IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
PEORIA COUNTY, ILLINOIS

CONNOR COMPANY, an Illinois corporation,	)	
Plaintiff,	)	
vs.	)	No. 05 MR 303
TRAVELERS INDEMNITY COMPANY OF AMERICA and TRAVELERS COMPANY OF ILLINOIS.	)	
Defendants.	)	

PLAINTIFF CONNOR COMPANY'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT TRAVELERS INDEMNITY COMPANY OF AMERICA's CROSS-MOTION FOR SUMMARY JUDGMENT

Travelers' response and cross-motion[1] seeks to portray as very complex and convoluted a matter that is really quite simple. The question presented by Connor's motion for summary judgment and Travelers' cross-motion is simply this: does Travelers have a duty to defend and indemnify Connor against the asbestos lawsuits?

The answer is yes.

The undisputed facts of this case are that Connor is the only company seeking insurance coverage from Travelers. Connor is the only company that needs insurance coverage. Connor is the only company that has been sued in the underlying asbestos

1 "Travelers Indemnity Company of America's Combined Response to Connor Company's Motion for Summary Judgment and Cross-Motion for Summary Judgment" ("Response").

lawsuits.

Connor seeks to collect on insurance that was written for *exactly the same risk* that Travelers agreed to insure when it accepted premiums and issued its policy – the risk that Field & Shorb's products might cause bodily injury. That risk has materialized in the form of numerous asbestos bodily injury lawsuits. Since Field & Shorb changed its name and went out of business shortly after Connor purchased its assets in 1991, and was dissolved years before the first asbestos lawsuit was filed, it is Connor, rather than Field & Shorb, that has been forced to defend itself and to settle some of those lawsuits. Just as Connor is now being sued in tort as the corporate successor to Field & Shorb, Connor is fully entitled to the benefits of Field & Shorb's coverage with Travelers. The tort liability arising out of Field & Shorb's products is what Connor is being sued for. It is the very risk that Travelers agreed to insure. Travelers must now defend and indemnify Connor against that risk.

If Field & Shorb existed today and had been sued instead of Connor, there would be no question that Travelers would be obligated to provide coverage. The underlying lawsuits allege that bodily injuries from asbestos products took place during Travelers' policy period. The evidence is undisputed that these were Field & Shorb's products, not Connor's. Travelers' policy insures Field & Shorb's operations and products. It contains no asbestos exclusion.

Rather than acknowledge its duties, Travelers in its Response seeks to hide

behind corporate formalities and speculation, and seeks to deny the very benefit of the bargain it agreed to provide in issuing its three-year occurrence-based policy to Field & Shorb. Upon careful examination, none of these arguments have merit.

I. CONNOR IS CLEARLY ENTITLED TO COVERAGE UNDER THE TRAVELERS POLICY ORIGINALLY ISSUED TO FIELD & SHORB.

At the outset, it should be noted that Travelers does not dispute (since it cannot) the fact that all of the asbestos lawsuits filed against Connor trigger the Travelers general liability insurance policy which was in effect from April 1, 1979 to April 1, 1982. See Repo Aff.,[2] Exh. 1. It has long been held in Illinois that if a lawsuit alleges a plaintiff was exposed to asbestos products during the policy period of a standard comprehensive general liability insurance policy, that insurer is obligated to provide coverage. Zurich v. Raymark, 118 Ill.2d 23, 45, 514 N.E.2d 150 (1987) ("We therefore conclude that an insurer whose policy was in force at the time a claimant was exposed to asbestos must provide coverage of that claim"). Every one of the asbestos lawsuits in this case alleges exposure to asbestos during the Travelers policy.

Since its policy is clearly triggered, Travelers is forced to argue that Connor is not entitled to coverage because Connor is not a named insured. However, as shown below, Connor is not a stranger to the Travelers policy. Connor simply seeks to

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2 "Master Affidavit of Geoffrey J. Repo in Support of Travelers Combined Response to Plaintiff's Motion for Summary Judgment and Travelers Cross-Motion for Summary Judgment" ("Repo. Aff.").

enforce its rights under the policy -- rights it acquired through its purchase of the assets of Field & Shorb, or alternatively, by operation of law.

Business transactions such as the 1991 Asset Purchase Agreement between Connor and Field & Shorb occur are commonplace. Large insurance companies such as Travelers can hardly deny being aware of this fact, since they themselves are frequently involved in such corporate combinations.

A. Connor Purchased Field & Shorb's Rights Under Travelers' Policy When It Purchased Field & Shorb's Assets in the Purchase Agreement.

Travelers suggests Connor did not purchase any rights under its policy in the 1991 Purchase Agreement because Connor purchased only physical assets, and Travelers claims that insurance is not a physical asset. (Response at 14) This claim is faulty for two reasons. First, the Asset Purchase Agreement includes in the list of "Assets to be Purchased" in Exhibit 3 to the Agreement, "accounts receivable due Field & Shorb Co." Repo Aff., Exh. 2 at CON05853. There is nothing in the Asset Purchase Agreement to suggest that insurance policies are excluded from the assets being purchased by Connor. Paragraph one of the Asset Purchase Agreement also refers to "accounts receivable" as one category of assets which Connor acquired. Id., at CON05839. Certainly accounts receivable are intangible or nonphysical assets. Rights to receive payments for defense and indemnity under an insurance policy are very much like accounts receivable. It is simply inaccurate to claim that Connor

purchased only physical assets from Field & Shorb.

Travelers's position would certainly be good news for the persons who owed Field & Shorb money as represented by the accounts receivable. Under Travelers's theory those parties would never have to pay Connor because their obligation was only to Field & Shorb, which went out of business and dissolved. Connor would thus be deprived of the benefit of its bargain in purchasing Field & Shorb's trade accounts receivable despite the fact that it expressly purchased those receivables. That is an absurd result which this Court should not countenance.

Travelers also ignores the language in paragraph one of the Asset Purchase Agreement which states that the assets being purchased by Connor are "*identified by category, and valued, on an audited balance sheet* prepared by KPMG Peat Marwick, the Seller's accountant, as of December 31, 1990, which is attached hereto and marked Exhibit 1." Id.

Exhibit 1 attached to the Asset Purchase Agreement includes under the heading "Current Assets" the item "prepaid expenses." Mr. Jim Bulger, Connor's vice president, testified that "prepaid expenses" included insurance premiums paid by Field & Shorb for its insurance policies. Siderius Aff.,[3] Exh. A. Mr. Dan Ludolph, Connor's current chief financial officer, also testified that the "prepaid assets" line on this balance sheet included insurance premiums. Siderius Aff., Exh. B. Moreover,

3 "Supplemental Affidavit of Jeffrey A. Siderius in Further Support of Connor Company's Motion for Summary

Mr. Omer Long, Connor's former chief financial officer, and the person most responsible for negotiating the asset purchase agreement for Connor, testified that he understood that Connor was acquiring rights under Field & Shorb's liability insurance policies. Siderius Aff., Exh. C. Travelers has provided no evidence whatsoever that contradicts this testimony.

Travelers' attempt to rely on paragraph four of the Asset Purchase Agreement is unavailing. In quoting a portion of that paragraph (Response at 14), Travelers conveniently omits the phrase following its excerpt. That phrase identifies the purpose for which the exhibit referred to in paragraph four was prepared. The full text of paragraph four shows that the purpose of the exhibit was not to exclude any liability insurance policies, as Travelers claims, but rather to satisfy the bulk transfer requirements of the Illinois Uniform Commercial Code:

> 4. The assets being purchased under the terms of this agreement are more specifically shown and listed on a schedule attached hereto as Exhibit 3, *prepared by the parties in accordance with the requirements of the Bulk Transfer section of the Uniform Commercial Code in Illinois,* and said list and schedule will be preserved by the Buyer for six months next following the transfer date of November 4, 1991, for inspection and copying by either party or by any creditor of the Seller, *as required by the said Bulk Transfer statute (Chapter 26, Section 6-104, Illinois Revised Statutes)* (Exhibit 2 to Repo Affidavit, CON05839-40) (emphasis added)

Nor is Travelers' attempt to rely on Exhibit 5 of the Asset Purchase Agreement any more persuasive. Travelers stretches the facts beyond the bounds of credibility

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Judgment." ("Siderius Aff.")

when it claims the "catch-all" provision of Exhibit 5 amounts to a statement that Field & Shorb "expressly retained" the Field & Shorb policy. (Response at 15) As Travelers must concede, the list of "excluded assets" in Exhibit 5 does not mention any liability insurance policies, or describe any category of similar assets. Certainly, if the parties intended what Travelers claims they did, they would have been expected to specifically mention Field & Shorb's liability insurance policies or some similar category of assets. However, they did not. Travelers' interpretation of Exhibit 5 must fail.

Travelers' final attempt to escape the common sense interpretation of the asset purchase agreement that Connor acquired the rights to Field & Shorb's insurance is to point to a variety of sources in a futile effort to suggest that Connor has somehow conceded Travelers' unreasonable interpretation. These items are also unconvincing. Connor's statements made in defending itself against claims of successor tort liability in the underlying cases, years after the Asset Purchase Agreement was executed, can in no way be taken as an admission that Connor did not intend to acquire the rights to Field & Shorb's insurance. The precise characterization of the assets purchased from Field & Shorb was irrelevant for Connor's purposes in those cases. Similarly, the fact that liability insurance policies which expired years before the Asset Purchase Agreement was consummated were not discussed specifically during these negotiations is hardly surprising, and is not an admission that Connor did not intend

to acquire them. It is undisputed that no asbestos claims had been made against Connor prior to 1991, and none were made against Connor until many years after the Asset Purchase Agreement was negotiated and executed.

By any fair reading, the Asset Purchase Agreement leaves Field & Shorb with no significant assets to conduct business. Travelers does not dispute, since it cannot, the fact the Field & Shorb's entire inventory of products was transferred to Connor in the agreement. Thus, there was no reason for Field & Shorb to retain any rights to the Travelers liability insurance that had been purchased to insure Field & Shorb's products.

By expressly acquiring and paying for the inventory of Field & Shorb's products and its associated insurance rights, Connor clearly acquired Field & Shorb's rights under the Travelers policy in the Asset Purchase Agreement.

B. Travelers' "No Assignment" Clause Does Not Bar Connor's Rights to Coverage as a Matter of Law.

Travelers next attempts to argue that even if Connor did acquire rights under the Travelers policy in the Asset Purchase Agreement, the "no assignment" clause precludes any coverage for Connor. (Response at 16-18) However, this argument runs afoul of established Illinois law.

Illinois, in line with the overwhelming majority of states, recognizes a crucial distinction – between assignment of an *interest* in the policy without the insurer's

consent, as opposed to assignment of a *loss* under the policy. Travelers' policy by its language prohibits "assignment of *interest* under this policy..." (Exh. 1 to Repo Affidavit, at TRAV/F&S 0000005) The Travelers policy by its terms does not prohibit any assignment of losses.

It has long been held in Illinois that the claim of an insured under a policy of insurance is assignable after a loss occurs. Brown v. State Farm Fire & Cas. Co., 33 Ill.App.3d 889, 894, 338 N.E.2d 427 (3d Dist. 1975) ("[t]he claim of an insured under a policy is assignable after the loss occurs"); see also Ginsburg v. Bull Dog Auto Fire Ins. Ass'n., 328 Ill. 571, 160 N.E. 145 (1928). As one court explained this distinction:

> An insurance policy that is assigned after a claim arises is an assignment of the policy proceeds; such a transaction results in an assignment of a chose in action which does not require the insurer's consent.

Young v. Chicago Federal Savings and Loan Ass'n., 180 Ill.App.3d 280, 285, 535 N.E.2d 977 (1st Dist. 1989). The court explained the reason for this rule by quoting from a leading insurance law treatise:

> "[The] great weight of authority supports the rule that general stipulations in policies prohibiting assignments thereof except with the consent of the insurer **apply to assignments before loss only, and do not prevent an assignment after loss,** for the obvious reason that the clause by its own terms ordinarily prohibits merely the assignment of the policy, as distinguished from a claim arising thereunder, **and the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim.** 16 G. Couch, Insurance § 63:40, at 763-65 (2d rev. ed. 1983) (emphasis added)

Here, the losses in question occurred prior to Connor's purchase of rights under the Field & Shorb policies in the Asset Purchase Agreement. Each of the asbestos plaintiffs alleges they sustained bodily injuries by exposure to asbestos products during the Travelers policy period of 1979-82. Repo Aff., Exhibits 4-15. Illinois law is clear that injury in asbestos bodily injury cases takes place, for purposes of occurrence-based liability insurance policies such as Travelers', when exposure occurs. Zurich v. Raymark, *supra*, 118 Ill.2d at 45; see also Reagor v. Travelers Ins. Co., 92 Ill.App.3d 99, 103, 415 N.E.2d 512 (1st Dist. 1980) (rights under a liability insurance policy vest at the time of the occurrence). Thus, Connor's acquisition of Field & Shorb's rights to these losses is not barred by Travelers' "no assignment" clause as a matter of law.

The cases cited by Travelers at page 17 of its Response do not support any different result. In Alberto-Culver Co. v. Aon Corp., 351 Ill.App.3d 123, 812 N.E.2d 369 (1st Dist. 2004), a case involving an airplane accident, the court mentioned the "no assignment" clause only in passing in a footnote, as one of several alternative grounds for its conclusion that the Interchange Agreement between the two parties did not apply. Nothing in the opinion discusses the distinction between post-loss and pre-loss assignments.

In Holloway v. Republic Ins. Co., 341 Ore. 642, 653, 2006 Ore. Lexis 1182

(Or. 2006), the court acknowledged that a majority of states (including Illinois) "do not follow this court's analytical approach to insurance contract construction..." The court cited Conrad Bros. v. John Deere Ins. Co., 640 N.W.2d 231, 237 (Iowa 2001) which includes Illinois among the states that follow the majority rule discussed above. The Holloway court itself recognized its ruling was out of step with the majority of states including Illinois.

C. Assuming for Argument's Sake that Connor Did Not Acquire Rights to the Travelers Coverage Under the Asset Purchase Agreement, Connor Clearly Acquired Rights Under the Travelers Policy by Operation of Law.

Even if this Court finds the Asset Purchase Agreement was not sufficient to transfer Travelers' policy benefits to Connor, the fact nevertheless remains that Connor is being sued for its liability arising from Field & Shorb's products. Courts have increasingly recognized that in this situation, so long as the parties have not agreed to contractually shift the predecessor's tort liability, it is both logical and consistent with the fundamental economic realities to recognize that if tort liability is imposed on the successor by operation of law, insurance benefits also transfer to the successor by operation of law. For the convenience of the Court, Connor has attached a table to this brief summarizing the cases relied upon by Connor and by Travelers.

Travelers makes several attempts to evade this common sense result. First,

Travelers makes the erroneous claim that all the cases Connor cites in its Memorandum of Law "rely on the doctrine of 'product-line' successor liability." (Response at 18) That is simply not the case, as the following discussion demonstrates. Contrary to Travelers' portrayal, these courts and others have applied the operation of law theory to find coverage *even where the insured's tort liability is not based on the product-line successor theory* adopted in cases such as Ray v. Alad Corp., 19 Cal.3d 22, 560 P.2d 3 (Cal. 1977).

The reasoning set forth in these better reasoned opinions is overwhelmingly persuasive. These courts hold *it makes no difference whatsoever* whether the liability imposed on the successor company (here, Connor) is based on the "product-line successor" theory or the more usual general rule of successor tort liability. What matters is that the successor is being pursued for tort liability created by its predecessor company and being imposed on the successor by operation of law. If it is, and the parties have not agreed by contract to shift that tort liability, the predecessor company's rights under its liability insurance policies also transfer by operation of law. The simple, logical and common sense reason for this is that in such a situation, *there is no change in the risk which the predecessor company's insurance carrier agreed to insure.*

It is undisputed that in the underlying asbestos lawsuits here, Connor is being pursued solely for tort liability created by Field & Shorb's products. Repo Aff., Exh.

22 at CON16172; Siderius Aff., Group Exh. D. Assuming for argument's sake that Connor did not acquire rights under the Travelers policy contractually in the Asset Purchase Agreement, Connor clearly acquired those rights by operation of law. There has been no change whatsoever in the risk that Travelers originally agreed to insure -- the risk that Field & Shorb's products would cause bodily injury. That is the risk Travelers accepted a premium to insure, and that is the risk that Travelers must cover.

In order to understand the case law in this developing area, it is necessary to understand the facts involved in one of the earliest cases to address this issue, Northern Insurance Co. v. Allied Mutual Ins. Co., 955 F.2d 1353 (9th Cir. 1992). In Northern Insurance, California Cooler was a manufacturer of alcoholic beverages. Brown-Forman purchased the assets of California Cooler in 1985 in an asset purchase agreement. Two years later, Brown-Forman was sued by the Howards, who alleged their child was born with fetal alcohol syndrome as a result of the mother's consuming California Coolers during the pregnancy. Northern Insurance, 955 F.2d at 1355.

Brown-Forman first tendered the defense of the lawsuit to Northern Insurance, which had insured California Cooler during a portion of Mrs. Howard's pregnancy. Northern, and later Brown-Forman, also tendered the defense to Allied Mutual, which had insured California Cooler immediately prior to Northern's coverage. Id. at

1356. After the Howards dismissed their lawsuit, Northern brought an action for contribution against Allied. The trial court ruled that even though the asset purchase agreement did not expressly transfer Allied's insurance policy to Brown-Forman, Brown-Forman was nevertheless entitled to policy benefits under the Allied policy by operation of law. Id.

The Ninth Circuit affirmed the trial court's decision, with reasoning that applies directly to the case at bar. Relying on Occidental Accident & Guar. Corp. v. Southwestern Bell Tel. Co., 100 F.2d 441 (8th Cir. 1939), the court held, contrary to Travelers' argument, that Allied owed coverage in spite of the "no-assignment" clause in its policy because the change in ownership did not result in any increased risk to the insurer:

> We agree with the *Ocean Accident* court that the rationale for honoring "no assignment" clauses vanishes when liability arises from presale activity. 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 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 Insurance, 955 F.2d at 1358 (emphasis supplied)

The Northern Insurance court held the corporate successor Brown-Forman was entitled to coverage from Allied, whose policy had insured California Cooler by name, even though the court found Allied's policy was not one of the assets expressly

transferred to Brown-Forman under the asset purchase agreement. Id. at 1357. The court held that "the benefits of Allied's policy, including the right to a defense, transferred by operation of law to Brown-Forman when Brown-Forman purchased substantially all of California Cooler's assets." Id. at 1358.

Much like Travelers here, Allied argued that no defense obligation should be imposed on it because California Cooler, not Brown-Forman, was the party it had agreed to insure. Thus, it argued, the fact that it would have to defend a different company would alter the risk it had agreed to insure. The court disagreed:

> 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. Northern Insurance, 955 F.2d at 1358.

Thus, the Northern Insurance court recognized the common sense principle that there was no significant change in the risk that the insurance company originally agreed to insure. Therefore, the court held the "right to indemnity [under the insurance policy] *followed the liability rather than the policy itself.*" Northern Insurance, 955 F.2d at 1357 (emphasis added). The key in Northern Insurance was not whether the product-line successor rule or any other particular theory of tort liability was present, but rather, whether the successor company was being held liable by operation of law. Brown-Forman and California Cooler did not transfer the

predecessor's tort liabilities in their asset purchase agreement. Id. at 1355-56.

The asbestos lawsuits filed against Connor allege that plaintiffs were exposed to asbestos products during the 1979-1982 Travelers policy period. That risk – the risk that Field & Shorb's products might cause injury to third parties during the policy period – is exactly the risk that Travelers undertook when it underwrote and issued its policy to Field & Shorb. That risk has never changed. The fact that Field & Shorb transferred its assets to Connor after those injuries took place in no way alters that risk. Field & Shorb did not transfer its tort liabilities to Connor in the Asset Purchase Agreement. Thus, as in Northern Insurance, Travelers as the insurer of Field & Shorb is simply being asked to honor its policy obligation to provide coverage for the identical risk it evaluated when it wrote its policy. Under the Northern Insurance reasoning, Connor is entitled to coverage under Travelers's policy by operation of law.

In cases subsequent to Northern Insurance, courts have made it clear that the application of the operation of law theory is not limited to only those situations where the "product-line successor" rule of tort liability is present.

In Glidden Co. v. Lumbermens Mut. Cas. Co., 2004 Ohio 6922, 2004 Ohio App. Lexis 6468 (2004), the Ohio Court of Appeals followed Northern Insurance and agreed with the dissenting opinions in two of the California cases Travelers relies upon. The court agreed that the successor is entitled to coverage by operation of law

whenever it is being sued as a successor based on the acts and omissions of the acquired company:

> We also recognize the dissenting opinion in *Quemetco, Inc., 24 Cal.App.4th 494, 29 Cal.Rptr.2d 627*, which agreed with Northern Insurance's conclusion that insurance benefits follow liability in successor liability situations by operation of law. The dissent also found that the principle applies to all "successor liability" situations, not just product liability cases. "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." Glidden, 2004 Ohio App. Lexis at **29, quoting Quemetco, Inc. v. Pacific Auto. Ins. Co., 24 Cal.App.4th 494, 29 Cal.Rptr.2d 627, 634-5 (Cal.App. 1994).

In Glidden, the policyholder, The Glidden Company, acquired a lead-based paint business through a series of transactions. Glidden was sued in a number of cases asserting products liability for bodily injury and property damage arising from the manufacture and sale of lead paint products. Glidden sought coverage for these lawsuits from the insurers of two companies that had sold lead paint prior to Glidden's acquisition of them. The trial court ruled Glidden could not obtain coverage, and Glidden appealed.

On appeal the Ohio Court of Appeals reversed. It held that Glidden, as corporate successor to the two manufacturing companies, was entitled to coverage under the policies issued to them by operation of law. The court agreed with the dissenting opinions in two of the California cases Travelers relies upon, Quemetco, *supra*, and Henkel v. Corp. v. Hartford Acc. & Indemn. Co., 29 Cal. 4th 934, 62 P.2d

69 (Cal. 2003):

> We believe the better reasoned authority applies the operation of law theory. Courts applying this theory have continued to extend its application to more general successor liability situations. We find that a corporation which succeeds to liability for pre-acquisition operations of another entity acquires rights of coverage by operation of law. This theory applies even where the acquisition was a purchase of assets or only part of a predecessor corporation. Glidden, 2004 Ohio App. Lexis at **30.

Recently, on December 20, 2006, the Ohio Supreme Court issued its opinion in the appeal of Glidden. The Glidden Company v. Lumbermans Mutual Casualty Co., et al, ___Ohio St. 3d ___, 2006-Ohio-6553. See Siderius Aff., Exh. E (slip opinion). The Supreme Court reversed the judgment of the Court of Appeals. However, in doing so, the Supreme Court relied on its reasoning set forth in a companion case filed the same day, Pilkington North America, Inc. v. Travelers Cas. & Sur. Co., ___Ohio St. 3d ___, 2006-Ohio-6551. See Siderius Aff., Exh. F (slip opinion). Thus, in order to understand the court's reasoning, it is necessary to consider Pilkington.

What Pilkington reveals is that the Supreme Court's decision to reverse the Court of Appeals rested on the fact that Glidden had assumed the tort liabilities in question by contract, and that they were not imposed by operation of law. Here, Connor did not assume the asbestos liabilities of Field & Shorb in the Asset Purchase Agreement. Therefore, the Ohio Supreme Court decisions in Pilkington and Glidden

are reconcilable with Northern Insurance. They clearly reflect the common sense principle that *where the liability sought to be imposed on the successor company would exist without regard to contract, then it is liability "imposed by operation of law" and insurance benefits follow it by operation of law.* Such liability is exactly what the tort plaintiffs seek to impose on Connor in the underlying asbestos lawsuits. To allow Travelers to avoid its coverage obligations under these circumstances would be to award it an unfair windfall by allowing it to escape coverage for a risk it agreed to insure, and for which it accepted premiums.

In Pilkington, the Ohio Supreme Court answered three certified questions from the federal district court for the Northern District of Ohio. The first certified question was:

> 1. "Whether the demand by Pilkington North America for defense and indemnification, as asserted in this case, constitutes a chose in action, as that term is defined under Ohio law?"

The court answered the first question as follows:

> "A chose in action arises under an occurrence-based insurance policy at the time the loss occurred." Pilkington, *slip op.* at 2

The second certified question was:

> 2. "Whether the policies' anti-assignment clauses bar acquisition by Pilkington North America of such chose in action?"

The court answered this certified question as follows:

> "...such a chose in action is transferable despite the existence of an anti-

> assignment provision contained in the policy as to the duty to indemnify. We are unable to answer definitively whether such a chose in action is transferable as to the duty to defend." Id.

Finally, the third certified question was:

3. "Whether by operation of law insurance benefits for transferred liabilities were conveyed, along with those liabilities, so that Pilkington North America may, notwithstanding the anti-assignment clauses, pursue insurance under the original LOF Glass's policies for the environmental liabilities at issue here, which arise out of the original LOF Glass's operations."

The court answered this question as follows:

> "...we answer that when a covered occurrence under an insurance policy occurs before liability is transferred to a successor corporation, coverage does not arise by operation of law **when liability was assumed by contract**." Id. (emphasis added)

In Pilkington, the successor entity, Pilkington North America, purchased the glass-manufacturing operations of Libbey-Owens-Ford Glass Company ("LOF Glass") in 1986. Through a Transfer and Assumption Agreement, Pilkington obtained both the glass business of LOF Glass, as well as the environmental liabilities arising from the business, including liabilities arising out of its conduct. Pilkington, *slip op*. at 3-4. Pilkington filed suit against various insurance companies that had issued liability policies to LOF Glass, claiming they owed Pilkington a duty to defend and indemnify it against the underlying environmental losses and actions. Id. at 2. Pilkington argued the insurers owed coverage for two reasons: first, because Pilkington acquired a chose in action as a result of the 1986 Transfer and Assumption Agreement, and

second, because when Pilington purchased the glass business of LOF Glass, the rights under the insurance policies followed the environmental liabilities by operation of law.

In answering the certified questions, the Ohio Supreme Court first found that since the policies were "occurrence" policies, Pilkington acquired a chose in action under those policies at the time of the occurrence:

> The insurance policies in the instant case are "occurrence" policies; i.e., they provide coverage for claims resulting from injury or damage that is based upon an occurrence during the policy period, regardless of when the claim is made...Our precedent has consistently recognized that **the insurer's coverage obligation in an occurrence policy arises at the time of the occurrence.** We...hold that a chose in action arises under an occurrence-based insurance policy at the time of the covered loss. Id., *slip op.* at 6 (emphasis added)

Illinois law likewise holds that the insurer's obligation arises at the time of the occurrence. Zurich v. Raymark, *supra*; see also Reagor v. Travelers, *supra*.

Next, the court found that, against consistent with Illinois courts, the "no assignment" clauses in the insurers' policies did not preclude the transfer of the chose in action insofar as the duty to indemnify under the policies was concerned:

> The duty to indemnify implicates both property damage and bodily injury. The losses are fixed at the time of the occurrence. We see no reason to deviate from the standard rule on this issue, and thus we hold that **the chose in action as to the duty to indemnify is unaffected by the anti-assignment provision when the covered loss has already occurred**. Id., *slip op.* at 12 (emphasis added)

Finally, the court addressed the third certified question. It is here the court's

analysis is particularly relevant to this case. The court first noted that in cases where liability is imposed on the successor company under the product-line successor rule,

> [t]he rationale for transferring insurance coverage for indemnification and defense by operation of law...is sound, since an unwary purchaser may be liable for significant bodily injury or property damage occurring before the sale, solely as a result of the purchase. The result also serves to ensure that the injured party receives compensation. Id., *slip op*. at 13.

The court then noted that Ohio did not follow the product-line successor liability theory, but rather the "general rule of successor liability." Id. This rule provides that the purchaser of a corporation's assets is not liable for the debts and obligations of the seller corporation, including the seller's tort liability, except in four well-defined situations:

> "(1) the buyer expressly or impliedly agrees to assume such liability;
>
> "(2) the transaction amounts to a *de facto* consolidation or merger;
>
> "(3) the buyer corporation is merely a continuation of the seller corporation; or
>
> "(4) the transaction is entered into fraudulently for the purpose of escaping liability." Id., *slip op*. at 14.

As Travelers points out, this is the rule also in Illinois. Vernon v. Shuster, 179 Ill.2d 338, 688 N.E.2d 1172 (1997). Significantly, however, this different theory of tort liability did not cause the Supreme Court to follow Travelers' suggestion and conclude that coverage does follow liability; instead, the court noted that three of the four exceptions to the general rule of successor liability imposed liability on the

successor corporation "*without regard to contract.*" Id., *slip op*. at 14. The court then concluded that since, in the case before it, liability was assumed by contract, and was not imposed by operation of law, it was not necessary to reach the issue of whether coverage transferred by operation of law:

> **None of these instances in which liability is imposed without regard to contract are alleged to be present. Thus, liability is not being imposed on Pilkington by operation of law, and we do not reach the question as to whether coverage follows by operation of law in such a circumstance...**
>
> We therefore hold that when a covered occurrence under an insurance policy occurs before liability is transferred to a successor corporation, coverage does not arise by operation of law **when the liability was assumed by contract.** Id. at 54, 60 (emphasis supplied)

The analysis of the Pilkington court's majority thus becomes clear. If the successor company agreed to contractually assume the tort liability of the predecessor, then that liability is being assumed by contract and is not being imposed by law. Thus, by the same logic, if the successor company did not agree contractually to assume the tort liability, but rather has liability forced upon it by operation of law without regard to contract, then coverage follows the tort liability.

This logic applies here. Whatever else may be said about the Asset Purchase Agreement, it cannot be said that Connor agreed to *contractually* assume the tort liabilities of Field & Shorb. The entire agreement stands against any such result. The asbestos plaintiffs, recognizing this fact, have sued Connor specifically under the general rule of successor liability, alleging that Connor is liable *without regard to*

contract – in other words, they seek to impose liability on Connor by operation of law. Connor therefore succeeds to the benefit of the Travelers coverage by operation of law.

As the Ohio Supreme Court noted in Pilkington, a number of courts have expanded the Northern Insurance reasoning "to include successor liability cases not based on the product-line theory." Pilkington, *slip op*. at 14. In Gopher Oil Co. v. American Hardware Mut. Ins. Co., 588 N.W.2d 756 (Minn. 1999), Gopher Oil Company was held liable for environmental cleanup costs based on the activities of its predecessor corporation, Gopher State. American Hardware, which had insured Gopher State during the time period of the alleged contamination, denied coverage. Gopher Oil brought a declaratory judgment action. The lower court found that Gopher Oil was entitled to coverage under the policies, and the Minnesota Court of Appeals affirmed.

The appeals court followed Northern Insurance, despite the "non-assignment" clause in the American Hardware policies. The court distinguished between the assignment of a risk, which changes the policy's covered activities, and the assignment of a loss, which assigns a claim arising from a covered activity which occurs during the policy period. 588 N.W.2d at 763. The court reasoned:

> The purpose of a non-assignment clause is to protect the insured from an increase in the risk it has agreed to insure. 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.**
>
> **An assignment of a loss does not expand the risk to cover other activities; it only allows a change in the identity of the insured to reconnect the policy's coverage to the insured loss.** This transfer of liability addresses the problem created when an insurer becomes liable at the time there is an accident or occurrence covered under the policy but the loss is enforced against a successor owner...The losses at issue here occurred before Gopher [Oil] acquired Gopher State, and extending coverage to Gopher [Oil] does not increase American Hardware's risk. Gopher Oil, 588 N.W.2d at 763-4 (emphasis added)

The court noted "the great majority of courts" follow the distinction between risk and loss, and allow an insured to assign a loss, notwithstanding the "non-assignment" clause. Id. at 763.

In Total Waste Management Corp. v. Commercial Union Ins. Co., 857 F. Supp. 140 (D.N.H. 1994), the plaintiff, Total Waste Management (TWM) purchased assets of George West & Sons, an oil recycler. A third party brought suit against TWM to recover the cost of cleaning up environmental contamination caused by George West. TWM then sued Maine Bonding & Casualty, one of George West's insurers, seeking defense and indemnity. 857 F. Supp. At 142. The court found that, although Northern Insurance discussed product-line successor liability, its reasoning was "persuasive authority." Id. at 152.

Maine Bonding, like Travelers, attempted to distinguish Northern Insurance by arguing the underlying action did not involve product-line successor liability in tort. The court, however, rejected this argument:

> While agreeing that Northern Insurance is a product-line successor liability case, the court finds the Ninth Circuit's reasoning is persuasive authority in deciding whether a potential corporate successor is entitled to coverage under its predecessor's insurance policy for a risk occurring before the transfer of assets. Total Waste Management, 840 F.Supp. at 152.

Significantly, in addition to rejecting the insurer's argument that its "no assignment" clause barred TWM's recovery under the policy, the court also rejected the insurer's argument that TWM was judicially estopped from claiming that it was the corporate successor to George West's assets because TWM had asserted in the underlying litigation that it was not. "TWM...[is] merely advancing an argument that if TWM is the corporate successor to George West's liabilities, TWM is also the corporate successor to George West's rights to insurance coverage." Id. at 153.

In addition to the above cases involving asset purchases, courts addressing the analogous situation in which the successor entity acquires the tort liabilities of its predecessor by operation of law as a result of a *de facto* merger or statutory merger, are virtually unanimous in holding that rights under the predecessor's liability insurance policies transfer by operation of law. See, e.g., Westoil Terminals Co. v. Harbor Ins. Co., 73 Cal.App.4th 634, 86 Cal.Rptr.2d 636 (1999) (*de facto* merger); Knoll Pharmaceutical Co. v. Automobile Ins. Co. of Hartford, 167 F. Supp. 2d 1004 (N.D. Ill. 2001) (statutory merger); Imperial Enterprises, Inc. v. Fireman's Fund Ins. Co., 535 F.2d 287 (5th Cir. 1976) (same); Paxton & Vierling Steel Co. v. Great American Ins. Co., 497 F. Supp. 573 (D. Neb. 1980) (same); Brunswick Corp. v. St. Paul Fire

& Marine Ins. Co., 509 F. Supp. 750 (E.D. Pa. 1981) (same); Chatham Corp. v. Argonaut Ins. Co., 70 Misc. 2d 1028, 334 N.Y.S. 2d 959 (N.Y. 1972) (same).

All of the above authorities are persuasive and represent the better reasoned view. Nonetheless, Travelers argues that a number of cases, particularly from California, support its position. Upon careful examination, however, all of these cases are either distinguishable or adopt reasoning that cannot be squared with the sound reasoning underlying the Northern Insurance and Pilkington approach.

First, Travelers cites Henkel v. Hartford Accident & Indem. Co., 29 Cal. 4th 934, 62 P.2d 69 (2003), claiming that this decision, as well as several lower California court decisions, have "rejected" Northern Insurance. A careful reading of Henkel, however, dispels any such reading. The majority opinion in Henkel *distinguished* Northern Insurance, and specifically stated it was not addressing whether Northern Insurance was wrongly decided:

> Defendant insurers contend that the Ninth Circuit's 1992 decision in *Northern Insurance* was wrong...(See General Accident Ins. Co. v. Superior Court (1997) 55 Cal.App.4th 1444, 64 Cal.Rptr.2d 781 (*General Accident*); Quemetco Inc. v. Pacific Automobile Ins. Co., (1994) 24 Cal.App.4th 494, 499-501, 29 Cal.Rptr.2d 627 (*Quemetco*). **We need not resolve this conflict, because the record shows that Henkel's liability was not imposed involuntarily by law but assumed voluntarily by contract.** Henkel, 29 Cal. 4th at 941 (emphasis added)

Henkel did not overrule or reject Northern Insurance. Unlike the facts in Henkel, Connor in this case did not voluntarily assume the tort liabilities of Field &

Shorb. Instead, Connor faces asbestos plaintiffs who seek to impose liability on Connor under general successor liability principles, by operation of law. Henkel, therefore, cannot be properly said to "reject" Northern Insurance. Rather, it is clearly distinguishable both from Northern Insurance and from this case on its facts.

Henkel is also distinguishable for two additional reasons. First, the Henkel court rested its conclusion that the insurance rights did not transfer by operation of law on its finding that no chose in action ever came into being under California law. Henkel, 29 Cal. 4th at 944.[4] As shown above, Illinois law holds that a chose in action came into being when the asbestos claimants were exposed to Field & Shorb's products, irrespective of whether or not those claims were actually asserted during Travelers' policy period.

Second, and perhaps most significant, the Henkel majority's opinion clearly rested in large part on the court's concern that the predecessor corporation, which continued to do business, might in theory emand a defense from the insurer, thus leading to what might be called a "two masters" problem. Henkel, 29 Cal.4th at 945 ("If both [the predecessor company] and [the successor company] were to claim the right to defense, the insurer might effectively be forced to undertake the burden of

4 The dissent took strong issue with the majority's statement of California law on this point, finding that "under the [occurrence-based] policies at issue in this case, a chose in action is established on the date of the *injury*, which is when the loss occurs." 29 Cal.4th at 948 (Moreno, J. dissenting).

defending both parties"). However, the dissent in Pilkington soundly refutes this claim:

> The idea that an insurer would have to defend both the transferor and the transferee for the same risk is not sound. If the right to a defense has been transferred to a successor, the transferor no longer has that right. The right cannot be both transferred and retained. If some other party asserts a right to a defense, the matter can be resolved through a declaratory judgment action. Pilkington, *slip op.* at 19-20 (Pfeiffer, J. dissenting) (emphasis added)

In this case, Field & Shorb changed its name to FASCOR, Inc. and was dissolved effective September 2, 1997, long before the first asbestos lawsuit was filed against Connor. See Siderius Aff., Exh. (certificate of dissolution). It went out of business after the 1991 asset purchase by Connor. Siderius Aff., Exh. H. Field & Shorb has never been sued, and therefore has never made a claim for coverage from Travelers or any other insurer. The hypothetical "two masters" concern expressed by the Henkel majority simply does not exist in this case.[5]

It should be noted that large commercial insurance companies such as Travelers frequently find themselves in situations where they must defend multiple

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[5] In his well-reasoned Henkel dissent, Justice Moreno criticized the majority for, among other things, adopting a rule that would inhibit parties from conducting business by allowing insurance companies veto rights over the free exchange of insurance protection as part of the daily business of buying and selling businesses:

"A successor company would not be inclined to assume this risk of liability for torts of a predecessor without also receiving the benefits of the predecessor's insurance coverage for presale occurrences. It is highly unlikely that a successor company would be able to obtain insurance coverage for injuries *that have already occurred* before the successor's acquisition of the business. Therefore, the only realistic way in which a successor corporation can obtain insurance coverage for the torts of its predecessor is if the predecessor is able to assign its insurance coverage benefits to the successor". Henkel, 29 Cal.4th at 952 (Moreno, J. dissenting)

insureds under the same liability insurance policy. To take a common example, assume an insurance company insures a subcontractor as named insured, and also insures the general contractor and property owner on a construction project as additional insureds under the same policy. If an employee of the subcontractor is injured on the site and the owner and general contractor are sued, the insurance carrier will almost certainly be required to hire two separate defense counsel to defend each of its additional insureds. Those insureds will likely pursue cross-claims against each other. They will even share the same policy limit. This frequently occurring situation is very familiar to large commercial insurance companies such as Travelers.

Travelers also cites three lower California court decisions which it claims have "rejected" Northern Insurance. Once again, careful review of these cases reveals they are distinguishable from Northern Insurance. In Quemetco, Inc. v. Pacific Automobile Ins. Co., 24 Cal.App.4th 494, 499-501, 29 Cal.Rptr.2d 627 (Cal.App. 2d Dist. 1994), somewhat unusual facts existed inasmuch as the successor company was held liable under a federal environmental statute that did not come into effect until after the asset purchase. Thus, the court found there was no loss that could be assigned. Id., 24 Cal. 4th at 502-03. Moreover, the majority relied on the "two masters" argument discussed above, since in that case the predecessor company continued in operation and was subject to being sued under the federal statute.

Here, Field & Shorb has been dissolved and can no longer be sued. See 805 ILCS 5/12.80 (West 2007) (action against dissolved corporation must be commenced within five years of date of dissolution).

Oliver Machinery Co. v. U.S.F.&G. Co., 187 Cal.App.3d 1510, 232 Cal. Rptr.691 (Cal. App. 2d Dist. 1986) was concerned with a successor corporation's own insurance policy and whether it covered an "additional insured," a distributor, for injuries caused by the predecessor corporation's products. In addition, the successor's policy expressly limited coverage to its own products. Oliver, therefore, does not apply since it does not address the issue of coverage under a predecessor's policy.

Finally, Travelers relies on General Accident Ins. Co. v. Superior Court, 55 Cal.App.4th 1444, 64 Cal.Rptr.2d 781 (1st Dist. 1997). The General Accident court based its conclusion on two grounds: the purported "two masters" problem, and its belief that if coverage transferred by operation of law, "an insurer which was never a party to an insurance contract would be held liable to an 'insured' that has never paid a premium or been subjected to an underwriting analysis." 55 Cal. App.4th at 1454-55. As seen above, the "two masters" problem, whatever relevance it might have had in General Accident, does not exist in this case. The second concern is also inapplicable. In the case at bar, Field & Shorb *did* pay a premium to Travelers, and *was* subjected to underwriting analysis by Travelers; Connor is simply stepping

forward to collect those insurance benefits since Field & Shorb is out of business and dissolved.

Although Travelers criticizes Connor for citing cases from outside Illinois, Travelers nevertheless cites a Wisconsin court of appeals case, a New York Supreme Court case, and a federal district court case decided under Michigan law in an effort to support its position. These cases are all distinguishable as well.

Red Arrow Products Co., Inc. v. Employers Ins. of Wausau, 233 Wis.2d 114, 607 N.W.2d 294 (Wis. App. 2000), as Travelers concedes, involved a contractual transfer of liabilities of the predecessor company. Response at 22; 607 N.W.2d at 296-97. By contrast, the Asset Purchase Agreement here did not involve the transfer of tort liabilities to Connor. In addition, as in Quemetco, no chose in action arose until many years after the asset purchase when the liability-creating environmental statute was enacted. Here, by contrast, the principles of general successor liability were in place long before 1991.

Similarly, in EM Industries v. Birmingham Fire Ins. Co., 141 A.D.2d 494, 496, 529 N.Y.S.2d 121 (N.Y. 1988), the successor company purchased "all...the liabilities relating to the business of [predecessor], of whatever kind, character or description..." No similar language is contained in the Asset Purchase Agreement here.

Finally, in Century Indem. Co. v. CCI Ins. Co., 318 F.Supp.2d 530 (W.D. Mich. 2003), the court declined to follow Northern Insurance because the court felt

the insurer's risk was increased due to the fact that the insurer would have had to defend additional entities. 318 F. Supp.2d at 539. As seen above, no such increased risk or additional parties are present in this case. In addition, the court found there was a question of fact whether injury had occurred prior to the asset purchase. Id. at 540.

In sum, even if this Court determines that Connor did not acquire rights under the Travelers policy by virtue of its purchase of Field & Shorb's assets, Connor has clearly done so by operation of law. To rule otherwise would be to award the insurance company an unfair windfall by allowing it to avoid coverage for a risk it agreed to insure. The operation of law rule is grounded in sound considerations of common sense and public policy. The dissent in Glidden states these policy reasons well:

> **The idea that one twist within a tortuous corporate history would absolve an insurer from the duty to indemnify and defend on a claim that arose within the policy period is intolerable.** [Such a holding] has unacceptable implications for would-be insureds, for corporate succession in Ohio, and most importantly, for victims of tortious acts...
>
> Glidden I [the predecessor company] paid premiums for that protection. The losses arose during the policy period. The losses were covered under the insurance contracts. Does the transfer of Glidden I's liabilities mean that the coverage never arose? **Does the coverage simply vanish as if it had never existed because the policies themselves were not transferred to Glidden III [the successor company]? No...**When the loss arises, the coverage implications become a part of the nature of the liability; the coverage is attached to the liability...

> Moreover, when coverage follows liability by operation of law, there is no risk that insurers will reap a windfall by denying coverage for covered losses based not upon the nature of the loss, but upon the post-loss corporate maneuverings of the entity that paid for the coverage. **Should a corporate structural change that negligibly affects an insurer's obligation be the basis for the complete abrogation of coverage?**
>
> The disappearance of coverage affects more than corporate successors – it greatly affects the victims of tortious acts. Families that suffered injuries long before Glidden III ever existed will be punished for the manner in which Glidden III came into being. The original tortfeasor may have been reorganized into unrecognizability, but the injuries it caused remain. Despite what the original corporation looked like, whether or not the current incarnation has the resources to face responsibility, the fact is that **insurers agreed to cover those very injuries for which the victims seek compensation.** Glidden, slip op. at 16-17 (emphasis added)

At the end of the day, this is the only rule that makes sense: *if the tort liability for which coverage is being sought is imposed on the successor company by operation of law – as opposed to being expressly transferred contractually by the parties themselves in their own agreement – then the liability insurance benefits also transfers by operation of law.* To the extent the cases Travelers relies upon have failed to recognize this common sense analysis, they should not be followed.

IV. TRAVELERS' PURPORTED COVERAGE DEFENSES DO NOT PRECLUDE ENTRY OF SUMMARY JUDGMENT AGAINST TRAVELERS AS THEY ARE WITHOUT SUPPORT IN THE RECORD AND ARE WITHOUT MERIT.

Travelers has persistently throughout this litigation engaged in scorched-earth discovery in a desperate effort to uncover some fact that might give it a coverage defense. Yet despite Connor's production of thousands of documents, and despite

numerous and lengthy depositions, Travelers has come up dry. Even if it could muster up some support for a coverage defense, Travelers is estopped to assert any coverage defenses as a matter of law.

The applicable estoppel rule is set forth in one of the cases Travelers cites, Employers Ins. of Wausau v. Ehlco Liquidating Trust, 186 Ill.2d 127, 150-51, 708 N.E.2d 1122 (1999):

> The general rule of estoppel provides that an insurer which takes the position that a complaint potentially alleging coverage is not covered under a policy that includes a duty to defend may not simply refuse to defend the insured. Rather, the insurer has two options: (1) defend the suit under a reservation of rights or (2) seek a declaratory judgment that there is no coverage. If the insurer fails to take either of these steps and is later found to have wrongfully denied coverage, the insurer is estopped from raising policy defenses to coverage.

Travelers, when Connor tendered the asbestos lawsuits to it, failed to follow either of the two courses of action prescribed by Illinois courts. Therefore, Travelers is estopped to asset its alleged coverage defenses. All of Travelers' attempts to circumvent the estoppel rule and employ its purported coverage defenses are without merit.

Travelers first claims (Response at 24-5) that its duty to defend cannot arise because Field & Shorb is not named as a defendant in the underlying asbestos lawsuits. What Travelers fails to grasp is that Illinois courts have allowed the insurer's duty to defend to be established by facts outside the "four corners" of the

complaint.

In one of the leading cases in this area, the Third District recently affirmed Judge Barra on this very point. L.A. Connection v. Penn-America Ins. Co., 363 Ill.App.3d 259, 843 N.E.2d 427 (3d Dist. 2006). The appellate court found that when determining whether a duty to defend exists, "we are no longer limited to the allegations of the complaint, but may also consider extrinsic evidence gathered during the discovery process." 363 Ill.App.3d at 266-67; see also Fidelity & Cas. Co. of N.Y. v. Envirodyne Engineers, 122 Ill.App.3d 301, 304, 461 N.E.2d 471 (1st Dist. 1983) (same).

Illinois courts have long held that an insurer such as Travelers which chooses to ignore such extrinsic facts and evidence does so at its peril:

> ...even though the complaint, standing alone, may not fairly apprise the insurer that the third party is suing the putative insured on an occurrence potentially within the policy's coverage, **the insurer is obligated to conduct the putative insured's defense if the insurer has knowledge of true but unpleaded facts, which, when taken together with the complaint's allegations, indicate that the claim is within or potentially within the policy's coverage... To hold otherwise would allow the insurer to construct a formal fortress of the third party's pleadings and to retreat behind its walls,** thereby successfully ignoring true but unpleaded facts within its knowledge that require it, under the insurance policy, to conduct the putative insured's defense.

Associated Indemnity Co. v. INA, 68 Ill.App.3d 807, 816, 386 N.E.2d 529 (1st Dist. 1979) (emphasis supplied); see also Ins. Co. of the State of Penn. v. Protective Ins. Co., 227 Ill.App.3d 360, 366-67, 592 N.E.2d 117 (1st Dist. 1992) (insurer "became

obligated to defend" the putative insureds "despite the possibility they might later be found not to be insureds").

Connor provided to Travelers undisputed extrinsic evidence in the form of the Asset Purchase Agreement showing that Connor acquired Field & Shorb's rights under the Travelers policy. In addition, Connor produced evidence showing that Field & Shorb's products, not Connor's products, are at issue. Siderius Aff., Exh. D; Repo Aff., Exh. 22 at CON16175. The evidence shows that Connor has never manufactured asbestos products and there is no evidence that any products it sold in its own right (as opposed to Field & Shorb products it sold) have ever exposed any of the asbestos plaintiffs to injury. Nonetheless, Travelers still refuses to defend. Therefore, the cases relied upon by Travelers are inapplicable and do not bar its duty to defend.

Travelers next contends it has no duty to defend certain of the underlying asbestos lawsuits because Connor allegedly "never tendered" them to Travelers. (Response at 25-26) Travelers' plea that Connor never gave it an "opportunity" to defend these lawsuits ignores the undisputed fact that Connor was not aware of the existence of the Travelers' policy until March, 2005. Siderius Aff., Exh. I. This plea also rings hollow in light of Travelers' own conduct. Even after Travelers was tendered Connor's asbestos claims and was provided with a copy of the Asset Purchase Agreement, Travelers simply issued a blanket denial letter and refused to do

anything. Siderius Aff., Exh. J. Travelers refused to defend Connor and did not file a declaratory judgment action. Given Travelers' response to Connor's tenders, it is clear that even if every single one of the asbestos lawsuits had all been tendered to Traveler the minute they were served on Connor, it would have been a useless act.

Travelers next claims that it cannot be estopped to assert its alleged coverage defenses because it "actively litigated" coverage in this case. However, the record shows that Travelers has been "actively litigating" only in the sense that it has actively sought to obstruct the orderly conduct of this case at every turn.

Connor filed its motion for summary judgment on March 10, 2006. Connor's five-page motion attached one affidavit and was accompanied by a five page memorandum of law which cited a grand total of seven cases. Nonetheless, rather than simply responding to Connor's motion for summary judgment on the merits, Travelers objected vehemently to Connor's request for a briefing schedule on its motion, and embarked upon nine months of pointless discovery including six depositions and the production of over 23,000 pages of documents by Connor. All of this is not to mention the diversionary tactic Travelers employed by moving to disqualify Connor's counsel. Judge Barra properly denied Travelers' motion after Travelers had forced Connor to extensively brief it. This is not what Illinois courts mean when they refer to an insurer "actively litigating" its coverage defenses.

Travelers seeks to rely on the fact that it filed pleadings after Connor filed this

declaratory judgment action. However, in Korte Construction Co. v. American States Ins. Co., 322 Ill.App.3d 451, 459, 750 N.E.2d 764 (5th Dist. 2001), the court rejected the claim that simply filing a pleading in response to a policyholder's complaint for declaratory judgment was sufficient to avoid estoppel. The court stated: "[T]he insurer must take some action to adjudicate the issue of coverage or undertake to defend the insured under a reservation of rights, and it must take that action within a reasonable time of a demand by the insured." Id., 322 Ill.App.3d at 458.

Here, Connor tendered the pending asbestos lawsuits to Travelers within days after it discovered the existence of the Travelers policy in March, 2005. Siderius Aff., Exh. H. Travelers did nothing more than file pleadings and inundate Connor with discovery until December 8, 2006 when it filed its cross-motion for summary judgment.

This delay of **twenty months** does not, as a matter of law, constitute "actively litigating" coverage defenses as Illinois courts have required. Korte Construction, *supra*, 322 Ill.App.3d at 86 (insurer which delayed some 23 months after being notified of lawsuit before filing its motion for summary judgment in declaratory judgment action filed by the insured held estopped); Ins. Co. of State of Pennsylvania v. Protective Ins. Co., *supra*, 227 Ill.App.3d at 369 (insurer that waited 23 months after denying a defense on alleged basis that party seeking coverage was not an

insured under its policy held estopped); West American Ins. Co. v. J.R. Const. Co., 334 Ill.App.3d 75, 86, 777 N.E.2d 610 (1st Dist. 2002) (insurer which failed to take necessary action to assert its alleged coverage defenses for 21 ½ months after being tendered the defense of the underlying lawsuit held estopped); Central Mut. Ins. Co. v. Kammerling, 212 Ill.App.3d 744, 750, 751 N.ED.2d 806 (1st Dist. 1991) (insurer that waited until ten months after it had notice of loss to assert its late notice claim in a declaratory judgment action held estopped). As one court put it, "...an insurer cannot avoid estoppel by seeking a declaratory judgment at its leisure." Westchester Fire Ins. Co. v. G. Heileman Brewing Co., 321 Ill.App.3d 622, 633, 747 N.E.2d 955 (1st Dist. 2001).

Travelers next claims that Connor is guilty of "late notice" of some of the asbestos lawsuits based on the time periods between when Connor was served with the asbestos lawsuits and the time Connor provided notice to Travelers. (Response at 27) What Travelers misconstrues is the key fact relating to notice in this case – the undisputed fact that Connor did not learn of the existence of the Travelers policy until March, 2005 when Connor discovered its policy number. Siderius Aff., Exh. I. Travelers was made aware all the asbestos lawsuits within days after Connor became aware of the Travelers policy. Id. Notably, Travelers refused to even provide Connor with a copy of its policy for months, forcing Connor to serve a request to produce on Travelers. Even then, Travelers still refused, forcing Connor to file a motion to

compel, which was granted when Judge Barra ordered Travelers to produce its policy to Connor on February 7, 2006.

In light of these undisputed facts, Travelers cannot be heard to argue that the notice it received was late. Zurich Ins. Co. v. Walsh Const. Co., 352 Ill.App.3d 504, 816 N.E.2d 801 (1st Dist. 2004) (insured excused from giving notice where it reasonably believed coverage under the policy was not likely to be implicated); see also American Country Ins. Co. v. Efficient Const. Corp., 225 Ill.App.3d 177, 181, 587 N.E.2d 1073 (1st Dist. 1992) (insured excused from giving notice to insurer where it was not clear that a claim covered by insurer's policy would be brought). It is certainly reasonable for an insured such as Connor, a small privately-owned business which does not employ a risk manager, to look first for coverage under its own insurance policies, and only later (after hiring outside counsel) to look for its predecessor's insurance policies. See Siderius Aff., Exh. I. Connor was unaware the Travelers policy even existed until March, 2005. As a matter of law, Travelers cannot assert any late notice defense.

Contrary to Travelers' suggestion, there is no genuine issue of fact concerning supposed "knowledge" Connor had about a Travelers policy in 2001. Here, Travelers stretches the facts beyond all bounds by attempting to rely on a single scrap of paper with one ambiguous reference as "proof" that Connor allegedly "knew" about the Travelers policy (the one Travelers refused to produce to Connor until ordered by

this Court to do so) in 2001. Mr. Bulger testified that Mr. Campbell, the author of this document, was not involved in any way with insurance related issues. Siderius Aff., Exh. K. Even construing the facts most liberally in favor of Travelers, this document and the testimony concerning it *might* suggest that *someone* was looking for *some unspecified type* of a Travelers policy. Nothing in the record shows or even suggests that the Travelers general liability policy at issue in this case was located or even identified until March, 2005.

As to Travelers' claim that some of the asbestos lawsuits were not tendered to Travelers until after they had been settled, it should be noted that Travelers does not even attempt to argue that the defense costs incurred by Connor or the settlements Connor entered into were unreasonable. Travelers has essentially made no meaningful attempt to demonstrate that it was prejudiced in any way.[6] To the extent Travelers may attempt to make such an argument, the undisputed facts belie any such suggestion. Those facts are: (1) Connor did not discover the Travelers policy number until March 2005 and provided notice to Travelers within days thereafter; (2) Travelers refused to provide its policy to Connor until eleven months later after forcing Connor to obtain an order from this Court; and (3) the settlements are, in

6 The same is true for Travelers' claim that Connor breached the "cooperation clause" of Travelers' policy (Response at 31). The Illinois test is "...unless the alleged breach of the cooperation clause substantially prejudices the insurer **in defending the primary action**, it is not a defense under the [insurance] contract." M.F.A. Mutual Ins. Co. v. Cheek, 66 Ill.2d 492, 363 N.E.2d 809 (1977). Travelers has never defended Connor in any of the asbestos cases, so it cannot claim a breach of cooperation.

fact, reasonable. See Guillen v. Potomac Ins. Co., 203 Ill. 2d 141, 161, 785 N.E.2d 1 (2003) ("One the insurer has breached its duty to defend, it is in no position to demand that the insured be held to a strict accounting under the policy language").

Travelers is left in a "philosophical quandary" about the fact that Connor did not know about the existence of the Travelers policy until March, 2005. Travelers wonders: "how could Connor have purchased the F&S Policy pursuant to the 1991 Purchase Agreement...when for 14 years, Connor did not know of its existence?" (Response at 29)

The answer is that things like that happen all the time in the real world. As the dissent in Pilkington argues forcefully: "We still make things here; Ohioans do not spend their work hours selling insurance to each other..." Pilkington, *slip op.* at 22 (Pfeiffer, J. dissenting) In the real world, Illinois companies still make and sell things, too. Connor, like any rational business, did not spend every waking moment thinking about its old insurance policies, let alone the old policies of its predecessor. This is all the more rational when one considers that the Travelers policy was issued to Field & Shorb, not Connor, Field & Shorb was never sued, and there were no asbestos lawsuits filed against Connor until almost a decade after the 1991 Asset Purchase Agreement. Whether or not they have substance in the abstract, Travelers' philosophical musings simply have no application to this case.

Travelers next claims that Connor cannot recover for any defense and

indemnity payments on certain of the asbestos lawsuits because they were "voluntary payments" and were defended and settled by Connor prior to Traveler receiving notice. (Response at 31) Once again, Travelers has not in any way suggested that these payments were unreasonable, excessive or unnecessary. In addition, these payments can hardly be called "voluntary" with regard to Travelers when Connor did not even have a copy of the Travelers' policy until February 2006; Connor could not voluntarily give up rights it did not know it had. Perhaps most significantly, it is clear from Travelers' blanket denial of the asbestos lawsuits that Connor tendered to it, from Travelers' refusal to defend or indemnify Connor or to file a declaratory judgment action, and from Travelers' blunderbuss discovery tactics in this case, that even if Connor had somehow identified the Travelers policy issued to Field & Shorb years earlier, tending the lawsuits to Travelers then would have made no difference. "The law never requires the performance of a useless or futile act." People v. Cameron, 286 Ill.App.3d 541, 544, 675 N.E.2d 1002 (1st Dist. 1997).

Travelers does not even attempt to articulate any support for its claim that it was prejudiced by the fact that Connor was forced to settle some of the asbestos lawsuits before it was aware of the existence or terms of the Travelers policy. Travelers was not, in fact, prejudiced since the costs incurred by Connor were reasonable, as Travelers effectively concedes by not challenging their reasonableness. As such, Travelers' claim of prejudice should be disregarded.

Travelers' final attempt to avoid its coverage obligations to Connor is to claim that it has no duty to defend or indemnify Connor against certain of the underlying asbestos lawsuits because the bodily injuries sustained by the asbestos plaintiffs supposedly fall outside the Travelers policy period of 4/1/79 to 4/1/82. Travelers bases this argument on two assumptions, neither of which is correct.

First, Travelers assumes that just because Field & Shorb is not mentioned in some of the asbestos lawsuits, that automatically means Travelers gets a pass. (Response at 32) This, however, ignores the fact that courts can look beyond the "four corners" of the complaint to examine whether an insurer has a duty to defend. L.A. Connection, *supra*; Associated Indemnity, *supra*. Here, the undisputed evidence shows that it was Field & Shorb products, not Connor's products, that were responsible for the alleged bodily injuries sustained by all the asbestos plaintiffs, since Connor never sold asbestos products in its own right. Travelers' assumption, therefore, is factually incorrect.

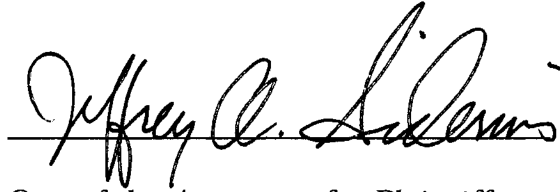
Second, Travelers assumes it is off the hook because any bodily injuries sustained by the asbestos plaintiffs "must have" taken place after 1991 when Connor acquired Field & Shorb's products. Travelers speculates that since its policy expired in 1982, its policy was never triggered.

This makeshift argument completely misses the point. There is no evidence whatsoever that products sold by Connor ever caused bodily injury to any of the

asbestos plaintiffs. Therefore, the bodily injury being claimed by the asbestos plaintiffs was, in fact, caused by Field & Shorb's products. Travelers itself concedes this point on page 33 of its Response when it states: "As noted above, Connor acquired certain *F&S products (for which it is now being sued in the Underlying Actions)*..." (emphasis added) It is a fact that Connor is being sued for *both pre-1991 and post-1991* bodily injuries allegedly caused by Field & Shorb's products. In fact, each and every one of the asbestos bodily injury lawsuits alleges plaintiffs were exposed to asbestos-containing products during the 1979-82 policy period of the Travelers' policy. In short, Connor is being sued *both* for asbestos bodily injury that resulted from the sale of Field & Shorb products prior to 1991, *and* for asbestos bodily injuries that resulted from the sale of Field & Shorb products after 1991. Accordingly, Travelers' argument fails.

III. CONCLUSION.

For all the reasons set forth above and in its Motion for Summary Judgment and Memorandum of Law, the Plaintiff, Connor Company, respectfully requests that this Court grant its Motion for Summary Judgment and deny Travelers' Cross-Motion for Summary Judgment in its entirety.



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Summary of Cases – Operation of Law

Connor's Cases

1. Northern Insurance (9th Cir. 1992): Insurance benefits transferred to successor corporation by operation of law. Asset purchase agreement did not transfer insurance rights and did not transfer tort liabilities.

2. Gopher Oil (Minn. App. 1999): Insurance benefits transferred to successor corporation even though insurance coverage not assigned specifically in asset purchase agreement. Court found losses had already occurred and could be transferred.

3. Total Waste Management (D. N.H. 1994): Court applied Northern Insurance to find insurance benefits transferred to successor corporation despite absence of product-line successor rule; court found no increase in risk to predecessor's insurer.

4. Glidden v. Lumbermens and Pilkington v. Travelers (Ohio 2006): Successor corporation assumed tort liabilities in asset purchase agreement but did not transfer insurance benefits; court held no transfer of insurance benefits by operation of law because successor assumed tort liabilities by contract.

Travelers' Cases

1. Henkel (Cal. 2003): Court found successor corporation voluntarily assumed tort liabilities in purchase agreement, therefore no transfer of insurance benefits; court distinguished Northern Insurance.

2. Quemetco (Cal. App. 1994): Court found insurance benefits did not transfer to successor corporation where chose in action had not come into existence at time of asset sale and predecessor corporation continued in existence.

3. Oliver Machinery (Cal. App. 1986): Did not address issue of whether successor corporation had coverage under predecessor's policy.

4. General Accident (Cal. App. 1997): Court found insurance benefits did not transfer primarily because of "two masters" dilemma and "stranger" argument.

5. Red Arrow (Wis. App. 2000): Court found insurance benefits did not transfer for an environmental liability that did not exist at time of asset sale because statute had not been enacted.

6. EM Industries (N.Y. 1988): Court found insurance benefits did not transfer where successor company assumed all liabilities of predecessor by contract.

7. Century Indemnity (WD. Mich 2003): Court declined to follow Northern Insurance because it believed insurer's risk would be increased due to defending additional entities, and a question of fact existed as to whether injury had occurred prior to asset purchase.