Certain Underwriters at Lloyd's, London v AT&T, Corp.
2021 NY Slip Op 31740(U)
May 19, 2021
Supreme Court, New York County
Docket Number: 653090/2013
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, CERTAIN LONDON MARKET INSURANCE COMPANIES INCLUDING BUT NOT LIMITED TO ACCIDENT & CASUALTY INSURANCE COMPANY OF WINTERTHUR (NO. 2A/C), ALBA GENERAL INSURANCE COMPANY LIMITED (AS PART OF GIBBON A33, B02, C13, AND D10 POOLS), ANGLO FRENCH INSURANCE COMPANY LIMITED, ASSICURAZIONI GENERALI SPA (UK BRANCH), BRITTANY INSURANCE COMPANY LIMITED, BRITISH MERCHANTS INSURANCE COMPANY LIMITED(AS PART OF CF&AU GROUP C POOL), CX REINSURANCE COMPANY LIMITED, EAGLE STAR INSURANCE COMPANY OF CANADA, EXCESS INSURANCE COMPANY LIMITED, FIDELIDADE INSURANCE COMPANY OF LISBON(AS PART OF GIBBON A33,B02, C13 POOLS), HARPER INSURANCE LTD F/K/A TUREGUM INSURANCE COMPANY, HELVETIA ACCIDENT SWISS INSURANCE COMPANY LIMITED (AS PART OF GIBBON A22,C13, AND D10 POOLS), LONDON AND EDINBURGH GENERAL INSURANCE COMPANY LIMITED (FOR ITSELF AND AS PART OF CF & AU GROUP C POOL HS WEAVERS AND LONDON AND ENDINBURGH GENERAL INSURANCE COMPANY LIMITED TOWER X POOL), NATIONAL CASUALTY COMPANY(FOR ITSELF AND AS PART OF GIBBON B02 AND GIBBON NATIONAL CASUALTY POOLS), NATIONAL CASUALTY COMPANY OF AMERICA LIMITED, NEW LONDON REINSURANCE COMPANY LIMITED, RIVER THAMES INSURANCE COMPANY LIMITED, ROYAL SCOTTISH INSURANCE COMPANY LIMITED (FOR ITSELF AND AS PART OF UMA POOL), SOUTHERN INSURANCE COMPANY LIMITED, STRONGHOLD INSURANCE COMPANY LIMITED, SWISSNATIONAL INSURANCE COMPANY LIMITED (AS PART OF GIBBON D10 POOL), SWITZERLAND GENERAL INSURANCE COMPANY (AS PART OF GIBBON D10 POOL), THE ANGLO SAXON INSURANCE ASSOCIATION (FOR ITSELF AND AS PART OF CF & AU GROUP C POOL), THE BRITISH AVIATION INSURANCE COMPANY LIMITED, THE DOMINION INSURANCE COMPANY LIMITED(FOR ITSELF AND AS PART OF CF&AU GROUP C POOL), THE EDINBURGH ASSURANCE COMPANY NUMBER 2 ACCOUNT, THE MOTOR UNION INSURANCE COMPANY LIMITED, THE WORLD MARINE & GENERAL INSURANCE COMAPNY(AS PART OFUMA POOL), TRENT INSURANCE COMPANY LIMITED (AS PART OF UMA POOL), UNIONAMERICAN INSURANCE COMPANY LIMITED(FOR ITSELF AND AS SUCCESSOR IN

INDEX NO. 653090/2013

MOTION DATE 08/27/2019

MOTION SEQ. NO. 026

DECISION + ORDER ON MOTION

INTEREST TO ST KATHERINE INSURANCE COMPANY PLC), WINTERTHUR SWISS INSURANCE COMPANY, WORLD AUXILIARY INSURANCE CORPORATION LIMITED, YASUDA FIRE & MARINE INSURANCE COMPANY(UK) LIMITED, AIU INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, COLUMBIA CASUALTY COMPANY, CONTINENTAL CASUALTY COMPANY, CONTINENTAL INSURANCE COMPANY(FOR ITSELF AND AS SUCCESSOR IN INTEREST TO FIDELITY & CASUALTY COMPANY OF NEW YORK HARBOR INSURANCE CO AND PACIFIC INSURANCE COMPANY), GRANITE STATE INSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMAPNY, LEXINGTON INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA, ONEBEACON AMERICA INSURANCE COMPANY(AS SUCCESSOR IN INTEREST TO EMPLOYERS LIABILITY ASSURANCE COMPANY AND EMPLOYERS SURPLUS LINES INSURANCE COMPANY), STARR INDEMNITY & LIABILITY CO (AS SUCCESSOR TO REPUBLIC INSURANCE COMPANY),

Plaintiffs,

- v -

AT&T, CORP., AT&T, INC., ALCATEL-LUCENT USA, INC., AIU INSURANCE COMPANY, ALLIANZ UNDERWRITERS INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, AMERICAN EXCESS INSURANCE ASSOCIATION, AMERICAN HOME ASSURANCE COMPANY, AMERICAN RE-INSURANCE COMPANY, ARROWOOD INDEMNITY COMPANY, ARROWOOD SURPLUS LINES INSURANCE COMPANY, ASSOCIATED ELECTRIC & GAS INSURANCE SERVICES, LIMITED, CENTURY INDEMNITY COMPANY, CERTAIN LONDON MARKET INSURANCE COMPANIES, ACCIDENT & CASUALTY INSURANCE COMPANY OF WINTERTHUR (NO.2 A/C), ALBA GENERAL INSURANCE COMPANY LIMITED, ANGLO-FRENCH INSURANCE COMPANY LIMITED, ASSICURAZIONI GENERALI SPA (UK BRANCH), BRITTANY INSURANCE COMPANY LIMITED, BRITISH MERCHANTS' INSURANCE COMPANY LIMITED, CX REINSURANCE COMPANY LIMITED, EAGLE STAR INSURANCE COMPANY OF CANADA, EXCESS INSURANCE COMPANY LIMITED, FIDELIDADE INSURANCE COMPANY OF LIBSON, HARPER INSURANCE LTD, HELVETIA-ACCIDENT SWISS INSURANCE COMPANY, LONDON AND EDINBURGH GENERAL INSURANCE COMPANY LIMITED, NATIONAL CASUALTY COMPANY, NATIONAL CASUALTY COMPANY OF AMERICA LIMITED, NEW LONDON

REINSURANCE COMPANY LIMITED, RIVER THAMES INSURANCE COMPANY LIMITED, ROYAL SCOTTISH INSURANCE COMPANY LIMITED, SOUTHERN INSURANCE COMPANY LIMITED, STRONGHOLD INSURANCE COMPANY LIMITED, SWISS NATIONAL INSURANCE COMPANY LIMITED, SWITZERLAND GENERAL INSURANCE COMPANY, THE ANGLO SAXON INSURANCE ASSOCIATION, THE BRITISH AVIATION INSURANCE COMPANY LIMITED, THE DOMINION INSURANCE COMPANY LIMITED, THE EDINBURGH ASSURANCE COMPANY NUMBER 2 ACCOUNT, THE MOTOR UNION INSUANCE COMPANY LIMITED, THE WORLD MARINE & GENERAL INSURANCE COMPANY, TRENT INSURANCE COMPANY LIMITED, UNION AMERICA INSURANCE COMPANY LIMITED, WINTERTHUR SWISS INSURANCE COMPANY, WORLD AUXILIARY INSURANCE CORPORATION LIMITED, AND, YASUDA FIRE & MARINE INSURANCE COMPANY (UK) LIMITED, COLUMBIA CASUALTY COMPANY, CONTINENTAL CASUALTY COMPANY, CONTINENTAL INSURANCE COMPANY, EMPLOYERS MUTUAL CASUALTY COMPANY, EVEREST REINSURANCE COMPANY, FEDERAL INSURANCE COMPANY, FIREMANS FUND INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, GENERAL REINSURANCE CORPORATION, GERLING KONZERN ALLGEMEINE VERSICHERUNGS AG, GRANITE STATE INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, HARTFORD INSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, MT. MCKINLEY INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, NEW YORK MARINE AND GENERAL INSURANCE COMPANY, NEW ENGLAND REINSURANCE COMPANY, NORTH RIVER INSURANCE COMPANY, NUTMEG INSURANCE COMPANY, OLD REPUBLIC INSURANCE COMPANY, ONEBEACON AMERICA INSURANCE COMPANY, PEERLESS INSURANCE COMPANY, SAFETY MUTUAL INSURANCE COMPANY, STARR INDEMNITY AND LIABILITY COMPANY, STONEWALL INSURANCE COMPANY, ST. PAUL SURPLUS LINES INSURANCE COMPANY, SWISS REINSURANCE COMPANY, LTD, THE TRAVELERS INSURANCE COMPANY, TIG INSURANCE COMPANY, TRANSAMERICA, TRANSAMERICA PREMIER INSURANCE COMPANY, TRAVELERS CASUALTY AND SURETY COMPANY, TRAVELERS, TRAVELERS INDEMNITY COMPANY, TWIN CITY FIRE INSURANCE COMPANY, U.S. FIRE INSURANCE COMPANY, WESTPORT INSURANCE CORPORATION, ZURICH AMERICAN INSURANCE COMPANY, DOE INUSURERS 1 - 50., HARTFORD ACCIDENT & INDEMNITY

COMPANY, FAIRMONT PREMIER INSURANCE COMPANY FORMERLY KNOWN AS TRANSAMERICA PREMIER INSURANCE COMPANY, TRANSAMERICA INSURANCE COMPANY, ALLIANZ VERSICHERUNGS - AG, ZURICH INSURANCE COMPANY, LTD, ZURICH INTERNATIONAL (BERMUDA), LTD.,

Defendants.

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 026) 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 840, 841, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1040, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1121, 1122, 1123, 1124, 1125, 1126, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1213, 1218

were read on this motion for PARTIAL SUMMARY JUDGMENT.

Defendant Nokia of America Corporation ("Nokia") seeks partial summary judgment to resolve, as a matter of law, a narrow but important threshold issue in this case: Does Nokia (through its predecessor, Lucent) have the right, by assignment, to seek coverage under certain insurance policies issued to AT&T for asbestos liabilities it inherited from AT&T?

The answer to that question turns on whether a Separation and Distribution Agreement (the "SDA"), which divided the AT&T empire into three independent businesses in 1996, validly assigned AT&T's relevant insurance rights to Nokia's predecessor, Lucent. The inquiry is strictly limited to assessing whether an assignment of rights occurred; what those rights consist of, and specifically whether they confer insurance coverage to Nokia for any particular asbestos

claim, is a question for another day. Put simply, Nokia is looking to confirm its seat at the table in this ongoing dispute with AT&T's insurers.

For the reasons set forth below, the Court answers the question presented in the affirmative, and Nokia's motion is granted.

BACKGROUND

A. AT&T Spins Off Lucent

In 1996, AT&T Corp. ("AT&T") separated its existing business into three independent businesses (Nokia Statement of Undisputed Material Facts ["SUMF"] ¶1). AT&T spun off its computer business and its telecommunications equipment business to two separate companies – known as NCR Corporation and NS-MPG Inc.– and retained the balance of its business consisting of communications and data services to customers (*id.*). To accomplish the spin-off of the telecommunications equipment businesses, on February 1, 1996, AT&T, NCR Corporation, and NS-MPG Inc. executed a Separation and Distribution Agreement (the "SDA") (*id.* ¶2). An amended and restated SDA was executed on March 29, 1996, by which time NS-MPG Inc. had changed its name to Lucent Technologies, Inc. ("Lucent") (*id.* ¶¶2-3).

In November 2008, Lucent's name was changed to Alcatel-Lucent USA Inc. (*id.* ¶17). And in January 2018, Alcatel-Lucent USA Inc.'s name was changed to Nokia of America Corporation, and as a result, the company formerly known as Lucent Technologies Inc. is now known as Nokia of America Corporation (*id.* ¶18).

B. The Legacy Policies

At issue on this motion is whether AT&T, through the SDA, effectively assigned to Lucent its rights under certain liability policies issued by the Insurers[1] to AT&T before its reorganization in 1996 (the "Legacy Policies"). It is uncontested that AT&T is an insured under the Legacy Policies.

Since 1996, Nokia has been sued in thousands of asbestos-related bodily injury lawsuits allegedly arising out of the operations of certain legacy businesses of AT&T (*see* NYSCEF 801 [exemplar complaint filed in the Circuit Court, Third Judicial Circuit, Madison County, Illinois naming "Lucent Technologies, Inc., Individually and as successor to A T & T Technologies, Inc., and Western Electric Company, Inc."]). Nokia is defending these asbestos claims as successor to these legacy businesses of AT&T (*see id.*). Nokia has sought coverage under the Legacy Policies for these asbestos claims and the Insurers, in turn, have denied coverage. In this lawsuit, the Insurers seek declarations and assert affirmative defenses that Nokia is not entitled to that coverage (*see, e.g.*, Am. Compl. ¶¶82 [b], 86 [a]).

On this motion, Nokia seeks to establish, as a matter of law, that it is entitled to assert rights under the Insurers' Policies for asbestos liabilities arising from the Lucent Business. But Nokia is not seeking to establish at this stage that any given asbestos claim is covered under the Insurers' Policies (NYSCEF 785 at 10 [Nokia motion for S.J.]).

DISCUSSION

To prevail on a motion for summary judgment, the moving party must establish its claim or defense and show, prima facie, that there is no issue of material fact (*Jones v Underhill Realty,*

[1] The "Insurers" denote the Plaintiff and Defendant insurers who oppose Nokia's motion (*see* NYSCEF 859 at 1, 21-27).

LLC, 160 AD3d 494, 494 [1st Dept 2018]). If the moving party makes this showing, the burden shifts to the non-movant to show that material issues of fact exist (*Jacobsen v New York City Health & Hosp. Corp.*, 22 NY3d 824, 833 [2014]).

"It is well settled that [the court's] role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract," and "[i]f that intent is discernible from the plain meaning of the language of the contract, there is no need to look further" (*Evans v Famous Music Corp.*, 1 NY3d 452, 458 [2004]).

A. Nokia establishes its prima facie case.

Nokia makes a prima facie showing that AT&T validly assigned to Lucent (and therefore to Nokia) insurance rights covering the liabilities of the Lucent Business.

"No special form or language is necessary to effect an assignment as long as the language shows the intention of the owner of a right to transfer it" (*Tawil v Finkelstein Bruckman Wohl Most & Rothman*, 223 AD2d 52, 55 [1st Dept 1996]; *Suraleb, Inc. v Intl. Trade Club, Inc.*, 13 AD3d 612 [2d Dept 2004] [same], *quoted by OneWest Bank, N.A. v Melina*, 827 F3d 214, 223 [2d Cir 2016]; *see SR Inter. Bus. Ins. Co., Ltd. v World Trade Ctr. Properties, LLC*, 375 F Supp 2d 238, 245 [SD NY 2005] [assignment of insurance rights "may be the product of inference"] [holding that a transaction "was, in substance even if not in form . . . . an assignment of the [insurance] claim"]).

The text of the SDA demonstrates, in several ways, the contracting parties' intent to assign AT&T's rights under the Legacy Policies. Most broadly, the SDA defines "Assets" to expressly include "all rights under insurance policies and all rights in the nature of insurance, indemnification or contribution" (§1.11 [n]). Next, the SDA transferred to Lucent "any and all Assets that are expressly contemplated by [the SDA] . . . as Assets to be transferred to Lucent or

any other member of the Lucent Group," as well as "[a]ny and all Assets owned or held immediately prior to the Closing Date by AT&T or any of its Subsidiaries that are used primarily in the Lucent Business" (SDA §§2.2 [a] [i], [vii]). In addition, the SDA confirms Lucent's rights under AT&T's insurance policies before and after the spin-off:

> [T]he parties intend by this Agreement that **Lucent and each other member of the Lucent Group be successors-in-interest to all rights that any member of the Lucent Group may have as of the Closing Date as a subsidiary, affiliate, division or department of AT&T prior to the Closing Date under any policy of insurance issued to AT&T by any insurance carrier unaffiliated with AT&T[,]** . . . including any rights such member of the Lucent Group may have as an insured or additional named insured, subsidiary, affiliate, division or department, **to avail itself of any such policy of insurance** . . . as in effect prior to the Closing Date.

(SDA §7.1 [c] [emphasis added]). Taken together, these provisions "show[ ] the intention" of AT&T to give Lucent the right "to avail itself of" the Legacy Policies for liabilities assumed from AT&T as part of the spin-off (*see Tawil*, 223 AD2d at 55; *Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307, 1308 [3d Dept 2012] ["[T]he language of these assignments . . . was broad enough to transfer the interest"]).

The structure of the "trivestiture" (Affidavit of Kevin O'Reilly ¶2 [NYSCEF 788]) engineered by the SDA further supports Nokia's reading. Through the SDA, AT&T's Board of Directors sought to create "three independent businesses" (SDA at 1). To that end, AT&T transferred to Lucent "all of" the Lucent Assets, along with "all the Lucent Liabilities," defined in part as "all Liabilities . . . primarily relating to, arising out of or resulting from . . . the operation of the Lucent Business as conducted any time prior to, on or after the Closing Date" (*id.* §2.3). Given the SDA's stated intention to establish Lucent as a standalone business, it is reasonable to read the SDA as seeding Lucent with the right to assert insurance coverage corresponding to the decades' worth of liabilities Lucent was assuming (*In re Lipper Holdings,*

LLC, 1 AD3d 170, 171 [1st Dept 2003] ["A contract should not be interpreted to produce a result that is . . . commercially unreasonable"]; *see* CSMF ¶34 [acknowledging that "AT&T structured the SDA to provide for a broad assumption by Lucent of liabilities relating to the so-called 'Lucent Business'"]).[2]

B. The Insurers fail to raise a triable issue of fact.

Because Nokia has made this prima facie showing, the burden then shifts to the Insurers "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact" (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). As discussed below, the Insurers fail to carry that burden here.

1. The Insurers' reading of the SDA does not compel denial of Nokia's motion.

The Insurers advance several arguments contesting Nokia's entitlement to coverage for specific asbestos claims under specific policies, but these arguments show the parties shooting at different targets. For instance, the Insurers "acknowledge that *some* members of the Lucent Group may have a claim for coverage" (NYSCEF 859 at 14 [Insurers' opp. to S.J.] [emphasis in original]), but faults Nokia for failing to "identify the member of the Lucent Group seeking coverage and to show that such member is covered under a Legacy Policy for an asbestos suit at issue in this case" (*id.*). As Nokia points out, however, "that is an exercise for another day" (NYSCEF 1047 at 7 [Nokia reply]) because on this motion, Nokia "does *not* seek an order that any given asbestos claim . . . is covered under the Insurers' Policies" (NYSCEF 785 at 10 n.6

[2] The Insurers argue that the SDA meant to achieve an imbalanced transfer between liabilities and assets, with Lucent agreeing to "a broad assumption" of liabilities but only "a narrower transfer of assets" (CSMF ¶34). "Lucent Liabilities," though, is defined in part as "all Liabilities . . . relating to, arising out of or resulting from . . . any Lucent Assets," a formulation that suggests the two were meant to be coextensive.

[Nokia mot. for S.J.] [emphasis in original]). As a result, individual coverage disputes do not present grounds for denying Nokia's narrowly targeted motion about the validity of the underlying assignment.

By the same token, the Insurers' insistence that the SDA "did not transfer rights under the Legacy Policies" but "merely preserved the *status quo*" draws what appears to be, at this stage, a semantic distinction without a practical difference. Section 7.1 [c] [i] confirms the parties' intent to name Lucent as "successor-in-interest" to certain of AT&T's insurance rights, allowing Lucent "to avail itself of any such policy of insurance." Successorship signifies an "assumption of interests," so that the successor "is vested with the rights and duties of an earlier corporation" (*Gismondi v Franco*, 206 F Supp 2d 597, 600 [SD NY 2002]).

In that light, the fact that section 7.1 [c] does not use talismanic words like "assign" or "transfer" is immaterial (*Tawil*, 223 AD2d at 55 ["[n]o special form or language is necessary to effect an assignment as long as the language shows the intention of the owner of a right to transfer it"]; *OneWest Bank, N.A.*, 827 F3d at 223 [same]). Regardless of the mechanism at work, Nokia contends that it has rights to assert coverage under the Legacy Policies for asbestos liabilities it received in the spin-off. Indeed, both sides arrive at the conclusion that the SDA preserved Lucent's pre-spin-off insurance rights as a division of AT&T (*compare* NYSCEF 785 at 5 ["the parties to the SDA explicitly intended . . . that after the Closing Date, Lucent and its subsidiaries and divisions would have the same insurance rights that they had as of the Closing Date"] [Nokia mot. for S.J.], *with* CSMF ¶45 ["the SDA did not extinguish whatever rights to coverage members of the 'Lucent Group' (as defined in the SDA) had to coverage as subsidiaries of AT&T before the effective date of the SDA"]). Whether AT&T "transferred" those insurance

rights to Lucent, or whether Lucent's pre-existing insurance rights were "preserved" in the spin-off, the end result is the same: Nokia possesses those rights.

2. *The anti-assignment clauses in the Legacy Policies do not raise triable issues of fact.*

Next, the Insurers fail to show that triable fact issues exist concerning the "anti-assignment" clauses in the Legacy Policies. These standard clauses purport to bar any assignment of the policy or rights thereunder without the Insurers' consent. But "under New York law, the enforceability of a no-transfer clause in an insurance contract is limited" (*Arrowood Indem. Co. v Atl. Mut. Ins. Co.*, 96 AD3d 693, 694 [1st Dept 2012], *quoting Globecon Group, LLC v Hartford Fire Ins. Co.*, 434 F3d 165, 170 [2d Cir 2006] [applying New York law]). "New York generally follows the majority rule that a no-transfer provision in an insurance contract is valid with respect to transfers that were made prior to, but not after, the insured-against loss" (*id.*; *Mellen v Hamilton Fire Ins. Co.*, 17 NY 609, 615 [1858]; *Kittner v E. Mut. Ins. Co.*, 80 AD3d 843, 846 n.3 [3d Dept 2011] ["while the insurance policy contains a provision that the '[a]ssignment of this policy is not valid without [defendant's] written consent,' this anti-assignment provision applies only to assignments before loss"] [citation omitted]; *Globecon*, 434 F3d at 170; *Viking Pump, Inc. v Century Indem. Co.*, 2 A3d 76, 103 [Del Ch 2009] ["New York law generally does not permit anti-assignment clauses to be erected as a barrier to the transfer of 'post-loss claims,' that is to say claims for losses that have already happened"]).[3]

[3] On the other hand, anti-assignment provisions are enforceable before a loss occurs (*e.g.*, *Travelers Indem. Co. v Israel*, 354 F2d 488, 490 [2d Cir 1965] ["Although assignment of the policy prior to loss was ineffective without the consent of the insurer, no such approval was necessary for an assignment of the right to the proceeds after the loss"]).

This principle "is based upon a judgment that, although insurers have a legitimate interest in protecting themselves against additional liabilities the insurer did not contract to cover, once the insured-against loss has occurred, there is no issue of an insurer having to insure against additional risk. Rather, in that circumstance, the only question is who the insurer will pay for the loss" (*Viking Pump*, 2 A3d at 103, *cited by Arrowood*, 96 AD3d at 694; *Globecon*, 434 F3d at 170 ["The idea behind the majority rule is that, once the insured-against loss has occurred, the policy-holder essentially is transferring a cause of action rather than a particular risk profile"]; *Beck-Brown Realty Co. v Liberty Bell Ins. Co.*, 137 Misc 263, 264 [Sup Ct, Kings County 1930] ["Before loss, the insurer is subjected to a risk, and it is this risk which the insurer may exempt from assignability except upon its own consent. Upon loss, however, the risk disappears and nothing remains except the assured's right to payment"]).

The Insurers start by challenging the applicability of the "post-loss" assignment principle because Nokia has not demonstrated, on this motion, that any covered losses actually occurred prior to the SDA's assignment of AT&T's insurance rights to Lucent. But Nokia need not prove coverage to demonstrate that any loss for which it is seeking coverage necessarily preceded the assignment. The Insurers' policies only cover liability for "accidents" or "occurrences" during the respective policy periods, all of which expired before the SDA (SUMF ¶22; Berringer Aff. ¶8 ["Nokia is only seeking insurance coverage for these suits in this action based upon 'accidents' or 'occurrences' that happened during these policy periods."] [NYSCEF 800]; *see id.* Ex. G [NYSCEF 807]).[4] The Insurers maintain that Nokia has not established any "occurrence" (*e.g.*,

[4] The Insurers' policies are all "occurrence-basis" policies. An "occurrence-basis policy" is a third-party liability policy form which covers "occurrences" or "accidents" during the policy period that result in bodily injury or property damage during the policy period (*see Olin Corp. v*

Compl. ¶¶81, 88 [NYSCEF 1]). But by definition, any covered loss must have occurred before the SDA; otherwise, the loss would not be covered. So, *to the extent a covered loss occurred*, it necessarily preceded the assignment to Nokia and thus cannot, as a general matter, be barred by the anti-assignment clauses.

To be sure, "a no-transfer clause may, in certain unusual circumstances, remain valid as to some pre-transfer claims even though the loss occurred before the transfer" (*Globecon*, 434 F3d at 171), but those circumstances are not shown here. Specifically, a post-loss assignment may be barred by an anti-assignment clause when the assignment "would unduly increase the risk borne by the insurer" (*SR Int'l. Bus. Ins. Co.*, 375 F Supp 2d at 249). The Insurers contend that bringing Nokia into the fold multiplies their defense costs because both Nokia and AT&T, which the Insurers also cover, are "regularly sued for the same liability" (NYSCEF 859 at 17). As an example, the Insurers point to a case in which Nokia and AT&T, as co-defendants, failed to cooperate in the defense of an asbestos claim and instead reached separate settlements with the plaintiff for vastly different sums (*id.* at 17-18). The Insurers urge that they should only be required to pay a portion of such a settlement – either Nokia's share or AT&T's – but not both. The added burden of covering both, in the Insurers' view, "necessarily increases their risk" (*id.*).

The prospect of incurring additional defense costs, however, is not the kind of "increase[d] . . . risk" that compels enforcement of an otherwise ineffective anti-assignment

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Certain Underwriters at Lloyd's, 468 F3d 120, 125 [2d Cir 2006] ["'[O]ccurrence policies' . . . cover events during the policy period, no matter how many years later the claim arises. Under New York law, such occurrence-based comprehensive general liability policies are 'triggered by occurrence of the property damage during the policy period.'"]). Such policies are distinguished from "claims-made" policies, which "provide liability coverage only when a claim is made against the insured within the policy period" (*Matter of John Paterno, Inc. By and Through Paterno v Curiale*, 88 NY2d 328, 331 [1996]).

clause. The concern with "increase[d] . . . risk" typically arises when an assignment of insurance rights carries with it "a claim for loss of business income . . . [that] is uncertain at the time of the assignment" (*Globecon Group, LLC*, 434 F3d at 171). Consider the situation in *Holt v Fid. Phoenix Fire Ins. Co. of N.Y.*, 273 AD 166, 168 [3d Dept 1948], *affd sub nom. Holt v Fid. Phoenix Fire Ins. Co. of New York*, 297 NY 987 [1948]. In that case, a fire forced the closure of a movie theater in Albany and forced the theater owner to collect on its business interruption insurance policy in order to recover lost payroll expenses. The policy covered lost profits, too, but "the business was operating at a loss," so "no loss of profits was claimed" (*id.*). A few days later, perhaps feeling enough was enough, the theater owner sold off the property to the plaintiff and assigned to him the rights under "all existing policies" (*id.* at 167). But when the plaintiff tried to make a claim for the losses *he* incurred in the business after the sale, the insurance company denied the validity of the assignment. And the Appellate Division agreed with the insurers:

> The obligation under the rider in question was to reimburse the William Berinstein Enterprises for the loss which *it* sustained, arising by reason of *its* loss of profits, etc., because of interruption of *its* business to be measured by *its* business experience before the loss and of *its* probable experience thereafter. The plaintiff was no party to this policy and any assignment to him was void. . . . No claim or cause of action for the plaintiff's loss accrued at the time of the fire. That loss was in effect established, if at all, by the assignment. What this action amounts to is an attempt by a stranger to a policy of insurance to collect for loss of profits, etc., arising out of a business which had not come into existence until eleven days after the fire, and after the named insured, to whom the defendant had issued its policy had ceased to operate the business covered . . . .

(*id.* [emphasis in original]).

Holt and a handful of more recent federal cases applying New York law have recognized the distinction "between fixed losses" and "speculative losses, such as profits" (*Globecon*, 434 F3d at 172). Courts "consider[ ] the former assignable because they had 'accrued' at the time of

loss," while the latter may not be assignable because the insurers' risk can vary depending on the characteristics of the assignee (*id.*; *see Bronx Entertainment, LLC v St. Paul's Mercury Ins. Co.*, 265 F Supp 2d 359, 363 [SD NY 2003] [holding that the assignee "may maintain an action for [the original insured's] losses that accrued as of the date of the assignment" but was not "entitled to those business losses which had yet to occur at the time of the assignment"]; *compare with SR Inter. Bus. Ins. Co., Ltd.*, 375 F Supp 2d at 249 [declining to invalidate assignment of rental insurance claim as a matter of law because "the amount of the loss under a rental insurance claim is largely 'fixed or easily ascertained' in advance of the assignment"]).

Those cases do not support the Insurers' position here. For one thing, the Insurers do not allege that the assignment in the SDA implicated speculative "lost profits" or some other uncertain calculation of risk. Nor do the Insurers deny that the occurrences covered by their policies have already accrued. Unlike business interruption losses, "the mechanism by which the extent of [an asbestos defendant's] liabilities [will] be determined [is] the same" as if the liabilities had remained with the original policyholder – meaning the insurer is not obligated to take on any greater risk than it agreed to insure (*Viking Pump*, 2 A3d at 106; *see SR Inter. Bus. Ins. Co., Ltd.*, 375 F Supp 2d at 249 ["[B]ecause these retail leases were in place before the assignment of the rental value loss claim in December 2003, the risk borne by the Insurers is not altered by either the conduct or the characteristics of the assignee."]). Taken to its logical end, the Insurers' argument amounts to a blanket prohibition against the assignment of insurance rights between entities that face common litigation threats, because any such assignment could drive up total defense costs to the insurer. That is not the law. And tellingly, the Insurers point to no authority invalidating a post-loss assignment under an occurrence-basis liability policy, like those here.

Moreover, courts have held that insurers can keep onerous defense costs in check through other contractual means, such as defense-cooperation provisions. In *Viking Pump*, for example, then-Vice Chancellor Strine rejected the insurers' argument that an assignment of rights "did, in fact, increase their risks" because "they might have to incur increased defense costs in order to protect [multiple assignees]" (2 A3d at 104 n.87). The court noted that "the Excess Insurers are free to use whatever contractual provisions they put in their policies to dictate an efficient defense," concluding that "the kind of cost factors the Excess Insurers posit are not of the kind or magnitude that New York courts would indulge as a basis to permit an insurer to bar an assignment" (*id.*; *see also Northern Ins. Co. v Allied Mut. Ins. Co.*, 955 F2d 1353, 1358 [9th Cir 1992] ["[D]efense costs could balloon if the successor firm failed to cooperate in the defense. . . . Yet, the insurer is protected against this risk because it is freed of its defense obligation if the successor firm does not fulfill its duty to aid in the defense."]; *Egger v Gulf Ins. Co.*, 903 A2d 1219, 1228 n.6 [Pa. 2006] [noting that if "some type of 'illegitimate manipulation' of the variables involved in litigation. . . were to occur, the insurer would have the full array of affirmative defenses to negate its obligation to indemnify"]).

Here, in fact, the Insurers have already invoked other contractual protections against defense costs (*see* Compl. ¶81 ["AT&T, Corp., AT&T, Inc. and/or Alcatel-Lucent has not established the requirements for and conditions precedent to coverage contained in the London policies, including but not limited to . . . (iii) obtaining necessary consent to incur defense costs . . . ."]). Accordingly, the increased risk identified by the Insurers here is not a sound basis for invalidating an assignment of insurance rights.

3. The Insurers have not shown that additional discovery is needed under CPLR 3212 [f] to resolve Nokia's motion.

Finally, the Insurers "failed to provide an evidentiary basis for concluding that discovery might lead to relevant evidence" as to the narrow issue spotlighted by this motion (*Unisol, Inc. v Kidron*, 180 AD3d 570, 571 [1st Dept 2020]). Under CPLR 3212[f], the Court may deny a motion for summary judgment as premature "[s]hould it appear . . . that facts essential to justify opposition may exist but cannot then be stated" (CPLR 3212 [f]). In their Rule 3212 [f] Affidavit, the Insurers identify two main areas as to which discovery is said to be incomplete: (1) the intent of the parties to the SDA, and (2) the extent to which any alleged transfer increased the Insurers' risk (Dozier Rule 3212 [f] Aff. ¶2 [NYSCEF 969]). Neither avenue of discovery, however, is needed to decide this motion.

Extrinsic evidence about the intent behind the SDA is irrelevant because the Court reads the agreement as unambiguously effecting an assignment of insurance rights to Nokia (*Maysek & Moran, Inc. v S.G. Warburg & Co.*, Inc., 284 AD2d 203, 204 [1st Dept 2001] [rejecting argument under CPLR 3212 [f] where "agreement discloses no ambiguity as to the intent of the parties"]; *see In re Chernik*, 150 AD3d 728, 730 [2d Dept 2017] [rejecting argument under CPLR 3212 [f] "[s]ince there was no ambiguity, resort to extrinsic evidence would have been inappropriate"]). And, as discussed *supra*, evidence about the Insurers' increased costs is not grounds for invalidating a post-loss transfer of rights under an occurrence-basis liability policy.[5]

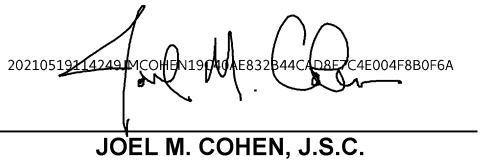
* * * *

Accordingly, it is

[5] Of course, the additional discovery sought by the Insurers may be relevant to other aspects of the case. The only question here is whether the sought-after discovery precludes Nokia's instant motion.

ORDERED that Nokia's motion for partial summary judgment is **GRANTED**. This decision is limited to determining that Nokia (through its predecessor, Lucent) has the right by assignment to seek coverage under certain insurance policies issued to AT&T for asbestos liabilities Nokia inherited from AT&T. It does not determine the scope of such coverage.

This constitutes the decision and order of the Court.



5/19/2021
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**