EFiled: Nov 25 2013 09:52PM EST
Filing ID 54615271
Case Number 467,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DANIELI CORPORATION, Plaintiff Below, Appellant, v. ARCELORMITTAL LAPLACE, LLP, formerly known as and/or successor in interest to BAYOU STEEL CORPORATION, Defendant Below, Appellee.	No. 467, 2013 Court Below, Superior Court of the State of Delaware C.A. No. N13C-03-126 JRJ

ANSWERING BRIEF OF DEFENDANT BELOW, APPELLEE ARCELORMITTAL LAPLACE, LLP

Kevin F. Brady (Bar No. 2248)
Jill Agro (Bar No. 4629)
ECKERT SEAMANS CHERIN & MELLOTT, LLC
222 Delaware Avenue, 7th Floor
Wilmington, DE 19801
302.574.7400
kbrady@eckertseamans.com
jagro@eckertseamans.com

Counsel for Defendant Below, Appellee

Dated: November 25, 2013

Table of Contents

Table of Citations

Cases

Statutes

Other Authorities

Nature of Proceedings

Plaintiff Below-Appellant Danieli Corporation ("Danieli") appeals the Delaware Superior Court's decision on August 6, 2013, denying Danieli's motion for judgment on the pleadings, and granting the cross-motion for judgment on the pleadings of Defendant Below-Appellee ArcelorMittal LaPlace, LLP ("ArcelorMittal").

Summary of Argument

1. Denied. The Superior Court correctly found that Danieli was not entitled to indemnification from ArcelorMittal for litigation expenses and settlement costs incurred by Danieli in defending and settling claims asserted in an action filed in 2005, because Danieli failed to satisfy the express contractual prerequisites for indemnification, which required Danieli to: (1) notify ArcelorMittal in writing of the claim within 10 days of receiving the claim; (2) provide ArcelorMittal the opportunity to participate in Danieli's defense; and (3) provide reasonable cooperation with ArcelorMittal and its insurer with respect to the investigation, handling and defense of the claim.

Statement of Facts[1]

Since 1981, Bayou Steel Corporation ("Bayou Steel") (predecessor-in-interest to ArcelorMittal), operated a steel minimill in LaPlace, Louisiana. (A4). Danieli contracted with Bayou Steel in 1998 for the supply and installation of Electric Arc Furnace Equipment ("EAFE") and a Ladle Metallurgical Facility ("LMF") at the Bayou Steel minimill in Laplace, Louisiana. (A5). In 1999, Bayou Steel initiated litigation against Danieli arising out of upgrades of the EAFE. (A5). In 2008, ArcelorMittal acquired Bayou Steel and became its successor-in-interest. (A5, A13-A14).

On June 14, 2001, Danieli and Bayou Steel entered into a settlement agreement to resolve claims that Bayou Steel filed against Danieli in 1999 (the "Settlement Agreement"). (A16-A29). Pursuant to that Settlement Agreement, Bayou Steel agreed to indemnify Danieli for certain future claims asserted against Danieli by employees of Bayou Steel subject to certain expressed conditions precedent. In particular, Danieli agreed to provide: (i) notice to Bayou Steel [ArcelorMittal] within ten (10) business days after Danieli received a claim; (ii) an opportunity to participate in the defense; and (iii) reasonable cooperation with

---

[1] The necessary facts for purposes of addressing the issues before this Court are not in dispute and are summarized in the decision of the Superior Court dated August 6, 2013. For reference purposes, Danieli Corporation's Opening Brief on Appeal will be referred to as "AOB."

Bayou Steel and its insurer with respect to the investigation, handling, and defense of such a claim. (A22-A23).

On August 27, 2004, Melvin Batiste, an employee of Bayou Steel, suffered an employment-related injury. (A6). On September 28, 2005, Mr. Batiste and several additional plaintiffs brought an action in Louisiana state court to recover damages for their injuries against nine defendants, including Danieli and Bayou Steel.[2] *Batiste v. Bayou Steel Corp.*, C.A. No. 2:05-cv-04417-KDE-KWR (the "*Batiste* litigation"). (A6).[3]

Danieli and ArcelorMittal participated in and defended against the *Batiste* litigation starting in 2005. (A8). It was not until February 14, 2012, over seven years after the accident, over six years after the claim was originally filed and sixteen months after ArcelorMittal was dismissed from the case, that Danieli, for the first time attempted to comply with the contractual prerequisites for indemnification by sending a letter to ArcelorMittal's counsel demanding that ArcelorMittal indemnify, defend, and hold harmless Danieli for the claims asserted in the *Batiste* litigation pursuant to the Settlement Agreement. (A127, A184, A313).

---

[2] Going forward, Bayou Steel and ArcelorMittal will be referred to collectively as ArcelorMittal.

[3] ArcelorMittal objects to the factual assertions made by Danieli which are not part of the record on appeal. For example, Danieli refers to arguments made by ArcelorMittal in the underlying *Batiste* litigation. (AOB at 16). Danieli also states that Zurich North America insured Danieli at the time of the accident and began defending Danieli in approximately November 2005. (AOB at 5). Those references do not appear to be part of the record on appeal.

ArcelorMittal's counsel rejected that demand by letter dated February 24, 2012, explaining that Danieli's demand was untimely and ineffectual pursuant to the express terms of the Settlement Agreement. (A9). In his response, counsel for ArcelorMittal specifically referenced paragraphs 10 and 20 of the Settlement Agreement. (A333).

Paragraph 10 of the Settlement Agreement states, in pertinent part:

> [A]ny obligation by Bayou Steel to indemnify Danieli hereunder is subject to and **expressly conditioned** upon **Danieli providing Bayou Steel notice** (as set forth in Paragraph 20 below) **within ten (10) business days after receipt by Danieli** of any such Bayou Steel Employees' Claim and/or Derivative Claim, **Danieli providing Bayou Steel the opportunity to participate in Danieli's defense** of any such Bayou Steel Employees' Claim and/or Derivative Claim, **and** upon **Danieli providing reasonable cooperation with Bayou Steel and Bayou Steel's insurer**, if any, with respect to **the investigation, handling and defense of** any such Bayou Steel Employees' Claim and/or Derivative Claim.

(A22-A23) (emphasis added).

Paragraph 20 of the Settlement Agreement states, in pertinent part:

> Notices. Any notice permitted or contemplated by this Agreement **shall be in writing and shall be addressed to the Party to be notified** at the address set forth below, or at such other addresses as each Party may designate for itself from time to time by notice hereunder.

(A25) (emphasis added).

By the Settlement Agreement's express terms, Danieli was required to notify ArcelorMittal in writing of the claim within 10 days of receiving the claim (which by Danieli's admission would have been in November 2005), provide ArcelorMittal an opportunity to participate in the defense and reasonably cooperate in the investigation, handling and defense of the claim. (A22-A23). Danieli chose not to satisfy the conditions precedent to indemnification. Instead, Danieli retained its own counsel and pursued its own investigation, litigation strategy and defense without seeking defense assistance or indemnification from ArcelorMittal until February 2012. (A39-A142).

Based on these facts, the Superior Court determined that Danieli failed to comply with the express terms of the Settlement Agreement, and therefore, was not entitled to indemnification or defense costs in the *Batiste* litigation. (A374-A377). Danieli is challenging the Superior Court's ruling in this appeal.

ARGUMENT

I. DANIELI FAILED TO COMPLY WITH THE EXPRESS TERMS OF THE SETTLEMENT AGREEMENT AND IT IS NOT ENTITLED TO INDEMNIFICATION OR DEFENSE COSTS IN THE *BATISTE* LITIGATION

A) Question Presented

Whether Danieli is entitled to indemnification and defense costs when it failed to comply with the express written conditions precedent in the Settlement Agreement?

ArcelorMittal's position regarding this issue is set forth in its Cross-Motion for Judgment on the Pleadings (A340-A346) and its Opposition to Danieli Corporation's Motion for Judgment on the Pleadings. (A354-A357).

B) Scope of Review

This Court applies a *de novo* standard of review to questions of law. *Brooks-McCollum v. Emerald Ridge Bd. of Dirs.*, 29 A.3d 245, ¶ 6 (Del. 2011) (order). The Superior Court implemented the proper standard for a judgment on the pleadings, which requires the Court to find that "no material issue of fact exists and the moving party is entitled to judgment as a matter of law." *OSI Sys. v. Instrumentarium Corp.*, 892 A.2d 1086, 1090 (Del. Ch. 2006).

C) Merits of Argument

1. Danieli is not Entitled to Indemnification Because it Failed to Provide Contractually Required Written Notice to ArcelorMittal

This is a dispute about indemnification in a contract and not an insurance policy. Notwithstanding that Danieli concedes that it did not comply with all of the express written conditions precedent for indemnification pursuant to the Settlement Agreement (A376), Danieli is asking this Court to rewrite the terms of the Settlement Agreement it negotiated with ArcelorMittal so Danieli can get indemnification and attorneys' fees for a claim that arose in 2005. Danieli's request is contrary to Delaware's earnest respect for the freedom of contract and should not be allowed. *In re Peierls Family Inter Vivos Trusts*, 59 A.3d 471, 479 (Del. Ch. 2012) ("Delaware respects freedom of contract.").[4]

It is the goal of contract interpretation to ascertain the shared intensions of the parties. *E. I. duPont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985). The presumption that the parties are bound by the language of the agreement they negotiated applies with even greater force when, like here, the parties are sophisticated entities that have engaged in arms-length negotiations. *West Willow-Bay Court LLC v. Robino Bay Court Plaza, LLC,* 2007 WL 3317551,

---

[4] It is particularly telling that the Settlement Agreement forms the basis for asserting a right to indemnification, and yet Danieli does not quote, reference or identify for this Court in its Opening Brief the specific provisions in paragraphs 10 and 20 of the Settlement Agreement that not only form the basis of the dispute, but establish the specific requirements to obtain the contractual indemnification that it seeks.

at * 9 (Del. Ch. Nov. 2, 2007). If a contract is clear and unambiguous on its face, a court may not look outside the four corners of the agreement "to interpret or search for the parties intent . . ." *Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991). Because there are no allegations in this case that the language in paragraphs 10 and 20 of the Settlement Agreement is ambiguous, the language of the contract controls this dispute. (A368, A376).

Danieli attacks ArcelorMittal's 2012 refusal to accept Danieli's demand to defend and indemnify Danieli for defense costs incurred in the *Batiste* litigation on several fronts. Danieli argues that it does not have to comply with the notice provisions in the Settlement Agreement because ArcelorMittal had "actual notice" of the claims against Danieli in the *Batiste* litigation as named defendants in that action. (AOB at 7). However, where contractual terms dictate how notice shall be given, those terms—and not "actual notice"—establish what constitutes proper notice. *See, e.g., Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 2012 WL 3201139, at * 11 (Del. Ch. Aug. 7, 2012) (noting that plaintiff was required to satisfy the "proper contractual notice" requirements set forth in the operative agreement).

Moreover, contractual indemnification claims are not automatic. *See Prudential Ins. Co. of Am. v. Barclays Bank PLC*, 2013 WL 221995, at * 3 (D.N.J. Jan. 22, 2013) (holding no right to indemnification where indemnitee failed to

provide notice as required by contract). In *Prudential*, the indemnitees argued that they were entitled to indemnification even though they failed to "promptly provide notice of the commencement of this action to the [indemnitor] in order to trigger any potential indemnification rights." *Id.* Similar to this matter on appeal, the indemnitees in *Prudential* did not comply with the contractual notice provision, and the court found that the indemnitees were not entitled to any "automatic" indemnification under the operative agreement. *Id.*

Even if an indemnitor is aware of indemnifiable claims against an indemnitee, the indemnitor is still entitled to "an unequivocal, certain and explicit demand to undertake the defense thereof" before a duty to indemnify attaches. *Purvis v. Hartford Accident & Indem. Co.*, 877 P.2d 827, 830 (Ariz. Ct. App. 1994); *see also Erie Ins. Exch. v. V.I. Enters.*, 264 F. Supp. 2d 261, 264-265 (D.V.I. 2003).

Erie Insurance is very instructive on this point. There, the primary issue before the court was whether Erie, the indemnified party, properly and timely tendered its defense to the indemnitor, Avis.[5] *Erie Ins. Exch. v. V.I. Enters.*, 264 F. Supp. 2d 261, 264 (D.V.I. 2003). Erie argued that Avis was on notice to defend it because Avis had knowledge of the suit as a named defendant. *Id.* The court

---

[5] The court in *Erie Insurance* repeatedly refers to the defendant, Avis Car Rental, as an insurer; however, Avis is not an insurance company and the obligations discussed in that case are obligations to indemnify—not obligations to insure. It was actually Erie, an insurance company, that failed to tender a defense or properly notify Avis of its indemnifiable claim.

agreed that "[t]here is little doubt that Avis knew of the lawsuit." *Id.* However, Erie did not provide any evidence that it requested indemnification or Avis's participation in its defense until a year after a settlement was reached. *Id.*

In finding that Avis was not required to indemnify Erie, the court held: "'[m]ere knowledge of a potentially covered claim by an insurer is not enough to constitute a tender. The insurer must know that its participation is desired by the insured.'" *Id.* (citing *Aetna Cas. & Sur. Co. v. Chicago Ins. Co.*, 994 F.2d 1254, 1261 (7th Cir. 1993) (additional citations omitted); *see also Hartford Accident and Indemnity Co. v. Gulf Ins. Co.,* 776 F.2d 1380, 1383 (7th Cir. 1985) (the court noted that "[w]hat is required is knowledge that the suit is potentially within the policy's coverage coupled with knowledge that the insurer's assistance is desired.") (emphasis added).

To enforce an express contractual indemnification provision, an indemnitee must provide an indemnitor with "proper notice" and "an adequate opportunity to undertake its duty to defend." *Pike Creek Chiropractic Ctr., P.A. v. Robinson*, 637 A.2d 418, 420-423 (Del. 1994) (holding that indemnitee provided sufficient notice and tendered its defense to the indemnitor and was entitled to fees for seeking indemnification).

In this case, there is no dispute that the shared expectations of the parties as to "proper notice" was memorialized in the Settlement Agreement that was

negotiated and agreed to by Danieli and Bayou Steel. Danieli has not argued, nor can it argue, that it provided ArcelorMittal with proper notice as required by the Settlement Agreement, or with any written expression that Danieli wanted defense assistance or indemnification, until, at the earliest, seven years into the litigation.

While ArcelorMittal was aware of the *Batiste* litigation, and both its and Danieli's status as defendants in the litigation, Danieli was still required to fulfill its express contractual obligations under the Settlement Agreement to provide proper notice of its claim for defense assistance and indemnification. Danieli failed to take any action, as required by the Settlement Agreement, to seek defense assistance or indemnification until 2012 so its claim for indemnification must fail.

2. Danieli's Reliance on the *Church* and *Harleysville* Cases for Notice is Misplaced

Danieli relies on the *Brown v. Church Ins. Co.* and *Harleysville Ins. Co. v. Church Ins. Co.* to argue that because ArcelorMittal was aware of the *Batiste* litigation as a party in the litigation, Danieli was relieved of its express obligations under the Settlement Agreement to provide proper and timely notice. (AOB at 9) (citing *Brown v. Church Ins. Co.*, 2005 Del. Super. LEXIS 400 (Del. Super., Mar. 24, 2005) (the "*Church*" case) and *Harleysville Ins. Co. v. Church Ins. Co.*, 892 A.2d 356 (Del. 2005) (the "*Harleysville*" case)).

The *Church* and *Harleysville* cases are irrelevant to the issue on appeal because those cases concerned the interpretation of proper notice under insurance contracts regarding an additional insured. Insurance policies, which are not the same as negotiated commercial contracts, are subject to specialized insurance laws.[6] Although insurance policies are contractual in nature, they are not ordinary agreements. Insurance policies are contracts of adhesion and, as such, are subject to special rules of interpretation and construction which differ from those applied to other contracts. *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925 (Del. 1982).

Indeed, both this Court in *Harleysville* and the Superior Court in *Church* considered specialized insurance law and looked to a specialized insurance treatise

---

[6] *See* 18 DEL. C. §§ 18-101 *et seq.* (encompassing the Delaware Insurance Code).

to determine that "where an insurer received proper and timely notice of [an] accident from the named insured including particulars sufficient to identify the additional insured, it is not necessary that another notice be given by the additional insured." 2005 Del. Super. LEXIS 400, at *24, *25 n.51 (citing 13 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3D § 187:12 (1999)) (emphasis added); *Harleysville Ins. Co. v. Church Ins. Co.*, 892 A.2d 356, 361 n.15 (Del. 2005) (same).

The parties to this dispute on appeal are sophisticated companies – not insurance companies – which were on equal footing in negotiating and drafting the Settlement Agreement, so the specialized insurance laws and cases interpreting insurance policies are not controlling. (A23). But, even if the discussion of insurance law was relevant to the issue on appeal in this matter, the decisions in *Church* and *Harleysville* do not support a finding that Danieli complied with the notice requirements in this dispute.

Contrary to the argument that Danieli makes, the facts in *Church* are not similar to the case on appeal and its holding fails to support Danieli's position. In *Church*, two insurance companies, Church Insurance Company (which insured the owner of property where the accident occurred, Cathedral Community Services Inc.) and Harleysville Insurance Company (which insured the manager of the property where the accident occurred, Capital Management Company) were

arguing about the primacy of coverage of their policies with respect to an additional insured. In particular, the issue was whether Church had received proper and timely notice from Capital Management Company as an additional insured on the Church policy when Church's primary insured (Capital Management) as well as Cathedral Community Services had both notified Church of the accident.[7] 2005 Del. Super. LEXIS 400, *23-24.

Notably, the party claiming indemnification in the *Church* case filed a cross-claim against the indemnitor – specifically seeking indemnification – in its answer to the complaint, and additionally, complied with the express "as soon as practical" requirements in the agreement by providing the indemnitor with written notice of the claim and a request for indemnification within ten days of learning of the claim. *Brown*, Del. Super. LEXIS 400, at *4, *13.

None of those material facts that are determinative in the *Church* case are present in the pending action. Danieli did not: (i) file a cross-claim seeking indemnification from ArcelorMittal in the *Batiste* litigation; or (ii) provide the contractually mandated notice to ArcelorMittal seeking defense assistance or indemnification.

---

[7] In the Supreme Court's decision in *Harleysville*, the only issues decided by the court concerned the duties of the insurance company for the indemnitor, the duties of the insurance company for the indemnitee and the additional insured's (through its insurer) waiver of coverage. *Harleysville Ins. Co. v. Church Ins. Co.*, 892 A.2d 356 (Del. 2005). Those issues are irrelevant to the parties in this action who are (or would be, if proper contractual notice was given) the actual indemnitor and indemnitee—not insurance companies.

Danieli also argues that ArcelorMittal (or its counsel) had an affirmative obligation to "inquire whether a defense is requested [from Danieli]," or otherwise investigate the claims asserted in the *Batiste* litigation. (AOB at 12-13). Danieli is wrong. The only affirmative obligation at issue is the one identified in the Settlement Agreement with respect to notification and indemnification and it belongs to Danieli which it has the duty to notify ArcelorMittal.[8] Danieli's attempt to shift the burden to ArcelorMittal—without any contractual basis for doing so—wrongfully enlarges ArcelorMittal's obligations (and Danieli's rights) under the Settlement Agreement. *See, e.g., New Zealand Kiwifruit Mktg. Bd. v. City of Wilmington*, 825 F. Supp. 1180, 1194 (D. Del. 1993) ("When the parties to a contract have entered into a written agreement expressly setting forth one party's indemnity liability, there is no room for any enlargement of that obligation by implication.") (citation omitted).

Danieli also criticized ArcelorMittal and claimed that the Superior Court erred when both relied on *Purvis v. Hartford Accident & Indem. Co.*, 877 P.2d 827 (Ariz. Ct. App. 1994), as persuasive (not mandatory) precedent, for the proposition that an indemnitee has to express its desire for indemnification from the indemnitor; simple notification of a claim is insufficient. (AOB at 26.)

---

[8] ArcelorMittal is not an insurer, and is not required to conduct an investigation of claims like an insurer. *See* 18 DEL. C. § 2304(16)(c) (stating insurers must "adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies").

The court in *Purvis* placed the obligation on the indemnitee to provide "unequivocal and explicit demand" to the insurer to undertake the defense before the duty to indemnify is triggered. 877 P.2d at 831. This does not conflict with the decisions in *Church* and *Harleysville* which dealt with an insurer receiving "proper and timely" notice of an accident from the named insured. *Brown v. Church Ins. Co.* at *24.

As a result, *Church* and *Harleysville* do not apply to this case on appeal and *Purvis* is not contrary to controlling Delaware law. Thus, the Superior Court reliance on *Purvis* was not improper.

3. Danieli Is Not Entitled To "Fees on Fees"

There are two reasons that Danieli is not entitled to recover its fees for seeking indemnification in this action. First, in its Complaint in the Superior Court, Danieli only requested indemnification for its defense costs related to the *Batiste* litigation; Danieli did not request fees for the pending indemnification suit. (A10). Second, since Danieli failed to provide proper contractual notice for obtaining indemnification, it is **not entitled to indemnification**, and is therefore not entitled to fees for seeking indemnification. *See Pike Creek Chiropractic Ctr., P.A. v. Robinson*, 637 A.2d 418, 420 (Del. 1994).

In *Pike Creek*, this Court reiterated the rule for granting fees for seeking indemnification:

> "The rule in most jurisdictions, regardless of whether indemnity is based upon an implied or an express agreement, is that when a claim is made against an indemnitee for **which he is entitled to indemnification**, the indemnitor is liable for any reasonable expenses incurred by the indemnitee in defending against such claim, regardless of whether the indemnitee is ultimately held liable."

Id. (quoting *Eastern Mem'l Consultants, Inc. v. Gracelawn Mem'l Park, Inc.*, 364 A.2d 821, 825 (Del. 1976)) (emphasis added; citation omitted).

Because Danieli failed to comply with the express contractual provisions in the Settlement Agreement for indemnification, it is not entitled to fees. Therefore,

Danieli's argument for "fees on fees" is without support, and should be disregarded for purposes of this appeal.

4. Danieli is not Entitled to Indemnification Because it Failed to Prove that it Reasonably Cooperated with ArcelorMittal with Respect to the Investigation, Handling and Defense of the *Batiste* Litigation

While Danieli demanded that ArcelorMittal "indemnify, defend and hold harmless" Danieli in February 2012, Danieli has failed to provide reasonable cooperation with ArcelorMittal regarding the investigation, handling and defense of Danieli in the *Batiste* litigation. The parties set forth their expectations with respect to indemnification in paragraphs 10 and 20 of the Settlement Agreement. They also set forth their expectations with respect to what was reasonable in terms of the timing of the specific conditions precedent. By the time Danieli made a demand in February 2012:

(i) seven and one-half years had elapsed since the accident in 2004 (A6);

(ii) the litigation had been ongoing for six and one-half years (A6);

(iii) the investigation by Danieli was completed;

(iv) discovery was completed;

(v) motions for summary judgment had been presented, decided and appealed (A88, A118);

(vi) ArcelorMittal had been dismissed from the case for 16 months (A184);

(vii) the pre-trial conference was less than four months away (A130); and

(vii) trial was a year away.

All of this activity had occurred without ArcelorMittal having the opportunity to provide any input with respect to directing the defense of Danieli or controlling the costs.

Danieli argues that while it waived its right to indemnification when it failed to comply with the express written terms of the settlement agreement (A376), it can resurrect its claim for indemnification by rescinding or retracting the waiver because ArcelorMittal has not been prejudiced or materially changed its position in reliance on the waiver. (AOB at 15, 16.) Looking to the specific language in the Settlement Agreement, there is no provision that permits Danieli to retract its waiver and there is no requirement that ArcelorMittal prove it has been prejudiced.

In an attempt to circumvent this Court's position that "[o]nce a right is waived it is gone forever," *see Harleysville*, 892 A.2d at 364, Danieli cites *Roam-Tel Partners v. AT&T Mobility Wireless Operations Holdings, Inc.*, for the proposition that Danieli can retract is waiver seven years after the fact as long as ArcelorMittal has not been prejudiced or materially changed its position in reliance on the waiver. *Roam-Tel Partners v. AT&T Mobility Wireless Operations Holdings Inc.*, 2010 WL 5276991 (Del. Ch. 2010).[9]

---

[9] The court in *Roam-Tel Partners* was addressing waiver in the context of specified time periods in an appraisal case under 8 *Del. C.* § 262. The court found that the shareholder may rescind a waiver of an appraisal right as long as it was within the statutory election time frame. 2010 WL 5276991, at *14.

While the Settlement Agreement does not require a showing of prejudice and there is no binding precedent that requires a showing of prejudice on the part of ArcelorMittal, the record demonstrates that ArcelorMittal has been prejudiced by the seven-year delay. ArcelorMittal can point to the laundry list of material events that have occurred in the litigation over seven years in terms of the investigations and the handling of the defense of the claim from which ArcelorMittal was excluded. Moreover, ArcelorMittal has been prejudiced in that it is being asked to pay for Danieli's attorneys' fees and expenses in a matter where ArcelorMittal was a co-defendant with its own counsel. ArcelorMittal was never afforded the opportunity to consider the use of one team of lawyers to represent both Danieli and ArcelorMittal in the *Batiste* litigation, which would have resulted in significant cost savings.

The key point in the *Church* decision was that the insured received proper and timely notice in accordance with the provisions of the insurance policy. *Brown v. Church Ins. Co.*, at * 24. Proper and timely notice allows the insured to act in accordance with its expectations under the insurance policy. It also "afford[s] the insurer an adequate opportunity to investigate, to prevent fraud and imposition on it, to form an intelligent estimate of its rights and liabilities before it is obligated to pay." *Id.* at *25, fn. 52.

Here, ArcelorMittal was denied those opportunities until the very end of the litigation when demand was made by Danieli for payment of the settlement amount and Danieli's attorneys' fees. That demand came seven years too late. While ArcelorMittal does not agree that it needs to show that it was prejudiced, if there was such a requirement, those lost opportunities alone would satisfy the requirement for prejudice. *See*, *Monsanto Co. v. Aetna Cas. and Surety Co., et al.*, 1994 WL 46726 (Del. Super. January 14, 1994), *aff'd,* 653 A.2d 305 (Del. 1994) ("[a] simple lost opportunity to participate in an investigation satisfies the requirement of prejudice."). *See also*, *Wilhelm v. Nationwide Gen. Ins. Co.*, 2011 WL 4448061 (Del. Super. May 11, 2011) (court found prejudice as a matter of law where plaintiff failed to notify carrier of a claim for UM benefits which required notice to be given "as soon as practicable."); and *Clemente v. Home Ins. Co.*, 791 F. Supp. 118, 120 (E.D. Pa. 1992), *aff'd*, 981 F. 2d 1246 (3d. Cir. 1992) (prejudice as a matter of law when notification delayed by over three years and underlying litigation settled).

Danieli is entitled neither to contractual indemnification nor attorneys' fees and costs associated with the *Batiste* litigation or this action. The Superior Court properly determined that there were no material issues of fact presented to the court, and that ArcelorMittal was entitled to judgment as a matter of law. *OSI Sys.*

v. Instrumentarium Corp., 892 A.2d 1086, 1090 (Del. Ch. 2006). That decision should be affirmed.

Conclusion

For these reasons, Defendant Below-Appellee respectfully requests that this Honorable Court affirm the ruling of the Delaware Superior Court.

ECKERT SEAMANS CHERIN & MELLOTT, LLC

By: */s/ Kevin F. Brady*

Kevin F. Brady (Bar No. 2248)
Jill Agro (Bar No. 4629)
222 Delaware Avenue, 7th Floor
Wilmington, DE 19801
302.574.7400
kbrady@eckertseamans.com
jagro@eckertseamans.com

Counsel for Defendant Below, Appellee

Dated: November 25, 2013