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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE TRAVELERS INDEMNITY COMPANY, **Defendant Below,** **Appellant,** **v.** **CNH INDUSTRIAL AMERICA, LLC,** **Plaintiff Below,** **Appellee.**	No. 420, 2017 Court Below—Superior Court Of The State of Delaware C.A. No. N12C-07-108 EMD CCLD **PUBLIC VERSION** **FILED DECEMBER 13, 2017**

APPELLANT THE TRAVELERS INDEMNITY COMPANY'S AMENDED OPENING BRIEF

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NATURE OF THE PROCEEDINGS

This appeal concerns breach of insurance contract claims asserted by Plaintiff-Appellee CNH Industrial America, LLC ("CNH") against Defendant-Appellant The Travelers Indemnity Company ("Travelers"). CNH seeks insurance coverage for underlying asbestos tort suits, under certain insurance policies purchased by Tenneco, Inc. ("Tenneco") between 1971 and 1986 that provided insurance for Tenneco and Tenneco subsidiaries nationwide (the "Tenneco Insurance Program"), including wholly owned Tenneco subsidiary J.I. Case Company ("J.I. Case"). The dispute between the parties is a purely contractual one regarding who will bear a portion of the costs incurred in defending and settling the underlying asbestos suits; the availability of insurance coverage will have no impact on the underlying asbestos claimants.

CNH was never a subsidiary of Tenneco, and it was never an insured under the Tenneco Insurance Program as it did not exist while that Program was in effect. CNH now contends that, in 1994, J.I. Case assigned to CNH its rights under the insurance policies issued by Travelers as part of the Tenneco Insurance Program. Travelers was never asked to consent to the assignment and did not do so.

At least as early as 1996, CNH began receiving service of complaints in the underlying suits. Those suits allege bodily injury caused by asbestos contained in products manufactured by J.I. Case or by other entities for which CNH allegedly is

responsible. CNH did not tender any of those suits to Travelers or provide any notification to Travelers for twelve years. Finally, in May 2008, CNH gave notice to Travelers of some (but not all) of the suits, and sought coverage as the alleged "successor" to J.I. Case.

In July 2012, CNH filed this action against Travelers and other primary and excess insurers of Tenneco and of J.I. Case before it merged with Tenneco, some of which subsequently entered into settlements with CNH. The Superior Court has issued a series of summary judgment rulings culminating in a determination that Travelers had a duty to defend CNH under certain policies that Travelers issued as part of the Tenneco Insurance Program.

On September 12, 2017, the Superior Court entered a Rule 54(b) judgment in favor of CNH in the amount of $13,047,415.31. Travelers appeals from that judgment.

SUMMARY OF ARGUMENT

1. The Superior Court held that Wisconsin law governs the determination of whether CNH is entitled to coverage under the policies issued by Travelers as part of the Tenneco Insurance Program (the "Travelers Policies"). That ruling cannot be reconciled with this Court's decision in *Certain Underwriters at Lloyds, London, et al. v. Chemtura Corp.,* 160 A.3d 457 (Del. 2017), the Restatement (Second) Conflict of Laws, or with prior Delaware cases applying the Restatement. Those authorities, and most notably *Chemtura,* compel the conclusion that Texas law governs. The choice of law analysis is critical because Texas and Wisconsin law differ regarding the validity of assignments made without the insurer's consent.

Delaware applies the "most significant relationship" test in making choice of law determinations. *Chemtura* addressed the availability of insurance coverage for environmental claims arising from sites located in two different states. The Superior Court held that state in which each site was located had the most significant relationship as to claims arising from that site. It therefore held that insurance contracts issued as part of a single nationwide program should be interpreted differently, depending on the location of the underlying site.

This Court reversed, emphasizing that the choice of law analysis should focus on the insured entity's relationship with its insurers at the time the insurance

contracts were negotiated, paid for and went into effect. It held in that regard that "the important purpose of fulfilling the justified expectations of the parties in contract disputes is best served by providing terms in the contract that does not vary based on the happenstance of the location of a particular claim." *Id.* at 467. This Court likewise emphasized "the need for comprehensive insurance programs to have a single interpretative approach utilizing a single body of law unless the parties to the scheme choose otherwise." *Id.* Because the policies at issue in *Chemtura* were issued when the policyholder was headquartered in New York, maintained offices and its risk management department in New York, and utilized a New York broker, this Court held that New York law applied to all coverage issues arising under the policies.

Applying these principles here, Texas law applies. CNH now seeks coverage as the purported assignee of J.I. Case, a subsidiary of Tenneco. The Travelers policies under which CNH seeks coverage were all issued as part of a comprehensive nationwide insurance program designed to provide coverage for Texas-based Tenneco and its subsidiaries. Those subsidiaries were sometimes included as insureds under policies issued directly to Tenneco and at other times were issued separate policies as part of the comprehensive Tenneco Insurance Program.

The Texas contacts with Tenneco's Insurance Program when all of these policies were issued are overwhelming: (1) Tenneco was at all times headquartered in Texas; (2) Tenneco's risk management department was at all times located in Texas; (3) Tenneco's principal place of business was at all times located in Texas; (4) every policy was negotiated in Texas; (5) every policy was paid for from Texas; (6) every policy was delivered in Texas; and (7) Tenneco at all times managed its insurance program from Texas.

In light of these myriad Texas contacts, the Superior Court erred in holding that Wisconsin law applies merely because J.I. Case is headquartered in Wisconsin. *Chemtura* and other cases applying Delaware choice of law principles teach that the law of a single state should govern all coverage questions arising under policies issued as part of the Tenneco Insurance Program. The availability of coverage for indistinguishable claims under the same policy language should not vary depending upon which particular subsidiary happens to be involved in the claim, or whether the parent company decided to arrange for a separate policy to be issued to its subsidiary as part of its comprehensive insurance program versus including that subsidiary directly under the parent company's policy.

Accordingly, this Court should hold that Texas law applies to all of the insurance coverage issues raised by this appeal. On that basis, this Court should either direct entry of judgment for Travelers because the purported assignment

from J.I. Case to CNH without Travelers consent is invalid under Texas law or remand for the Superior Court to apply Texas law to all of the Travelers Policies.

2. Assuming, *arguendo*, that the Superior Court was correct in its choice of law ruling, it nevertheless erred in several important respects in its application of Wisconsin law. First, the Superior Court erred in holding on summary judgment that Travelers had waived its coverage defenses to the claims tendered by CNH. Wisconsin law, like that of other states, requires a stranger to an insurance policy to establish its right to policy benefits. Travelers timely and repeatedly issued reservations of rights letters on this basic coverage issue only to be stonewalled by CNH. Travelers also presented extensive evidence regarding CNH's repeated violations of its notice and cooperation obligations under the Travelers Policies and the resulting prejudice to Travelers. These issues are intensely factual, and should not have been resolved against Travelers on summary judgment.

3. Second, even if Travelers is found to have waived its coverage defenses, the Superior Court erred in refusing to apply binding Wisconsin law holding that an insurer is not liable for amounts incurred by its insured before the insured tenders each lawsuit or claim. Wisconsin law is clear that there is no coverage for such pre-tender amounts, including in cases where an insurer has breached its duty to defend.

4. Finally, the Superior Court erred in refusing to allow Travelers to obtain discovery regarding CNH's settlements with other insurers to ensure that CNH does not obtain a double recovery. Specifically, Travelers sought production of a settlement agreement between CNH and CNA to evaluate whether CNH had already recovered from CNA the same amounts it sought from Travelers. The Superior Court erred by not ensuring that CNH would not be unjustly enriched by recovering from Travelers amounts it had already recovered from others.

STATEMENT OF FACTS

I. The Parties

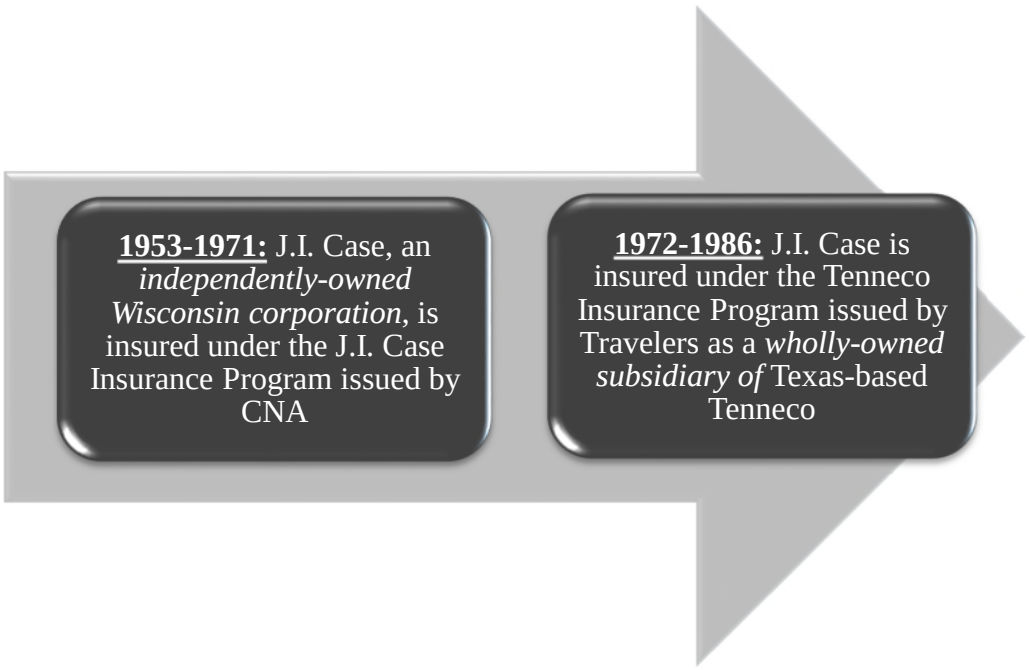
A. The Travelers Indemnity Company

Defendant-Appellant Travelers is a Connecticut corporation with its principal place of business in Connecticut. A00002529-30.

B. CNH Industrial America, LLC

Plaintiff-Appellee CNH is a limited liability company created and organized under the laws of Delaware that maintains its principal place of business in Racine, Wisconsin. A00002412. J.I. Case became a wholly-owned subsidiary of Tenneco in 1970. A00002408. CNH, after contending for years that it was a "successor" to J.I. Case, now contends in this litigation that it is the assignee of certain assets and liabilities of J.I. Case. A00002409-10.

Before becoming a wholly-owned subsidiary of Tenneco, J.I. Case was a stand-alone corporation headquartered in Wisconsin that maintained its own comprehensive insurance program issued by its historic primary insurer, CNA. A00002408; A00002418-2424. J.I. Case became part of the Tenneco Insurance Program after its acquisition by Tenneco. Thereafter, Tenneco procured coverage for J.I. Case beginning in 1972 when J.I. Case's last policy with CNA expired. A00002424; A00000194. This timeline is depicted graphically below.



II. The Tenneco Insurance Program.

Tenneco was a Texas oil and gas corporation with its principal place of business in Houston, Texas. A00000373-82; A00000434; A00000439. In addition, Tenneco owned and controlled a number of manufacturing subsidiaries. A00000434. From 1971 to 1986, [redacted]

As a part of the Tenneco Insurance Program, Travelers issued a series of general liability insurance policies to Tenneco from 1971 to 1986, each providing nationwide liability insurance for Tenneco and its subsidiaries (the "Travelers Policies").[1] In some instances, Tenneco also procured separate liability policies for certain subsidiaries. A00000338-43; A00000416-20.

Consistent with this practice, Tenneco procured a single liability policy for J.I. Case covering the policy period from January 1, 1972 to January 1, 1973 (the "J.I. Case Policy"). A00000526-653. Thereafter, Tenneco added J.I. Case as an insured under the liability policies issued to Tenneco. A00000503.

CNH was never an insured under any of the Travelers Policies. A00001364-65.

A. Tenneco's corporate headquarters, principal place of business, and insurance department were all in Texas.

Throughout the duration of the Tenneco Insurance Program, Tenneco was a Texas corporation that maintained its corporate headquarters, principal place of business, and Property & Casualty Insurance Department (the "Insurance Department") in Houston, Texas. A00000373-82; A00000434; A00000440.

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[1] The liability insurance policies issued by Travelers as part of the Tenneco Insurance Program are identified and described in Defendant The Travelers Indemnity Company's Opening Brief In Support Of Its Motion For Partial Summary Judgment With Regard To Choice Of Law, at A00000331-69. In addition, the policies are exhibits to the Affidavit of Gary C. Bennett, at A00000454-1131.

B. The Travelers Policies were negotiated in Texas.

Tenneco, assisted by its broker Marsh & McLennan ("Marsh"), negotiated the entire Tenneco Insurance Program in Texas. A00000435-49; A00000439-441; A00001136-45; A00001147-50; A00002167-68. The negotiations for the Travelers Policies often extended for months and involved frequent communications among Tenneco, Marsh, and Travelers. A00000440-41; A00000442.[2] The negotiations in Texas included the scope and nature of coverage for J.I. Case. A0000441-43; A00000451-53; A00001146-50; A00001237-38.

C. The Travelers Policies were delivered to Tenneco in Texas.

All of the Travelers Policies, including the J.I. Case Policy, were delivered to Tenneco in Houston, Texas, where Tenneco maintained its corporate headquarters and Insurance Department. A00000435-38; A00001682-83.

D. Tenneco paid all premiums for the Travelers Policies from Texas.

Throughout the duration of the Tenneco Insurance Program, Tenneco paid all premiums due for the Travelers Policies on behalf of all covered subsidiaries and corporate divisions, including J.I. Case. A00000349-50; A00000444-45; A00001239-41; A00002167-68. Tenneco transmitted those payments to Travelers from Houston, Texas in the form of checks drawn on bank accounts located in

[2] Underwriting records show several meetings occurred in Texas among representatives of Tenneco, Marsh, and Travelers. A00000442-43; A00000452-53; A00001163-1206. The underwriting records reveal extensive written communications to and from Tenneco personnel in Houston regarding the Tenneco Insurance Program. A0000043-44; A00001207-1236.

Houston. A00001239-41. There is no evidence that J.I. Case ever paid any premiums to Travelers with respect to any of the Travelers Policies, including the J.I. Case Policy, or that any premiums were ever paid by Tenneco from Wisconsin. A00000394-96. [redacted] A00000396.

E. The Tenneco Insurance Program was managed in Texas.

The Tenneco Insurance Program was managed entirely in Texas. Tenneco's Insurance Department, located in Houston, managed all underwriting and claims components of the Tenneco Insurance Program on behalf of Tenneco's corporate family, including J.I. Case. A00000350-53; A00000445-46; A00001245-48; A00001648-49. The Tenneco Insurance Department served as the epicenter for all information flow relating to the Tenneco Insurance Program, including claims management correspondence, special account instructions applicable to all entities in the Tenneco corporate family, and communications regarding claims and the defense of claims. *Id.*, *see also* A00000440-41. Tenneco's Houston headquarters consistently requested from Travelers loss run data for the entire corporate enterprise, including loss run data related to J.I. Case. A00000445-48; A00001245-48; A00001249-67. Tenneco maintained extensive control over all

underwriting and claim issues affecting all its subsidiaries, including J.I. Case. *Id.; see also* A00001648-49.

III. The alleged assignment of policy rights to CNH.

Each of the Travelers Policies contains an express anti-assignment provision stating that "[a]ssignment of interest under this policy shall not bind the company until its consent is endorsed hereon." A00000438-39. CNH was not an insured under any of the Travelers Policies; indeed, CNH did not even exist until 1994, approximately *eight years* after the last policy issued by Travelers under the Tenneco Insurance Program had expired. A00002409-10. Instead, CNH claims that J.I. Case assigned to CNH its rights under the Travelers Policies pursuant to two 1994 agreements, which purported to assign some but not all of J.I. Case's assets and liabilities to CNH. A00002408-10; A00001296-1303; A00001364-1437; A00001449.

Neither Tenneco, J.I. Case, nor CNH ever requested Travelers consent to the purported assignment, and Travelers never gave its consent. A00000449; A00001349-51; A00001446-47.

IV. CNH's request for insurance coverage from Travelers for asbestos claims.

No later than 1996, numerous lawsuits began to be served against CNH alleging bodily injury because of exposure to asbestos contained in products

manufactured by a variety of entities, including, but not limited to, J.I. Case. A00001288; A00001321-35.

[redacted] A00000313-29; A00001982.

A. The notice and cooperation requirements contained in the Travelers Policies.

All of the Travelers Policies include nearly identical provisions requiring anyone seeking coverage to provide written notice of an "occurrence" (including "particulars sufficient to identify the insured") to Travelers "as soon as practicable" and of any lawsuit "immediately":

> In the event of any occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place, and circumstances thereof, and the names and addresses of the insured and of available witnesses, shall be given by or for the insured to the company or its authorized agents as soon as practicable.
>
> * * *
>
> If a claim is made or suit is brought against the insured, the insured shall immediately forward to the company

> every demand, notice, summons or other process received by him or his representative.

A00000532; A00000787-78; A00001104-05.

All of the Travelers Policies also contain nearly identical provisions requiring that one seeking coverage cooperate with Travelers in both the investigation of coverage (or a purported insured's entitlement to coverage) and the defense of any claim, and explicitly require that one seeking coverage not, "except at its own cost, make any voluntary payments, assume any obligation or incur any expense":

> The insured shall cooperate with the company and upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of bodily injury or property damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at its own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of the accident.

Id.

B. CNH's late notice to Travelers and inaccurate representation that CNH was a "successor" to J.I. Case.

In May 2008, more than twelve years after the first asbestos lawsuit had been filed against CNH, Marsh, on behalf of CNH, first provided Travelers with notice of [redacted] asbestos lawsuits. A00002081. [redacted]

A00000258. *Id.*

[redacted]

CNH also wrongfully withheld from discovery extensive documentation showing that early on CNH's broker James Dorion had questioned CNH's assertion that it was the "successor" to J.I. Case. [redacted]

CNH did not produce these documents, which had been in the possession of CNH's in-house counsel, until years after they were requested in discovery, prompting Special Discovery Master Ridgely to award sanctions against CNH. A00002624-58.

C. Travelers reservation of rights pending a coverage investigation.

Travelers never denied coverage for any of the asbestos suits tendered by CNH. A0000234-46. To the contrary, Travelers reserved all of its rights while it continued to seek from CNH documentation necessary for Travelers to properly evaluate CNH's contentions that it was a "successor" to J.I. Case and entitled to coverage under the Travelers Policies. *Id.* [redacted]

D. CNH's continuing failure to provide timely notice of suits.

CNH also repeatedly failed to comply with its obligation "immediately" to transmit each underlying asbestos lawsuit to Travelers. [redacted] A00002011; A00002015-18. [redacted] A00002098-117.[3] [redacted] A00002505-06.

CNH also routinely incurred significant defense costs for a specific lawsuit before providing Travelers with a copy of the complaint in that lawsuit. A00002375-80. On summary judgment, the Superior Court awarded CNH

[3] In addition to its summary judgment motion seeking the payment of defense costs already incurred, CNH moved for summary judgment seeking a ruling that Travelers had a duty to defend 138 asbestos suits that were in active litigation when the motion was filed. A0000224-25. [redacted]

[redacted] in pre-tender defense costs. A00002730; A00002784; A00002836-43; *see also* A00002375-80.

V. The proceedings in the Superior Court.

On July 11, 2012, CNH filed this coverage action against Travelers, CNA and various other primary and excess insurers seeking coverage for losses (indemnity) and associated defense costs allegedly incurred in the underlying asbestos suits. A00000189.

CNH contended that all of the Travelers Policies provide coverage for its asbestos claims. The litigation focused, however, on only three of the Travelers Policies because the limits of liability of all of the other policies were exhausted by payments Travelers had previously made in connection with other unrelated claims. A00002707. Those three Travelers Polices were the J.I. Case Policy and the policies issued to Tenneco for the policy periods of January 1, 1978 to September 1, 1978 and September 1, 1985 to September 1, 1986, under which J.I. Case was an insured. *Id.*

A. The CNA Choice Of Law Order

On April 10, 2013, CNH filed a motion for summary judgment contending that CNA owed CNH coverage for the underlying asbestos lawsuits under the policies CNA had issued to J.I. Case between 1965 and 1971 (the "CNA Policies"). A0000056-154.

On January 6, 2014, the Superior Court (Vaughn, J.) held that the J.I. Case Insurance Program issued by CNA would be governed by the law of Wisconsin. A00000188-209 (the "CNA Choice Of Law Order"). Importantly, the CNA Choice Of Law Order on its face did not apply to the Tenneco Insurance Program or the Travelers Policies:

> This opinion addresses only the issue of the CNA Defendants' duty to defend in connection with three policies. It does not address and is without prejudice to the rights or liabilities of any other party or any other policies.

A00000190.

B. The CNA Settlement

Following the CNA Choice of Law Order, CNH and CNA entered into a settlement agreement, and CNA was dismissed from the case. A00002882-83.

The Superior Court subsequently denied two motions by Travelers seeking settlement documents withheld from production by CNH, characterizing the requests as "premature." A00001959-61; A00002699-2704. On April 6, 2017, the Superior Court again denied Travelers motion for the withheld settlement documents. A00002880-93; A00003215-17.

C. The Travelers choice of law and assignment decisions.

On October 14, 2014, Travelers filed a motion for summary judgment on the choice of law issue. A00000332-69. Travelers submitted extensive evidence in support of its motion showing the pervasive connections between Texas and the

Tenneco Insurance Program. A00000370-1281. This evidence included, among many other things, the Affidavit of Gary C. Bennett (the "Bennett Affidavit"), a former Travelers underwriter who worked on the Tenneco account from October 1977 until the conclusion of the program in 1986. A00000432-49.[4]

The Superior Court found that the Travelers Policies were "contracted, negotiated, and performed in Texas" and that Tenneco paid the premiums for all of the Travelers Policies from Texas. A00002170; A00002167-68.

Nevertheless, on May 18, 2015, the Superior Court (Davis, J.) held in an oral ruling that the law of Wisconsin, and not Texas, would govern interpretation of the Travelers Policies issued as part of the Tenneco Insurance Program. A00002166-75. The Superior Court opined that the location of the particular subsidiary whose products were at issue in the underlying asbestos claims was the most important factor in determining the choice of law for issues of insurance coverage, rather than the place where the insurance contracts were negotiated, executed, delivered, and paid for. A00002171 ("Tenneco is not the relevant party in this dispute. It is J.I. Case, a Wisconsin corporation, that was the insured and that possessed the indemnification rights against Travelers that CNH now seeks to enforce."). Thus,

[4] The Superior Court struck certain paragraphs of the Bennett Affidavit and certain of its exhibits. A00001962-69. Travelers believes that the Superior Court erred in striking this evidence, but there is no need to resolve the issue because the Superior Court accepted other evidence that established the key facts showing that the Tenneco Insurance Program was as at all times centered in Texas.

the Superior Court did not base its decision on any lack of evidence that the entire Tenneco Insurance Program was centered in Texas. Rather, it held that the location of the particular subsidiary whose products were at issue in the underlying litigation outweighed the fact that the overall insurance program was centered in Texas.

The Superior Court also held, under Wisconsin law, that CNH had validly obtained rights by assignment under the Travelers Policies, notwithstanding that CNH never sought nor obtained Travelers consent to the assignment. A00002172-74.

D. The duty to defend and waiver decisions.

On August 21, 2015, the Superior Court (Davis, J.) held that, "unless there is another reason why Travelers has been relieved of its duty to defend, the Court holds that Travelers has a duty to provide CNH with a defense as to the Underlying Lawsuits so long as the asbestos-related complaints either refer to a J.I. Case Company product or do not refer to a brand name, and does not only refer to International Harvester, New Holland or another non-J.I. Case Company brand." A00002192-2201. The Superior Court also requested supplemental briefing regarding CNH's argument that Travelers had "waived" its right to enforce the notice and cooperation provisions of the Travelers Policies. A00002200-01.

On August 19, 2016, the Superior Court (Davis, J.) held that Travelers had waived its late notice and cooperation defenses by failing to defend the underlying suits, including cases where it had received late notice or even no notice at all before the filing of this action. A00002684-98. It reached this conclusion notwithstanding Travelers' evidence establishing its ongoing efforts to investigate coverage and CNH's repeated failure to provide critical requested information, including regarding CNH's alleged status as a "successor" to J.I. Case. *Id.*; A0000234-46; A00002508-10.

E. The pre-tender costs decision.

On November 14, 2016, the Superior Court (Davis, J.) issued an oral ruling regarding CNH's right to coverage for defense costs incurred in particular lawsuits before CNH had tendered those lawsuits to Travelers. A00002818-68. The Superior Court held that all costs incurred after CNH provided initial notice of an asbestos-related "occurrence" to Travelers in May 2008 were potentially recoverable, even if CNH had breached its obligation immediately to provide Travelers with copies of the actual complaints in particular cases to Travelers. *Id*.

F. The damages decision and Rule 54(b) judgment.

On April 6, 2017, the Superior Court issued its decision regarding alleged contractual damages owed by Travelers to CNH. A00003203-17. The Superior

Court determined the specific categories of disputed costs recoverable by CNH subject to its prior decisions. *Id.*

On September 12, 2017, consistent with its prior rulings, the Superior Court entered a final judgment under Del. Civ. Pro. R. 54(b) against Travelers in the amount of $13,047,415.31. A0003247-50. Travelers appealed to this Court.

ARGUMENT

I. The Superior Court erred in applying Wisconsin law to the Travelers Policies, which were issued as part of the Texas-based Tenneco Insurance Program.

A. Question presented.

This Court has recently reaffirmed that insurance contracts issued as part of a comprehensive nationwide insurance program should be subject to "single interpretive approach utilizing a single body of law unless the parties to the scheme choose otherwise."[5] The Travelers Policies were all negotiated, executed, paid for, delivered, and administered in Texas as part of a comprehensive nationwide insurance program created for a Texas-based corporation and its subsidiaries. A00000331-69; A00002494-521. Did the Superior Court err in holding that Wisconsin law applies to the Travelers Policies?

B. Scope of review.

This Court reviews *de novo* a trial court's grant of partial summary judgment. *See, e.g.*, *Chemtura*, 160 A.3d at 457.

C. Merits of argument.

In a classic case of the tail wagging the dog, the Superior Court held that Wisconsin law applies for purposes of determining the availability of coverage for the underlying claims, merely because J.I. Case had its principal place of business

[5] *Certain Underwriters at Lloyds, London. v. Chemtura Corp.*, 160 A.3d 457 (Del. 2017).

in Wisconsin. It acknowledged that all of the Travelers Policies were issued as part of the Tenneco Insurance Program, which had its epicenter in Texas and which provided insurance for Texas-based Tenneco and its subsidiaries that were spread throughout the country. A00002167-70. Nonetheless, the Superior Court held that the location of the subsidiary whose purported assignee was seeking coverage trumped the connections between Texas and the entire insurance program negotiated, executed, paid for and managed by the Texas-based parent corporation. A00002170.

The Superior Court's rationale cannot be reconciled with this Court's recent decision in *Chemtura*, the Restatement (Second) Conflict of Laws, or prior Delaware cases applying the Restatement. *Chemtura* emphasized that a comprehensive insurance program, like the Tenneco Insurance Program, must be interpreted on a uniform, consistent, and predictable basis based upon the justified expectations of the parties. Thus, *Chemtura* overturned a Superior Court choice of law decision holding that the law of the state in which a claim happened to be pending would control the determination of coverage for the claim, because that approach would have "result[ed] in the policy being read in fundamentally different ways in different cases . . . ." *Chemtura*, 160 A.3d at 460. Instead, *Chemtura* held that fundamental choice of law principles requires selection of the

law of a single state to govern the entire insurance program based upon the "contacts among the parties at the outset of the insurance program." *Id.* at 470.

Like the Superior Court decision reversed in *Chemtura*, the decision below is fundamentally flawed because it summarily dismissed the extensive Texas contacts between Travelers and Tenneco in negotiating, forming, and implementing the Travelers Policies. And, like the Superior Court decision in *Chemtura*, the Superior Court's analysis here would lead to the incongruous result that claims indistinguishable in principle would be subject to the law of different states under insurance policies issued as part of the same insurance program. Thus, for example, claims for insurance coverage similar to the underlying claims made by Tenneco subsidiaries in Virginia, California, Illinois, and Wisconsin could all be subject to the law of different states, even though those subsidiaries were all seeking coverage for similar claims under policies issued to Tenneco on which they were named as insureds or issued to them as part of the same Tenneco Insurance Program.

1. The Superior Court misapplied the "most significant relationship" test under the Restatement and failed to follow established Delaware precedent applying the substantive law of a single state to nationwide insurance programs.

Delaware applies the "most significant relationship" test from the Restatement (Second) to determine choice of law in insurance contract cases. This

test requires an analysis of a constellation of factors regarding the insurance contracts and the contracting parties, including the place of contracting, the place of negotiation, the place of performance, the location of the subject matter, the principal location of the insured risk, and the domicile, residence, nationality, place of incorporation and place of business of the parties. Restatement (Second) Conflict of Laws § 188; *see also Chemtura*, 160 A.3d at 459 (discussing the "most significant relationship framework, which Delaware has adopted for analyzing contract choice of law"); *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 46-47 (Del. 1991). These contacts are then evaluated in light of the general choice of law principles enumerated in Section 6 of the Restatement, which include, among other things, "the protection of justified expectations," as well as "certainty, predictability, and uniformity of result" and "ease in the determination and application of the law to be applied." Restatement (Second) of Conflict of Laws § 6.

Delaware choice of law decisions applying the Restatement emphasize that nationwide insurance programs intended to provide coverage for geographically diverse operations, sites, and subsidiaries should properly be interpreted in accordance with the substantive law of a single state. These cases hold that the most significant contacts are with the state where the insurance contracts are negotiated, issued, managed, and paid for – often, as here, the state where the

parent corporation maintains its headquarters and risk management staff. By contrast, Delaware courts have declined to base choice of law decisions on the locations of particular operations, claims, or subsidiaries, viewing those contacts as less significant and recognizing that a choice of law regime turning on such secondary contacts would defeat the Restatement's objectives of certainty, predictability, and uniformity.

In *Chemtura*, Chemtura Corporation sought coverage for environmental liabilities associated with the operations of its predecessor, Uniroyal, at two different sites – one located in Arkansas and one in Ohio – under a comprehensive insurance program issued to Uniroyal in New York. 160 A.3d at 459. The Superior Court held that the law of the State in which the environmental site at issue was located controlled, and so applied Arkansas law to claims arising from the Arkansas site and Ohio law to claims arising from the Ohio site. *Id.*

On appeal, this Court reversed, holding that the law of New York should govern all claims under the insurance contracts because Uniroyal was headquartered in New York, maintained offices and its insurance risk department in New York, and utilized a broker in New York. *Id.* at 461. In applying the Restatement analysis, this Court focused on Uniroyal's relationship with its insurers at the time the insurance contracts were negotiated, paid for, and went into effect, noting that the policyholder "was a New York-based business seeking

nationwide coverage" and that "the policies were intended to provide expansive non-site-specific coverage, throughout the United States in some instances, and anywhere in the world in others." *Id.* at 466.

This Court observed that the focus on these New York contacts "is based, in part, on the sensible understanding that a company's headquarters staff is usually heavily involved in managing insurance programs that cover the entire company." *Id.* at 470. This Court forcefully stated the need for the law of a single State to control contract interpretation:

> in analyzing the contacts relevant to determining the most significant relationship, we focus on the reality that this is a contract dispute and that the important purpose of fulfilling the justified expectations of the parties in contract disputes is best served by providing terms in the contract with meaning that does not vary based on the happenstance of the locations of a particular claim.

Id. at 467. Accordingly, *Chemtura* concluded that, "[g]iving greater weight to the New York contacts is the best way to vindicate the justified expectations of the parties to the contract and avoids a result that none would have anticipated." *Id.* at 460. This Court also emphasized "the need for comprehensive insurance programs to have a single interpretive approach utilizing a single body of law unless the parties to the scheme choose otherwise." *Id.*

The Superior Court's decision in *Viking Pump, Inc. v. Century Indemnity Co.*, authored by then-Vice Chancellor Strine, is likewise on point. 2 A.3d 76

(Del. Ch. 2009). In that case, Warren Pumps and Viking Pump each acquired businesses once owned by Houdaille Industries ("Houdaille"), and each sought coverage for asbestos-related lawsuits under insurance contracts issued to Houdaille and its subsidiaries. *Id.* at 81. As with Tenneco here, Houdaille had purchased an integrated series of insurance contracts to provide specified coverage for itself and "a variety of distinct business either as unincorporated divisions or through wholly owned subsidiaries." *Id.* at 83. In determining choice of law, the Court placed great weight on Houdaille's principal place of business, noting that Houdaille, "obtain[ed] insurance for risks and operations in a variety of jurisdictions," that the location of Houdaille's headquarters "takes on even more importance because its operations were widely spread throughout the United States," and that "Houdaille's headquarters appears to be the only common link between the operations that [the insurer] and the [excess insurers] were insuring." *Id.* at 87-88. *Viking Pump*, therefore, focused on the headquarters of Houdaille, and not Houdaille's subsidiaries, because Houdaille had maintained a comprehensive, unitary insurance program on behalf of its entire corporate enterprise.

Thus, in cases such as this, Delaware courts have routinely and consistently applied the substantive law of the state where the corporate parent maintains its headquarters and coordinates its insurance program, regardless of the existence of

subsidiaries or operations in other states. *See Chemtura*, 160 A.3d at 470; *Viking Pump*, 2 A.3d at 88-90; *Monsanto Co. v. Aetna Cas. & Sur. Co.*, No. 88C-JA-118, 1991 WL 236936, at *3 (Del. Super. Ct. Oct. 29, 1991) (applying Missouri law to entire insurance program because "[t]he constant thread which bound together Monsanto's insurance program with its insurers from beginning to end was the fact that the program was coordinated and implemented from Monsanto's corporate headquarters" and that was "the situs which linked all the parties together"); *N. Am. Philips Corp. v. Aetna Cas. & Sur. Co.*, No. 88C-JA-155-1-CV, 1994 WL 555399, at *7 (Del. Sept. 2, 1994) (applying law of corporate headquarters in part because "[i]t was also the location of [the corporate parent's] insurance department which was the nerve center of [the insured's] decision-making process during the formation of the contracts"); *Liggett Grp. Inc. v. Affiliated FM Ins. Co.*, 788 A.2d 134, 138 (Del. Super. Ct. 2001) (noting that Delaware courts have held "that the most significant factor for conflict of laws analysis in a complex insurance case with multiple insurers and multiple risks is the principal place of business of the insured because it is 'the situs which link[s] all the parties together.'") (citation omitted).

Here, the Tenneco Insurance Program was a comprehensive nationwide insurance program spanning fifteen years. A00000416-20. In late 1970, Tenneco acquired J.I. Case, which was insured under policies issued by CNA directly to J.I.

Case until January 1, 1972, when J.I. Case's coverage with CNA expired. A00002408; A00002418-24. For the next year, as part of the Tenneco Insurance Program, Tenneco arranged for Travelers to issue the J.I. Case Policy for the one-year period beginning January 1, 1972. A00000526-653. The terms of the J.I. Case Policy, like those of all the other Travelers Policies, were negotiated by Tenneco, and the policy was delivered to and paid for by Tenneco in Texas. A00000419-41; A00001136-45; A00001147-50; A00002167-68. Thereafter, Tenneco insured J.I. Case under the policies issued to Tenneco as the named insured. The terms and conditions of the J.I. Case Policy were substantively identical to the terms contained in all the policies in the Tenneco Insurance Program.

The Texas contacts with the Tenneco Insurance Program are pervasive. Tenneco maintained its headquarters and principal place of business in Houston, Texas[6]; all of the insurance contracts (including the J.I. Case Policy) were negotiated in Texas by Tenneco[7]; all of the premiums (including for the J.I. Case Policy) were paid by Tenneco in Texas[8]; all of the insurance contracts (including

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6 A00000373-82; A00000434; A00000440.

7 A00000419-41; A00001136-45; A00001147-50; A00002167-68.

8 A00000444-45; A00001239-41; A00002167-68.

the J.I. Case Policy) were delivered to Tenneco in Texas[9]; Tenneco's Insurance Department was located at its Texas headquarters and served as the primary contact with Marsh and Travelers[10]; and Tenneco personnel located in Tenneco's corporate headquarters oversaw the day to day operations of the Tenneco Insurance Program, including with respect to J.I. Case[11].

The Superior Court acknowledged that the evidence established that at all times Texas was the epicenter of the entire Tenneco Insurance Program. It held, for example, that Tenneco paid the premiums for the Travelers Policies from Texas, that the place of contracting was Texas, and that the place of negotiation was Texas. A00002168 ("So as Travelers pointed out correctly, the check is not going to come from – it's not going to come from J.I. Case. It never would. It never would."); *Id.* ("[T]he facts demonstrate that the place of contracting is Texas. That would be the last act that would have brought together the whole agreement. The place of negotiation of the contract, again, is Texas.").[12]

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9 A00000435-38; A00001682-83.

10 A00000434; A00000439.

11 A00000441-43; A0000445-46; A00000648-49.

12 As noted above, the Superior Court struck portions of the Bennett Affidavit, holding that Bennett did not have personal knowledge of events before he assumed responsibility for the Tenneco account in 1977. A00001962-69. [redacted]

There is no question that the Superior Court determined that the entire Tenneco Insurance Program centered on Texas and did not distinguish between the J.I. Case Policy and the other policies issued to Tenneco in that regard. The Superior Court committed legal error in its application of the "most significant relationship" test by holding that the location of the Tenneco subsidiary whose products were at issue in the underlying claims outweighed the location of the parent corporation from which all substantive activity regarding insurance for the parent and its subsidiaries was conducted. The Superior Court's reasoning directly contradicts this Court's holding in *Chemtura*.

The Superior Court was also influenced by then-Judge Vaughn's determination that Wisconsin law applied to the insurance policies issued by CNA

[redacted] *See, e.g.*, *BAE Sys. Info. & Elec. Sys. Integration Inc. v. Aeroflex Inc.*, No. 09-769-LPS, 2011 WL 3474344 (D. Del. Aug. 2, 2011). Furthermore, the Superior Court clearly erred in disregarding certain exhibits to the Bennett Affidavit. The documents qualify as "ancient documents," and so fall within an exception to the hearsay rule, and as the former underwriter for the account Bennett was competent to authenticate them. Fed. R. Evid. 803(16). [redacted] *See* Exhibit E, Defendant The Travelers Indemnity Company's Opposition To Plaintiff CNH Industrial America LLC's Motion For Partial Summary Judgment Regarding The Duty To Defend, (May 1, 2015). Nevertheless, the Superior Court correctly held that other evidence established the critical Texas connections to the entire Tenneco Insurance Program, although it erred by holding that the location of J.I. Case's headquarters outweighed those Texas connections.

to J.I. Case. A00002172. Significantly, CNA insured J.I. Case while it was an independent Wisconsin corporation, unrelated to Tenneco. In sharp contrast, all of the Travelers Policies (including the J.I. Case Policy) were issued through Texas-based Tenneco while J.I. Case was a wholly-owned subsidiary of Tenneco as part of the Tenneco Insurance Program, which had no connection at all to Wisconsin.

The Superior Court's exclusive focus on the location of a subsidiary, as opposed to the headquarters of the parent company that negotiated, paid for and administered a comprehensive insurance program, cannot be reconciled with Delaware law. As noted above, in *Chemtura*, this Court unequivocally rebuffed the insured's argument that the law of the state in which the environmental site from which a coverage claim arose should apply, holding instead that the law of a single state should apply as to all coverage claims. *See Chemtura*, 160 A.3d at 459.

Likewise, in *Sequa Corp. v. Aetna Casualty & Surety Co.*, No. 89C-AP-1, 1995 WL 465192 (Del. Super. Ct. July 13, 1995), the court rejected the insured's argument that the law of the state where the corporate subsidiary had its headquarters should apply. It noted that "there were contacts between various insurers and [the subsidiary] through New York offices" of the corporate parent, including "New York-based brokers act[ing] on behalf of [the subsidiary] from time-to-time." *Id.* at *3. Here, of course, communications regarding the Tenneco Insurance Program, including issues involving J.I. Case, were transmitted through

Tenneco's Texas offices, and Tenneco's insurance brokers in Texas consistently communicated with Travelers on behalf of J.I. Case. A00000445-48; A00001245-48; A00001249-67.

Even the decision in *Liggett Group*, relied on by the Superior Court, supports the application of Texas law in this case. In *Liggett Group*, the court considered choice of law with respect to policies issued to Liggett Group (and various corporate entities that acquired ownership interests in Liggett Group) spanning approximately twenty-eight years. 788 A.2d at 138-39. Liggett Group was headquartered in North Carolina for nineteen of the twenty-eight years in question, with headquarters elsewhere in the first and last years of the insurance program. *Id.* The court concluded that North Carolina law controlled because it served as the "situs which links all of the parties together," and was the location of the corporate headquarters for the majority of the years in question. *Id.* at 139. The court also noted that Liggett Group's Insurance and Risk Management Department in North Carolina was involved in the management and negotiation of the policies and insurance program in question. *Id.* at 140-41. Thus, *Liggett Group* supports a determination that Texas bears the most significant relationship to the Tenneco Insurance Program.

2. The Superior Court's choice of law decision would undermine the Restatement goals of certainty, predictability, and uniformity.

The Superior Court's decision to apply Wisconsin law to the Travelers Policies, if upheld, would undermine the Restatement's principles of certainty, predictability, and uniformity by subjecting the same insurance contracts to differing interpretations under the substantive law of multiple states, merely based upon the fortuitous location of each subsidiary insured under the Tenneco Insurance Program. Both the Restatement and Delaware law promote uniform and predictable contract interpretation. *See* Restatement (Second) Conflict of Laws § 6 (stating a goal of "certainty, predictability and uniformity of result"); *see also Sequa Corp.*, 1995 WL 465192, at *5 ("In sum, since New York has so many significant relationships, the considerations of certainty, uniformity, ease of determination and application of its laws to this dispute dovetail"); *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, No. 89C-AU-99, 1991 WL 236943, at *4 (Del. Super. Ct. Oct. 21, 1991) (noting that "a major objective in a choice of law analysis is to promote certainty, predictability and uniformity of result" and holding that an entire insurance program should be subject to interpretation under a single state's law to avoid "inconsistent interpretations"); *N. Am. Philips Corp.*, 1994 WL 555399, at *5 ("Certainty and predictability of outcome are enhanced when the parties' justified expectations are supported.").

The *Chemtura* decision underscores, time and time again, the importance of honoring the expectations of the parties and ensuring consistency, certainty and uniformity in the interpretation of insurance contracts in a comprehensive nationwide insurance program:

> Giving greater weight to the New York contacts is the best way to vindicate the justified expectations of the parties to the contract and avoids a result that none would have anticipated. This result not only gives effect to the Second Restatement's policies for contracts generally, but also fulfills the need for comprehensive insurance programs to have a single interpretive approach utilizing a single body of law unless the parties to the scheme choose otherwise. Precisely because this is an insurance scheme covering diverse nationwide risks, the relationship of the parties cannot center in a rotating and ever-changing way on where the insurer happens to be sued currently, resulting in the policy being read in fundamentally different ways in different cases, based on the happenstance of where, across a broad variety of locations and jurisdictions, potential liability results in litigation. Such rotating uncertainty would not be limited to litigation over environmental claims, rather, given the broad scope of the insurance program, it could draw the insurers into great uncertainty in all manner of tort disputes.

Chemtura, 160 A.3d at 460. This Court rejected an approach that would subject insurers to a "choice-of-law road trip any time an insured changed the location of its headquarters or opened a facility in a different state," stressing that comprehensive nationwide insurance programs "are intended to work together to provide overall protection to the insured" and "[t]hat result would be frustrated if

identical policy language, granting identical coverage, was interpreted in different ways" based on the happenstance of a facility's location. *Id.* at 470-71.

Similarly, in *Viking Pump*, the court underscored the predominant importance of certainty and uniformity in interpreting a continuous series of insurance contracts:

> That result would make little sense in the case of an integrated series of contracts like the Houdaille Policies. The obvious reason why Houdaille purchased a continuous and tightly-related group of policies was to create seamless coverage. The Policies were clearly intended to work together in order to adequately protect Houdaille, a result that would be frustrated by interpreting identical policies in a different way.

2 A.3d at 89. Adoption of a rationale allowing the choice of law to change when the insured moved its headquarters would also allow an insured to "forum shop" by moving operations to a more favorable jurisdiction after claims arose.

In this case, the Superior Court's decision, if upheld, would send Travelers on the very "choice-of-law road trip" that *Chemtura* explicitly rejected. *Chemtura*, 160 A.3d at 470-71. The Superior Court's decision would subject the Travelers Policies to the laws of any state in which any of Tenneco's numerous former insured subsidiaries had its principal place of business. [redacted]

[redacted]

Neither Travelers nor Tenneco could possibly have expected – much less approved – this kaleidoscope of interpretation when they negotiated and entered into the insurance contracts from 1971 to 1986. To the contrary, both parties would have expected that the insurance contracts comprising Tenneco's integrated insurance program would be interpreted and applied in accordance with one uniform law, and that law would be the substantive law of Texas, the state where the insurance contracts were negotiated, paid for and delivered, and where Tenneco maintained its headquarters and risk management department. The choice of law analysis adopted by the Court below, depending as it does on the happenstance of each subsidiary's location, cannot be reconciled with the reasonable expectations of the parties or with the Restatement's principles of certainty, predictability, and uniformity, and it must therefore be reversed.

3. As the Superior Court recognized, there is an actual conflict between Texas law and Wisconsin law regarding enforcement of contractual anti-assignment provisions.

In *Chemtura*, this Court held that there are three components to the "most significant relationship" analysis under the Restatement: "(i) determining if two parties made an effective choice of law through their contract; (ii) if not, determining if there is an actual conflict between the laws of the different states

each party urges should apply; and (iii) if so, analyzing which state has the most significant relationship." *Chemtura*, 160 A.3d at 464. Here, it is undisputed that the insurance contracts at issue do not contain choice of law provisions,[13] and that there is an actual conflict between Texas law and Wisconsin law with respect to enforcement of contractual anti-assignment provisions. Texas unequivocally enforces anti-assignment provisions, like those contained in the Travelers Policies, while Wisconsin permits certain post-loss assignments without the consent of the insurer despite the terms of the anti-assignment provisions.[14] The Superior Court found that:

> The anti-assignment provision states that the assignment of interest under this policy shall not bind the company until

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[13] As this Court explained in *Chemtura*, it is not surprising that the parties did not include a choice of law provision in the insurance contracts. When Travelers and Tenneco negotiated the insurance contracts in the Tenneco Insurance Program, most states applied the *lex loci contractus* approach (*Chemtura* at 23-24), which would have resulted in application of the substantive law of Texas, the place of contract formation. In light of *Chemtura*, the Superior Court's consistent reliance on the lack of choice of law provisions in the Travelers Policies was plainly erroneous. A00002171.

[14] *See Island Recreational Developmental Corp. v. Republic of Tex. Savs. Ass'n.*, 710 S.W.2d 551, 556 (Tex. 1986) (enforcing anti-assignment provision in loan commitment letter of consent); *Tex. Farmers Ins. Co. v. Gerdes By & Through Griffin Chiropractic Clinic*, 880 S.W.2d 215, 218 (Tex. Ct. App. 1994) (anti-assignment provision in automobile insurance policy is unambiguous and prohibits assignment of policy without insurer consent); *Dallas Cnty. Hosp. Dist. v. Pioneer Cas. Co.*, 402 S.W.2d 287, 288 (Tex. Ct. App. 1966) (same); *Tex. Pac. Indem. Co. v. Atl. Richfield Co.*, 846 S.W.2d 580, 582 (Tex. Ct. App. 1993) (enforcing anti-assignment provision in fidelity bond).

> consent is endorsed therein. Travelers never consented to the assignment of interest to CNH. Under Texas law, the anti-assignment provision is effective, and CNH would have no interest in the other insurance policies. Under Wisconsin law, the anti-assignment provision is ineffective, and CNH would have an interest in the other insurance policies and may seek indemnification from Travelers.

See A00002170. Accordingly, it is undisputed that an actual conflict of law exists between Texas and Wisconsin mandating application of the "most significant relationship" analysis contained in the Restatement.

Accordingly, this Court should direct entry of judgment for Travelers on the ground that the purported assignment to CNH without Travelers' consent was invalid under controlling Texas law, or, alternatively, remand for consideration of all issues under Texas law.

II. The Superior Court erred in holding on summary judgment that Travelers waived certain coverage defenses under Wisconsin law.

A. Questions presented.

Summary judgment is inappropriate when "a rational trier of fact could find any material fact that would favor the non-moving party in a determinative way."[15] There were extensive factual disputes regarding whether Travelers wrongfully denied its duty to defend and thereby absolved CNH from its duty to comply with the notice and cooperation provisions of the Travelers Policies. A00001989-2001; A00002053-72; A00002339-2352; A00002363-64. Did the Superior Court err in holding, on summary judgment, that Travelers "waived" its right to enforce the notice and cooperation provisions in the Travelers Policies?

B. Standard of review.

This Court reviews *de novo* a trial court's grant of partial summary judgment. *See, e.g.*, *Chemtura*, 160 A.3d at 457.

C. Merits of the argument.

Travelers presented extensive evidence, in opposition to CNH's various motions for summary judgment, that CNH repeatedly violated its express contractual duties to provide prompt notice of any occurrence, to forward a copy of any suit to Travelers "immediately," and to cooperate with Travelers. Under Wisconsin law, CNH's breaches of these duties relieved Travelers from any

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[15] *Cerberus Int'l., Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002).

defense or indemnity obligations that might otherwise arise under the policies. The Superior Court erroneously held on summary judgment that Travelers "waived" these coverage defenses when it did not immediately assume the defense of the underlying suits in May 2008. This holding is erroneous in light of Travelers diligent efforts to investigate whether CNH had any rights to coverage under the Tenneco Insurance Program before accepting the defense and CNH's failure to cooperate with Travelers' investigation of its claims for coverage. The Superior Court erred in determining these fact-intensive issues on summary judgment.

1. The Superior Court erred in holding on summary judgment that Travelers waived its late notice and cooperation defenses.

The Superior Court never reached the merits of Travelers late notice and cooperation defenses. Instead, on summary judgment, the Superior Court held that Travelers had waived those defenses by not assuming the defense of the underlying suits, before CNH had established that it had any rights under the Travelers Policies. A00002684-98. That holding was erroneous.

Like most jurisdictions, Wisconsin law defines waiver as a party's intentional relinquishment of a known right. *See Brunton v. Nuvell Credit Corp.*, 785 N.W.2d 302, 311 (Wis. 2009) ("[W]aiver is the intentional relinquishment or abandonment of a known right.") (internal quotation marks and citations omitted); *see also Bantum v. New Castle Cty. Vo-Tech Educ. Ass'n.*, 21 A.3d 44, 50 (Del.

2011). Here, the record contains no evidence that Travelers intentionally relinquished any of its coverage defenses. To the contrary, Travelers had the unequivocal right to investigate and evaluate CNH's claim that it was entitled to pursue coverage before accepting or denying a defense and Travelers did everything it could to exercise that right. See *Am. Design & Build, Inc. v. Houston Cas. Co.*, No.11-C-293, 2012 WL 719061, at *7, *11 (E.D. Wis. Mar. 5, 2012) (holding that "an insurer may investigate a claim before accepting the defense" and did not breach the duty to defend due to a delay in accepting coverage where the insurer "conducted an active investigation of the claim" in which "[o]n multiple occasions, it requested and received relevant information and documents" from the insured); *Lakeside Foods, Inc. v. Liberty Mut. Fire. Ins. Co.*, 789 N.W.2d 754, 2010 WL 2836401 (Wis. Ct. App. 2010) (unpublished) (insurer did not breach the duty to defend by engaging in an investigation of coverage before accepting the insured's tender).

In *Towne Realty, Inc. v. Zurich Insurance Co.*, 273, 548 N.W.2d 64, 67 n.2 (Wis. 1996), for example, the Wisconsin Supreme Court held that one claiming coverage has an unequivocal obligation to cooperate with an insurer's request for information that is necessary for the insurer to determine if it has any coverage obligations. In that case, the Wisconsin Supreme Court observed that an insurer is entitled to obtain documentation necessary to investigate a claim for coverage, and

that "a simple letter requesting clarification of the claimant's position should suffice." *Id.* at 67. Moreover, the court further explained that:

> The insurer fulfills its duty once it requests [from] the insured [] clarification of its position. *If the insured is uncooperative or unresponsive, the insurer need not pursue the matter further.*

Id. at 67 n.2 (emphasis added).

Travelers offered extensive evidence demonstrating that it timely sought additional information from CNH necessary to establish CNH's potential right to coverage under the Travelers Policies. A00002081-82; A00002340-46. This information included information pertaining to CNH's initial claim that it was a "successor" to J.I. Case.

[redacted] A00002011; A00002340-46. [redacted] A00002345-46.[16] [redacted]

[16] In addition, the Superior Court's decision is contrary to the controlling Wisconsin statute, which provides that an insurer does not waive any rights under its insurance policies by acknowledging claims subject to a reservation of rights pending an investigation of coverage. *See* Wis. Stat. Ann. § 631.81(3) ("The acknowledgment by the insurer of the receipt of notice, the furnishing of forms for filing proofs of loss, the acceptance of such proofs, *or the investigation of any claim* are not alone sufficient to waive any of the rights of the insurer in defense of any claim arising under the insurance contract.") (emphasis added).

[redacted] A00002344.

Despite this evidence, the Superior Court summarily concluded that any such investigation was "futile" because Travelers already had taken the legal position that Texas law barred assignment of the Travelers Policies to CNH. A00002693. But the undisputed record evidence shows that CNH originally sought coverage from Travelers not as an alleged assignee under the Travelers Policies, but as the purported "successor" to J.I. Case. A00000258. [redacted] A00002081-82; A00002340-46. [redacted] (A00002634-35), [redacted] Travelers could not have responded in 2008 to an "assignment" theory that CNH had not yet asserted.

Moreover, CNH was sanctioned for wrongfully withholding from discovery until 2016 important evidence in the possession of its in-house counsel [redacted] A00002624-58. [redacted]

[redacted] A00002634-35. [redacted]

Ultimately, the question of whether Travelers "waived" its rights under Wisconsin law to enforce the notice and cooperation provisions in the Travelers Policies should not have been resolved on summary judgment. This Court has unequivocally held that "[i]f a rational trier of fact could find any material fact that would favor the non-moving party in a determinative way . . . summary judgment is inappropriate." *Cerberus Int'l*, 794 A.2d at 1150; *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002). Travelers evidence regarding its investigation of the underlying claims and CNH's failure to comply with its contractual obligations under the Travelers Policies was more than sufficient to create, at a minimum, a genuine issue of material fact.

For these reasons, the Superior Court erred in holding that Travelers waived its notice and cooperation defenses.

2. Travelers presented ample evidence demonstrating that CNH breached its notice and cooperation obligations.

Each of the Travelers Policies contains notice and cooperation provisions requiring, as a condition precedent to coverage, that an insured notify Travelers of

any accident or occurrence "as soon as practicable"; "immediately" forward copies of any lawsuit to Travelers; and fully cooperate with Travelers in its investigation and defense of any claim. A00000532; A00000787-88; A00001104-05. Wisconsin law enforces such provisions and provides that, if the insurer is prejudiced by any violation of these provisions, the insurer has no duty to defend or indemnify.[17]

Travelers set forth extensive factual evidence demonstrating that even if CNH is found to be an insured, it repeatedly violated and repudiated its notice and cooperation obligations. A00001970-2035; A00002036-117; A000020326-65; A000020389-97. Although CNH was served with underlying asbestos suits beginning at least as early as 1996, it provided no notification of any kind to Travelers *for over a decade*. A00002081. Then, in seeking coverage in its first notice letter dated May 2, 2008, CNH incorrectly claimed to be the "successor" to the J.I. Case, without offering any documentation to support that contention. A00000258.

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[17] *See Gerrard Realty Corp. v. Am. States Ins. Co.*, 277 N.W.2d 863, 869 (Wis. 1979) (holding that "the requirement of timely notice is a condition precedent to liability under the policy" and stating that "the purpose of the requirement that an insurer be given timely notice is to afford the liability carrier an opportunity to investigate possible claims against the policy or its insured while the witnesses are available and their memories are fresh"); *Ansul, Inc. v. Emp'rs Ins. Co. of Wausau*, 826 N.W.2d 110, 120 (Wis. Ct. App. 2012) (noting that cooperation provisions "protect the insurer's interests by permitting it to obtain relevant information concerning the loss while the information is fresh, decide on its obligations, and protect itself from fraud").

[redacted] A00002344.

[redacted]

[redacted]

Under the standards established by Wisconsin law, CNH's breach of these contractual obligations caused prejudice to Travelers.[18] Travelers was unable to investigate coverage issues with respect to the asbestos suits, or to make informed decisions to accept or decline coverage for those suits. A00002011-12. Similarly, CNH's late notice and failure to forward the underlying complaints and other legal

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[18] *See, e.g., W. Bend Co. v. Chiaphua Indus., Inc.*, 112 F. Supp. 2d 816, 823 (E.D. Wis. 2000) (finding prejudice to an insurer where the insurer "had no opportunity to investigate and evaluate the [claim]" and was left "in the dark concerning its potential liability"), *aff'd*, 11 F. App'x 616 (7th Cir. 2011); *Gerrard Realty*, 277 N.W.2d at 871 (insurer was prejudiced by late notice of claim because it was "denied an opportunity to investigate, defend, or settle" the claim); *Old Republic Ins. Co. v. Liberty Mut. Fire Ins. Co.*, 138 F. Supp. 3d 1013, 1028-29 (E.D. Wis. Sept. 30, 2015) (holding late notice prejudiced insurers because insurer was denied the opportunity to control and be a part of the defense); *Lewis v. Wolter Bros. Builders, Inc.*, 785 N.W.2d 688, 2010 WL 1050252, at *4 (Wis. App. Ct. 2010) (holding insurer faced "significant prejudice" from late notice because it was denied opportunity "to control the defense"); *Kreckel v. Walbridge Aldinger Co.*, 721 N.W.2d 508, 513 (Wis. Ct. App. 2006) (finding prejudice to an insurer from late notice when insurer "cannot seek an immediate determination of coverage, it cannot participate in alternative dispute resolution efforts, and it cannot select defense counsel and control the defense"); *Phoenix Contractors, Inc. v. Affiliated Capital Corp.*, 681 N.W.2d 310, 315 (Wis. Ct. App. 2004) (finding prejudice to an insurer due to late notice because the insurer was "deprived of the opportunity to conduct depositions, serve interrogatories, independently investigate [the insured's] claims and participate in the arbitration"); *Town of Mount Pleasant v. Hartford Accident & Indem. Co.*, 625 N.W.2d 317, 321 n.3 (Wis. Ct. App. 2001) (holding that insurer was prejudiced by late notice because, in part, it was denied the opportunity to control the defense).

process deprived Travelers of its bargained-for right to control the defense of the underlying suits, including the crucial ability to control the selection of defense counsel, make strategic decisions regarding the defense of the underlying suits, and control settlement of underlying suits. *Id.*

Accordingly, this Court should hold that the Superior Court erred in granting summary judgment for CNH on Travelers' notice and cooperation defenses.

III. The Superior Court erroneously awarded pre-tender costs that are not recoverable under Wisconsin law.

A. Question presented.

The Wisconsin Supreme Court has held that insurers are not liable for pre-tender defense costs, even in cases where the insurer has breached its duty to defend. Here, the Superior Court entered judgment against Travelers for defense costs CNH incurred before it had provided any notice to Travelers of the suits in which those defense costs were incurred. A00002065-66; A00002375-80. Did the Superior Court err as a matter of Wisconsin law in doing so?

B. Scope of review.

This Court reviews *de novo* a trial court's grant of partial summary judgment. *See, e.g.*, *Chemtura*, 160 A.3d at 457.

C. Merits of argument.

CNH sought recovery from Travelers of [redacted] in "pre-tender costs," *i.e.*, costs incurred by CNH in the defense of certain underlying asbestos lawsuits before CNH had tendered those specific lawsuits to Travelers as required by the Travelers Policies. A00002730; A00002784; A00002836-43; *see also* A00002375-80. The Superior Court held that CNH is entitled to recover those costs. A00002836-43. That decision was clear error under binding Wisconsin law and must be reversed.

1. Wisconsin law precludes recovery of pre-tender costs, even when the insurer breaches its duty to defend.

In *Towne Realty*, the Wisconsin Supreme Court considered whether an insured could recover pre-tender costs where it provided late notice of a lawsuit to the insurer, the insurer denied coverage based on the late notice, and the insurer later was found to have wrongfully denied a defense based on the insured's late tender. 548 N.W.2d at 68. The Court held that the insured was not entitled to recover its pre-tender defense costs because "[the insurer] had no duty to defend until it had been put on notice" and "any expenses which the insureds incurred before this time . . . cannot flow from [the insurer's] breach of this duty." *Id.* Notably, the Wisconsin Supreme Court did not require that the insurer demonstrate any form of prejudice, holding that pre-tender expenses are not recoverable under any circumstances because those costs are, by definition, incurred before an insurer's duty to defend arises. *Id.*

Moreover, *Towne Realty* explicitly held that pre-tender defense costs cannot be recovered even if the insurer breached its duty to defend. *Id.* The Wisconsin Supreme Court stated in this regard that "the fact that [the insurer] did eventually breach its duty . . . is a distinction without a difference in relation to the issue of pre-tender expenses." *Id.* Thus, Wisconsin law forbids an insured from recovering its pre-tender defense costs under any circumstances.

Other courts applying Wisconsin law have followed *Towne Realty*. In *Old Republic Ins. Co.*, 138 F. Supp. 3d at 1025, for example, the insured sought a significant amount of defense costs incurred before tendering the lawsuits to the insurer. Citing *Towne Realty*, the Wisconsin federal court held that "an insurer has no obligation to pay defense costs prior to tender." *Id.* In so holding, the court ruled that the insurer did not need to pay any defense costs for a lawsuit that was only tendered to the insurer after the case was settled and all defense costs were incurred. *Id.* ("Consequently, as a matter of law, [the insurer] is not liable for any defense costs incurred in that action.").

2. The judgment improperly awarded CNH more than [redacted] in nonrecoverable pre-tender costs.

CNH sought to recover from Travelers [redacted] in alleged costs that CNH incurred in defending a number of underlying asbestos suits before it had tendered those suits to Travelers. A00002730; A00002784; A00002836-43; *see also* A00002375-80. The Superior Court, in an oral ruling on November 14, 2016, held that all costs incurred after CNH provided initial notice of an asbestos-related "occurrence" to Travelers in May 2008 were potentially recoverable, even if CNH had not tendered the actual complaints to Travelers in a timely manner. A00002836-43. In so holding, the Superior Court acknowledged that the decision was a close call and "easily the most difficult of all the decisions" of the case. A00002842-43.

Contrary to the Superior Court's perception, recovery of pre-tender costs is not a close call; rather, it is absolutely foreclosed by the Wisconsin Supreme Court's decision in *Towne Realty*. Costs that an insurer incurs prior to tendering a suit to its insurer are never recoverable under Wisconsin law because, as *Towne Realty* succinctly observed, "[the insurer] had no duty to defend until it had been put on notice" and "any expenses which the insureds incurred before that time . . . cannot flow from [the insurer's] breach of this duty." 548 N.W.2d at 68. This rule makes perfect sense as an insurer's duty to defend is determined based on the allegations of the tendered complaints, and an insurer would have no way to investigate its obligations with respect to a particular suit if it has not been provided with a copy of the actual complaint. CNH was not unilaterally entitled to decide that it would be futile to give notice of the underlying lawsuits to Travelers.

Moreover, the Superior Court appears to have conflated CNH's general notice of a particular "occurrence" in May 2008 (which was, in any event, twelve years late) with the insurance contracts' separate and distinct requirement that CNH provide notice and tender of each specific lawsuit "immediately" upon receipt.[19] Courts construing similar policy language have held that such provisions impose upon an insured two distinct duties: to provide notice of an occurrence and to provide notice of any subsequent lawsuit. *See, e.g., AXA Marine & Aviation Ins.*

[19] The Travelers Policies contain separate provisions requiring prompt notice of any "occurrence," and that any claim or suit be forwarded "immediately."

(UK) Ltd. v. SeaJet Indus. Inc., 84 F.3d 622, 626 (2d Cir. 1996) (concluding that "an insurer's interest in early control over litigation is served as much by prompt notice of [suit] as by prompt notice of occurrence"). Thus, a claimant has a contractual obligation to immediately tender any claim or suit to the insurer, even if notice was previously provided regarding the "occurrence" that gave rise to such claim or suit. *See, e.g., Scottsdale Ins. Co. v. Bieber & Assoc., Inc.*, No. 03-2673, 2004 WL 1541134, at *3 (3d Cir. July 8, 2004). In so holding, courts have recognized that such "[c]ontinuing notice requirements . . . acknowledge the fact that, however involved the insurer becomes in defending a claim, the insured remains the party with primary access to the information necessary to do so at each of the . . . relevant stages." *Id.* at *4.

Moreover, the Superior Court's holding that Travelers "waived" its right to contest the recoverability of pre-tender costs based on its purported breach of the duty to defend is equally erroneous and should be reversed. A00002837-38; A00002841-42. *Towne Realty* and its progeny make unmistakably clear that an insured is not entitled to recover pre-tender defense costs under any circumstances including where an insurer has breached the duty to defend. Consequently, this Court should reverse the Superior Court's decision to award CNH [redacted] in pre-tender defense costs and hold that CNH may not recover pre-tender defense costs.

IV. The Superior Court erred by potentially allowing CNH to be unjustly enriched by recovering the same defense costs from two different primary insurers.

A. Question presented.

Wisconsin law abhors a double recovery. Travelers sought in discovery information regarding CNH's settlement with other insurers, most notably CNA, to evaluate whether CNH was seeking recovery from Travelers of amounts CNH has already recovered from others. A00001465-79; A0000220-83; A000028880-925. Did the Superior Court err in denying Travelers' discovery requests, including refusing to require CNH to produce its settlement agreement with CNA?

B. Standard of review.

While this Court will generally only review rulings regarding discovery under an abuse of discretion standard, it reviews a Superior Court's formulation and interpretation of the appropriate legal standard *de novo*. *See, e.g.*, *Hopkins v. State*, 893 A.2d 922, 927 n.5 (Del. 2006); *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006). A trial court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

C. Merits of the argument.

CNH has sought recovery of defense costs incurred in the underlying asbestos cases from each of two primary insurers, Travelers and CNA, as well as

multiple excess insurers. CNH and CNA entered into a settlement whereby CNA paid an undisclosed settlement amount that necessarily included payment of at least some of CNH's defense costs. Travelers repeatedly sought production of that settlement agreement in discovery so that it could determine whether it is entitled to a set-off.

1. After the Superior Court determined that CNA had breached its duty to defend under certain primary policies, CNA paid defense costs to CNH pursuant to a settlement agreement.

CNH asserted claims in this case against CNA under a series of primary insurance policies issued directly to J.I. Case before its acquisition by Tenneco. The Superior Court held on summary judgment that CNA had breached its duty to defend the underlying asbestos claims. A00000188-209. CNH then sought summary judgment that CNA was obligated to reimburse it for substantially the same defense costs CNH seeks from Travelers, but CNH and CNA settled before there was a ruling on that motion. A00002882-83.

The Superior Court twice denied Travelers' efforts to obtain copies of settlements between CNH and other insurers, deeming Travelers' requests "premature" but noting that the CNA settlement agreement "may eventually become relevant in computing Travelers liability." A00001959-61; A00002699-704.

On December 7, 2016, in connection with the determination of the amount of contract damages owed to CNH under the Superior Court's prior rulings, Travelers renewed its motion to obtain discovery of CNH's settlements with other insurers, including CNA. A00002880-93. Travelers did so to permit it to determine whether CNH was seeking an impermissible double recovery. *See id.* The Superior Court denied Travelers' motion. A00003215-17.

2. The Superior Court's decision refusing Travelers request for discovery of the settlement agreement between CNH and CNA is contrary to Wisconsin law forbidding double recoveries.

In deciding that Travelers could not obtain the insurer settlement documents, the Superior Court stated, "[u]nder Wisconsin law . . . when an insurer breaches its duty to defend, it is not entitled to a proration of defense costs in the absence of a contractual right under the relevant policy." A00003216. The Superior Court acknowledged that "Wisconsin's public policy disfavors double recovery by an injured party," but suggested that "this case is different" because it is a contract dispute and not a personal injury action. A00003216. In so holding, the Superior Court misapprehended Wisconsin law, which properly construed protects Travelers from being required to pay amounts already paid by others.

In case after case, and in a variety of contexts, Wisconsin courts have rejected double recoveries as against public policy. *See, e.g., Heifetz v. Johnson,* 211 N.W.2d 834, 841 (Wis. 1973); *Lambert v. Wrensch,* 399 N.W.2d 369, 377

(Wis. 1987); *see also Lamphier v. Ferber*, 703 N.W.2d 384, 2005 WL1431954, at *4 (Wis. Ct. App. 2005).

The Superior Court distinguished these cases as involving "personal injury claims." A00003216. This distinction finds no support in Wisconsin law. It also makes little sense that CNH (a tortfeasor in the underlying asbestos lawsuits) would be treated more generously than an injured party.

The Superior Court relied on *Burgraff v. Menard, Inc.*, 875 N.W.2d 596 (Wis. 2016), as support for its distinction between contract and tort cases. It held that *Burgraff* established an absolute rule "that equitable contribution, a form of offset, is not available to an insurer in a case where the insurer has breached its duty to defend." A00003216.

In fact, however, *Burgraff* did not involve a potential double recovery and so is not on point. 875 N.W.2d at 609. Rather, in *Burgraff*, the court held that an automobile insurer could not assert a claim for equitable contribution against its own insured who was also self-insured under a self-insured retention pursuant to its own insurance program. *Id.* The insured, which had defended itself against the underlying claim, did not obtain a double recovery of its defense costs. Indeed, *Burgraff* declined to allow the insured to recover the amount of the jury verdict from the automobile insurer because it had already recovered an amount sufficient to make it whole, and any further recovery, "would be a windfall for [the insured]."

Id. Properly read, *Burgraff* continues the longstanding Wisconsin rule against double recoveries and windfalls. *Burgraff* even cited, with approval, the Seventh Circuit's decision in *Hamlin Inc. v. Hartford Accident & Indemnity Co.*, which explicitly warned against windfalls and punitive awards against insurers. 86 F.3d 93 (7th Cir. 1996).

Burgraff also cited, with apparent approval, the Arizona Court of Appeals decision in *Nucor Corp. v. Employers Insurance Co.*, 296 P.3d 74 (Ariz. Ct. App. 2012), in which "equitable contribution was allowed because all the insurers breached their duty to defend." *Burgraff*, 875 N.W.2d at 611. The *Burgraff* decision pointedly observed that "this is not the case here" and that "only [the automobile insurer] breached its duty to defend." *Id.* In this case, the Superior Court determined that both CNA and Travelers breached their duty to defend. Nothing in *Burgraff* or Wisconsin law, therefore, permits CNH to obtain a double recovery on the facts of this case.

Courts in other jurisdictions have recognized that defendants, such as Travelers, are absolutely entitled to a reduction in damages in order to prevent a double recovery. *See, e.g., Ill. Sch. Dist. Agency v. Pac. Ins. Co.*, 571 F.3d 611, 615-16 (7th Cir. 2009) ("To prevent double recovery by plaintiffs, defendants are entitled to a reduction in damages—sometimes called a 'setoff'—to offset any amounts that the plaintiff has collected from other sources in compensation for the

same injury."); *see also Zlotogura v. Progressive Direct Ins. Co.*, No. CIV-12-516-M, 2013 WL 1855879, at *2 (W. D. Okla. May 1, 2013) (finding that insurer "may be entitled to an adjustment or an apportionment of any damages awarded to plaintiff based on the proceeds tendered to plaintiff by [the other insurer]" and only review of the settlement agreement itself permits the discovering insurer to "properly evaluate the claims against it"). The Superior Court erred in holding that *Burgraff* holds that this common-sense rule does not apply in Wisconsin, and the case should be remanded with instruction that Travelers be permitted to pursue all relevant discovery on this issue.

CONCLUSION

The Court should reverse the judgment of the Superior Court regarding choice of law and either direct that judgment be entered for Travelers or remand the case with directions that the Superior Court consider the validity of the purported assignment from Tenneco and J.I. Case to CNH and all other issues under Texas law. Alternatively, the Court should reverse and remand with the following holdings: (1) the Superior Court erred in granting summary judgment for CNH that Travelers waived its coverage defenses; (2) CNH may not recover any pre-tender defense costs; and (3) Travelers is entitled to obtain all relevant discovery as to prior insurer settlements, including, but not limited to, the settlement agreement between CNA and CNH.

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