



**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

TENNECO AUTOMOTIVE INC., a Delaware corporation, TENNECO AUTOMOTIVE OPERATING COMPANY, INC., a Delaware corporation, WALKER MANUFACTURING COMPANY, a Delaware corporation, NEWPORT NEWS SHIPBUILDING INC., a Delaware corporation, NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, a Virginia 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.

**MEMORANDUM OPINION**

Date Submitted: July 19, 2006

Date Decided: January 8, 2007

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Robert K. Payson, Esquire and Gregory A. Inskip, Esquire of Potter Anderson & Corroon LLP, Wilmington, Delaware, and Michael John Miguel, Esquire of Morgan, Lewis & Bockius LLP, Los Angeles, California, Attorneys for Defendants El Paso Corporation, El Paso Natural Gas Company and El Paso Tennessee Pipeline Co.

Francis J. Murphy, Esquire and Jonathan L. Parshall, Esquire of Murphy Spadaro & Landon, Wilmington, Delaware, Attorneys for Defendants Certain Underwriters at Lloyd's, London and London Market Insurance Companies.

NOBLE, Vice Chancellor

## I. BACKGROUND

Tenneco, Inc. (“Old Tenneco”) was a conglomerate. Two of its business lines were natural gas and shipbuilding. In 1996, Old Tenneco was broken up. The shipbuilding business was spun off as Plaintiff Newport News Shipbuilding Inc. (“Newport News”). After the other lines of business were divested, Defendant El Paso Corporation (“El Paso”) acquired what was left of Old Tenneco, essentially the natural gas business and corporate entity liability for Old Tenneco’s discontinued operations. Old Tenneco was merged into an El Paso subsidiary.

Old Tenneco had many insurance policies, and the various entities acquiring its lines of business entered into the Insurance Agreement which had been drafted for the purpose of a rational allocation of insurance coverage among the entities that might have claims against the various policies. In essence, all of the surviving entities had rights to Old Tenneco’s insurance policies. The entities, of course, could not predict with any certainty who would assert claims against the policies or when those claims would be brought. They anticipated that El Paso would face the greatest risks, primarily environmental liability, that would be insured by the historical policies because of its responsibility for discontinued operations. The entities agreed in the Insurance Agreement<sup>1</sup> that, if El Paso exhausted the existing

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<sup>1</sup> PX 39, Ex. H.

coverages, it would use its best efforts to obtain replacement coverage for the other insureds on terms no less favorable than those of the existing policies, all subject to a cap equal to 350% of the premiums paid for the exhausted policies.

Shortly after El Paso acquired Old Tenneco, it sought indemnification under Old Tenneco's historical insurance policies (the "Subject Policies") issued by Defendants Certain Underwriters at Lloyd's, London ("Lloyd's") and London Market Insurance Companies ("London Market") (collectively, the "London Insurers"). Following extensive negotiations, El Paso and the London Insurers entered into the Confidential Settlement Agreement and Release (the "Settlement Agreement")<sup>2</sup> which purported to release identified London Insurers from any remaining obligations under almost 200 listed insurance policies. El Paso also agreed to indemnify those settling subscribers among the London Insurers in the event claims were filed by the other former constituent entities of Old Tenneco.

El Paso, on February 12, 2001, approximately 50 days after execution of the Settlement Agreement by Lloyd's and shortly before its execution by the London Market, sent to Newport News (and other surviving Old Tenneco entities) the Notice of Impending Exhaustion of Occurrence-Based Excess Insurance Limits of Liability (the "Notice"), which provided in part:

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<sup>2</sup> PX 169.

Pursuant to the Insurance Agreement . . . notice is hereby given of the anticipated exhaustion and release of certain insurance policies originally issued to Tenneco Inc. El Paso . . . has made certain claims and filed a declaratory judgment action against historic insurers of El Paso Natural Gas, Tenneco and their predecessors relating to the substantial environmental liabilities of El Paso Natural Gas and of the former Tenneco Inc. that were retained by El Paso under the 1996 merger. Please be advised that as a result of this litigation, El Paso has entered into a settlement agreement with Lloyd's of London and the London Market Insurers (“London Market”) that, among other things, will result in the exhaustion and release of historic Tenneco Inc. insurance coverage potentially available to El Paso as well as other insureds formerly related to Tenneco Inc. As you may know, the London market . . . [is] in the process of resolving [its] exposure to long-tailed liability under occurrence-based policies issued prior to the mid-1990s. There is a diminishing pool of assets from which insureds may be able to recover under the historic policies. The liquidity of the underwriting syndicates is questionable, and many are in schemes of arrangement for payment of debts to insureds. . . . Under the Insurance Agreement, El Paso is entitled to pursue insurance coverage issued to Tenneco Inc. with respect to the substantial environmental liabilities that face El Paso, to the full extent of the limits of liability under the historic policies. As part of the settlement of these claims, pre-1993 excess level insurance coverage issued by the London Market to Tenneco Inc. will be exhausted and released. Pursuant to Paragraph 3.1(d) of the Insurance Agreement, El Paso's only obligation is to attempt to reinstate the coverage, which is impossible given the London Market's current posture, or to obtain replacement insurance with the same coverage, terms and conditions as the original policies. This obligation, however, is limited to the expenditure of 350% of the original premiums paid with respect to the limits of liability being exhausted.<sup>3</sup>

Newport News, promptly, but unsuccessfully, sought to obtain a copy of the Settlement Agreement from El Paso. It then (together with other former Old

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<sup>3</sup> PX 177.

Tenneco entities) filed suit in this Court seeking a declaration of its rights under the Insurance Agreement and the Settlement Agreement. It soon obtained a copy of the Settlement Agreement. After trial, the Court concluded that the Settlement Agreement did not release Newport News's rights under the Subject Policies and that the Settlement Agreement did not exhaust the limits of those policies. The Court, in substance, found that the Settlement Agreement did not directly or adversely affect the rights of Newport News.<sup>4</sup>

During the course of this litigation, but before the Court determined the consequences for Newport News of the Settlement Agreement, Newport News, motivated by El Paso's guidance that a material portion of its historical insurance coverage had been "exhausted" and "released" by the Settlement Agreement between El Paso and the London Insurers, purchased replacement coverage for which it paid more than \$6 million. Newport News now seeks to recover those payments from both El Paso and the London Insurers. Pending before the Court is the motion for summary judgment filed by El Paso and joined in by the London Insurers.

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<sup>4</sup> *Tenneco Automotive, Inc. v. El Paso Corp.*, 2004 WL 3217795 (Del. Ch. Aug. 26, 2004), from which the foregoing and, perhaps overly, simplified narrative has been drawn. Any reader seeking a more complete understanding of how sophisticated parties ended up in the mess leading to this litigation may turn to the Court's earlier memorandum opinion.

## II. CONTENTIONS

In seeking to recover its payments for replacement coverage, Newport News contends that El Paso tortiously interfered with its insurance contracts with the London Insurers when it induced the London Insurers to enter into the Settlement Agreement which, for example, purported to treat the Subject Policies as if the settling underwriters had “never subscribed” to them; that the London Insurers, by entering into the Settlement Agreement, repudiated their obligations under the Subject Policies; and that the Defendants are estopped from arguing—because of the positions asserted in earlier stages of this proceeding—that there was no breach of either the Insurance Agreement or the Subject Policies.

El Paso, as it seeks summary judgment, first argues that Newport News’s reimbursement (or damages) claims are not properly before the Court because they have not been fairly asserted.<sup>5</sup> Next, El Paso contends that, because Newport News and El Paso are co-parties to (or, at least, have parallel rights under) not only the Insurance Agreement but also the Subject Policies, it could not, as a matter of law, have interfered with its own contract. It also argues that, with the Court’s earlier conclusion that there was no breach of the Insurance Agreement or deprivation of coverage under the various policies, Newport News suffered no

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<sup>5</sup> El Paso, in substance, revisits an argument that the Court has previously rejected. *See Tenneco Automotive Inc. v. El Paso Corp.*, C.A. No. 18810-NC, let. op. at 4-10 (Del. Ch. Jan. 28, 2005). Accordingly, this contention will not be addressed again.

harm. In a nutshell, El Paso asserts that it caused no actual injury to Newport News and, thus, cannot be held liable for any expenses incurred by Newport News in any effort to mitigate damages.<sup>6</sup>

Finally, the London Insurers, in addition to joining generally with El Paso's arguments, assert that they did not repudiate their obligations under the Subject Policies because Newport News cannot show that there was an "outright refusal" to honor the policies or that the London Insurers ever communicated any such position to Newport News.<sup>7</sup>

### III. ANALYSIS

#### A. *Applicable Standard*

Motions for summary judgment are evaluated under Court of Chancery Rule 56. If there are no genuine, material issues of fact, a party may obtain summary judgment if it is entitled to judgment as a matter of law.<sup>8</sup> When assessing a motion for summary judgment, this Court must view the facts in the light most favorable to the nonmoving party.<sup>9</sup> In order to withstand a motion for summary judgment, a party is required to present some evidence, either direct or circumstantial, to support all of the elements of the claim. A motion for summary

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<sup>6</sup> Questions of the reasonableness of the replacement coverage, or of its similarity to the coverage replaced, are not presently before the Court.

<sup>7</sup> Newport News, of course, learned of the Settlement Agreement and its potential consequences not from the London Insurers, but from El Paso.

<sup>8</sup> Ct. Ch. R. 56(c).

<sup>9</sup> *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).



judgment is properly granted against a party who fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial.<sup>10</sup> Also, “[o]nce the moving party presents evidence that if undisputed would entitle it to summary judgment, the burden then shifts to the opposing party to dispute the facts by affidavit or proof of similar weight.”<sup>11</sup>

B. *Is El Paso Estopped from Adopting the Court’s Position After it Previously Argued Against that Position?*

Newport News argues that the doctrine of estoppel prevents El Paso from changing its position on the effect of the Settlement Agreement.<sup>12</sup> El Paso advised Newport News that its rights under the various policies had been eliminated but now asserts that it caused no harm at all. Newport News’s argument might succeed if there had not been an intervening judicial determination. A party is entitled to accept the Court’s articulated position, despite having taken a contrary position in previous argument; thus application of estoppel in this instance would be both unfair and unreasonable.<sup>13</sup>

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<sup>10</sup> *Watson v. Taylor*, 2003 WL 21810822, at \*2 (Del. Aug. 4, 2003).

<sup>11</sup> *Fleet Fin. Group, Inc. v. Advanta Corp.*, 2001 WL 1360119, at \*1 n.4 (Del. Ch. Nov. 2, 2001).

<sup>12</sup> *See Steinman v. Levine*, 2002 WL 31761252, at \*11 (Del. Ch. Nov. 27, 2002) (“[U]nder the doctrine of judicial estoppel, a party may be precluded from asserting in a legal proceeding a position inconsistent with a position previously taken by him in the same or in an earlier legal proceeding.”).

<sup>13</sup> *Zirn v. VLI Corp.*, 1994 WL 548938, at \*2 (Del. Ch. Sept. 23, 1994) (“Once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears.”) *See*

C. *Does the Court's Ruling on the Settlement Agreement's Effect Have Retroactive Implications for Whether a Previous Breach, or Previous Damages, Actually Occurred?*

Although estoppel does not prevent El Paso or the London Insurers from adopting the Court's determination that the Settlement Agreement did not adversely affect Newport News's rights, it does not necessarily follow that Newport News suffered no damages. The Court previously held:

Thus, the Court concludes that the Settlement Agreement did not release the Plaintiffs' [including Newport News's] rights under the Subject Policies; the Settlement Agreement did not exhaust (or cause the "deemed exhaustion") of limits of the Subject Policies; and New Tenneco did not waive its rights or acquiesce in El Paso's actions in such a fashion as to allow El Paso to achieve, in substance, a "deemed exhaustion" of limits of the Subject Policies. In short, the Settlement Agreement, primarily by its express terms, did not adversely affect the rights of Plaintiffs, and the Plaintiffs are entitled to a declaratory judgment to that effect.<sup>14</sup>

Newport News prevailed with respect to the consequences of the Settlement Agreement. Until it learned of the Court's decision, however, it was legitimately concerned because of actions of the London Insurers and El Paso with respect to its insurance coverage. When Newport News purchased the replacement coverage, a live controversy existed over the effect that the Settlement Agreement would have

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*also* 18B CHARLES A. WRIGHT, ARTHUR R. MILLER AND EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4477, at 574 (2d ed. 2002) (Judicial estoppel "permits a party whose first position has been rejected to adopt the Court's position in later litigation."). Indeed, El Paso could not take any position other than that adopted by the court. *See Siegman v. Palomar Medical Techs., Inc.*, 1998 WL 409352, at \*2 (Del. Ch. July 13, 1998).

<sup>14</sup> *Tenneco Automotive Inc.*, 2004 WL 3217795, at \*13.

on its coverage under the Subject Policies. El Paso advised Newport News in the Notice that its coverage had been adversely impacted. If it had been obvious that the Agreement did not affect Newport News's coverage, complex litigation should not have ensued.

Merely because the Court ultimately held that the parties to the Settlement Agreement lacked the authority to modify Newport News's coverage, and did not exhaust such coverage, does not demonstrate that the Settlement Agreement should not have reasonably been perceived at the time of its receipt by Newport News as jeopardizing Newport News's coverage and subjecting it to a cognizable degree of risk exposure. The Settlement Agreement purported to eliminate Newport News's coverage, but the Court ultimately determined that it did not do so.<sup>15</sup> The Settlement Agreement's implications were clear only as of the date of the issuance of the Court's memorandum opinion (assuming that no appeal would be taken). Therefore, El Paso's assertion that the Court's prior ruling alone precludes any damages claim cannot prevail.

D. *Does Exposure to Risk Without Insurance Coverage Constitute Actual Harm?*

El Paso argues that Newport News suffered no harm and that, therefore, its pending tort claims cannot survive. The benefit contracted for was defined and

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<sup>15</sup> *Tenneco Automotive Inc.*, 2004 WL 3217795, at \*9 (“The settling London Insurers obtained a release from El Paso, and that is all that can be fairly read from the Settlement Agreement.”).

available insurance coverage for certain risks to which Newport News might be exposed. Thus, harm in these circumstances would be the absence of such coverage. In the event of wrongful termination of insurance coverage without the intervening occurrence of a covered loss, the measure of damages would be simply the cost of obtaining replacement coverage.<sup>16</sup> Repudiation of a contract of insurance does not first require that the insured undergo a loss, file a claim with its insurer, and then be denied coverage.<sup>17</sup> Committing to revoke coverage would alone, if wrongful, constitute anticipatory breach of the insurance contract. Thus, the threshold measure of damages for a termination (assuming the other elements of a requisite cause of action are found) would be the cost of replacement coverage. Even though the mitigation may later be proven unwarranted because the efforts to terminate were not effective, a party in breach may still be liable for the cost of reasonable efforts to mitigate.<sup>18</sup>

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<sup>16</sup>*Matter of Liquidation of Integrity Ins. Co.*, 685 A.2d 1286, 1290 (N.J. 1996) (“On the date of liquidation, Integrity breached its contract with every policyholder, because it repudiated its prior promise to provide insurance and bear future losses. As a result of that breach, each policyholder was entitled to pursue a claim for damages pursuant to ordinary contract rules. Contract damages are designed to put the injured in as good a position as he would have had if performance had been rendered as promised. . . . [D]amages should not be a simple return of premiums, but rather the difference between the cost of a new policy and the present value of the premiums yet to be paid on the policy at the date of the breach.”) (citations and certain internal punctuation omitted).

<sup>17</sup> Forcing insureds to wait to determine the status of their policy, when the status of coverage is at issue, until they suffer an actual loss defeats the purpose of obtaining coverage in the first place.

<sup>18</sup> *In re Kellett Aircraft Corp.*, 186 F.2d 197, 198-99 (3d Cir. 1951) (“In this connection, reasonable conduct is to be determined from all the facts...and must be judged in the light of one viewing the situation at the time the problem was presented. [T]he person whose wrong forced the choice cannot complain that one rather than the other was chosen. The rule of mitigation of

E. *Did Newport News Act with Commercial Reasonableness when it Obtained Replacement Coverage?*

A mitigating party will be allowed recovery “for expenditures reasonably made or harm suffered in a reasonable effort to avert further harm.”<sup>19</sup> Because of the purchase of replacement coverage, Newport News is now covered under two different sets of policies, resulting in double coverage for the same risk. Did this result from a cover unwarranted from the circumstances of this case?<sup>20</sup>

El Paso advised Newport News, through the Notice, that the Settlement Agreement would “result in the exhaustion and release of historic Tenneco, Inc. insurance coverage potentially available to El Paso as well as other insureds [including Newport News] formerly related to Tenneco Inc.”<sup>21</sup>

El Paso was (and is) Newport News’s co-insured under the Subject Policies and a co-party to the Insurance Agreement that purported to define their relationship as co-insureds. El Paso was afforded rights to exhaust coverage on behalf of Newport News (and the other parties to the Insurance Agreement), with an attendant obligation to attempt to replace coverage that was lost. It is

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damages may not be invoked by a contract breaker as a basis for hypercritical examination of the conduct of the injured party, or merely for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter.”) (citation omitted).

<sup>19</sup> RESTATEMENT (SECOND) OF TORTS § 919 (1979).

<sup>20</sup> The question of whether obtaining replacement coverage was reasonable is, of course, different from the question of whether the replacement coverage obtained was reasonable. The latter question is not now before the Court. *See supra* note 6.

<sup>21</sup> *See supra* text accompanying note 4.

reasonable, then, that Newport News would rely on representations about the status of that coverage from El Paso. Furthermore, if Newport News had received a judgment that the policy was exhausted and if it had also experienced a covered loss during that time, all of which were reasonable possibilities when Newport News acquired replacement coverage, Newport News might then have been precluded from obtaining relief on the grounds that it had failed to mitigate damages.<sup>22</sup> Therefore, Newport News responded reasonably to the Notice from El Paso in attempting to mitigate damages flowing from threatened termination of coverage. The Defendants also assert that the pre-trial stipulation (before Newport News acquired replacement coverage) to the effect that Tenneco's (and therefore Newport News's) coverage was not released, makes Newport News's purchase of replacement coverage redundant.<sup>23</sup> However, a stipulation that coverage was not "released" did not necessarily also constitute a stipulation that coverage was not "exhausted," "affected," or "impaired" according to the semantic maze of the earlier portion of this action. Thus, notwithstanding the Defendants' pre-trial stipulation, Newport News's coverage was still at risk when the replacement insurance was obtained.

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<sup>22</sup> *Delaware Use of Gen. Crushed Stone Co. v. Mass. Bonding & Ins. Co.*, 49 F. Supp. 467, 472 (D. Del. 1943) (noting that "defendants were under the duty to attempt, at least, to minimize their potential damages"). See also *Am. Gen. Corp. v. Continental Airlines Corp.*, 622 A.2d 1, at \*11 (Del. Ch. May 14, 1992) (citing *Edward M. Crough, Inc. v. Dept. of Gen. Servs.*, 572 A.2d 457 (D.C. App. 1990) (duty to mitigate damages with reasonable effort and without substantial risk of loss)). See also *Matter of Liquidation of Integrity Ins. Co.*, 685 A.2d at 1291.

<sup>23</sup> Transcript of Pretrial Conf. at 12-15.

F. *Could El Paso, as a Party to the Subject Policies, Tortiously Interfere with Newport News's Rights in the Subject Policies?*

Newport News's central cause of action against El Paso is that of tortious interference with contractual relations. Newport News argues that El Paso interfered with the Subject Policies, causing the London Insurers to breach those contracts, and should therefore be liable.<sup>24</sup> But that would require that El Paso be a "stranger" to the insurance contracts, and not a party to them. After all, "[a] defendant cannot interfere with its own contract."<sup>25</sup> Imposition of liability for tortious interference with contractual relationship requires that the defendant "be a stranger to both the contract and the business relationship giving rise to and underpinning the contract."<sup>26</sup>

Newport News first tries to cast El Paso as a stranger to the insurance contracts by noting that El Paso held no interest in any Tenneco entity when the

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<sup>24</sup> "Tortious interference [with contract] requires that plaintiff demonstrate that (1) a contract existed, (2) the defendant knew of the contract, (3) defendant's intentional actions played a significant role in causing the breach of such contract, (4) defendant acted without justification, and (5) the breach caused injury." *EDIX Media Group, Inc. v. Mahani*, 2006 WL 3742595, at \*11 (Del. Ch. Dec. 12, 2006); *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1266 (Del. 2004). El Paso does not dispute that the insurance contracts existed or that it knew of their existence. It rejects Newport News's contention that El Paso's conduct caused any breach; that El Paso acted without justification; and that any injury resulted. The parties did not address the choice of law question. They have, through their briefing, implicitly adopted the law of Delaware.

<sup>25</sup> 2 DAN B. DOBBS, *THE LAW OF TORTS* § 446, at 1360 (2001); *RESTATEMENT (SECOND) OF TORTS* § 766 (1979) ("One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person . . . is subject to liability").

<sup>26</sup> *Atlanta Market Ctr. Mgmt., Inc. v. Equitable Real Estate Invest. Mgmt., Inc.*, 503 S.E.2d 278, 283 (Ga. 1998).

Subject Policies were purchased. It points out that El Paso only obtained rights in the coverage with its acquisition of the residuum of Old Tenneco.<sup>27</sup> Although Newport News's history is accurate, El Paso nevertheless became a party to the Subject Policies. El Paso, by virtue of the merger of its wholly-owned subsidiary with Old Tenneco, succeeded to Old Tenneco's residual rights.<sup>28</sup> Thus, its interests in the Subject Policies trace back to their acquisition. Moreover, when the Settlement Agreement was negotiated, El Paso was an insured under (and party to) the Subject Policies, along with others, including Newport News. Accordingly, El Paso cannot fairly be characterized as a stranger to the Subject Policies and cannot be held liable for tortious interference with them.

Newport News observes (1) that one of the reasons behind the notion that one cannot interfere with one's contracts is the perception that the parties have a commonality of economic interests<sup>29</sup> and (2) that, because both El Paso and Newport News were likely to seek coverage from the same limited pool of insurance resources evidenced by the Subject Policies, their interests were not aligned, but, instead, were adverse. When Old Tenneco purchased the Subject

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<sup>27</sup> There is, of course, no allegation that El Paso interfered with Newport News's relationship with the London Insurers before it acquired any interest in Old Tenneco, when it would have been a stranger to the insurance contracts.

<sup>28</sup> The effect of a merger is that "all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation as they were of the several and respective constituent corporations." 8 *Del. C.* § 259.

<sup>29</sup> See *Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 589 (Del. Ch. 1994) (referencing "the commonality of economic interests which underlay the creation of an interference privilege.").



Policies to protect its various lines of business, there were, of course, common or shared economic interests. With the deconstruction of the conglomerate, the economic interests diverged: two independent insureds shared mutual contract rights with their insurer but lacked direct obligations to each other under the insurance policies.<sup>30</sup> Merely because one party later tried to exercise its rights to the potential detriment of another party does not make one of them a stranger to the contract. Among contracting parties, economic incentives for cooperation or adverse conduct are likely to change with time. That conflicting courses of conduct may become appropriate for various parties to a contract does not alter the relationship among those parties with respect to the potential for claims sounding in tortious interference with contract. Otherwise, when any party to a multi-party agreement takes a position that is adverse to the interests of some other party (especially with respect to a duty owed by yet another party to the contract), the offended party could argue that because, with respect to that issue at that point in time, there is no continuing commonality of economic interest, the “stranger” exception to the law of tortious interference would no longer apply. Such a view would eviscerate the protection afforded parties to the contract because it is difficult otherwise to conceive of how a tortious interference with contract claim

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<sup>30</sup> The purpose of the Insurance Agreement was to bridge this gap. A pause for irony may be appropriate. Newport News, even before execution of the Insurance Agreement, had been advised that it was “at best, unworkable.” *Tenneco Automotive Inc.*, 2004 WL 3217795, at \*4 n.19.

could be brought unless one party to the multi-party contract arrangement took an action that was adverse to the interests of another party to that contract.

Finally, Newport News contends that El Paso's efforts to induce the London Insurers to accept its release of the rights of the other Old Tenneco surviving entities were beyond both the Insurance Agreement and the Subject Policies and thereby deprive El Paso of the "stranger" exception because its actions were not authorized either by the Subject Policies or by the Insurance Agreement.<sup>31</sup> The Insurance Agreement anticipated competition among the various Old Tenneco entities for the coverages provided by the Subject Policies. Indeed, El Paso, acting in a manner consistent with the Insurance Agreement, could have exhausted the Subject Policies and thereby deprived Newport News and the other Old Tenneco entities of any benefits under the Subject Policies. The difficulty is that El Paso and the London Insurers decided that a release provided the appropriate pathway. Granting a release on behalf of the several entities, however, was something that El Paso was not empowered to do. The actions taken by El Paso not only were

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<sup>31</sup> Newport News, analogizing to the potential liability of corporate officers for interfering with the contracts of the corporation they serve, relies upon *Wallace v. Wood*, 752 A.2d 1175, 1182-83 (Del. Ch. 1999) ("However, the Officers could only be liable for tortious interference with their own company's contract if they exceeded the scope of their authority. '[E]mployees acting within the scope of their employment are identified with the defendant himself so that they may ordinarily advise the defendant to breach his own contract without themselves incurring liability in tort.'"). This addresses the potential liability of agents of corporations; it does not address the potential liability of one undeniably a party to the contract.

unauthorized; they were also ineffectual.<sup>32</sup> Thus, El Paso, by attempting to release the rights of Newport News under the Subject Policies, acted beyond its contractual rights, even though its pursuit of the insurance coverage was something that it was entitled to do. Newport News argues that El Paso should be held liable because it engaged in conduct that was not authorized. Conduct which establishes any claim of tortious interference with contract must be without justification; thus, Newport News conflates the third-party prerequisite to tortious interference with the “without justification” element of the tort. Ultimately, Newport News would impose tort liability for conduct by a fellow contracting party because its conduct is inconsistent with the contract. An unjustified breach of contract, however, should be remedied through contract law and not through tort law.<sup>33</sup>

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<sup>32</sup> In order for a plaintiff to prevail on a claim for tortious interference with contract, the plaintiff must demonstrate a breach of the contractual relationship. For these purposes, proof that a repudiation (or anticipatory breach) occurred suffices. *See UbiquiTel Inc. v. Sprint Corp.*, 2005 WL 3533697, at \*8 (Del. Ch. Dec. 14, 2005). Whether the London Insurers repudiated their obligations to Newport News under the Subject Policies is addressed in Part III. G.

<sup>33</sup> For convenience, the Court has referred to the various El Paso defendants collectively as “El Paso.” With respect to the question of tortious interference with contractual relationships, the nomenclature may be confusing. There are two sets of issues. The first, described above, is whether the El Paso entity with rights to the Subject Policies may—in light of the multi-party nature of the insurance contracts—be held liable as a stranger to those contracts. The second is whether a parent (or other entity among the wholly-owned collective corporate entities comprising El Paso Corporation) can tortiously interfere with a contract of a subsidiary. There are two general ways of analyzing the latter question. The first invokes a general principle that a parent corporation, as a matter of status, cannot, as a matter of law, tortiously interfere with a subsidiary’s contract. “It is not unfair to regard a parent and its wholly owned subsidiary as a single economic unit. Beginning with that premise, courts have reasoned that just as an entity cannot be liable for interfering with the performance of its own contract, a parent cannot be liable for interfering with the performance of a wholly owned subsidiary.” *Wallace*, 752 A.2d at 1183. If that is the case, then the El Paso entities cannot be liable because of the separate legal existence, *i.e.*, simply because some of them are not the actual party to the contracts of insurance.

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The other approach is more nuanced. As explained in *Shearin*, 652 A.2d at 591, a corporate parent may be liable for tortiously interfering with a subsidiary’s contract if “the parent was not pursuing in good faith the legitimate profit-seeking activities of the affiliated enterprise.” *Allied Cap. Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1039 (Del. Ch. 2006). The record before the Court does not support an inference that would satisfy this “stringent” standard, a standard supported by at least two significant policy considerations described in *Allied Cap. Corp.*, 910 A.2d at 1039:

In so holding, Chancellor Allen acknowledged the test for holding a parent corporation liable for tortious interference had to be high or every-day consultation or direction between parent corporation and subsidiaries about contractual implementation would lead parents to be always brought into breach of contract cases. He also feared that the option of efficient breach—the conscious decision to breach a contract and pay the required damages because the potential for profit even after the payment of those damages—would be chilled by holding the parent responsible in tort.

In short, unless the El Paso entity “closest” to the insurance contracts could be held liable for tortious interference (which it cannot), neither can the El Paso entities more “distant” from the insurance contracts be held liable.

One could reasonably conclude that the flexibility animating the latter analysis of liability in the parent-subsidiary context should extend to questions of whether a party to a contract should be treated as a stranger to that contract because of the nature of its conduct. That treatment could be reserved for those rare and extreme circumstances in which the argument for imposition of liability is compelling. Newport News would view this case as one of those rare instances. The contracts at issue, the Subject Policies, do not define any duties owed by Newport News to El Paso or by El Paso to Newport News. That, of course, is due to the fact that when the policies were written, the various businesses were under common ownership. In this instance, El Paso purported to release Newport News’s rights under the Subject Policies, without prior notice to Newport News and without any authority, under the Insurance Agreement or otherwise, to accomplish the release. El Paso sought to eliminate all rights of Newport News under the Subject Policies, a step which it perhaps could have accomplished had it taken a different route. A party to a multi-party contract, however, should not be concerned about whether its effort to pursue rights under that contract could, if it misconstrued the contract or misunderstood its rights, create tort liability. Inevitably, imposing tort liability of this nature to regulate conduct within the context of a relationship which the parties have chosen to define by contract would impinge on (or, at least, substantially complicate) their right to allocate risks among themselves. Because one need not be a party to a contract to be deemed not to be a stranger to the contract, officers, subsidiaries, and agents, such as lawyers, benefit from a privilege against tortious interference with contract claims because they are so closely related to the parties to the contract. Whether a related person is entitled to assert such a privilege is a question allowing discretionary consideration; that is to be contrasted with one’s status as a party to the contract which, in a definitional sense, precludes imposition of tort liability. There are, of course, other torts, such as fraud and misrepresentation, which may be companions to contract claims.

In sum, Newport News fails, as a matter of both undisputed material fact and law, in its effort to present a tortious interference with contract claim against El Paso.<sup>34</sup>

G. *Did the London Insurers Breach or Repudiate their Obligations Under the Subject Policies?*

A refusal to perform contractual obligations constitutes a repudiation of the contract and an anticipatory breach of the agreement.<sup>35</sup> A clear statement of the refusal must be made to an obligee under the contract.<sup>36</sup> However, a mere threat of non-performance does not constitute repudiation.<sup>37</sup> Newport News contends that through the combination of the Settlement Agreement and the Notice, the London Insurers were in anticipatory breach of the Subject Policies.

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<sup>34</sup> In the Court's post-trial memorandum opinion, it held that no breach of the Insurance Agreement occurred. *See Tenneco Automotive, Inc.*, 2004 WL 3217795, at \*15. Because there is no underlying breach of the Insurance Agreement, there can be no associated claim against the London Insurers for any interference with the Insurance Agreement. In addition, Newport News has not suggested that it is the beneficiary of any implied covenants arising under the Subject Policies.

<sup>35</sup> *CitiSteel USA, Inc. v. Connell Ltd. P'ship*, 758 A.2d 928, 931 (Del. 2000) ("Under Delaware law, repudiation is an outright refusal by a party to perform a contract or its conditions entitling "the other contracting party to treat the contract as rescinded."). *See also Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027, at \*27 (Del. Ch. Apr. 29, 2005) ("An 'unequivocal statement by a promisor that he will not perform his promise' is the essential underpinning for a repudiation claim.") (quoting *Carteret Bancorp, Inc. v. The Home Group, Inc.*, 1988 WL 3010, at \*5 (Del. Ch. June 13, 1988)).

<sup>36</sup> RESTATEMENT (SECOND) OF CONTRACTS § 250 (1981).

<sup>37</sup> *See, e.g., Campos v. Olson*, 241 F.2d 661 (9th Cir. 1957) (professional boxer's statement to his manager in charge of Hawaiian bouts that he was leaving for the mainland, followed by his obtaining new management and other matches, did not constitute an unequivocal anticipatory breach).

The parties to the Settlement Agreement intended that it remain confidential. The only voluntary communication that Newport News received was the Notice sent by El Paso. The London Insurers should have anticipated that the Settlement Agreement would eventually be shared, either voluntarily or involuntarily, with the other parties covered under the Subject Policies.<sup>38</sup> Furthermore, the London Insurers did nothing to displace Newport News's reasonable assumption that it needed to obtain replacement coverage after learning of the Settlement Agreement's stated objections.

Newport News contends that the Settlement Agreement demonstrated an intent by the London Insurers not to honor any of Newport News's potential claims under the Subject Policies. The Settlement Agreement clearly demonstrates that the London Insurers no longer considered themselves obligated to perform for Newport News's benefit in accordance with the Subject Policies.<sup>39</sup>

Although the London Insurers never unequivocally communicated directly to Newport News that they would not perform under the Subject Policies, the London Insurers may not benefit from the fact that they tried to keep secret their purported release from liability under the Subject Policies; to do otherwise would

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<sup>38</sup> The Settlement Agreement was provided to Newport News during the discovery phase of this proceeding and before Newport News's purchase of replacement coverage.

<sup>39</sup> The Settlement Agreement, at § 4, recited that "all . . . duties, responsibilities and obligations of [the London Insurers] created by or in connection with the [Subject Policies] are hereby terminated." Newport News properly understood this as a statement that the London Insurers no longer intended to perform under the Subject Policies.

be inequitable. In addition, the London Insurers should have realized that the settlement would reach Newport News. The Settlement Agreement, on its face, unequivocally discharged any obligation of the London Insurers to Newport News under the Subject Policies. Newport News, thus, has an arguable claim that the London Insurers repudiated the Subject Policies based upon their negotiation of the purported release from El Paso and their subsequent conduct. Such a fact intensive inquiry, buffeted by the multiple conflicting inferences which may reasonably be drawn, is not amenable to resolution on summary judgment.<sup>40</sup>

#### **IV. CONCLUSION**

For the foregoing reasons, El Paso's motion for summary judgment is granted, but the London Insurers' application for summary judgment is denied. An implementing order will be entered.

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<sup>40</sup> More specifically, the Court cannot conclude, after drawing all reasonable inferences in favor of Newport News, that the London Insurers are entitled to judgment as a matter of law.