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COURT OF APPEALS

STATE OF NEW YORK

MILLENNIUM HOLDINGS LLC,

Appellant,

-against-

No. 38

THE GLIDDEN COMPANY,

Respondent.

20 Eagle Street
Albany, New York 12207
March 29, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Number 38 on the
2 calendar, Millennium Holdings v. Glidden.

3 MR. KRAVITZ: Good afternoon, Your Honors.
4 Carl Kravitz for the insurers who are appellants
5 here. I would like to reserve three minutes, if I
6 may, for rebuttal.

7 CHIEF JUDGE DIFIORE: You may.

8 The anti-subrogation rule bars an insurer from
9 obtaining subrogation from an insured for a risk covered
10 by the policy. This court has never applied this
11 exception to the general rule of subrogation unless both
12 conditions of the rule are met. One is, the claim is
13 against an insured to recover a payment for a covered
14 risk.

15 And this court, in the Jefferson case, described
16 that anti-subrogation rule as follows: "We have limited
17 the right to subrogation on policy grounds, where the
18 insurer seeks to claim in subrogation against its own
19 insured."

20 ANP is not, and has never been, an insured of
21 the insurers in that case. That was decided by the Ohio
22 Supreme Court, in 2006, in the Glidden decision.

23 JUDGE STEIN: Is this really a case about
24 whether a third-party contractual indemnitor can be
25 subrogated? Is that what this is really about?

1 MR. KRAVITZ: Well, I think that - - - that
2 is an issue in the case, but I - - - the answer to
3 that question - - -

4 JUDGE STEIN: I guess, assuming - - -
5 assuming your argument that the anti-subrogation rule
6 doesn't apply, then we get to that, right?

7 MR. KRAVITZ: Right. And - - - and so I
8 guess the question that you're asking is, does the
9 subrogation rule apply only as to third-party
10 tortfeasors, as opposed to contractual indemnitors;
11 is that - - -

12 JUDGE STEIN: I guess that would be - - -
13 yeah - - -

14 MR. KRAVITZ: Yeah. And so, I would say
15 that the answer to that is - - - is that it clearly
16 does apply to contractual indemnitors. And I think
17 there are a number of reasons for that.

18 The first is that this court has said that
19 there are two purposes of the anti-subrogation rule.
20 One is to avoid of the imposition of the loss on an
21 insured. And the other is to avoid situations where
22 there might be a conflict, which obviously can arise
23 if an insurer is trying to recover from one of its
24 insured for a loss that is covered.

25 Those are the two purposes of the rule, and

1 sort of define the contours of the exception. Those
2 - - - those purposes apply equally with respect to a
3 contractual indemnity.

4 You - - - to start with the first purpose, the -
5 - - the third party, the defendant, is either an insured
6 or not an insured. That doesn't change if there is the
7 contractual indemnification, and nor does the conflict
8 question. In fact, the conflict question, in most cases,
9 is going to be even clearer. In other words, there isn't
10 one.

11 There is one circumstance where a conflict has
12 been identified, not in a - - - a case in this court, but
13 where you have the third party is a tortfeasor, and so
14 that the insurer's liability arises from the negligence of
15 this third party. In that situation, the insurance
16 company has to provide a defense, and therefore defend
17 against the negligence of that third party. While at the
18 same time, the insurance company might want to establish
19 that negligence because that gives rise to the implied
20 indemnification claim, which they can then be subrogated
21 to. That does not exist in a case with a contractual
22 indemnification. So the - - - the purposes apply equally.

23 I would also, in terms of the law in New York, I
24 would say that what - - - that this court - - - and I
25 would refer the court to the Gerseta decision; it is old

1 but it is venerable. And it is from 1925 and it deals
2 with a contractual indemnification situation. It deals
3 with commercial relationships where there were debts, and
4 a debt was paid on behalf of someone else. And the court
5 - - - this court made it crystal clear that subrogation
6 applies in that situation. And it said there that,
7 "Subrogation includes so wide a range of subjects, it has
8 been called 'the mode which equity adopts to complete the
9 ultimate payment of a debt by one who in justice, equity,
10 and good conscience, ought to pay it.'"

11 That's the contractual situation. When you get
12 to the tortfeasor situation, the North Star case is an
13 example, you will see that this court uses the same basic
14 formulation. And that is, what - - - subrogation applies
15 and what it does is it transfers the loss to the party
16 that ought to pay. And so when you look at the
17 contractual cases and the tortfeasor cases, it's the same
18 principle. And - - - and so there is no reason to apply
19 them differently, and the courts have not done that.

20 Then - - - so moving on through New York Law,
21 we've cited cases from the Appellate Division, the Dillon
22 case, the Harleysville case, the Hamilton case - - - they
23 are in our brief - - - all of which applied subrogation to
24 a contractual indemnitor.

25 I would point out also that the Pennsylvania

1 General case and the Jefferson case, cases from this
2 court, were both contractual indemnification cases. They
3 were - - - they involved a contractual indemnity in a
4 rental agreement, or a car leasing agreement. And sure,
5 the lessee got in an accident, and you could say that that
6 person was a wrongdoer, but the source of the
7 indemnification was the contractual indemnification in
8 those rental agreements. So this - - -

9 JUDGE FAHEY: I thought of the Jefferson case.
10 Supreme Court really relied on that, didn't she?

11 MR. KRAVITZ: Yes.

12 JUDGE FAHEY: In the Supreme Court ruling?

13 MR. KRAVITZ: Well - - - oh, you mean in
14 this case?

15 JUDGE FAHEY: Yes.

16 MR. KRAVITZ: Yes. Regrettably - - -

17 JUDGE FAHEY: And that's - - - that's just
18 so I'm clear in my own mind. That's the permissive
19 user case where a permissive user of a rented
20 automobile - - - or - - - you're right, it's a rental
21 car company.

22 MR. KRAVITZ: Yes.

23 JUDGE FAHEY: Okay.

24 MR. KRAVITZ: Yes. And you're absolutely
25 correct. And one of the prob - - - one of the

1 reasons we're here is that Supreme Court misread
2 Jefferson. And in Jefferson, the insurance policy
3 covered permissive users; the permissive user was an
4 insured, therefore the anti-subrogation rule applied
5 and barred a claim against the permissive user.

6 Unfortunately, Supreme Court misread Jefferson
7 and said, the permissive user was not an insured. And
8 that was the basis for the decision saying that coverage
9 is irrelevant.

10 JUDGE FAHEY: Well - - - the borderline
11 area seems to be those situations where you have an
12 employee of an insured, or a user of a vehicle that
13 is insured, someone who is - - - who is slightly one
14 step off from a direct line of insurance. And it
15 seems to have come up in that context where we are at
16 the borderline of the anti-subrogation rule.

17 But that's not the way I see you arguing
18 this case. You're arguing that - - - the way I
19 understand it is that the anti-sub - - - that they
20 weren't - - - it doesn't apply in the first instance.
21 That -- were never a covered insured, you just bought
22 the assets.

23 MR. KRAVITZ: That's - - -

24 JUDGE FAHEY: And of course that gets us to
25 the '86 purchase agreement, doesn't it?

1 MR. KRAVITZ: Sure. I'm happy to - - - do
2 you have a - - - what I was going to say about that -
3 - - and I'm happy also to answer a question about
4 what you said, sort of on the intersection there.
5 But let me - - - let me just address the '86 purchase
6 agreement. Because there is nothing about that
7 transaction that would indicate that ANP should be
8 immune from the subrogation action. And - - - and -
9 - -

10 JUDGE FAHEY: Well, what about the
11 indemnification language itself?

12 MR. KRAVITZ: Well, that was - - - that was
13 litig - - - let me give you the procedural answer and
14 then I will give you the substantive answer, if
15 that's okay.

16 The procedural answer is that that was one of
17 the two main issues that was litigated in the Supreme
18 Court. In other words, what is the scope of the
19 indemnification, and does it cover the costs that are in
20 issue in this case.

21 JUDGE FAHEY: Uh-huh.

22 MR. KRAVITZ: And that was litigated, we
23 won on that. When we - - - we lost then on the anti-
24 subrogation rule, we appealed, and ANP raised that
25 issue in the Appellate Division. And they lost on

1 payment argument is as follows. The basic facts
2 there - - - and just to understand, we are talking
3 about the 3.2-million-dollar payment that the
4 insurers made for the Santa Clara settlement. That
5 was - - -

6 JUDGE STEIN: Which the Ohio Court said - -
7 -

8 JUDGE ABDUS-SALAAM: Yup.

9 JUDGE STEIN: - - - was voluntary. So why
10 aren't you bound by that?

11 MR. KRAVITZ: Okay. And I am glad you
12 raised that because that's not true, with all
13 respect. That is what the lower court said, and that
14 was urged below. That is absolutely not true; I was
15 there. And the issue in the Ohio case was, first of
16 all, was there coverage for that claim, and then
17 second of all, was our reservation of rights
18 effective. And that turned on a question of contract
19 law.

20 And - - - and so the reimbursement right is
21 not in the policy. And what the court said was that
22 - - - that an insurer cannot impose that new
23 condition on the insurance contract over the
24 objection of the insured. That was the ruling, if
25 you look at the record from page A1200 to 1203, you

1 will see that is precisely what was decided; the word
2 voluntary payment is not uttered.

3 JUDGE STEIN: But didn't Ohio say it wasn't
4 covered?

5 MR. KRAVITZ: Oh, absolutely.

6 JUDGE STEIN: Okay. And doesn't your
7 policy refer to claims that are covered under the
8 policy?

9 MR. KRAVITZ: Yeah, well - - -

10 JUDGE STEIN: "Whereby", I think, is the
11 language.

12 MR. KRAVITZ: Yes. But - - - and let me -
13 - - as to that, the anti-subrogation rule, I think,
14 where I started, has two predicates. One is, you're
15 suing an insured for something covered by policy. So
16 with respect to the Santa Clara payment, neither
17 underlying predicate exists. We're not suing an
18 insured, right - - - ANP is not an insured; that was
19 decided in Glidden. And, with respect to the 3.2
20 million dollars, it's outside the policy.

21 In terms of the voluntary payment, which I
22 think I haven't gotten to, but, the bottom line there
23 - - - and my red light is on, and I will sit down
24 once I answer your question, I apologize - - - is
25 that at that time, there was a coverage dispute.

1 There was a pending declaratory judgment action - - -
2 this is the one we were just discussing. Our
3 insured, Millennium, was in bankruptcy. They made a
4 settlement in the Santa Clara case, and they came to
5 us and they said, this is a great deal and we insist
6 that you contribute to it, and if you don't, we're
7 going to hold you responsible for bad faith.

8 And so we're an insurance company, we're fa
9 - - - we're facing possibly a adverse judgment of 100
10 times more, increased defense costs, extra-
11 contractual damages from bad faith, and our insurer
12 is insisting that it's covered. Under the law, I
13 think everywhere, paying under those circumstances is
14 not voluntary, you can see that in the law of New
15 York, where there often come up in cases where two
16 insurance companies arguably could cover, and if one
17 tenders the defense to the other and the other says,
18 no, from that point forward, a payment is not
19 voluntary.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.
21 I think we understood your point.

22 MR. KRAVITZ: Certainly. Thank you.

23 CHIEF JUDGE DIFIORE: Counsel.

24 MS. MONAGHAN: Good afternoon, Your Honors.

25 My name is Maura Monahan, I'm from Debevoise &

1 Plimpton and I represent respondent-defendant Akzo
2 Nobel Paints, along with my colleague, Mr. Adler.

3 The crux of appellant's claim here - - - because
4 I'd like to go to Judge Stein's question about is there
5 really a subrogation claim here. And there really isn't.
6 What there is is a priority dispute disguised as a
7 subrogation claim.

8 The crux of appellant's grievance here is that
9 they argue that ANP, an entity spun off from their insured
10 Millennium in 1986, should have to cover liabilities that
11 Millennium has paid before the liability insurers have to,
12 where those liabilities are arguably covered by both
13 insurance policies and indemnity in a contract.

14 Their argument is not that ANP is a tortfeasor,
15 which is the traditional subject of a subrogation claim.
16 They can't argue that ANP agreed to indemnify the
17 insurers, because it's clear that there is nothing in the
18 contract that says that ANP agreed to pay the insurers.

19 Instead, what they argue is that our wrongdoing
20 alleged is that we breached the contract by not paying
21 Millennium, and Millennium then turned to its insurers.
22 But Millennium turned to its insurers because its insurers
23 wrote policies covering these liabilities during the
24 subject periods.

25 JUDGE STEIN: But that is true in any

1 subrogation claim; isn't it?

2 MS. MONAGHAN: No, I don't think so. In
3 this case, their argument is that the wrongdoing was
4 the breach of the contract. But the breach of the
5 contract, they are asserting, is that we didn't pay
6 them first. But Millennium has never argued that
7 they were entitled to indemnity for amounts covered
8 by the insurance policies. Quite to the contrary,
9 Millennium has always taken the position that the
10 insurance policies respond to these liabilities
11 first. And that's consistent with what - - -

12 JUDGE PIGOTT: Well, if they respond to it
13 first, they can still come after you, right? In
14 other words, they pay the claim and then they come
15 after you because it's your responsibility.

16 MS. MONAGHAN: No, because in this case,
17 it's not our responsibility. We were not - - -

18 JUDGE PIGOTT: Well, that's your argument,
19 but it's - - - but it's not an anti-subrogation
20 argument, it's an argument that you're not an insured
21 and they paid their - - - for and on the behalf of
22 their insured, and they're coming after you, because
23 it's your fault.

24 MS. MONAGHAN: No, no, no, they are not
25 arguing - - - and you can ask Mr. Kravitz when he

1 gets up on rebuttal; they are not arguing that the
2 underlying lead liabilities are Akzo Nobel's fault.
3 What they are arguing is that the 1986 contractual
4 indemnity, given decades after they wrote these
5 policies to their insured, entitles them to step into
6 their insured's shoes and sue us on the contract.

7 JUDGE PIGOTT: Well, that is what I meant;
8 I didn't - - - I didn't - - - I wasn't talking about
9 - - -

10 MS. MONAGHAN: But the contract itself
11 makes clear that that indemnity is net of insurance.
12 The only issue that was dis - - -

13 JUDGE PIGOTT: That's an argument, but it's
14 not an anti-subrogation argument, right?

15 MS. MONAGHAN: It's not an anti-subrogation
16 rule argument, it's an argument against the
17 application of subrogation in the first instance.

18 There are two pathways this court can take
19 to affirmance here. One is to do what the lower
20 courts did and find that the anti-subrogation rule
21 applies. We admit it is, to the Judge's point, a
22 half-step removed from being an insured, because we
23 were a business that was insured at the time the
24 policies were written. 1986, we were spun off, but
25 that shouldn't create a right to subrogation. The

1 issue that the Ohio Supreme Court addressed was
2 whether Akzo Nobel could make a claim against the
3 policies after the 1986 spin-off, not whether the
4 insurers could make a claim against Akzo Nobel.

5 There are provisions in the contract that
6 make clear that this indemnity only kicks in after
7 the insurance policies have been exhausted. And you
8 can see that in the side letter agreement which
9 provided that ANP would get the benefit of any policy
10 of an insurance.

11 JUDGE STEIN: And there - - - hasn't there
12 been a court determination that Hanson didn't have
13 the authority to make that agreement?

14 Hanson could not convey the policies themselves;
15 that's what the Ohio Supreme Court held. But what the
16 side letter agreement did - - - and Millennium is Hanson
17 for these purposes, because the side letter agreement was
18 novated from Hanson to Millennium - - - Millennium gave
19 ANP a right from Millennium that Millennium would look in
20 the first instance to its insurers and give Akzo Nobel the
21 benefit of any policy of insurance that applied.

22 JUDGE FAHEY: You know why you're losing me
23 in the argument? Because it's hard for me to tell,
24 are you saying that - - - that you are protected by
25 the anti-subrogation rule or not?

1 MS. MONAGHAN: Yes, we are. We are saying
2 there is two paths to affirmance. One is there
3 shouldn't be a subrogation claim. But if there was a
4 proper subrogation claim, then the anti-subrogation
5 claim should apply, because you can't have it both
6 ways. You can't say that this spin-off transaction
7 subjects us to a subrogation claim, but prevents us
8 from taking advantage of the insurance policies that
9 existed at the time. We're saying that if you're
10 looking at the proper time period - - -

11 JUDGE FAHEY: So - - - all right, so - - -
12 right. So either - - - either - - - if the
13 subrogation rule applies and you're covered by the
14 insured - - - if it doesn't apply, you're covered by
15 the insurance; anti-subrogation applies, then you're
16 out.

17 MS. MONAGHAN: Yes, exactly. In other
18 words, there - - - if there - - -

19 JUDGE STEIN: The question is which time
20 period we look at. Do we look at the time period
21 when the insurance policy was in place, or do we look
22 at the time period when - - - when the insurer is now
23 attempting to subrogate you in?

24 MS. MONAGHAN: You look at the time that
25 the pol - - -

1 JUDGE STEIN: Is that the question?

2 MS. MONAGHAN: That is a question - - -

3 JUDGE STEIN: I know what your argument is;
4 I'm just wondering what the question is.

5 MS. MONAGHAN: I think that is a question,
6 and I think the answer is clear that you are supposed
7 to look at the time that the insurance policy was in
8 place and was written; that's the time that the
9 economic expectations of the insurer and the insured
10 were set. And it is also consistent with the Beth
11 Abraham case.

12 It also reflects the reality that when the
13 insurance policy is written, there are subsequent
14 events that can occur. So you can think about, for
15 example, a homeowner's policy written to a husband
16 and wife who subsequently divorced. They might agree
17 in the divorce that one party retains the insurance
18 coverage, and that might mean that the other spouse
19 can't make a claim against that insurance policy
20 thereafter, but it shouldn't mean that the other
21 spouse has suddenly become subject to claims by the
22 insurer to not only not collect money from the
23 insurer, but pay money to the insurer.

24 JUDGE PIGOTT: Yeah, but that's not quite
25 the same. I mean, if you add a stranger to the

1 homeowner's policy - - - in other words, somebody
2 bought your house, and you say, well, anything that
3 happens is going to be covered by my insurance. All
4 right. And then something happens, and your
5 insurance pays it but say, wait a minute, this was a
6 subsequent purchaser who was at fault here. They can
7 sue the subsequent purchaser.

8 MS. MONAGHAN: If the - - - if the
9 subsequent purchaser was at fault, and was a
10 tortfeasor, and was a true third-party stranger to
11 the contract, then that fits within the outlines of
12 the subrogation law as outlined by this court. But
13 that's not the circumstance we have here.

14 JUDGE PIGOTT: Well - - -

15 MS. MONAGHAN: Akzo Nobel is not - - - this
16 is not a case where the argument is - - -

17 JUDGE PIGOTT: Well, that's - - - that's
18 what - - -

19 MS. MONAGHAN: - - - oh, the lead
20 liabilities actually belong to Akzo Nobel.
21 Millennium was sued in the underlying cases; the
22 insurers had to respond because Millennium was being
23 subject to claims of liability. Akzo Nobel is just a
24 more remote successor. So I don't - - - I don't
25 think that that is exactly the same.

1 I would also note that there is language from
2 this court in the FDIC v. Anderson case, in which the
3 court said, in fairness, a compensated insurer should bear
4 the loss, rather than a contractual indemnitor. That's
5 the same pronouncement that was made in the Viacom case.
6 And in the ELRAC case, which is another one of these car
7 rental cases, Judge Kaye, writing for this court, said
8 that the car rental company could only look to the
9 indemnity after its self-insurance limits had been
10 exhausted.

11 JUDGE PIGOTT: That's statutory here in New
12 York.

13 MS. MONAGHAN: Yes. That was the basis of
14 it - - -

15 JUDGE PIGOTT: That's not - - - was not
16 contractual.

17 MS. MONAGHAN: - - - that it was - - - it
18 was based on the statutory requirement that they
19 carried the insurance up to the limit of the Vehicle
20 and Traffic Law. But nonetheless, as a policy
21 matter, they made it clear that the insurance comes
22 before the contractual indemnity.

23 The appellants have cited numerous cases that
24 say that a third-party stranger to the contract is not
25 properly part of the anti-subrogation rule. But that's

1 not the circumstance that Your Honors are dealing with
2 here. Here, the case is not, you know, is the enchanted
3 evening stranger across the room subject to a subrogation
4 claim, but is the former spouse subject to the - - -

5 JUDGE PIGOTT: Let's take the former
6 spouse. If he - - - even in that situation, there
7 may be situations where - - - let's assume the former
8 spouse is - - - is guilty of some tort - - - not
9 negligence, but intentional tort.

10 MS. MONAGHAN: Uh-huh.

11 JUDGE PIGOTT: All right. You don't get
12 coverage.

13 MS. MONAGHAN: During the policy period?

14 JUDGE PIGOTT: Right.

15 MS. MONAGHAN: When did this tort take
16 place?

17 JUDGE PIGOTT: Right. During the policy
18 period. I mean, even after the divorce you don't get
19 covered, because it doesn't cover intentional acts.
20 So it's not automatically anti-subrogation because he
21 can say, well, I was married to her during the policy
22 period, and she's got the house, and I get covered by
23 the house, and therefore you have got to pay. That's
24 why I say, it's not that easy on the anti-
25 subrogation; it depends on what ANP was doing.

1 MS. MONAGHAN: But I think - - - I - - -
2 respectfully, Your Honor, I don't think that that is
3 at all a question that's implicated here because I
4 believe that if you ask the insurance counsel - - -

5 JUDGE PIGOTT: No, I'm just - - - I'm just
6 challenging your analogy, and I know they all limp.
7 But I - - - you just can't say "because, therefore".

8 MS. MONAGHAN: Here, the argument is not
9 that the paint company had it - - - I think the
10 insurers would know that had the paint company
11 remained within the insured entity, they would have
12 no subrogation claim. So it's not similar to your
13 intentional tort theory, where they would say, it's
14 outside what would apply in that case. Their only
15 argument is that the 1986 transaction severed the
16 relationship between Akzo Nobel and the insured
17 entity such that the anti-subrogation rule doesn't
18 apply.

19 JUDGE FAHEY: Well, the way I saw it - - -

20 MS. MONAGHAN: That doesn't - - -

21 JUDGE FAHEY: Well, slow down.

22 MS. MONAGHAN: I'm sorry.

23 JUDGE FAHEY: But, the way I saw it was
24 that, when Hanson came in and took over SEC as - - -
25 in a hostile takeover, that that was the breakup

1 point. And I thought that's - - - wasn't that what
2 the Ohio Court said?

3 MS. MONAGHAN: What the Ohio Court held was
4 that the - - - the insurance policies at issue were
5 not transferable. They had a consent requirement.

6 JUDGE FAHEY: And that was the point,
7 though, that they identified that they were not
8 transferable.

9 MS. MONAGHAN: Yes. The point - - -

10 JUDGE FAHEY: Is that your reading of it?

11 MS. MONAGHAN: Yes. The point at which
12 they became nontransferable - - - the transaction at
13 issue involved a drop down of assets and liabilities
14 into newly created companies and then the companies
15 were spun off - - -

16 JUDGE FAHEY: So Millennium was post H - -
17 - post HSCM-6 in its creation in Hanson and the
18 Hanson takeover of SEC.

19 MS. MONAGHAN: Well, actually what happened
20 was, SCM created twenty fan companies.

21 JUDGE FAHEY: I understand.

22 MS. MONAGHAN: One of them became
23 Millennium.

24 JUDGE FAHEY: Right.

25 MS. MONAGHAN: The other one became Akzo No

1 - - - another one of the other ones became Akzo
2 Nobel.

3 JUDGE FAHEY: Right.

4 MS. MONAGHAN: Akzo Nobel was thereafter
5 sold to a company called ICI. So when they say that
6 Akzo Nobel is the purchaser of the paint business,
7 that's not actually correct, technically. What a - -
8 -

9 JUDGE FAHEY: No, I agree with you on that.
10 But it's - - - it's still - - - which still brings us
11 back to the breakup point beyond which the coverage
12 doesn't carry because arguably it's not a covered
13 person.

14 MS. MONAGHAN: That's exactly the same
15 thing that happened in the Beth Abraham case, where
16 the doctor at issue had left the hospital's
17 employment by the time the litigation arose, and in
18 fact, had never had a claim against the hospital's
19 insurance for his own professional liability.
20 Instead, he had carried a separate policy. The
21 court, in that instance said, no, what we're going to
22 look at is what was the doctor's status at the time
23 of the conduct giving rise to the claim.

24 That means looking at what ANP's status was at
25 the time of the 1962 to 1970 period that these policies

1 cover. And at that point in time, indisputably, the
2 paint business was covered.

3 If I may just take one second to address the
4 voluntary-payment question. It's very clear that the Ohio
5 Court did find that the payment was voluntary. Frankly,
6 we were surprised by our adversary's claim to it because
7 their own corporate rep, at his deposition, indicated that
8 they would only be seeking subrogation for that claim if
9 the Ohio court determined that there was coverage. We
10 have submitted that deposition transcript as part of the
11 appendix and I think it makes it quite clear that that was
12 their theory, up until they found out that they couldn't
13 claw back the payment from the insured.

14 JUDGE PIGOTT: Was there a reservation of
15 rights?

16 MS. MONAGHAN: There was an argument about
17 whether the reservation of rights was effective.

18 JUDGE STEIN: And we - - - do we get to
19 look at the circumstances under which they made the
20 payments?

21 MS. MONAGHAN: Well, the circumstances
22 under which they made the payment were to foster this
23 settlement. But the argument - - -

24 JUDGE STEIN: Well, if we take their
25 version of it, it was under certain economic threats.

1 MS. MONAGHAN: That's absolutely not the
2 case. And one way in which you can be assured that
3 that is not the case is that there were other
4 insurers, not in this case, who not only made a
5 contribution to the settlement without making a
6 subrogation claim against ANP, they joined in
7 Millennium's release of any claims under the
8 indemnity against ANP, without payment of any
9 compensation. So clearly, the other insurers did not
10 feel that maintenance of the subrogation claim was a
11 key to their decision whether to contribute to the
12 settlement or not.

13 What I heard counsel saying is, it looked
14 like a good settlement and they didn't want to lose
15 the benefit of it. Their complaint is that they
16 couldn't have it all ways. They couldn't both get
17 the finality and benefit of the settlement, and
18 pursue their insured by denying coverage, and pursue
19 subrogation against ANP; that's just not what the law
20 permits. The law suggests you take your choice; you
21 assess the circumstances and make your decision.
22 That's what the Ohio Court held them to, the decision
23 that they made.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 MS. MONAGHAN: Thank you, Your Honor.

1 CHIEF JUDGE DIFIORE: Mr. Kravitz.

2 MR. KRAVITZ: Your Honor, a few points.

3 Let me start with the last one first. In terms of
4 the issue in the - - - in the coverage case include -
5 - - about Santa Clara - - - I'm now reading from page
6 A1200, bottom paragraph. "The issue before this
7 court for summary judgment is whether an insurer can
8 create a valid right to reimbursement of a settlement
9 payment based solely on a unilateral reservation of a
10 right to seek repayment and over an explicit
11 objection by the insured." This court finds that it
12 cannot. That's what the issue was there - - - I
13 mean, Mr. Naunton and I were there, we argued it, and
14 that's what the issue was.

15 Also, I'm - - - just to correct the record in
16 terms of what our corporate rep said. What our corporate
17 rep said was that if we establish that there's no coverage
18 for the Santa Clara case and we get the money back, we
19 won't seek a double recovery by also seeking subrogation.
20 That's what he said, that's at record A1069, and I would
21 refer the court there, so as to that.

22 Let me just talk about the - - - this thing
23 about the time period. What we were talk - - - what we're
24 talking about in the transaction was that - - - that the
25 old Glidden company had certain operations. One of the

1 things they did was they made paint, they had a plant,
2 they had fac - - - they had machines, and things like
3 that. The insureds, until 1986, were Glidden, and then
4 after 1967, a division of SCM. The machines and the
5 factory building, they were never an insured - - - never
6 an insured. ANP had no connection to this until 1986. So
7 that the notion that they somehow were an insured at the
8 time, that's just absolutely not true.

9 JUDGE ABDUS-SALAAM: Well, it's - - - it's
10 - - - that may be true, and I'm not going to dispute
11 counsel that they - - - they didn't exist until
12 essentially 1986, for this case, right? So - - - but
13 the point I thought counsel was making is that the
14 injury occurred during the policy period and that,
15 you know, because they were successors to Millennium,
16 that they should be covered by the insurance that
17 they are now seeking.

18 MR. KRAVITZ: Right. Well, actually
19 they're not successors to Millennium. What happened
20 was that - - - and I also want to clarify one thing
21 here because it's a bit confusing. But just - - -
22 and I'm going to start with that fact which is that,
23 the cost that we are talking about here, are costs
24 associated with lawsuits against Millennium - - -

25 JUDGE ABDUS-SALAAM: Uh-huh.

1 MR. KRAVITZ: - - - which is the insured.
2 We are not talking about a case arising from the
3 historic operations against ANP. So that - - - so
4 what happened is, Millennium, our insured, got sued
5 for things arising from the historic operations.
6 Okay. Then, under the indemnification agreement,
7 which came into effect in 1986, we said that ANP owes
8 that money back to us under a subrogation theory.

9 So we are not talking about a case where
10 there was a claim from the historic operations
11 against ANP; that's not this case. Now, it's
12 confusing, and a lot of the language in the briefs
13 isn't that precise, but I want to make sure that - -
14 - that you understand that this isn't a situation
15 where there was that transaction in '86, and then
16 there's the claim against ANP based on something that
17 happened back then; that is not true.

18 And let me - - - let me also go on and say one
19 thing about the Glidden decision. Okay. So what happens
20 is, that you have this transaction in 1986, and ANP's
21 predecessor is an asset purchaser. The law is quite clear
22 that an asset purchaser doesn't get insurance rights;
23 that's a law in New York, and it's also law in Ohio. And
24 what Glidden decided - - - the Glidden decision decided
25 two things, not just one thing.

1 One is, when you look at the contract documents,
2 the accusation documents, it did not transfer the
3 insurance. And in fact, if you look at the assets that
4 were distributed to HSCM-6, which is the entity that - - -
5 that ANP's predecessor bought, it specifically says, we
6 are excluding the insurance policy. So they bought a
7 company that did not have that. That was one holding; the
8 contract documents don't transfer the insurance policy.

9 Second holding is, as an asset purchaser, by
10 operation of law, you don't get contract rights. Okay.
11 So it's two-fold; it's not just the contract documents,
12 but it's also by operation of law. This party was never
13 an insured, they weren't an insured before, and they
14 aren't an insured after. This is a classic subrogation
15 issue; we covered our insured and we have an
16 indemnification right against this third party.

17 JUDGE FAHEY: Let me ask this - - - Judge,
18 if it's all right, because the red light is on.
19 HSCM-6 - - -

20 MR. KRAVITZ: Yes.

21 JUDGE FAHEY: We've got the Glidden assets
22 in the - - - when they took over.

23 MR. KRAVITZ: Some of them.

24 JUDGE FAHEY: Okay. Were - - - was - - -
25 the way I read the flow from there to ANP is that ANP

1 is essentially a successor to HSCM-6; would you agree
2 with that?

3 MR. KRAVITZ: Yes. I think - - - I think
4 that's fair enough.

5 JUDGE FAHEY: Okay. All right.

6 MR. KRAVITZ: I mean, it's complicated, but
7 - - -

8 JUDGE FAHEY: All right. Yeah, I
9 understand you, believe me, I understand. But - - -
10 we all understand. So if HSCM-6 is a successor to -
11 - - or ANP is the successor to HSCM-6, then was HSCM
12 covered by the policy that was in place? If they - -
13 - if HSCM had been sued in '87, would they have been
14 covered by the policy that was in place?

15 MR. KRAVITZ: And I think you're saying
16 HSCM-6 - - -

17 JUDGE FAHEY: 6. This - - -

18 MR. KRAVITZ: Absolutely not. And - - -

19 JUDGE FAHEY: All right. And why is that?

20 MR. KRAVITZ: Well, because if you look at
21 the distribution agreement, I think that if you - - -
22 I think it - - -

23 JUDGE FAHEY: By the "distribution
24 agreement" you mean the breakup agreement into - - -

25 MR. KRAVITZ: Yeah, yeah - - -

1 JUDGE FAHEY: - - - different companies?

2 MR. KRAVITZ: - - - what happened was that

3 when he - - -

4 JUDGE FAHEY: Slow down. You mean the
5 breakup agreement by the twenty different companies -

6 - -

7 MR. KRAVITZ: Yes.

8 JUDGE FAHEY: - - - for HSCM?

9 MR. KRAVITZ: Yes.

10 JUDGE FAHEY: All right.

11 MR. KRAVITZ: I - - - Yes.

12 JUDGE FAHEY: Okay.

13 MR. KRAVITZ: The - - - when Hanson came in
14 and decided to liquidate SCM - - -

15 JUDGE FAHEY: Uh-huh.

16 MR. KRAVITZ: - - - and the assets went
17 into these twenty fan companies - - -

18 JUDGE FAHEY: Right.

19 MR. KRAVITZ: - - - one of which was a
20 HSCM-6, and one of which was HSCM-20 - - -

21 JUDGE FAHEY: Right.

22 MR. KRAVITZ: - - - 20 is the one that
23 became Millennium, 6 became ANP. 20 held the stock
24 of 6. So what happened is, ANP's predecessor came
25 and bought the stock of 6 from 20.

1 JUDGE FAHEY: Right. But the point is, is
2 that the Ohio Court's - - - that's why they focused
3 in as Hanson as the - - - as the - - - as the party
4 that did not have coverage and that was never a
5 covered insured - - -

6 MR. KRAVITZ: Well, I - - -

7 JUDGE FAHEY: - - - because that's the
8 point that there was a break in coverage.

9 MR. KRAVITZ: I think that's right. I
10 think that what happened is when the assets of SCM
11 got distributed - - - there really are two points to
12 this - - -

13 JUDGE FAHEY: Okay.

14 MR. KRAVITZ: - - - and then I will sit
15 down because the light is on.

16 JUDGE FAHEY: Go ahead.

17 MR. KRAVITZ: But the first is that when
18 the assets of SCM got distributed to these twenty
19 companies, they specifically excluded the policies in
20 what went into HSCM-6. And you can see it at A57 and
21 A63; I mean, it's clear as a bell. That's number
22 one.

23 Number two, was there was this side letter. And
24 the side letter was from Hanson, which didn't have the con
25 - - - the right to transfer the policies, and that was

1 ineffective.

2 JUDGE FAHEY: I see. Thank you.

3 CHIEF JUDGE DIFIORE: Thank you.

4 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Millennium Holdings LLC v. The Glidden Company, No. 38 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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