NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JMM
JEK by pum
RHP by pum

2009 CA 0632

DON A. PERKINS, INDIVIDUALLY AND AS ADMINISTRATOR OF THE MINOR CHILDREN, ROSS ALAN PERKINS, BRITTANY NICOLE PERKINS, AND KURT MICHAEL PERKINS, AND CYNTHIA E. PERKINS, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE MINOR CHILD HOWARD MACK HUGHES

VERSUS

ENTERGY CORPORATION, LOUISIANA POWER & LIGHT COMPANY, GULF STATES UTILITIES COMPANY, INCORPORATED, AIR LIQUIDE AMERICA CORPORATION, BIG THREE INDUSTRIES, INC., DRESSER INDUSTRIES, INC., MASONEILAN INTERNATIONAL, EXXON CORPORATION, HIGHLANDS INSURANCE COMPANY

Consolidated with

2009 CA 0633

JOSEPH E. BUJOL, III, INDIVIDUALLY AND AS ADMINISTRATOR OF THE MINOR CHILDREN, DEREK BUJOL, DUSTIN BUJOL, AND DEVIN BUJOL AND TINA HEBERT BUJOL

VERSUS

ENTERGY CORPORATION, LOUISIANA POWER & LIGHT COMPANY, GULF STATES UTILITIES COMPANY, INCORPORATED, AIR LIQUIDE AMERICA CORPORATION, BIG THREE INDUSTRIES, INC., DRESSER INDUSTRIES, INC., MASONEILAN INTERNATIONAL, EXXON CORPORATION, HIGHLANDS INSURANCE COMPANY

Consolidated with

2009 CA 0634

ROBERT HRACEK, FRANK E. HRACEK AND ERIC RAY HRACEK

VERSUS

ENTERGY CORPORATION, LOUISIANA POWER & LIGHT COMPANY, GULF STATES UTILITIES COMPANY, INCORPORATED, AIR LIQUIDE AMERICA CORPORATION, BIG THREE INDUSTRIES, INC., DRESSER INDUSTRIES, INC., MASONEILAN INTERNATIONAL, EXXON CORPORATION

Judgment Rendered: JUN 10 2010

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APPEALED FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF IBERVILLE
DOCKET NUMBERS, 45,646, 45,647, 45,718, DIVISION "D"
STATE OF LOUISIANA

THE HONORABLE JACK T. MARIONNEAUX AND WILLIAM C. DUPONT,
JUDGES PRESIDING

* * * * * * *

COUNSEL OF RECORD:

Jay Russell Sever New Orleans, Louisiana	Attorney for Intervenor/Appellee Great American Assurance Company d/b/a/ Agricultural Insurance Company
Ralph S. Hubbard, III. Tina L. Kappen New Orelans, Louisiana	Attorneys for Intervenor/Appellee Travelers Casualty and Surety Company d/b/a AETNA Casualty & Surety Company
Edward T. Hayes New Orleans, Louisiana	Attorney for Defendant/Appellee Royal Indemnity Company
T. Justin Simpson Metairie, Louisiana	Attorney for Defendant/Appellee Hartford Casualty Insurance Company
John P. Wolff, III Baton Rouge, Louisiana	Attorney for Defendant/Appellee Federal Insurance Company
Ralph H. Wall Louis C. LaCour, Jr. Laurie B. Young Lauren J. Delery New Orleans, Louisiana	Attorneys for Defendant/Appellant National Union Fire Insurance Company of Pittsburgh, PA
Thomas E. Schwab New Orleans, Louisiana	Attorney for Defendant/Appellee X.L. Insurance Company
Patrick W. Pendley Plaquemine, Louisiana	Attorney for Defendant/Appellee The Big Three Insurers
Melvin A. Elden Lafayette, Louisiana	Attorney for Defendant/Appellee Reliance Insurance Company

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

McDONALD, J.

National Union Fire Insurance Company of Pittsburgh, PA (National Union) appeals from two summary judgments, the first finding that a policy issued by National Union afforded coverage for injuries suffered by three employees of its insured, Air Liquide America Corporation (ALAC), and the second ordering National Union to pay over $17 million (including interest) in contribution toward the settlement of the injured employees' claims. We affirm.

BACKGROUND

On April 6, 1994, ALAC operated an air-separation facility near Plaquemine, Louisiana, which produced oxygen, nitrogen, and argon.[1] An oxygen flash fire and explosion occurred at the ALAC facility after an electrical disturbance and while three employees were assisting in restarting the plant. They were near the end of the task of restarting the plant when an operating problem developed in the "let-down station." An automatic control valve was regulating differential pressures between a 700-pound oxygen pipeline supplying one customer, Exxon, and a 400-pound pipeline supplying other customers. The employees were closing an eight-inch manual isolation valve upstream from the automatic control valve when the plant manager told them to stop. He then climbed inside the loop of piping that formed the let-down station while the other men watched, standing close enough to the automatic control valve to see it cycle open and then abruptly close. The flash fire erupted with catastrophic results.[2]

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[1] The nature of the air separation business was to draw air into "air machines," where the oxygen, nitrogen, and argon are separated via a cryogenic process. The air is then liquefied and sold. The core business of the Air Liquide conglomerate is to supply oxygen, nitrogen, hydrogen, and other gases and services to various industries.

[2] For a detailed description of the accident, see **Perkins v. Entergy Corporation**, 98-2081, 98-2082, 98-2083 (La. App. 1st Cir. 12/28/99), 756 So.2d 388, aff'd, 2000-1372 (La. 3/23/2001), 782 So.2d 606; see also **Bujol v. Entergy Services, Inc.**, 2000-1621 (La. App. 1st Cir. 8/14/02), 833 So.2d 947, rev'd, 2003-0492, 2003-0502 (La. 5/25/2004), 922 So.2d 1113.

SUBSTANTIVE AND PROCEDURAL HISTORY

L'Air Liquide, Societe Anonyme pour L'Etude et L'Exploitation des Procedes Georges Claude (ALSA) is a multinational company headquartered in France. In the 1960s, ALSA was distributing pressurized oxygen by pipeline in France and Belgium. In the early 1970s, the company began expanding and, by the 1990s, ALSA's corporate family operated in at least 60 countries, including the United States.

In 1986, ALSA acquired Big Three Industries, Inc. (Big Three), a major oxygen pipeline systems operator in the United States that operated air-separation plants throughout the Gulf South, including the Plaquemine plant, for $1,000,500,000, making Big Three a part of the ALSA family of companies and adding approximately 15 plants in Louisiana, Mississippi, and Texas to the ALSA list of subsidiaries.

The Big Three plants continued to operate under the Big Three name until January 1, 1994, when the Big Three division merged with its sister subsidiary, Liquid Air Corporation, forming the new subsidiary ALAC. Though ALSA is the ultimate majority shareholder of ALAC, it is not its direct parent. Through a mechanism described as "cascading ownership," ALSA owns the majority of shares of Air Liquide International, S.A., which owns the majority of shares of American Air Liquide, Inc., which owns the majority of shares of AL America Holdings, Inc., which owns the majority of shares of ALAC. Thus, ALSA is the corporate ancestor of ALAC, which, as of January 1, 1994, is the owner of the Plaquemine plant and employer of the injured men at the time of the accident. Neither the original acquisition nor the subsequent merger affected the physical operation of the Plaquemine plant, which kept the same executives, plant manager, and workers who formerly operated under the Big Three ownership.

The underlying plaintiffs filed suit on March 19, 1995. On October 1, 1996, ALAC filed a Motion for Partial Summary Judgment against the insurance providers for Big Three (Big Three Insurers) seeking a determination that the policies issued by the Big Three Insurers covered the underlying accident and subsequent injuries. The Big Three Insurers denied coverage, but the trial court ruled in favor of ALAC. This Court determined that a genuine issue of material fact existed as to coverage, reversed the judgment and remanded the case. The Big Three Insurers subsequently settled the claims against ALAC.

The Big Three Insurers filed a motion for partial summary judgment seeking a determination that National Union insured ALAC for its liabilities arising out of its ownership and operation of the Plaquemine plant at the time of the accident. That motion was granted on March 1, 1999. However, the Big Three Insurers' contribution claim against National Union was stayed until all underlying claims were resolved.

In January 2007, the Big Three Insurers filed a motion for partial summary judgment seeking an allocation of the $34.5 million payment, plus interest, among all of ALAC's insurers, including National Union. National Union filed a cross-motion challenging the right of contribution and the reasonableness of the settlement amount. The Big Three Insurers responded with a cross-motion for summary judgment. The trial court granted the Big Three Insurers' motion and awarded principal and pre-judgment interest against National Union in excess of $17 million.

After a decade and a half of litigation, the only remaining dispute is whether National Union, an insurer of ALAC and the appellant in this case, must contribute a percentage of the settlement of ALAC's liability already paid to the underlying plaintiffs by the Big Three Insurers. National Union contends that its policy did not afford coverage for the underlying accident and, therefore, it has no obligation

to contribute. National Union further contends that, even if its policy did afford coverage, it does not have a solidary obligation to contribute to the settlement.

APPLICABLE LAW

An appellate court reviews a district court's decision to grant a motion for summary judgment *de novo,* using the same criteria that govern the district court's consideration of whether summary judgment is appropriate. **Smith v. Our Lady of the Lake Hosp., Inc.**, 93-2512, p. 26 (La. 7/5/94), 639 So.2d 730, 750. Summary judgment shall be rendered if there is no genuine issue as to a material fact and the mover is entitled to judgment as a matter of law. **Power Marketing Direct, Inc. v. Foster**, 2005-2023, p. 9 (La. 9/6/06), 938 So.2d 662, 669. A summary judgment may be rendered on the issue of insurance coverage alone, although there is a genuine issue as to liability or the amount of damages. **Bilbo for Basnaw v. Shelter Ins. Co.**, 96-1476, p. 5 (La. App. 1st Cir. 7/30/97), 698 So.2d 691, 694, writ denied, 97-2198 (La. 11/21/97), 703 So.2d 1312.

When the issue before the court is one on which the party bringing the summary judgment motion will bear the burden of proof at trial, the burden of showing there is no genuine issue of material fact remains with the party bringing the motion. **Buck's Run Enterprises, Inc. v. Mapp Const., Inc.**, 99-3054, p. 4 (La. App. 1st Cir. 2/16/01), 808 So.2d 428, 431. An insurer seeking to avoid coverage through summary judgment bears the burden of proving some exclusion applies to preclude coverage. **Lewis v. Jabbar**, 2008-1051, p. 5 (La. App. 1st Cir. 1/12/09), 5 So.3d 250, 254-55 (citing **McMath Const. Co., Inc. v. Dupuy**, 2003-1413, p. 4 (La. App. 1st Cir. 11/17/04), 897 So.2d 677, 681, writ denied, 2004-3085 (La. 2/18/05), 896 So.2d 40).

An insurance policy is a contract between the parties and should be construed employing the general rules of interpretation of contracts set forth in the Louisiana Civil Code. **Reynolds v. Select Properties, Ltd.**, 93-1480 (La.

4/11/94), 634 So.2d 1180, 1183. Words and phrases used in a policy are to be construed using their plain, ordinary, and generally prevailing meaning, unless the words have acquired a technical meaning. **Lewis**, 2008-1051 at 5, 5 So.3d at 255. Where the language in the policy is clear, unambiguous, and expressive of the intent of the parties, the agreement must be enforced as written. **Id**.

The purpose of liability insurance is to afford the insured protection from damage claims. Thus, policies should be construed to effect, and not to deny, coverage. A provision that seeks to narrow the insurer's obligation is strictly construed against the insurer, and if the language of the exclusion is subject to two or more reasonable interpretations, the interpretation which favors coverage must be applied. **Reynolds**, 93-1480, 634 So.2d at 1183. However, subject to the above rules of interpretation, insurance companies have the right to limit coverage in any manner they desire, so long as the limitations do not conflict with statutory provisions or public policy. **Id**.

The rule of strict construction does not authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists. Nor does it authorize courts to alter the terms of policies under the guise of contractual interpretation when the policy provisions are couched in unambiguous language. **Lewis**, 2008-1051 at 5-6, 5 So.3d at 255 (citing **Doiron v. Louisiana Farm Bureau Mut. Ins. Co.**, 98-2818, p. 8 (La. App. 1st Cir. 2/18/00), 753 So.2d 357, 363). The mere fact that an insurance policy is a complex instrument requiring analysis to understand it does not render it ambiguous. **St. Paul Fire & Marine Insurance Company v. Valentine**, 95-0649, p. 5 (La. App. 1st Cir. 11/9/95), 665 So.2d 43, 46, writ denied, 95-2961 (La. 2/9/96), 667 So.2d 534. However, any ambiguity that does exist must be resolved by construing the policy as a whole; one policy provision is not to be construed separately at the

expense of disregarding other policy provisions. **Louisiana Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.**, 93-0911 (La. 1/14/94), 630 So.2d 759, 763-64.

COVERAGE

National Union issued two policies relevant in this case. The primary insurance policy, No. RMGL 175-93-18, was issued on September 10, 1993, with a stated policy period of June 1, 1993, to June 1, 1994. It covered those sums that the "insured" became legally obligated to pay as damages because of "bodily injury" caused by an "occurrence" during the policy period. The definition of "insured" under the terms of the policy includes those designated in the Declarations, that is, Liquid Air Corporation, as well as those listed or described in Endorsement No. 1. Endorsement No. 1 reads:

> NAMED INSURED
>
> LIQUID AIR CORPORATION
> AIR LIQUIDE INTERNATIONAL S.A.
> AMERICAN AIR LIQUIDE, INC.
>
> AND ANY PAST, PRESENT OR FUTURE SUBSIDIARY PARTNERSHIP, AFFILIATED OR PROPRIETARY ORGANIZATION, PROVIDED THE NAMED INSUREDS ABOVE MAINTAIN AND/OR CONTROL DIRECTLY OR INDIRECTLY 50% OR MORE OWNERSHIP INTEREST.
>
> NONE OF THE AFOREMENTIONED ARE AFFORDED COVERAGE WITH RESPECT TO THE OPERATIONS OF BIG THREE INDUSTRIES, INC. (WITH THE EXCEPTION OF LIQUID AIR CORPORATION PLANTS IN WHICH BIG THREE INDUSTRIES HAS 100% OPERATIONAL AND OWNERSHIP [EXCEPT TITLE] CONTROL), LIQUID AIR ENGINEERING CORPORATION, LIQUID AIR PUERTO RICO CORP., CANADIAN LIQUID AIR, ALOXY CANADA, INC., OXYCHEM CANADA, INC. AND LA OXIGENA S.A. ALSO EXCLUDED ARE THE DISTRIBUTORS IN WHICH LIQUID AIR CORP. HAS AN EQUITY INTEREST.
>
> THE POLICY SHALL ALSO APPLY TO ANY CLAIM OR CLAIMS ARISING FROM L'AIR LIQUIDE, SOCIETE ANONYME POUR L'ETUDE ET L'EXPLOITATION DES PROCEDES GEORGES CLAUDE AND ALAC ENVIRONMENTAL SERVICES, INC. OR THEIR RESPECTIVE SUBSIDIARY OR OWNED OR CONTROLLED COMPANIES,

BUT ONLY WITH RESPECT TO THE OPERATIONS AND PRODUCTS OF THE NAMED INSURED.

The policy subsequently was amended by Endorsement No. 24, dated January 12, 1995 (after the subject accident), to add ALAC and AL America Holdings, Inc. to the list of Named Insureds, effective January 1, 1994 (before the subject accident).[3] That same endorsement states, "IT IS FURTHER AGREED THAT THIS POLICY EXCLUDES FROM COVERAGE THE OPERATIONS FORMERLY KNOWN AS BIG THREE INDUSTRIES, INC. ETAL [*sic*]."

National Union's excess insurance policy, No. BE 308-57-86, covered "that portion of the ultimate net loss in excess of the retained limit . . . which the Insured shall become legally obligated to pay as damages for liability imposed upon the insured by law . . . because of (i) personal injury . . . caused by an occurrence." The named insured under the primary policy is "Liquid Air Corporation as per Endorsement No. 1." Endorsement No. 1 as to the excess policy reads:

NAMED INSURED ENDORSEMENT

It is agreed that Item 1 of the Declaration, Named Insured, shall read:

Air Liquide International S.A.
American Air Liquide, Inc.
Liquid Air Engineering Corporation/Societe D'Ingenierie Air Liquide
Liquid Air Puerto Rico Corporation
U.S. Divers Co., Inc.
Sea Quest, Inc.
Industrial Gases Distributors in which Liquid Air Corporation has an equity interest
Vitalaire Limited Partnerships
Q-S Oxygen Processes, Inc.
Argonal, Inc.
Hydrogenal, Inc.
Hydrogenal II, Inc.
Medal L.P.
ASGT, Inc.
Canadian Liquid Air
CSI (as ALAC Environmental's interest may appear)
Pro Cal (as LAC[']s interest may appear)

[3] There is no dispute regarding whether ALAC was included as an insured at the time of the accident. Even if ALAC had not been added to the list of Named Insureds, the policies specifically provided coverage to subsidiaries, affiliations, and subsequently acquired companies not otherwise excepted.

ALAC Environmental Services[4]

And any past, present or future subsidiary, partnership, affiliated or proprietary organization, provided that any of the aforementioned maintains and/or directly or indirectly, controls a 50% or more ownership interest.

None of the aforementioned are afforded coverage with respect to the operations of Big Three Industries, Inc., Oxychem Canada, Inc. and Aloxy Canada, Inc., with the exception of Liquid Air Corporation plants in which Big Three Industries owns assets.

This policy shall also apply to any claim or claims arising from L'Air Liquide, Societe Anonyme pour L'Etude et L'Explotation des Procedes Georges Claude or Aqualung International or their respective subsidiary or owned or controlled companies only as respects the operations and products of the Named Insured.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

This endorsement was likewise revised to add ALAC and AL America Holdings, Inc. after the subject accident (said revision is dated December 14, 1994) with an effective date of January 1, 1994. Finally, just as Endorsement No. 24 was added to the primary policy, Endorsement No. 27 attempted to add or clarify, depending on which party is asserting the claim, the "Specific Entity Exclusion," stating:

THIS POLICY DOES NOT APPLY TO "BODILY INJURY", "PROPERTY DAMAGE", "PERSONAL INJURY" OR "ADVERTISING INJURY" ARISING OUT OF ANY OPERATIONS OF THE ENTITY FORMERLY KNOWN AS BIG THREE INDUSTRIES, INC. ET AL.

This endorsement is not dated, but was undisputedly issued after the accident, sometime between December 14, 1994, and October 10, 1995.[5]

It is undisputed that, after the merger in January 1994, the Plaquemine plant was owned and operated by ALAC. When asked which entity operated the plant on the date of the accident, ALAC's corporate designee responded, "It would have

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[4] ALAC Environmental Services should not be confused with the ALAC that owned the Plaquemine plant at the time of the accident.

[5] The endorsement falls sequentially between Revised Endorsement No. 1 (issued December 14, 1994) and Endorsement No. 28 (issued October 10, 1995).

been the tonnage operations of Air Liquide America." The Big Three insurers contend that this resolves the coverage dispute. In other words, Big Three stopped operating the Plaquemine plant when it ceased to exist as a separate entity, having dissolved as a result of the merger with ALAC. Thus, any exclusion as to Big Three operations no longer applied.

National Union contends that the endorsement language excluded coverage for all operations at the Plaquemine plant. It argues that the Plaquemine plant was one of the "operations" of Big Three at the time of the inception of the policy and that the exclusion of those operations included ALAC's liabilities at that location.

ENDORSEMENT NO. 1

We turn to the provisions of the National Union policies in place on the date of the accident to determine the merits of National Union's assertion that the policies specifically excluded coverage for the underlying accident.

The pertinent provisions are found in the Named Insured Endorsements, which each have an effective date of June 1, 1993. The named insured is Liquid Air Corporation, the corporation that merged with Big Three on January 1, 1994, to become ALAC, the owner of the Plaquemine plant on the date of the accident. National Union does not dispute that ALAC is a covered insured under its policies. However, National Union contends in its brief that the accident resulted from "the operations of Big Three Industries," which operations are specifically excluded by Endorsement No. 1, and further asserts that this Court has already determined this issue in National Union's favor.

In **Bujol,** this Court considered whether ALSA, the ultimate parent company of ALAC, was entitled to coverage under the excess liability policy at issue now. We said:

> The pertinent provisions are found in the "Named Insured Endorsement," which has the effective date of "6/1/93." The named insured is Liquid Air Corporation, the corporation that merged with

> Big Three on January 1, 1994, to become ALAC, the owner of the Plaquemine plant on the date of the accident. Thus, Liquid Air Corporation, as well as Big Three, had no operations at the Plaquemine plant on the date of the flash fire. However, the endorsement provides for additional named insureds, some of which were in the "cascading" ownership scheme, which begins with ALSA and ends with ALAC. . . .
>
> ALSA is mentioned only in the final paragraph of the endorsement and not in the list of additional insureds beginning with Air Liquide International S.A. ALSA is not one of the "aforementioned" to which the exclusion of the operations of Big Three was meant to apply. Thus, coverage for ALSA is not excluded by the terms of the second-to-last paragraph of the Named Insured Endorsement in effect on the date of the accident.

Bujol, 2000-1621 at 39-40, 833 So.2d at 978-79. Thus, National Union argues, inasmuch as we determined ALSA was *not* one of the "aforementioned" entities in the endorsement to which the exclusion could apply, ALAC *is* one of the "aforementioned" entities in the endorsement and, therefore, an insured to which the exclusion was intended to apply. But the exclusion was not, in fact, analyzed by this Court in **Bujol**. On the contrary, because the exclusion could not apply to ALSA, regardless of whether it would apply to the accident in question, any further analysis became moot.[6]

Generally speaking, upon a merger of corporations, the separate existences of the constituent or merging corporations cease to exist, except that of the surviving business. **El Chico Restaurants of Louisiana, Inc. v. Louisiana Gaming Control Bd.**, 2001-0205, p. 5 (La. App. 1st Cir. 12/20/02), 837 So.2d 641, 645 (citing La. R.S. 12:115B; 8 Del.C. § 259(a)). The surviving corporation then possesses the rights and privileges of the former corporations that are merged or consolidated. **Id**. Moreover, the property and assets of the constituent corporations are deemed to be transferred to the surviving corporation without

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[6] As previously mentioned, ALAC was not specifically named as an "aforementioned" entity at the time of the accident, but was added in the revised endorsements after the accident occurred. Nevertheless, the parties agree that ALAC was a covered insured. Thus, we address the exclusions as if ALAC were specifically named in the original policies.

further act. **Id**. Thus, Big Three did, in fact, cease to exist at the time of the merger.

National Union urges, however, that the exclusion was not intended to apply to those acts of the corporation known as Big Three, but rather to the activities of ALAC that were formerly performed by Big Three. In essence, National Union suggests in its brief that "Big Three Industries, Inc." should be read as an adjective identifying the "physical plants, facilities, and operations engaged in tonnage-gas activity." But reading "Big Three Industries, Inc." as a "descriptor of the specific type of facilities for which coverage would not be afforded," as National Union suggests, rather than as a noun identifying a corporate entity, confounds the endorsements specifically and the policies as a whole.

Insurance contracts are to be read as a whole. **Peterson v. Schimek**, 98-1712, p. 5 (La. 3/2/99), 729 So.2d 1024, 1029. One portion should not be construed separately at the expense of disregarding another. **Crabtree v. State Farm Ins. Co.**, 93-0509 (La. 2/28/94), 632 So.2d 736, 741. When read as a whole, it is clear that the references to corporate names within the "Named Insured" endorsements are references to the corporate entities and are not used as descriptors of various operations. This interpretation is in line with the policy as a whole, as it is a contract to provide coverage for the liabilities of the insured entities and not for specific property or facilities. "The operations of Big Three Industries, Inc.," when read within the whole of the insurance policies, cannot mean anything other than the corporation known, as of the issuance date of the policy, as Big Three Industries, Inc.

Furthermore, the term "operations" is not defined in the policy. Words and phrases used in an insurance policy are to be construed using their plain, ordinary, and generally prevailing meaning, unless the words have acquired a technical meaning. **Cadwallader v. Allstate Insurance Co.**, 2002-1637, p. 3 (La. 6/27/03),

848 So.2d 577, 580. When the terms of the policy are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. C.C. art. 2046. The word "operations" is the plural of operation, a noun, which is understood to mean an act or manner of functioning. See http://dictionary.reference.com/browse/operations (accessed 2/18/2010).

Neither Liquid Air Corporation nor Big Three had any operations at the Plaquemine plant on the date of the accident. ALAC both **owned** and **operated** the Plaquemine plant at the time of the accident. The underlying plaintiffs' claims, therefore, were not based on the operations of Big Three. Rather, those claims were based on the operations of ALAC, which National Union accepted as an additional insured. Thus, Endorsement No. 1 does not operate to exclude coverage for the accident in question.

ENDORSEMENT NO. 27

National Union contends that Endorsement No. 27 evidences the parties' mutual intent to exclude the operations at the Plaquemine plant. The "Specified Entity Exclusion" was meant, according to National Union's brief, to "memorialize the **pre-merger** decision to exclude coverage for all operations formerly conducted by Big Three Industries." (Emphasis in original).

The district court dismissed the endorsement as an attempt to annul coverage retroactively. See La. R.S. 22:1262[7] (specifically prohibiting an insurer and an insured from retroactively annulling liability coverage after the occurrence of an injury). This Court likewise rejected National Union's argument that Endorsement No. 27 evidenced an exclusion of coverage in **Bujol**, 2000-1621 at 39, 833 So.2d at 978. We maintain that the retroactive endorsement issued by National Union after the accident in question can have no effect on the claims that resulted from the accident. To the extent that National Union offers Endorsement No. 27 as

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[7] La. R.S. 22:639 was redesignated Acts 2008, No. 415, § 1, to La. R.S. 22:1262.

evidence of the parties' previous intent, accepting such evidence would be contrary to public policy and jurisprudence regarding strict construction of insurance policies. Even if the post-accident endorsement was signed by the insured and the insurer in good faith, allowing it to have effect would encourage bad-faith cooperation between an insured who seeks to avoid payment of claims and a named insured whose premiums are affected by past losses. See, e.g., **Duncan v. U.S.A.A. Ins. Co.**, 2006-363, p. 15 (La. 11/29/06), 950 So.2d 544, 553 (regarding reformation of a UM policy waiver). Thus, National Union cannot rely on Endorsement No. 27 to deny coverage.

EXTRINSIC EVIDENCE

Lastly as to the coverage issue, National Union argues that the trial court should have considered extrinsic evidence to ascertain whether coverage exists under its policy for the accident in question if it had "any doubt" that no coverage existed. But the use of extrinsic evidence is proper only when a contract is found to be ambiguous after an examination of the four corners of the agreement, or when it is susceptible to more than one interpretation, or the intent of the parties cannot be ascertained. **Sanders v. Ashland Oil, Inc.**, 96-1751, pp. 8-9 (La. App. 1st Cir. 6/20/97), 696 So.2d 1031, 1036, writ denied, 97-1911 (La. 10/31/97), 703 So.2d 29. Whether a contract is ambiguous is a question of law. **Gaylord Container Corp. v. CNA Ins. Companies**, 99-1795, p. 9 (La. App. 1st Cir. 4/3/01), 807 So.2d 864, 870, writ denied, 2001-2368 (La. 12/07/01), 803 So.2d 31. As previously addressed, we find no ambiguity in the phrase "operations of Big Three Industries, Inc." The terms of the policy are clear and unambiguous and lead to no absurd consequences. Thus, no further investigation into the parties' intent may be made. The trial court properly refused to consider National Union's offer of extrinsic evidence.

Having determined no valid basis for the denial of coverage, we find that the policies issued by National Union provide coverage for ALAC's liability resulting from the underlying accident. Thus, summary judgment on this issue was proper.

CONTRIBUTION

National Union contends that, even if the policies provided coverage, the Big Three Insurers' claim for contribution must, nevertheless, fail. As a "ready and willing" insurer prepared to defend its insured at trial, National Union asserts that it should not be compelled to pay for the strategic decision made by the Big Three Insurers to avoid trial by settling with the underlying plaintiffs on behalf of ALAC. National Union relies on three bases to support its assertion: ALAC's liability, if any, has yet to be adjudicated; any obligation that National Union has resulting from that liability is joint with the Big Three Insurers and not solidary, as expressed in the policies at issue; and the settlement reached between the Big Three Insurers and the underlying plaintiffs was unreasonable in light of the then-existing state of the law regarding punitive damages.

SOLIDARY LIABILITY

It is axiomatic that when one of two or more potentially liable insurers pays a loss, whether in satisfaction of a judgment or in settlement of a claim, it may then seek payment from the other insurers of their fair share of the loss. Under Louisiana law, an obligation is "solidary among debtors when they are obliged to the same thing, so that each may be compelled for the whole, and when payment by one exonerates the other toward the creditor." **Hoefly v. Gov't Employees Ins. Co.**, 418 So.2d 575, 576 (La. 1982); see also **Great Southwest Fire Ins. Co. v. CAN Ins. Cos.**, 557 So.2d 966 (La. 1990). In other words, if two or more insurance companies fully insure the same loss and one company pays total loss, that company may force contribution from others. See **Bellard v. American Cent. Ins. Co.**, 2007-1335 and 2007-1399, p. 11 (La. 4/18/08), 980 So.2d 654, 663-64 (a

solidary obligation exists when the obligors: (1) are obliged to the same thing, (2) so that each may be compelled for the whole, and (3) when payment by one exonerates the other from liability toward the creditor).

We have previously determined that National Union had an obligation regarding ALAC's liability for the underlying accident. The settlement reached by the Big Three Insurers relieved National Union from its liability to its insured. Thus, the obligation of National Union is solidary to that of the Big Three Insurers and payment by the Big Three Insurers to the underlying plaintiffs subrogated the Big Three Insurers to ALAC's rights against National Union.

ADJUDICATION OF LIABILITY

National Union contends that the settlement reached between the Big Three Insurers and the underlying plaintiffs does not provide proof of the original damages, and such proof is required before the Big Three Insurers can seek contribution. National Union cites **Citgo Petroleum Corp. v. Yeargin, Inc.**, 95-1574 (La. App. 3d Cir. 2/19/97), 690 So.2d 154, to support this assertion.

In **Citgo**, the Third Circuit originally rendered an opinion concluding that parties who had requested a jury trial on all issues were wrongfully denied their right to have the issue of insurance coverage, not underlying liability, decided by the jury. **Id.**, 95-1574 at p. 7, 690 So.2d at 161 (citing **Citgo Petroleum Corp. v. Yeargin, Inc.**, 95-1574 at p. 12-13 (La. App. 3d Cir. 7/3/96), 678 So.2d 936, 942). The supreme court granted writ applications and stated, in a one sentence order, "Granted and remanded to the court of appeal to decide the case on the record. **Gonzales v. Xerox**, 320 So.2d 163 (La. 1975)." **Citgo Petroleum Corp. v. Yeargin, Inc.**, 96-2000 (La. 11/15/96), 682 So.2d 746; **Citgo Petroleum Corp. v. Yeargin, Inc.**, 96-2007 (La. 11/15/96), 682 So.2d 747. We do not find this case persuasive.

National Union also cites **Constans v. Choctaw Transport, Inc.**, 97-0863 and 97-0864 (La. App. 4th Cir. 12/23/97), 712 So.2d 885, writs denied, 98-0408 and 98-0412 (La. 3/27/98), 716 So.2d 892, in which a trucking company that was ultimately found to be without fault in an auto accident settled with various plaintiffs and took a subrogation and assignment of rights to proceed against other parties. The **Constans** court found that recovery had been made against the trucking company by virtue of the settlement which it had entered into and that, therefore, a third party claim by the trucking company against another entity was appropriate. **Id.** However, the Fourth Circuit later clarified that it was referencing third parties who previously had been determined to be at fault by the trial court. See **Spiro v. Liberty Mutual Fire Ins. Co.**, 99-1797, p. 7 (La. App. 4th Cir. 4/12/00), 761 So.2d 53, 57.

The Fourth Circuit determined in **Spiro** that awarding contribution absent a joint stipulation or a judicial ruling as to the amount of damages would be "patently unfair," forcing "one tortfeasor to contribute a percentage of whatever amount the other tortfeasor chooses to offer in settlement and the injured party chooses to accept, unless that amount is clearly less than the amount of the injured party's damages." **Id**. But **Spiro** did not involve multiple insurers settling the same liability of their underlying insured.

More similar is **Maryland Casualty v. Liberty Mutual Insurance Co.**, 254 La. 489, 224 So.2d 465 (La. 1969), in which the supreme court addressed whether a workers' compensation compromise settlement can form the basis for fixing the indebtedness of a third party as a solidary obligor. In **Maryland Casualty**, an employee worked for a company that leased equipment and workers to other companies. The employee was injured while working for the special employer. The insurer of the general employer settled with the employee and sought to recover one-half of the settlement from the special employer. The supreme court

found that the demand was proper and held that the general employer and the special employer were solidary obligors, with the settlement acting as the basis for the demand, holding:

> In **Morris v. Kospelich**, 253 La. 413, 218 So.2d 316, we held: '* * * If the joint tortfeasor requesting contribution proves that a tort was in fact committed, that the defendant was solidarily liable with him for the amount compromised, and that the amount paid was not in excess of the damage inflicted, he may collect his pro rata share from the other joint tortfeasor by virtue of a separate suit. * * *' The record now before us reflects that the settlement was not excessive, and that no real issue is made by the defendant as to its fairness. Additionally, as required by law, the workmen's compensation settlement was approved by a judgment of court, and it should be accorded even greater respect than a tort compromise. We hold that the settlement by this plaintiff may be the basis for a demand for contribution under a solidary obligation.

Id., 254 La. at 494, 224 So.2d at 467. The insurer of the general employer was allowed to claim contribution of one-half of the settlement from the special employer.

Thus, just as in **Morris** and **Maryland Casualty**, the settlement entered into by the Big Three Insurers and the underlying plaintiffs, if determined to be fair and not excessive, may form the basis for the demand for contribution from National Union as a solidary obligor in lieu of a judicial adjudication of liability.

REASONABLENESS OF SETTLEMENT

National Union contends that the subrogation claims asserted by the Big Three Insurers, which derive from the personal injury claims of the underlying plaintiffs, can only subsist on proof of actionable punitive damages because ALAC was statutorily immune from tort claims filed by its injured workers. Thus, National Union surmises, in order to obtain contribution, the Big Three Insurers were required to establish ALAC's punitive-damage liability and that the settlement reached was reasonable considering that liability and none other. Because punitive damages never would have been assessed against ALAC, says

National Union, had the issue gone to trial, this is a hurdle the Big Three Insurers cannot mount.

At the time of the accident, the workers' compensation exclusivity provision of La. R.S. 23:1032 provided immunity to ALAC from tort claims arising from unintentional acts. Five months after the underlying accident occurred, and before suit was filed, the supreme court issued **Billiot v. B.P. Oil Co.**, 93-1118 (La. 9/29/94), 645 So.2d 604. In **Billiot**, the supreme court held that employers, otherwise immune from tort liability under La. R.S. 23:1032, could be held liable to their employees for punitive damages as provided for in La. C.C. art. 2315.3. **Id.**, 93-1118 at p. 12, 645 So.2d at 611. Article 2315.3 had been added by Acts 1984, No. 335, § 1, effective September 4, 1984. It was repealed by Acts 1996, 1st Ex.Sess. No. 2, § 1, effective April 16, 1996. It provided:

> In addition to general and special damages, exemplary damages may be awarded, if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances. As used in this Article, the term hazardous or toxic substances shall not include electricity.

Subsequent to the settlement in this case, the supreme court overruled **Billiot** in **Adams v. J.E. Merit Const., Inc.**, 97-2005, pp. 3-12 (La. 5/19/98), 712 So.2d 88, 89-94.

Because **Billiot** was not the state of the law at the time of the accident, and because it was subsequently reversed, National Union contends that the Big Three Insurers cannot rely on it to support the reasonableness of the settlement. The Big Three Insurers respond that **Billiot** was merely an interpretation of the application of the exclusive remedy provision of the worker's compensation statute that was in effect at the time of the accident and that was silent as to an employee's ability to collect punitive damages from an employer and, as such, could support a reasonable belief that punitive damages could be awarded for the underlying

accident. Furthermore, the trial court determined that ALAC could be held liable for punitive damages, and both this Court and the Louisiana Supreme Court denied ALAC's writ application regarding its potential liability for punitive damages less than two weeks before trial and settlement of its liability. Thus, the Big Three Insurers assert, in April of 1997, it was reasonable to believe that punitive damages would be awarded against an employer notwithstanding La. R.S. 23:1032, as interpreted by the supreme court in **Billiot**.

Contrary to this assertion is the legislative history associated with La. R.S. 23:1032 as cited by the supreme court in **Deshotel v. Guichard Operating Co., Inc.**, 2003-3511, pp. 12-13 (La. 12/17/04), 916 So.2d 72, 80, taken verbatim from the minutes dated May 25, 1995:

> The Supreme Court rendered an opinion September of 1994 . . . made two very substantive changes in the area of workers comp and tort law. This bill deals with one of those areas and specifically would reinstate comp. as the exclusive remedy in the work place. What the Supreme Court said in the **Billiot** decision was that workers could go beyond comp. [a]nd sue for punitive damages under 2315. That decision, which ran counter to eight decades of jurisprudence, ran counter to the trial courts decision, ran counter to the appeals court decision . . . is an actuarial time bomb for the workers comp. system.

But this does not mean that such an interpretation as that reached in **Billiot** was unreasonable. The supreme court explained its rationale in **Adams**:

> In **Billiot**, . . . a four-justice majority of the Court held that former La. R.S. 23:1032(A)(1)(a) did not bar a worker from recovering punitive damages from his employer under former Article 2315.3. The Court based its holding on a finding that in 1914, when the Workers' Compensation Act was first enacted, Louisiana law did not recognize punitive damages; therefore, the Legislature did not intend to include punitive damages in the phrase "shall be exclusive of all other rights and remedies" because punitive damages were not a right or remedy then available under the law. 645 So.2d at 608. Expanding on this theme, the Court further held that the remedy exclusion rule of 1914 was not tacitly amended to bar an employee's rights to punitive damages under Article 2315.3 by any contemporaneous or subsequent reenactments of La. R.S. 23:1032, essentially freezing in time the term "all other rights and remedies." In addition, the **Billiot** court held that in light of the history and policy underlying the Workers' Compensation Act to preserve the general tort rights of an injured worker in the absence of explicit statutory language limiting or

> excluding such rights, punitive damages were not barred because La. R.S. 23:1032 did not contain such explicit language. Lastly, the **Billiot** court held that the language of Article 2315.3 did not exclude an employee's recovery of punitive damages, even though the employee would not be entitled to general damages for the same injury. **Id**. at 608-612.

Adams, 97-2005 at 3-4, 712 So.2d at 90. But, in overruling **Billiot**, the supreme court did more than just acknowledge the express intent of the legislature in amending La. R.S. 23:1032 to preclude employees from recovering punitive damages in tort. Rather, the court detailed why the analysis in **Billiot** was flawed as contrary to the express language of La. R.S. 23:1032A that "[t]he rights and remedies herein granted . . . shall be exclusive of all other rights and remedies," as based on erroneous underlying rationale, and as inconsistent with the history and policy underlying the Workers' Compensation Act. **Id**., 97-2005 at 4-12, 712 So.2d at 90-94. Nevertheless, **Billiot** was the law at the time the settlement was reached and the Big Three Insurers sought guidance from all levels of the judiciary regarding ALAC's potential punitive damage liability before reaching a compromise with the underlying plaintiffs. We conclude that the Big Three Insurers had reason to believe that punitive damages could be awarded against ALAC and were reasonable in considering that risk during the settlement negotiations. Thus, the question remaining is whether $34.5 million was a reasonable amount for settlement based on the facts and law known at the time.[8]

A settlement agreement entered into by an insured may be enforced against the insurer if the settlement was made in good faith, on a reasonable basis, and in a reasonable amount. See **Arceneaux v. Amstar Corp.**, 2006-1592, p. 21 (La. App. 4th Cir. 10/31/2007), 969 So.2d 755, 771, writs denied, 2007-2486 and 2008-0053 (La. 3/24/08), 977 So.2d 952 and 977 So.2d 953. The insured need only show that a reasonably prudent person would have settled the case. The Big Three Insurers

[8] National Union has not challenged the amount awarded as its *pro-rata* contribution of principal and pre-judgment interest totaling $17,173,336.

rely on the following factors to support the reasonableness of the $34.5 million settlement:

1. Prejudgment interest on any potential award against ALAC had been accruing since March of 1995, when the plaintiffs filed the lawsuit.

2. Jury research sessions in February of 1997 resulted in six jury verdicts for damages against ALAC ranging from $27 million to $60 million and punitive damages ranging from $20 million to $1.5 billion, which equates to ALAC's gross revenues for one year.

3. Big Three Insurers' trial counsel advised that, pursuant to **BMW of North America, Inc. v. Gore**, 116 S.Ct. 1589 (1996), a punitive damages award of *at least* $15 million per injured plaintiff was not unreasonable, with a potential award of at least $75 million.

4. On February 27, 1997, less than two weeks before trial, the Louisiana Supreme Court denied ALAC's writ application regarding its exposure to punitive damages. Consequently, **Billiot** remained the applicable law at the time of the settlement.

5. ALAC's counsel emphatically demanded that the Big Three Insurers settle ALAC's liability to eliminate the risk of any uninsured, excess exposure.[9]

Considering the above factors, we conclude that the Big Three Insurers acted reasonably in settling all liability claims against ALAC in return for $34.5 million and avoiding exposure that very well could have exceeded the amount of the settlement.

CONCLUSION

After a careful review of the record and the law applicable to this case, we find that summary judgment was appropriate and affirm both judgments of the court below. Costs of the appeal are to be paid by National Union.

AFFIRMED.

[9] Counsel for ALAC indicated an expectation of settlement and that, in light of the "possibility of a catastrophic verdict," ALAC would take action if the Big Three Insurers failed to settle by the end of week. (41: 9871-72).