

SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, DE 19801-3733
Telephone (302) 255-0669

April 9, 2012

(VIA E-FILED)

John E. James, Esquire
Michael B. Rush, Esquire
Potter Anderson & Corroon LLP
Hercules Plaza - Sixth Floor
1313 North Market Street
Wilmington, DE 19801

Patricia L. Enerio, Esquire
Melissa N. Donimirski, Esquire
Proctor Heyman LLP
300 Delaware Avenue, Suite 200
Wilmington, DE 19801

RE: *ConAgra Foods, Inc. v. Lexington Insurance Co.*
C.A. No.: 09C-02-170 FSS

**Upon Lexington's Motion for Partial Summary Judgment –
DENIED, as moot.**

Dear Counsel:

After the court granted Lexington's Motion for Partial Summary Judgment on October 30, 2009, ConAgra tried unsuccessfully to certify an interlocutory appeal. The court was adamant that this case should not be sent to the Supreme Court piecemeal.¹ The Supreme Court also refused to certify an interlocutory appeal.²

Apparently in response to this court's and the Supreme Court's refusals to certify an interlocutory appeal, ConAgra agreed to a final judgment order, entered on April 20, 2010. While the final judgment recites various agreements between the

¹ *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 2010 WL 748171, at *1 (Del. Super. Feb. 4, 2010) (Silverman, J.) (“[I]f the parties' cross-appeals were decided interlocutorily, such an appeal's outcome will not be case-dispositive.”).

² *Lexington Ins. Co. v. ConAgra Foods, Inc.*, 998 A.2d 937 (Del. 2010) (TABLE).

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ConAgra Foods, Inc., v. Lexington Insurance Co.
C.A. No.: 09C-02-170 FSS
Letter/Order
April 9, 2012
Page 2

parties, it is a final judgment. The last sentence of the order reads: “There being no other claims or issues before the Court, this Final Judgment Order is final and appealable.” But for that, the court would have not entered the order that finally cleared the way for appeal.

In light of that history, the court considers every issue, including but not limited to ConAgra’s waiver and estoppel claims, was extinguished by the final judgment order. Again, had the court viewed its final judgment order as leaving anything to litigate, it would have not entered the order. The final judgment order was not an interlocutory appeal certification by another name. At this point, therefore, the only issues left are the ones opened by the April 28, 2011 remand.³

In closing, and only by way of mention in passing, the court has always viewed the waiver and estoppel arguments as far-fetched. Basically, ConAgra latched onto Lexington’s befuddled response to ConAgra’s demand for coverage and the fact that it took Lexington a little time to get its wits together. If not at the first moment, Lexington tried to reserve its rights early on. Thus, ConAgra’s waiver and estoppel arguments are overblown. That helps explain why it made sense when ConAgra agreed to convert the partial summary judgment into the final judgment.

For the foregoing reasons, Lexington’s Motion for Partial Summary Judgment is **DENIED** as moot. Final judgment has already been entered on the waiver and estoppel claims.

IT IS SO ORDERED.

Very Truly Yours,

/s/ Fred S. Silverman

cc: Prothonotary (Civil)

³ *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62 (Del. 2011).