they owed no obligation to provide either defense or indemnity for any claims asserted against Henkel or an entity identified as "Amchem Products, Inc." It was and is the Insurers' position that the only party entitled to claim coverage under the liability policies issued by them in the name of "Amchem Products, Inc." during the 1959–1976 period is Rhone. It is that corporation, they contend, which is the proper successor to Amchem No. 1 and is thus the actual insured party. In order to fully litigate that contention, the Insurers caused Rhone to be added as a necessary party to this action on October 14, 1997.

Thereafter, Rhone filed a cross-complaint against Henkel for declaratory relief claiming it was the corporate successor of Amchem No. 1 and that Henkel was not entitled to coverage under any of the Insurers' policies. It was and is Rhone's position that those policies were *not* among the assets "relating to the metal working chemical products" business which had been assigned to Amchem No. 2 on April 1, 1979. Such policies instead were retained by Amchem No. 1 and thus it was the only proper insured who could assert a claim thereunder. Rhone argues that, since it is the corporate successor of Amchem No. 1, it is entitled to a judgment

declaring that Henkel has no viable claim for coverage under the policies issued by the Insurers during the 1959–1976 time period.

In light of such argument, it is necessary at this point to digress to a critical procedural event which took place during the underlying Lockheed litigation. In early 1992, the plaintiffs in that litigation had served on Rhone a summons and complaint which named "Amchem Products, Inc." as a defendant. Rhone promptly moved to quash such service on several grounds. One of those grounds was that the named defendant, Amchem Products, Inc., "was in no way a part of [Rhone] or any [Rhone] entity." Rhone argued that since neither Rhone nor any Rhone entity had been listed on the summons, service on Rhone should be quashed.

In support of this motion, an in-house counsel employed by Rhone, Barbara A. Moore, submitted a declaration under penalty of perjury in which she stated that she acted as litigation counsel for Rhone and all of that companies' subsidiaries. She further stated that she had "personal knowledge of all of the facts" set out in her declaration. Ms. Moore then stated: "To the best of my information and belief, *Amchem Products, Inc. no longer exists. If it does exist, it certainly is not in any way a part of [Rhone] or any [Rhone] entity. It may be a part of a completely unrelated corporation named Henkel Corporation* which is already a defendant in this litigation." (Italics added.)

Before its motion to quash could be ruled upon, Rhone negotiated directly with the Lockheed plaintiffs for a stipulation that its motion could be granted. That stipulation, to which Rhone was a party, provided in part: "Plaintiffs have conducted further investigation, since April 13, [1992] of [Rhone's] potential involvement in the Lockheed Consolidated Cases, and have been presented with documents establishing that Henkel Corporation is answerable for the liabilities of Amchem Products, Inc. alleged in the Lockheed Consolidated Cases. Accordingly, plaintiffs have no interest in asserting their claims against [Rhone]." In sum, it would appear that Rhone was dropped from the Lockheed litigation on the ground that the entity responsible for the production and sale of the alleged toxic chemicals *no longer existed as it had been merged into Henkel.* This fact is relevant to our later ***349** discussion of Henkel's claim that it is entitled to coverage under the Insurers' policies for the claims arising from the pretransfer injuries to the Lockheed plaintiffs and that Rhone is now judicially estopped to contest that proposition.

In September 1998, Henkel filed a motion for summary judgment claiming that as the corporate successor of the entity that had manufactured the toxic chemicals that were the subject of the Lockheed litigation, it was entitled to the benefit of the liability policies that had been purchased to provide liability coverage for such manufacturing activity. Since Henkel had defended and settled all of those claims, it asserted that it was entitled to obtain recoupment from the Insurers. In October 1998, the Insurers and Rhone filed cross-motions for summary judgment.

On January 15, 1999, these competing motions came before the trial court. It concluded that there were no disputed issues of material fact and held that the Insurers and Rhone were entitled to judgment. It rejected Henkel's arguments that, as the successor to the metal-working product business attacked in the Lockheed litigation, it was entitled to the benefit of liability insurance issued to cover such business. [13] The court also rejected Henkel's "defacto merger" contention. It did so, as stated by the trial court, because that doctrine did not apply in this case since Amchem No. 1, the company that had sold off the offending business, "continued to exist" and, in any event, a claimant is free to pursue the successor company, Amchem No, 2. In the trial court's view, the continued existence of Amchem No. 1 and the Lockheed plaintiffs naming of Henkel and "Amchem Products, Inc." as defendants was sufficient to avoid application of the "defacto merger" doctrine. Finally, the court also rejected Henkel's fall back position that if no insurance coverage was available then Rhone was liable to equally share Henkel's settlement and defense costs in the Lockheed litigation.

Judgment was entered against Henkel on July 13, 1999 and this timely appeal followed.

ISSUE PRESENTED

The fundamental question before us is whether Henkel, under the facts presented in this case, has standing to claim the benefit of coverage under the liability policies issued by the Insurers to Amchem No. 1 during the time period 1959–1976 so as to recoup the settlement and defense costs which it incurred to dispose of the claims that arose from the business activities of Amchem No. 1 during that period. To resolve that question we must examine the proper application of the principle that coverage should follow liability.

DISCUSSION

1. *Standard of Review*

The matter comes to us after the trial court granted motions for summary judgment. Such motions are to expedite litigation and eliminate needless trials. (*Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 323, 39 Cal.Rptr.2d 296.) They are ***350** granted only "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); *KOVR–TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1027–1028, 37 Cal.Rptr.2d 431.) A defendant meets its burden upon such a motion if it proves "one or more elements of the cause of action, ... cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (*o*)(2).) Once a defendant or cross-defendant has met that burden, the "burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists...." (*Ibid.; Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 583, 37 Cal.Rptr.2d 653.) If a defendant does not meet its burden then the motion must be denied.

On appeal, we exercise "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court...." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222, 38 Cal.Rptr.2d 35; *Union Bank v. Superior Court, supra,* 31 Cal.App.4th at p. 579, 37 Cal.Rptr.2d 653.) "[W]e construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it. [Citation.]" (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19, 17 Cal.Rptr.2d 356; accord, *Lorenzen–Hughes v. MacElhenny, Levy & Co.* (1994) 24 Cal.App.4th 1684, 1686–1687, 30 Cal.Rptr.2d 210.)

2. *The Trigger of Coverage Under An Occurrence Liability Policy*

Critical to our analysis is an understanding of the basic principles of insurance law governing a determination of whether a particular third party claim may be covered by a particular liability policy. What is necessary to trigger coverage under a specific policy?

The term "trigger of coverage" is not found in a general liability policy. Rather, it is a term of convenience which is used to describe what operative event must happen *during the policy period* to activate the insurer's defense and indemnity obligations. As the Supreme Court has put it, "[t]he issue is largely one of timing—what must take place *within the policy's effective dates* for the potential of coverage to be 'triggered'?" (*Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 655, fn. 2, 42 Cal.Rptr.2d 324, 913 P.2d 878; emphasis in original (*Montrose*).)

[1] [2] [3] In an "occurrence-based" liability policy, such as those issued by the Insurers in this matter, coverage is established *at the time the complaining party was actually damaged.* (*Id.* at pp. 669–670, 42 Cal.Rptr.2d 324, 913 P.2d 878.) To put it another way, coverage under a liability policy, promising to indemnify the insured for all sums it may become legally obligated to pay as damages because of bodily injury or property damage, is triggered when the bodily injury or property damage occurs, irrespective of when the insured's allegedly wrongful conduct may have taken place. If that injury or damage occurs during the policy period, then coverage under the policy is triggered provided the accident or condition is at least a potentially covered risk. (*Id.* at p. 675, 42 Cal.Rptr.2d 324, 913 P.2d 878.)

[4] Thus, if the insured's wrongful conduct—in this case, the manufacture and sale of toxic chemicals without proper warnings—occurs during the policy period, but injury or damage to a claimant does not occur until after the policy has expired, there can be no coverage because the operative ***351** event necessary to trigger that coverage did not occur during the policy period. (*State Farm Mut. Auto. Ins. Co. v. Longden* (1987) 197 Cal.App.3d 226, 232, 242 Cal.Rptr. 726 [the insured's allegedly negligent failure to maintain the brakes on an automobile caused a brake failure and resulting accident *after* the policy expired; no coverage available as required coverage trigger (i.e., the injuries caused by the accident) did not occur during policy period]; *Schrillo Co. v. Hartford Accident & Indemnity Co.* (1986) 181 Cal.App.3d 766, 773, 226 Cal.Rptr. 717 [a product liability policy in effect when defective product was manufactured did not cover claim for injuries suffered several years later]; *Maples v. Aetna Cas. & Surety Co.* (1978) 83 Cal.App.3d 641, 647, 148 Cal.Rptr. 80 [a gas boiler installed by contractor caused fire damage to home six years later; the owner's claim for damages was not covered under contractor's liability policy in effect at time of allegedly negligent installation].)

[5] In continuous injury cases, such as we appear to have here, where the insured's actions result in claims of continuing or progressively deteriorating bodily injury or property damage, a similar rule is applied. Such cases usually implicate, as they do here, multiple and successive policies and policy periods. In such cases, "bodily injury and property damage which is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies in effect during those periods." (*Montrose, supra,* 10 Cal.4th at p. 689, 42 Cal.Rptr.2d 324, 913 P.2d 878.) "In other words, if specified harm is caused by an included occurrence and results, at least in part, within the policy period, it perdures to all points of time at which some such harm results thereafter." *(Aerojet–General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 57, 70 Cal.Rptr.2d 118, 948 P.2d 909, fn. omitted, (*Aerojet*).)

[6] [7] Thus, where damages continue throughout successive policy periods, *all* insurance policies in effect during those periods, are triggered. Coverage is not limited to the policy in effect at the time of the precipitating event or condition. Nor is coverage cut off once the injury or damage begins or becomes manifest. (*Montrose, supra,* 10 Cal.4th at pp. 677, fn. 17, 685–689, 42 Cal.Rptr.2d 324, 913 P.2d 878.) Thus, although the *trigger* of the duty to defend and indemnify is limited to the policy period, the *extent* of that duty is not. As a result, any "triggered" policy is liable *up to the policy limit,* for *all* injuries or damages caused by a covered occurrence, not just the injury or damage which took place during the specific policy period. (*Aerojet, supra,* 17 Cal.4th at pp. 56–57, 70 Cal.Rptr.2d 118, 948 P.2d 909.)

When we apply these settled legal principles to this case, it would appear that a basis for coverage under the several policies issued by the Insurers during the 1959–1976 time period, for claims arising from injuries to the Lockheed plaintiffs occurring during such policy periods, is established by the occurrence of such injuries. As a result, the Insurers owe a duty of defense and indemnification under those policies to *somebody* upon the assertion of such claims. [14] This is a fundamental point ***352** which is critical to the proper resolution of this case. According to the allegations of the Lockheed plaintiffs, they sustained bodily injuries during the 1959–1976 period due to exposure to the chemical products of Amchem No. 1. Whether or not *asserted* during the policy periods (i.e., 1959–1976), the claims of the Lockheed plaintiffs constituted claims for which the Insurers had been paid an agreed premium to defend and indemnify. Henkel, therefore, is seeking nothing more than the enforcement of an obligation already undertaken by the Insurers. Nothing Henkel seeks to do will increase any risk to the Insurers which they have not already agreed to assume and for which they were paid a premium.

The only question before us then is whether Henkel is entitled to assert that claim. We now turn to that issue.

3. *Henkel Is Entitled To Coverage Under The Insurers' Policies For Claims Existing As Of April 1, 1979, Whether Or Not Asserted*

a. *There Was No Expressed Intent To Deny Coverage Under The Policies For Unasserted Pre–Sale Claims*

[8] [9] On April 1, 1979, Amchem No. 2 succeeded to all of the assets and liabilities of Amchem No. 1 which related to the metal working chemical products business. Did this include, in the absence of a contrary agreement, the right to coverage under existing applicable policies for those claims for injuries which existed as of that date, even though such claims had not yet been asserted? We believe the answer to that question is yes. It is settled that the right to recover under a policy *after a loss has occurred* is an asset assignable separate from the policy itself. (*Greco v. Oregon Mut. Fire Ins. Co.* (1961) 191 Cal.App.2d 674, 682, 12 Cal.Rptr. 802.) Thus, it can be assigned without insurer consent, the "no assignment" clause notwithstanding. (*Ibid.*) Such an assignment in no way interferes with the insurer's right to chose its own indemnitee but only involves the payment of a claim founded upon a loss which has already occurred and against which the policy indemnifies. [15] If it was the intent of Amchem No. 1 to retain the exclusive right to seek coverage under the Insurers' policies for any claims arising from the conduct of its metal working chemical products business prior to April 1, 1979, it is not directly or expressly reflected in the record presented to us.

Moreover, if Amchem No. 1 had any such intent on April 1, 1979, it is not only unsupported by any of the documentation of its divestiture of the metal working chemical products business to Amchem No. 2, it is also strongly contradicted by the position Rhone took when it was served with a summons and complaint in the Lockheed litigation. The documents that it filed to quash that service, as well as the stipulation it entered into with the Lockheed plaintiffs, makes it clear that as far as any business activity of Amchem No. 1 upon which the Lockheed plaintiffs might be basing their injury claims was concerned, the only surviving responsible entity

was Amchem No. 2. If it was Amchem No. 1's position that it was not a proper party to the Lockheed litigation, then that assertion is very probative of its intent and understanding of the terms of its divestiture of the business to Amchem No. 2 in 1979. Obviously, if it is the case that after April 1, 1979, Amchem No. 1 was to have no responsibility for any claims arising from the metal working ***353** chemical products business, and could not properly be sued thereon, then it had no need for reliance on the insurance coverage available for such claims. Further, if the Insurers, having been paid a premium to cover the very claims asserted against Henkel, owe coverage of those claims to somebody, then does it not follow that Henkel is the only party rightfully entitled to claim such coverage? [16]

b. *Henkel, As The Successor Corporation Liable On The Claims Of The Lockheed Plaintiffs, Is Entitled To Coverage Under The Insurer's Policies By Operation of Law*

[10] Under the facts of this case, where Amchem No. 2 acquired all of the assets and liabilities of Amchem No. 1 as to the metal working chemical products business which is the source of the Lockheed litigation, the *benefits due* under the Insurers' policies, including the right to a defense of the claims asserted by the Lockheed plaintiffs, passed to Amchem No. 2 by *operation of law.*

This is so because as of April 1, 1979, Amchem No. 2 expressly agreed to accept all of the "assets, liabilities and goodwill" utilized by Amchem No. 1 in its metal working chemical business and, based on the record before us, we cannot conclude that its right to call upon insurance available to cover those liabilities was excluded from the purchase and sale transaction. It appears to us that, absent a contrary agreement as to the availability of such liability insurance, the principles articulated in *Northern Ins. Co. of New York v. Allied Mut. Ins. Co.* (9th Cir.1992) 955 F.2d 1353 (*Northern*) apply.

In *Northern,* the court held, in a factual context very similar to that before us, that the benefits due under the policy transferred by operation of law. In that case, Brown Forman bought out California Cooler under an agreement where the predecessor company would indemnify the successor company for any liabilities arising from presale activities. [17] A child born before the sale filed suit after the sale alleging fetal alcohol syndrome attributable to the California Coolers his mother consumed during her pregnancy. This suit ended in a voluntary dismissal, but the issue remained as to whether the predecessor's insurer had any liability to contribute to defense costs. As in our case, the insurer's policy had *not* been assigned to the successor corporation; indeed, it had been *expressly excluded* from the list of assets transferred to Brown–Forman.

Nonetheless, the *Northern* court concluded that Brown–Forman was entitled to the coverage benefits due under the policy. It held that neither the sales agreement between the predecessor and successor corporations, nor the intent of these parties, nor the terms of the predecessor corporation's contract with its insurance company ***354** ultimately controlled. [18] Instead, the benefits due under the policy passed to Brown–Foreman by operation of law. Since the doctrine of "successor liability" transferred the liability from the predecessor to the successor corporation, the right to indemnity followed as well. "[T]he right to indemnity arising from [the predecessor corporation's insurance] policy transferred together with the potential liability. *This right to indemnity followed the liability rather than the policy itself. As a result, even though the parties did not assign [the predecessor corporation's insurer's] policy in the agreement, the right to indemnity under the policy transferred to [the successor corporation] by operation of law.*" (*Id.* at p. 1357; italics added.)

The court also concluded that these policy benefits extended to a defense. The rationale for both conclusions rested upon the obvious fact that the insurer is not prejudiced by such a result when the loss occurred before sale or transfer to the successor. In that circumstance, "the characteristics of the successor are of little importance: regardless of any transfer the insurer still covers only the risk it evaluated when it wrote the policy.... [¶] .... [¶] The nature of the risk, rather than the particular characteristics of the defendant, will have the greater effect on defense costs. The extent and character of the defense will turn on the nature of the product itself and the attributes of the firm that manufactured the product. Aspects of the successor firm could affect the defense, but the shape of the defense will be determined largely by the characteristics of the risk originally insured. Admittedly, defense costs could balloon if the successor firm failed to cooperate in the defense. Inasmuch as the successor firm was not a party to the original policy, the risk of noncooperation arguably increases. Yet, the insurer is protected against this risk because it is freed of its defense obligation if the successor firm does not fulfill its duty to aid in the defense." (*Id.* at p. 1358.)

We believe that *Northern* articulates the correct analysis in those successor corporation cases where the loss has already occurred but a claim is not asserted until after the transfer to the successor. Its reasoning has been followed by a number of courts. For example, in *B.S.B. Diversified Co. Inc. v. American Motorists Ins.* (W.D.Wash.1996) 947 F.Supp. 1476, the court followed *Northern* and concluded that coverage followed liability by operation of law. In a case much like the one before us, the successor corporation in *B.S.B.* had assumed the predecessor's assets and liabilities by contract. The *B.S.B.* court held that the underlying principle that insurance follows liability is equally valid even though the successor's liability burden was imposed by contract rather than under successor product liability rules. (*Id.* at p. 1481.) This is so because an insurer's risks are not increased when its duty to defend and indemnity relates to events occurring prior to the transfer. (*Ibid.*) "Coverage will depend on the terms ***355** of each policy, but the damage to the property is the same regardless." (*Ibid.*; see also *Total Waste Management v. Commercial Union Ins. Co.* (D.N.H.1994) 857 F.Supp. 140, 152 ["An insurer's risk does not increase where the loss or liability arose prior to the transfer."].)

The only two California cases which have considered this issue, however, appear at first glance to reach a different conclusion than *Northern.* Unsurprisingly, these two cases are the ones which the Insurers and Rhone urge upon us. Neither are persuasive.

In *Quemetco Inc. v. Pacific Automobile Ins. Co.* (1994) 24 Cal.App.4th 494, 29 Cal.Rptr.2d 627 (*Quemetco*), the successor corporation purchased all of the assets of the predecessor in 1970. The predecessor had in 1957, and again in 1960–1964, shipped sulfuric acid waste and battery electrolytes to the Stringfellow acid pits in Riverside County. No deposits were ever made by the successor. The predecessor's insurance policies were not assigned to the successor; the predecessor distributed all of its assets and wound up and dissolved in January 1971. The successor was then sued in 1982 in both federal and state court actions. The federal case was filed under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and sought damages for environmental exposure as well as cleanup costs. The state case was an action by 5,000 individual plaintiffs for personal injury and property damages allegedly caused by the hazardous waste material deposited at the Stringfellow site. [19]

Relying on the *Northern* case, the successor filed an action for declaratory relief to determine its entitlement to coverage under the predecessor's insurance policies. The *Quemetco* court, however, refused to follow *Northern* on the ground that the CERCLA case before it did not present similar circumstances. Unlike the facts in *Northern,* and those in the case before us, *Quemetco* involved a claim which arose long after the sale when federal environmental laws were enacted requiring the clean up of toxic waste sites. "Thus, unlike the situation in *Northern,* no liability passed as a matter of law [to the successor] at the time of the asset sale *as no such liability existed at that time.*" (*Quemetco, supra,* 24 Cal.App.4th 494, 501, 29 Cal.Rptr.2d 627; italics added.) The court also rejected, for the same reason, the proposition that there could have been any assignment of the proceeds of the policies "*as there was no loss or injury* or accrued right to collect the proceeds in existence. The cleanup damages were not assessed until 1987, long after the 1970 sale." (*Id.* at pp. 502–503, 29 Cal.Rptr.2d 627.) Finally, the *Quemetco* court also noted that the predecessor corporation, although dissolved, could still be sued and was entitled to a defense from its insurers. (*Id.* at p. 503, 29 Cal.Rptr.2d 627.) Thus, any recognition of policy benefits in favor of the successor *would* have placed an increased risk and burden on the insurers requiring them to provide a defense for two parties, only one of which they had agreed to insure. (*Id.*) This, of course, is not a problem in this case, as Rhone's actions to end its participation in the Lockheed litigation clearly demonstrated. It obtained a dismissal from that action upon the representation (and ultimately by a stipulation) that it had no liability whatsoever for the claims asserted against Henkel. Thus, the *Quemetco* decision is factually distinguishable and cannot justify our ***356** rejection of the analysis and reasoning of *Northern.* [20]

The other case relied by the Insurers and Rhone is *General Accident Ins. Co. v. Superior Court, supra,* 55 Cal.App.4th 1444, 64 Cal.Rptr.2d 781 (*General Accident*). In that case, the successor took over the predecessor in about 1967 under circumstances which resulted in a later judicial determination, under the "successor liability" doctrine (*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 31, 136 Cal.Rptr. 574, 560 P.2d 3), that the successor corporation was liable for the tortious claims arising from the predecessor's business which involved the manufacture and sale of asbestos products. (*General Accident, supra,* 55 Cal.App.4th at pp. 1446–1447, 64 Cal.Rptr.2d 781.) The successor sued the predecessor's insurers for a declaratory judgment that the predecessor's insurance policies had been transferred to the successor by

operation of law. (*Id.* at p. 1445, 64 Cal.Rptr.2d 781.) The successor relied upon the *Northern* decision. (*Id.* at p. 1449, 64 Cal.Rptr.2d 781.)

The *General Accident* court rejected the reasoning of *Northern* and refused to follow it. (*General Accident, supra,* 55 Cal.App.4th at p. 1449, 64 Cal.Rptr.2d 781.) Specifically, it refused to conclude that insurance coverage would transfer by operation of law simply based on the finding of successor liability for product liability torts. "An insured-insurer relationship is a matter of contract. Successor liability is a matter of tort duty and liability. It is one thing to deem the successor corporation liable for the predecessor's torts; it is ***357** quite another to deem the successor corporation a party to insurance contracts it never signed, and for which it never paid a premium, and to deem the insurer to be in a contractual relationship with a stranger." (*Id.* at p. 1451, 64 Cal.Rptr.2d 781.) The court concluded that any transfer of a policy by operation of law was "a violation of the basic principles of contract and is also bad public policy." (*Id.* at p. 1454, 64 Cal.Rptr.2d 781.)[21] With all due respect to our colleagues in the First District, we must question just what conclusion we are to draw from the *General Accident* decision. If it stands for the proposition that the imposition of successor tort liability cannot by itself justify the transfer of an interest in a policy of insurance by, in effect, adding (or substituting) a new insured to which the insurer has not consented, and thereby creating additional unbargained for and uncompensated risks, then we have no problem with it. Such a conclusion would clearly violate fundamental contract law. If, however, as the Insurers and Rhone argue, *General Accident* stands for the proposition that the right to obtain *policy benefits* for the defense and indemnification of claimed losses which had occurred during the policy period *prior to the sale or transfer to a successor corporation,* then we must reject it. *Northern* did not purport to sanction what *General Accident* found so improper. It did *not* sanction the transfer of an insurance contract so as to create new unbargained for burdens or to impose upon an unwilling insurer a new insured whose activities ***358** it had not agreed to underwrite. Rather, *Northern* simply affirmed a successor's right to call upon the *policy benefits* already due to the predecessor for unasserted claims which arose *as the result of the occurrence of injury or damage during the policy period.* In short, and in legal effect, it simply held that the right to claim such benefits was a right of the predecessor corporation to which the successor corporation succeeded *by operation of law.* Thus, the *General Accident* decision provides no relevant reason for rejecting the analysis made by the *Northern* court.

c. *The "No Assignment" Clause In The Insurers' Policies Does Not Defeat Henkel's Coverage Claim*

[11] As we have already emphasized, the transfer of policy benefits which have effectively accrued impose no new or additional burden on an insurer. There is no increase in risk when an insurer's duty to defend and indemnify relates to injury or damage which was suffered by the claimant *prior* to the sale or transfer to the successor corporation. Thus, there is no reason to be concerned with the "no assignment" clause when the claims for which coverage is demanded arose prior to the sale or transfer.

As the *Northern* court put it, "Insurers take account of the nature of the insured when issuing a policy. Risk characteristics of the insured determine whether the insurer will provide coverage, and at what rate. An assignment could alter drastically the insurer's exposure depending on the nature of the new insured. 'No assignment' clauses protect against any such unforeseen increase in risk. When the loss occurs before the transfer, however, the characteristics of the successor are of little importance: regardless of any transfer the insurer still covers only the risk it evaluated when it wrote the policy." (*Northern, supra,* 955 F.2d at p. 1358; see also, *Ocean Accident & Guar. Corp. v. Southwestern Bell Tel. Co.* (8th Cir.1939) 100 F.2d 441, 444–445, *cert. denied,* 306 U.S. 658, 59 S.Ct. 775, 83 L.Ed. 1056.)

Other than the overly broad and misdirected characterization in *General Accident,* we have found no California authority suggesting otherwise. However, a number of other courts *have* endorsed the basic principle articulated by *Northern.* (See e.g., *Imperial Enterprises, Inc. v. Fireman's Fund Ins. Co.* (5th Cir.1976) 535 F.2d 287, 293 ["the no-assignment clause should not be applied ritualistically and mechanically to forfeit coverage in these circumstances"]; *National American Insurance Co. v. Jamison Agency, Inc.* (8th Cir.1974) 501 F.2d 1125, 1128 [the purpose of a "no assignment" clause is " 'to prevent an increase of risk and hazard of loss by change of ownership without the knowledge of the insurer.' [Citation.]"]; *Brunswick Corp. v. St. Paul Fire & Marine Ins. Co.* (E.D.Pa.1981) 509 F.Supp. 750, 753 ["The reason for refusing to apply a 'no-assignment' clause to avoid an involuntary assignment is pragmatic: 'such transfers do not entail any increase in the risk or hazard assumed by an insurer'."]; *Paxton & Vierling Steel Co. v. Great American Insurance Co.* (D.Neb.1980) 497 F.Supp. 573, 580 [same]; *Gopher Oil Co. v. American Hardware Mut. Ins. Co.*

(Minn.Ct.App.1999) 588 N.W.2d 756, 763 ["The purpose of a non-assignment clause is to protect the insurer from an increase to the risk it has agreed to insure. [Citations.] But when events giving rise to an insurer's liability have already occurred, the insurer's risk is not increased by a change in the insured's identity. [Citation.]"].)

[12] That such claim was unasserted as of the date of the sale or transfer to the successor corporation is not determinative. Coverage liability under a particular policy ***359** is determined as the date of the claimant's loss or injury irrespective of when the claim is asserted. In this case, Amchem No. 1 would clearly have been entitled to the policy benefits prior to April 1, 1979, when it transferred *all* of the relevant assets to Amchem No. 2. Such benefits obviously related *solely* to the metal-working chemical products business which was the object of the transfer. Therefore, why should Henkel (as the successor to Amchem No. 2) not now be entitled to receive such benefits? As we discuss below, Rhone (as successor to the original named insured) is estopped to assert any claim to such benefits.

There is no reason to rely on the "no assignment" clause to defeat Henkel's claim of coverage. No new contractual burden is imposed on the Insurers; they need only defend a single party as to the very same claims which would have been asserted against the original named insured but for the circumstances of this case. The Insurers collected premiums to cover these very risks. If they are successful in defeating Henkel's claim to such policy benefits, the Insurers will realize an undeserved windfall as they would now owe no coverage to *any* party for a risk they promised to insure and for which they were paid an agreed premium.

4. *Rhone Is Judicially Estopped To Assert That Extension Of Coverage To Henkel Will Increase Any Burden On Insurers Or Diminish Its Own Coverage For Claims Arising From PreSale Injuries, The Liability For Which Was Assumed By Amchem No. 2*

[13] As we have already discussed, Rhone was able to obtain a stipulated dismissal from the underlying Lockheed action on the representation which it formally asserted that there was no corporate responsibility for the claims made by the Lockheed plaintiffs other than that assumed by Amchem No. 2 (and Henkel). Rhone made it clear that no predecessor existed with respect to the pre-sale liabilities assumed by Amchem No. 2. Based on that representation, Rhone successfully extricated itself from the Lockheed litigation. It thus follows that it will have no occasion to call upon the Insurers to provide coverage for any of the claims relevant to this proceeding. If the Insurers are going to provide coverage to anyone for these claims (for which they were paid the requested premiums) they will have to provide it to Henkel. Rhone should not, in this action, be heard to argue otherwise.

[14] Judicial estoppel is a well-recognized doctrine. (*Thomas v. Gordon* (2000) 85 Cal.App.4th 113, 117–118, 102 Cal.Rptr.2d 28.) It will be applied when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. [Citations.]" (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183, 70 Cal.Rptr.2d 96.) All of these elements are clearly satisfied here.

[15] " 'Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process.' [Citation.]" (*Jackson v. County of Los Angeles, supra,* 60 Cal.App.4th at p. 181, 70 Cal.Rptr.2d 96.) It is a doctrine that is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes will have an adverse impact on the judicial process. A litigant should not be permitted to play "fast and ***360** loose" with the courts. (*Ibid.*) We believe the doctrine should be applied here to foreclose Rhone from asserting any argument premised on the fiction that any party other than Henkel would have any legitimate claim on coverage from the Insurers arising from the *presale activities* of Amchem No. 1 in the conduct of the *metal-working chemical business* sold to Amchem No. 2 on April 1, 1979.

CONCLUSION

For all of these reasons, we conclude that Henkel is entitled to assert a claim for the policy benefits under the policies issued by the Insurers. In reaching this conclusion, however, we emphasize that it does not follow that the Insurers will necessarily have any obligation to reimburse Henkel for the defense and settlement costs which it expended to obtain a dismissal from the Lockheed litigation. We simply reverse the summary judgment granted on the competing claims

to declaratory relief. It is our intent only to resolve in Henkel's favor the predicate legal question that Henkel is entitled to pursue the policy benefits due under the Insurers' policies for coverage of claims arising from bodily injuries suffered during the 1959–1976 period which were allegedly caused by exposure to the metal working chemical products manufactured and sold by Amchem No. 1 during said period. Absent an *express* agreement to the contrary (which is not established by the record before us), Henkel has standing to assert a claim to such policy benefits by operation of law, even though the policies themselves were never assigned or the Insurers' consent obtained.

It will still be Henkel's burden at trial, however, to produce evidence establishing a basis for potential coverage (duty to defend) or actual coverage (duty to indemnify) under the policies. There are also open questions as to the proper allocation of Henkel's defense costs and settlement expenses to claims arising under the Insurers' policy coverage and under other time periods for which different insurers may have some responsibility. Finally, as we have already suggested, we do not foreclose the possibility of a factual dispute as to the terms of the contract between Amchem No. 1 and Amchem No. 2 regarding the right to claim policy benefits under the Insurers' policies and whether Amchem No. 2 waived any of its rights with respect thereto. Rhone has made assertions regarding the nature and scope of such agreement that are not supported by the documents cited. However, other evidence may exist. These and any other relevant unresolved issues will have to be settled upon remand.[22]

DISPOSITION

The summary judgment entered on July 13, 1999, in favor of Rhone and the Insurers is reversed. The matter is remanded for further proceedings not inconsistent with the views expressed herein. Henkel shall recover its costs on appeal.

KLEIN, P.J., and ALDRICH, J., concur.

Parallel Citations

, 01 Cal. Daily Op. Serv. 3424, 2001 Daily Journal D.A.R. 4191

Footnotes

1 The policies contained "no assignment" clauses which precluded their assignment by the named insured without the consent of the insurer.

2 The relevant facts (as opposed to their competing characterizations by the parties) are not in dispute and are clearly established by the record on appeal.

3 Amchem No. 1 started life in 1914 as a Delaware corporation and through an acquisition and merger became a Pennsylvania corporation in 1968. Such corporate history, however, is irrelevant to the issues before us.

4 During this period, Amchem No. 1 carried liability insurance with a number of insurers. According to the appellate record before us, however, coverage by the Insurers was as follows:

(1) Hartford: September 1959—September 1962;

(2) Century: September 1962—September 1965;

(3) Hartford: October 1971—October 1975.

5 Contemporaneously, Amchem No. 1 changed its name to Union Carbide Agricultural Products Company, Inc. (UCAPCO.); however, in the interests of clarity and simplicity, we will, continue to refer to this company as Amchem No. 1.

6 Such policies contained a "no-assignment" clause which precluded any assignment of the policies themselves without the consent of the Insurers. It was expressly understood, however, that with respect to any claims covered under any of the policies which had been *asserted* against Amchem No. 1 prior to April 1, 1979, and which related to the metal working chemical products business, were deemed covered under such policies; in other words, such *existing and asserted claims* constituted a basis for coverage under the Insurers' policies and were thus considered "assets" relating to the metal working chemical products business.

7 This statement, however, is a self-serving post transaction conclusion asserted in this litigation. The record presented to us does not reflect that Amchem No. 2 agreed to any such characterization of the policies issued by the Insurers.

8 We have found nothing in the record before us reflecting a specific agreement between Amchem No. 1 and Amchem No. 2 regarding the latter's right to call upon liability insurance covering claims existing but not asserted as of April 1, 1979.

9 We have greatly simplified our summary of these very complex corporate histories, but the relevant background facts are stated sufficiently to provide an accurate context for our consideration of the validity of Henkel's claims for recovery of defense and

indemnification (i.e., settlement) expenses incurred in connection with the Lockheed litigation arising out of Amchem No. 1's metal working chemical product business during the 1959–1976 time period.

10 The chemical products identified by the plaintiffs in the Lockheed litigation as being the responsibility of Henkel were products identified as Alodine 600, Alodine 1200 and Alodine 12005. These products all had been produced and marketed by Amchem No. 1 prior to its April 1, 1979 divestiture of its metal working chemical products business to Amchem No. 2.

11 Henkel also tendered the litigation to its own insurers which had issued policies directly to Henkel. We are not concerned with the coverage claims (or disputes, if any) which may have arisen out of those tenders. We have before us only the claims against the Insurers which had provided liability coverage to Amchem No. 1 during the period 1959–1976.

12 While not directly relevant to the issues before us, some allocation obviously is required as to the portion of the settlement and defense costs which are fairly attributable to the 1959–1976 time period for which it is claimed that the Insurers have coverage liability. A determination of the proper allocation of Henkel's defense and settlement costs is one of the issues that the trial court may have to resolve upon remand.

13 In rejecting that argument, the trial court relied primarily upon the decision in *General Accident Ins. Co. v. Superior Court* (1997) 55 Cal.App.4th 1444, 64 Cal.Rptr.2d 781. As the trial court put it, "it doesn't make common sense or business sense to require an insurance company to indemnify a party that it never agreed to provide insurance to and also wherein that insurance company never had the right or opportunity to assess the risk associated with that. I think that would fundamentally impact the entire insurance industry and would really change the nature of insurance. The insurance companies, especially in the business world, would not have the opportunity to adequately assess risk when determining premiums associated with a policy."

14 As do the parties, we make the assumption that the conduct alleged in the Lockheed litigation was actually or potentially covered under the Insurers' policies issued during the 1959–1976 time period. That assumption, however, is only for the purposes of this appeal. Upon remand, it will be Henkel's burden to prove that the claims made in the Lockheed litigation fell within the coverage provided by the Insurers' policies. Proof of the existence of any exclusionary policy provisions sufficient to preclude such coverage would, under settled principles, be the burden of the Insurers. (*Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1188, 77 Cal.Rptr.2d 537, 959 P.2d 1213.)

15 We discuss the impact of the "no assignment" clause in more detail below.

16 However, as we only have pleadings from the Lockheed litigation before us, we cannot determine just which of the claims of the several Lockheed plaintiffs triggered coverage under the Insurers' policies. That will be another matter to be resolved by the trial court upon remand. Henkel will have to establish just which portion of the defense and settlements costs which it expended are attributable to the claims covered by the Insurers' policies.

17 In *Northern,* the predecessor had agreed to hold the successor harmless; in our case, the opposite was true. This is an interesting, but insignificant, distinction. It does not detract from the force of *Northern's* articulation and application of the fundamental principles governing the transfer, by "operation of law" of the right to policy benefits due on existing claims. The *Northern* court's reasoning and decision was not impacted by the indemnification commitment made by the predecessor.

18 We do not intend to suggest by our endorsement of the reasoning and decision in *Northern* that the parties could not have *expressly* entered into a contract providing for a waiver by Amchem No. 2 of the right it would otherwise have to call upon relevant liability policies for coverage of claims arising from pretransfer injuries. Upon the making of such an *express* waiver agreement, Amchem No. 2 would be then properly chargeable with knowledge that liability insurance was *not* available should claims be asserted after the transfer; and *would* be on notice of the need to purchase "claims made" or other insurance providing "prior acts" coverage. As we have repeatedly noted, the record before us reflects no such express waiver agreement.

19 Significantly, it is not at all clear from the opinion when such injuries occurred or whether coverage was ever triggered under the relevant policies.

20 There is also another problem with the *Quemetco* decision. We question its reliance on the fact that the successor's liability was based on CERCLA. The *Quemetco* court did this in order to distinguish itself from *Northern.* We see no significance, however, in the fact that CERCLA liability did not exist at the time of the transfer of the assets of the predecessor to the successor corporation. Had the predecessor remained in business *it* would have been liable under the subsequently enacted CERCLA statute; and it would have been entitled to call upon the same liability policies to which the *Quemetco* court denied the successor access.

As Justice Johnson stated in *Quemetco* in his dissent from the majority's opinion:

"While it is true [*Northern*] involved 'successor liability' in the context of a product liability case, there is no reason its rationale would fail to apply where 'successor liability' was imposed in a different sort of case.... If the law holds the successor liable for its predecessor's tortious acts—no matter the nature of those acts—then the law likewise transfers the insurance benefits covering liability for those acts to the successor.... [¶] The majority attempts to make something of the fact the particular causes of action involved in the underlying lawsuit here were predicated on CERCLA, a statute which did not come into existence until several years after the predecessor last dumped toxic chemicals into Stringfellow and several years after the predecessor corporation sold

> out to the successor corporation.... [¶] What is relevant is whether the predecessor's acts occurred before the sale, not whether they matured into cognizable causes of action before that time.... [¶] Had the predecessor corporation not sold out can there be any doubt its insurer would have had a duty to defend and indemnify that corporation in the strict liability lawsuits filed under CERCLA, even though those suits were based on a statute enacted years after the corporation's toxic dumping? Since there was a sale, however, the successor corporation was found liable under CERCLA for that toxic dumping, on a 'successor liability' theory. Further, because the predecessor corporation's insurer would have been responsible for its insured's acts of toxic dumping even though its liability would have been based on CERCLA, a law passed years after the dumping, it likewise is responsible for defending and indemnifying the successor corporation for its liability under CERCLA. As [*Northern*] emphasized, insurance benefits follow liability. And, I submit, that principle extends to liability which is expanded by legal changes occurring after the transfer takes place." (*Quemetco, supra,* 24 Cal.App.4th at pp. 507–508, 29 Cal.Rptr.2d 627; fn. omitted; disn. opn. of Johnson, J.).

21 In support of this conclusion, the court discussed and relied on a number of cases which dealt with attempts to extend coverage under expired policies to cover corporate acquisitions which take place *after* the policies in question had expired. (*General Accident, supra,* 55 Cal.App.4th at pp. 1453–1454, 64 Cal.Rptr.2d 781.) Such efforts to create liability coverage after the fact were rightly rejected as they would have constituted an ex post facto attempt to change the name of the insured. (See *Cooper Companies v. Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094, 1107–1111, 37 Cal.Rptr.2d 508; *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1, 80, 52 Cal.Rptr.2d 690; *A.C. Label Co. v. Transamerica Ins. Co.* (1996) 48 Cal.App.4th 1188, 1194, 56 Cal.Rptr.2d 207.) These cases, however, were not really relevant to the issues before the *General Accident* court.

General Accident also relied upon *Oliver Machinery Co. v. United States Fid. & Guar. Co.* (1986) 187 Cal.App.3d 1510, 232 Cal.Rptr. 691 as a basis for criticizing the decision in *Northern.* (*General Accident, supra,* 55 Cal.App.4th at pp. 1451–1452, 64 Cal.Rptr.2d 781.) However, we agree with Justice Johnson's comments in his dissent in *Quemetco.* As the author of the *Oliver* decision, he was in a unique position to characterize its relevance to the *Northern* decision: "In *Oliver,* this court was concerned with the issue of the *successor* corporation's insurance policy and whether it covered an 'additional insured' on that contract, a distributor, for injuries caused by the *predecessor* corporation's products *when the contract specifically limited coverage to the successor corporation's products.* This is entirely unrelated to the question of whether the benefits of the predecessor company's insurance policy passed to the successor by operation of law as to injuries *which occurred before the successor bought out the predecessor.* The former issue, of course, is a matter of construction of the contract the 'additional insured' signed with the insurance company. But that has nothing to do with the issue of whether and which benefits pass to the successor corporation from the predecessor corporation related to injuries the predecessor corporation's actions already have caused." (*Quemetco Inc. v. Pacific Automobile Ins. Co., supra,* 24 Cal.App.4th at p. 504, 29 Cal.Rptr.2d 627; italics added; fn. omitted; disn. opn. of Johnson, J.) In spite of such a lack of relevancy to the issue presented in *Northern,* the *General Accident* court appeared to be critical of *Northern's* failure to mention the *Oliver* decision. (*General Accident, supra,* 55 Cal.App.4th at pp. 1451–1452, 64 Cal.Rptr.2d 781.) Beyond that, however, *General Accident* supplied no analysis as to why *Oliver* should dilute the force of *Northern's* reasoning or conclusion.

22 Our decision is also limited to Henkel's claim for coverage under the relevant policies of Insurers. To the extent that such coverage is found not to exist or has been exhausted by the payment of prior claims, we see no basis on this record for Henkel obtaining any contribution from Rhone. That issue does appear to have been put to rest by the agreement of Amchem No. 2 to assume all of the liabilities of Amchem No. 1. While we have concluded that Henkel is entitled to look to the Insurers' relevant policies, we do not go further.

End of Document

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On June 10, 2013, I served true copies of the following document(s) described as **HARTFORD ACCIDENT AND INDEMNITY COMPANY'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ANSWER BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 10, 2013, at Encino, California.

/s/
Jan Loza

SERVICE LIST
Fluor Corp. v. Superior Court (Hartford)
S205889

Counsel Name/Address	Party Represented
Brook B. Roberts John M. Wilson Latham & Watkins LLP 600 West Broadway, Suite 1800 San Diego, CA 92101-3375	Attorneys for Petitioner **FLUOR CORPORATION**
Clerk to the Honorable Ronald L. Bauer Orange County Superior Court Civil Complex Center, CX103 751 West Santa Ana Boulevard Santa Ana, CA 92701	[Case No. 06cc00016]
Clerk, Court of Appeal Fourth Appellate District, Division Three Post Office Box 22055 Santa Ana, CA 92702	[Case No. G045579]