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Date Decided: March 20, 2002

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Re: Tenneco Automotive Inc., et al. v.
El Paso Corporation, et al.
C.A. No. 18810-NC

Dear Counsel:

This matter was tried during the week of February 11, 2002, and post-trial briefing is ongoing.

Shortly before trial commenced, Newport News Shipbuilding, Inc. ("NNS II") sought to be substituted for an original plaintiff entity, Newport

News Shipbuilding, Inc. ("NNS I").' This motion was necessitated by the acquisition of NNS I by Northrop Grumman Corporation ("Northrop"). On January 18, 2002, NNS I, pursuant to an exchange offer, merged into Purchaser Corp. I, a wholly-owned subsidiary of Northrop. Purchaser Corp. I then changed its corporate name to Newport News Shipbuilding, Inc.

NNS I and Defendant El Paso Tennessee Pipeline Co. (collectively with Defendant El Paso Corporation and its related defendants, "El Paso") were among the surviving entities from the deconstruction of Tenneco, Inc. ("Old Tenneco") in 1996. The rights of the surviving entities to Old Tenneco's historical insurance coverage are at the center of this litigation. These entities have been bound by the "Insurance Agreement," which was negotiated in an attempt to allocate the benefits and duties associated with Old Tenneco's historical insurance coverage. NNS I, in bringing this action, asserted its rights under the Insurance Agreement.

[1] **See Ch. Ct. R. 25(c); 8 Del. C. § 261.**

The Insurance Agreement (Section 8.6) contains the following provision:

> *8.6 Successors and Assigns.* Except as otherwise expressly provided herein, no party hereto may assign or delegate, whether by operation of law or otherwise, any of such party's rights or obligations under or in connection with this Agreement without the written consent of each other party hereto. No assignment will, however, release the assignor of any of its obligations under this Agreement or waive or release any right or remedy the other parties may have against such assignor hereunder. Except as otherwise expressly provided herein, all covenants and agreements contained in this Agreement by or on behalf of any of the parties hereto will be binding upon and enforceable against the respective successors and assigns of such party and will be enforceable by and will inure to the benefit of the respective successors and permitted assigns of such party.

El Paso has opposed the motion to substitute NNS II for NNS I.[2] It contends that the merger of NNS I into Purchaser Corp. I constituted an

[2] El Paso's opposition is limited to those claims arising under the Insurance Agreement. To the extent that NNS II seeks to assert other rights in this proceeding, El Paso does not oppose the motion to substitute.

"assignment . . . by operation of law . . ." of rights under the Insurance Agreement. The parties agree that NNS I did not seek or obtain El Paso's consent to the merger. Thus, El Paso contends that Section 8.6 of the Insurance Agreement, which it characterizes as an "anti-assignment" provision, precludes the transfer of rights covered by the Insurance Agreement to NNS II.

The basic principles governing interpretation of a contract are not in dispute. In interpreting a contract (here, the Insurance Agreement), courts look to the language of the agreement, read as a whole, in an effort to discern the parties' collective intent.[3] Where the language of a contract is clear and unambiguous on its face, the parties' intent is derived by giving the contractual terms their ordinary and plain meaning.[4] Only if the intent of the parties cannot be derived from the plain meaning of the contractual language may a court resort to the use of extrinsic evidence.'

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[3] *Northwestern Nat 'l Ins.' Co. v. Esmark, Inc., 672* A.2d 41, 43 (Del. 1996).
[4] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc., 702* A.2d 1228, 1233 (Del. 1997).
[5] *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co., 693* A.2d 1059, 1061 (Del. 1997).

Fortunately, the parties agree that the language of the Insurance Agreement is unambiguous. Unfortunately, the parties' readings of that agreement are diametrically opposed. I conclude that the Insurance Agreement, and Section 8.6 thereof in particular, is ambiguous.

El Paso argues that a merger is an "assignment . . . by operation of law" and that the language of the first sentence of Section 8.6 of the Insurance Agreement makes clear that any such transfer must first receive its consent. As a general matter in the corporate context, the phrase "assignment by operation of law" would be commonly understood to include a merger. Indeed, the Delaware Supreme Court has equated an "assignment by operation of law" with a merger.[6] Furthermore, this Court has suggested

[6] *DeAscanis v. Brosius-Eliason* Co., 533 A.2d 1254 (Del. 1987) (TABLE) (ORDER at ¶ *9); see also In re Asian Yard Partners & Asian Yard Venture Corp. v. Barker,* Bankr. D. Del., C.A. No. 95-333-PJW, Walsh, J. (Sept. 18, 1995).

that the phrase "transfer by operation of law" would, again in the corporate context, be understood to include a merger.[7]

In sum, I would read the first sentence of Section 8.6 of the Insurance Agreement, in isolation, to preclude a transfer of rights under the Insurance Agreement by merger absent prior consent from the other parties to the Insurance Agreement.

The Court's task, however, is to consider the Insurance Agreement as a whole and certainly to consider Section 8.6 as a whole. The second sentence of Section 8.6 provides that an assignment of rights or duties under the Insurance Agreement does not relieve the assignor of responsibility for those duties. The application of this provision in the context of a traditional assignment, accomplished by one party specifically assigning certain rights to another party, is obvious. The application of this provision to an

[7] *Star Cellular Tel. Co., Inc. v. Baton Rouge CGSA, Inc.*, Del. Ch., C.A. No. 12507, mem. op. at 12, Jacobs, V.C. (July 30, 1993). I do not find persuasive NNS II's argument that a "transfer by operation of law" is materially different from an "assignment by operation of law," at least for these purposes.

"assignment by operation of law," however, is less transparent. "Assignment by operation of law" can be understood to include the vesting of rights in a receiver or in a trustee. In these cases, the vesting of rights and duties in a receiver or trustee would not *ipso facto* relieve the corporation for which the trustee or receiver was appointed from responsibility under the subject agreement in perpetuity. The corporation for which the receiver or trustee is appointed would resume the rights and duties under the agreement in the event that the receivership or trusteeship were discontinued (assuming that the corporation ever lost such rights or duties). In the context of a merger, however, the second sentence has no apparent purpose. Once the merger is complete, there is no "assignor" remaining because the corporation that was merged (in this case, NNS I) into the second corporation (in this case, Purchaser Corp. I) ceases to exist.* Thus, this sentence is consistent with the first sentence of Section 8.6 if it is read as preserving the duties of a surviving assignor. On the other hand, if it is read as in essence requiring

[8] ***See 8 Del. C.*** § 259(a).

that there be a surviving assignor, the scope of the phrase "assignment by operation of law" would be called into question.

The third sentence of Section 8.6 raises other questions. First, it reads in part:

> Except as otherwise expressly provided herein, all covenants and agreements contained in this Agreement . . . will be enforceable by and will inure to the benefit of the respective successors and permitted assigns of such party.

The parties agree that NNS II is a "respective successor" of NNS I and that it is not a "permitted assign." Thus, if read in isolation, this third sentence would appear to allow NNS II, as successor to NNS I, to continue to assert the rights of NNS I under the Insurance Agreement against El Paso. Second, both the first sentence and the third sentence begin with a phrase "[e]xcept as otherwise expressly provided herein." When two of the three sentences in a paragraph begin with this phrase and where the two sentences can plausibly be read as being inconsistent with one another, determining the

priority of each or the meaning to be ascribed to the paragraph as a whole becomes more difficult.

If, for example, the introductory language had been omitted from the first sentence, the first sentence could have been viewed as controlling.[9] However, merely because it is the first sentence appearing in the paragraph does not lead to the conclusion that it is the controlling or more important sentence. There are no signals, such as "provided further" or "provided, however," to lead the reader to an understanding that the second and third sentences are subordinate to or merely limitations on the language of the first sentence. In short, the tension between the relatively clear language of both the first and third sentences cannot be resolved based exclusively on the

[9] El Paso is unable to identify any provision in the balance of the Insurance Agreement that would fall within the scope of "otherwise expressly provided." Indeed, El Paso comes close to asking the Court simply to ignore the "[e]xcept as otherwise expressly provided" clause in the first sentence either as without meaning or as boilerplate.

wording of either the Insurance Agreement as a whole or the text of Section 8.6."

Thus, I cannot conclude that the language of the Insurance Agreement can fairly be read to preclude transfer of the rights conferred under the Insurance Agreement by any and all mergers unless consent to the merger is first obtained. Accordingly, it becomes necessary to engage in the analysis employed by this Court in *Star Cellular:*

> [W]here an antitransfer clause in a contract does not explicitly prohibit a transfer of property rights to a new entity by a merger, and where performance by the original contracting party is not a material condition and the transfer itself creates no unreasonable risks for the other contracting parties, the court should not presume that the parties intended to prohibit the merger.' [11]

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[10] It is for this reason that the authorities cited by El Paso for the proposition that a merger is an "assignment by operation of law" are ultimately unhelpful. See, e.g., ***DeAscanis v. Brosius-Eliason Co., supra; In re Asian Yard Partners & Asian Yard Venture Corp., supra; Pacific First Bank v. The New Morgan Park Corp., 876*** P.2d 761 (Or. ***1994); The Citizens Bank & Trust Co. of Maryland v. The Barlow Corp., 465*** A.2d 1283 (**Md.** App. 1983).

[11] ***Star Cellular, mem.*** op. at 15.

This requires consideration of the rights and duties arising under the Insurance Agreement, which generally deals with the handling and allocation of claims to Old Tenneco's historical insurance coverage. These claims all arise out of past conduct and do not affect the current insurance held by the parties to the Insurance Agreement.

Those parties are responsible for performing certain obligations under the Insurance Agreement, such as processing claims for historical coverage, not only for themselves, but also for other entities which were former members of the Old Tenneco corporate structure and which were in the same line of business as their respective representatives among the parties to the Insurance Agreement. For example, NNS I represented, as the exclusive agent, the interests of all "shipbuilding" entities, including Newport News Shipbuilding & Dry Dock, Inc. ("Dry Dock"), which was the principal corporate entity engaging in the shipbuilding business both before and after the breakup of Old Tenneco.[12] It is difficult to perceive how a change in the

[12] Insurance Agreement, § 8.14. Dry Dock continues as a subsidiary of NNS II.

identity of a party charged with this responsibility could be viewed either as a material condition or as creating an unreasonable risk to the other parties to the Insurance Agreement. [13]

The Insurance Agreement, however, imposes other duties on the parties as well. For example, a party exhausting certain historical coverage may be under an obligation to procure replacement coverage for (or to take other steps for the benefit of) the other parties to the Insurance Agreement. The financial wherewithal of such a party, for example, could be a basis for concern. However, there are protective provisions in the Insurance Agreement to mitigate this type of risk. One of those provisions is Section 3.2(d) which may be read to provide for advance notice of impairment of such coverage that would afford the other parties to the Insurance Agreement the opportunity to take appropriate steps to protect their interests in advance of the loss of coverage under a particular policy.

[13] Indeed, El Paso's position would appear to preclude any of the "shipbuilding" entities from asserting claims to Old Tenneco's historical insurance coverage.

In short, the ongoing interactions among the parties required by or anticipated by the Insurance Agreement are relatively limited.[14]

Furthermore, El Paso has not identified any adverse consequences that may befall it from the merger. The only difference that is immediately obvious is that NNS I was owned by public shareholders and NNS II is owned by Northrop. Thus, it does not appear that the merger and the resulting transfer of rights and duties under the Insurance Agreement to NNS II pose any unreasonable risk to El Paso.

In conclusion, and in accordance with the approach adopted in *Star Cellular,* I am satisfied that the parties to the Insurance Agreement would not have intended to preclude the acquisition of rights under the Insurance Agreement by NNS II as the result of the Northrop transaction." Thus, I

[14] This limited relationship stands in stark contrast to the active partnership relationship in ***Star Cellular.***

[15] Given this determination, I need not consider the other grounds advanced by NNS II in support of its motion to substitute.

will enter an order, a copy of which is enclosed, that grants the motion to substitute NNS II for NNS I as a party plaintiff.

Very truly yours,

JWN/cap
Enc.
oc: Register in Chancery-NC (w/ original Order)

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

TENNECO AUTOMOTIVE INC., a Delaware corporation, NEWPORT NEWS SHIPBUILDING INC., a Delaware corporation, and PACTIV CORPORATION, a Delaware corporation,	:	
Plaintiffs,	:	
v.	:	C.A. No. 18810-NC
EL PASO CORPORATION, a Delaware corporation, EL PASO NATURAL GAS COMPANY, a Delaware corporation, EL PASO TENNESSEE PIPELINE CO., a Delaware corporation, and CERTAIN UNDERWRITERS AT LLOYD'S, LONDON and LONDON MARKET INSURANCE COMPANIES, foreign corporations,	:	
Defendants.	:	

ORDER

Plaintiff Newport News Shipbuilding Inc., having moved to substitute the extant Newport News Shipbuilding Inc. for the former Newport News Shipbuilding Inc. as a plaintiff in this action, and the Court having

considered the motion, and for the reasons set forth in the Court's letter to counsel of even date,

IT IS HEREBY ORDERED this 20th day of March, 2002 that:

1. the Motion to Substitute Party is granted;

2. the extant Newport News Shipbuilding Inc. is hereby substituted for the former Newport News Shipbuilding Inc. as plaintiff in this action.

Vice Chancellor