2012 IL App (2d) 111025-U
Nos. 2-11-1025 & 2-11-1178 cons.
Order filed December 26, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

REXNORD CORPORATION, Plaintiff-Appellant, v. AMERICAN EMPLOYERS INSURANCE COMPANY, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 03-MR-742 Honorable Terence M. Sheen, Judge, Presiding.

EMPLOYERS INSURANCE COMPANY OF WAUSAU, Plaintiff-Appellant, v. REXNORD INDUSTRIES, LLC f/k/a Rexnord Corporation, Defendant (RHI Holdings Inc., In Its Own Right and As the Real Party-In-Interest In Place of Northwestern National Insurance Company, The Fairchild Corporation, American Employers Insurance Company, Defendants-Appellees).	))))))))))))))))	Appeal from the Circuit Court of Du Page County. No. 03-MR-742 Honorable Terence M. Sheen, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's entry of summary judgment in favor of appellees and against appellants was affirmed where there was no genuine issue of material fact as to which entity had rights under the insurance policies at issue, and appellees were entitled to judgment as a matter of law.

¶ 2 In this insurance coverage dispute case, Employers Insurance Company of Wausau (Wausau) and Rexnord Industries, LLC, f/k/a Rexnord Corporation (Rexnord[1]) took the position that Rexnord was entitled to coverage under several policies issued by Wausau and American Employers Insurance Company (AEIC). The policies covered Rex Chainbelt Inc. and Rexnord Inc. as the named insureds from 1953 through 1977. Rexnord Inc.'s ultimate successor in interest, RHI Holdings Inc., a subsidiary of The Fairchild Corporation, also claimed rights under the policies. Wausau, Rexnord, and RHI/Fairchild each filed a declaratory judgment action, and the trial court consolidated them. Upon motions for summary judgment by all of the parties, the trial court entered summary judgment in favor of Fairchild[2] and AEIC and against Wausau and Rexnord. Wausau and Rexnord appeal. For the following reasons, we affirm.

[1]Rexnord will be used to denote only this entity. It is not to be confused with Rexnord Inc. or Rexnord Holdings Inc., discussed infra.

[2]Both RHI and The Fairchild Corporation filed for bankruptcy during the pendency of the summary judgment motions. As a result, the Fairchild Liquidating Trust was created in 2010 and was substituted for RHI/Fairchild in the pending declaratory judgment actions. For ease of discussion, we will refer generally to these entities as "Fairchild."

¶ 3 BACKGROUND

¶ 4 From 1953 through January 1, 1972, AEIC issued several comprehensive general liability insurance policies covering "Rex Chainbelt, Inc. and Subsidiaries" as the named insured. Rex Chainbelt was comprised of numerous divisions, one of which was its mechanical power division, located at the Ellsworth Industrial Park in Downers Grove, Illinois. Rex Chainbelt subsequently changed its name to Rexnord Inc. and continued operation of its mechanical power division at the Ellsworth site. From 1972 through 1977, Wausau issued several insurance policies covering Rex Chainbelt and, after the name change, Rexnord Inc. as the named insured.

¶ 5 In late 1987, Rexnord Inc. was acquired by Banner Industries. To finance the acquisition, Banner orchestrated certain asset sales whereby three of Rexnord Inc.'s divisions were "spun-off" into three different subsidiary corporations created for this purpose. As reflected in an August 16, 1988, "Bill of Sale, Assignment and Assumption Agreement" between Rexnord Inc. and Rex-PT Inc., the assets of the mechanical power division were sold to Rex-PT, which continued to operate at the Ellsworth site. Section 1.2 of the bill of sale, entitled "Transfer of Assets," transferred, assigned, and conveyed to Rex-PT:

> "all of the assets, properties, rights and interests of every kind and description existing as of the date hereof that relate to, have been or are used in, or have arisen or arise out of the Business as conducted by Rexnord [Inc.] prior to the date hereof, other than the rights and properties identified in Section 1.3.[3]"

The "Business" was defined in section 1.1 as "the business conducted by Rexnord [Inc.] immediately

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[3]Section 1.3 identified the "[r]etained [a]ssets," as corporate records, Rexnord names, and tax refund claims.

prior to the date hereof as the Rexnord [Inc.] Mechanical Power Division." Section 1.2 further provided that "[w]ithout limiting the generality of the foregoing, the Acquired Assets shall include the following" as delineated in subsections (a) through (p). Those subsections described various types of assets such as fee property, leased property, inventory, accounts receivable, and intellectual property rights. Subsection (j) addressed "Contracts" and stated:

> "Subject to Article II,[4] all rights and benefits of Rexnord [Inc.] in, to or under licenses, contracts, agreements, commitments and undertakings relating to the Business, whether oral or written, to which Rexnord [Inc.] is a party on the date hereof or by which any of the Acquired Assets are bound, including, without limitation, *** (iv) all rights of Rexnord [Inc.] as the insured under the insurance policies set forth on the Schedule entitled 'Insurance Policies' attached hereto ***."

No schedule was attached.

¶ 6 Simultaneously with the asset sales of the three divisions, the remaining divisions of Rexnord Inc. were merged into Rexnord Holdings Inc., which later became RHI Holdings Inc., a subsidiary of The Fairchild Corporation (all of which are herein referred to as Fairchild).

¶ 7 In the meantime, Rex-PT changed its name to Rexnord Corporation, which later became Rexnord Industries Inc., and finally, Rexnord Industries, LLC (herein referred to as Rexnord).

¶ 8 In 2002, groundwater contamination was discovered near the Ellsworth site. A portion of the contamination was alleged to have come from Rexnord's facility. As a result, over the next few years, Rexnord was named as a defendant or third-party defendant in numerous suits in both state

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[4]Article II addressed assets that might be nonassignable under contractual consent-to-assign provisions if Rexnord Inc. was unable to obtain consent from third parties.

and federal court, including a cost recovery suit filed by the Illinois Environmental Protection Agency, three federal class action suits, a personal injury action, and a wrongful death claim. Rexnord also entered into agreements with the United States Environmental Protection Agency (U.S. EPA), in which Rexnord contributed to the cost of connecting affected homeowners to a public water supply and of conducting further studies of the groundwater contamination. Rexnord subsequently filed claims against Fairchild (pursuant to indemnity provisions in the August 16, 1988, bill of sale and a December 2, 1993, purchase agreement in which Fairchild sold its Rexnord stock).[5]

¶ 9 Both Rexnord and Fairchild tendered defenses in the various actions to both Wausau and AEIC. Wausau defended Rexnord under a reservation of rights and made indemnity payments in a number of cases but refused to defend Fairchild. AEIC did not provide a defense for either Rexnord or Fairchild. AEIC investigated the nature of its obligations until, in 2006, it determined that Rexnord was not an insured under its policies.

¶ 10 On January 15, 2003, Rexnord filed a declaratory judgment action against AEIC (No. 03-L-61). On June 23, 2003, Wausau filed a declaratory judgment action against Rexnord, Fairchild, and AEIC (No. 03-MR-742). On February 19, 2004, Fairchild filed its own declaratory judgment action against AEIC and Wausau (No. 04-MR-208). The trial court consolidated all three of the cases into

[5]Two separate arbitration panels in Cook County, Illinois, and a Delaware trial court, made findings that 90% of the contamination occurred prior to August 1988, for which Fairchild was responsible. Rexnord was found liable for the 10% portion of the contamination that occurred after August 1988. Judgments were entered in favor of Rexnord, but its collection efforts were thwarted by the commencement of the Fairchild bankruptcy, which also resulted in a one-year stay of the present proceedings.

Wausau's action (No. 03-MR-742).[6] As discovery proceeded, it became apparent that the threshold issue in all of the cases was the question of which entity, Rexnord or Fairchild, had rights under the AEIC and Wausau policies.

¶ 11 All of the parties addressed this threshold question, among other issues, in motions for summary judgment. On June 30, 2011, the trial court heard argument on the issue of which entity had rights under the AEIC and Wausau policies. Rexnord and Wausau argued that Rexnord was entitled to rights under the policies based on a broad assignment of insurance policies in the August 16, 1988, bill of sale between Rexnord Inc. (which merged into what ultimately became Fairchild) and Rex-PT (Rexnord's undisputed predecessor in interest). Fairchild and AEIC responded that the bill of sale unambiguously did not assign any insurance policies because the referred-to schedule of policies was never attached. Rexnord also maintained that AEIC was estopped from asserting the policy defense of the identity of the insured because AEIC neither defended Rexnord under a reservation of rights nor timely filed a declaratory judgment action. AEIC asserted that estoppel was not applicable because there was never a contract between it and Rexnord.

¶ 12 The trial court entered its decision in a written order on June 30, 2011. The court initially addressed the August 16, 1988, bill of sale. The court noted that section 2.1 of the bill of sale precluded assignment of assets that were "not capable of being assigned" without the consent of a third party. Despite the consent-to-assign provisions in the Wausau and AEIC insurance policies and the undisputed lack of consent by either insurer, the court concluded that the policies were capable of being assigned because the purported assignment was made after the loss (*i.e.*, the groundwater

[6]In its June 2, 2005, answer to Wausau's fourth amended complaint, AEIC included a counterclaim seeking declaratory judgment as to the identity of the insured under its policies.

contamination) was incurred. The court next considered whether the bill of sale operated as an assignment of the rights under the policies. Reasoning that the lack of the attached schedule of insurance policies referred to in section 1.2(j)(iv) of the bill of sale created an ambiguity, the court considered extrinsic evidence to conclude that, as a matter of law, there was no intent to transfer the rights under the policies. The court further found that Rexnord did not have rights under the policies by operation of law because Fairchild obtained those rights as Rexnord Inc.'s successor in interest in the merger. Finally, the court rejected Rexnord's argument that AEIC was estopped from asserting policy defenses, finding that "no duty to defend arises when a non-insured tenders a claim and no contract exists." The court entered summary judgment in favor of Fairchild and AEIC, and against Rexnord and Wausau, on the issue of which entity had rights under the policies.

¶ 13 On September 19, 2011, on the parties' motions, the court entered an agreed order, which clarified its findings regarding the groundwater contamination. The court also included language pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), that there was no just reason to delay appeal of the June 30, 2011, order.

¶ 14 Rexnord and Wausau each timely appeal. We consolidated their appeals for purposes of decision.

¶ 15 ANALYSIS

¶ 16 Rexnord argues that the trial court erred in entering summary judgment in favor of Fairchild and AEIC and against Rexnord and Wausau because (1) AEIC was estopped from asserting policy defenses by its failure either to defend Rexnord under a reservation of rights or to timely file a declaratory judgment action; (2) the August 16, 1988, bill of sale unambiguously assigned to Rexnord all of the rights under the AEIC and Wausau insurance policies; and (3) assuming that the

bill of sale was ambiguous, the extrinsic evidence presented a genuine issue of material fact as to the parties' intent that precluded entry of summary judgment. Wausau filed briefs in which it joined Rexnord's arguments.

¶ 17 Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Pekin Insurance Co. v. Precision Dose, Inc.*, 2012 IL App (2d) 110195, ¶ 28. When parties file cross-motions for summary judgment, they agree that only a question of law is involved, and they invite the court to decide the issues based on the record. *Pekin Insurance Co.*, 2012 IL App (2d) 110195, ¶ 27. We review summary judgment rulings *de novo*. *Pekin Insurance Co.*, 2012 IL App (2d) 110195, ¶ 29.

¶ 18 We first address Rexnord's argument that the August 16, 1988, bill of sale unambiguously assigned the rights under the insurance policies at issue. "An assignment occurs when 'there is a transfer of some identifiable interest from the assignor to the assignee.' " *Brandon Apparel Group v. Kirkland & Ellis*, 382 Ill. App. 3d 273, 283 (2008) (quoting *Klehm v. Grecian Chalet, Ltd.*, 164 Ill. App. 3d 610, 616 (1987)). An assignment is a contract construed according to principles of contract law. *Amalgamated Transit Worker's Union, Local 241 v. Pace Suburban Bus Division*, 407 Ill. App. 3d 55, 60 (2011). Our goal in interpreting a contract is to effectuate the parties' intent. *McHenry Savings Bank v. Autoworks of Wauconda, Inc.*, 399 Ill. App. 3d 104, 111 (2010). To determine the parties' intent, the court looks to the plain and ordinary meaning of unambiguous terms. *McHenry Savings Bank*, 399 Ill. App. 3d at 111. However, if the contract is susceptible to more than one reasonable interpretation, it is ambiguous. *McHenry Savings Bank*, 399 Ill. App. 3d

at 111. We decide the question of ambiguity as a matter of law. *McHenry Savings Bank*, 399 Ill. App. 3d at 111.

¶ 19 Turning to the August 16, 1988, bill of sale in the present case, section 1.2 broadly provided for the transfer and assignment "of all of the assets, properties, rights and interests of every kind and description *** that relate to *** the [b]usiness ***." Before describing particular assets to be transferred in subsections (a) through (p), section 1.2 further stated that those subsections did not "limit[] the generality of the foregoing." Subsection (j) of section 1.2 provided for assignment of all rights under contracts, "including, without limitation, *** (iv) all rights of Rexnord [Inc.] as the insured under the insurance policies set forth on the Schedule entitled 'Insurance Policies' attached hereto ***." As noted above, no schedule was attached.

¶ 20 Rexnord argues that the specific provision—section 1.2(j)(iv), listing a category of assets—functions as an example but does not limit the broad assignment of assets which was effectuated by section 1.2' s introductory paragraph. Thus, according to Rexnord, the absence of the schedule is "legally irrelevant" and "merely means that the broad assignment language controls." Fairchild responds that the fact that no schedule was attached indicates that the plain meaning of the bill of sale was that no insurance policies were assigned.

¶ 21 Rexnord would have us ignore the specific provision in subsection (j)(iv) in favor of the general provision of section 1.2; this we cannot do. See *Nationwide Mutual Fire Insurance Co. v. T & N Master Builder & Renovators*, 2011 IL App (2d) 101143, ¶ 25 (noting that, where there is an inconsistency between provisions, it is well established that the more specific provision controls over the more general one). However, neither can we simply adopt Fairchild's reading that the "plain language" assigned no insurance policies, given the specific language explicitly addressing insurance

policies. That the specific provision assigning "all rights of *** the insured" was included suggests an intent to assign the rights under at least some insurance policies. Yet, the simultaneous absence of the referred-to attached schedule suggests an intent to not assign any policies. Because section 1.2(j)(iv)'s language was susceptible to more than one reasonable interpretation, it was ambiguous. *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007) ("If the language of the contract is susceptible to more than one meaning, it is ambiguous."). Accordingly, the trial court properly examined extrinsic evidence to ascertain the parties' intent. *Gallagher*, 226 Ill. 2d at 233 (the court may consider extrinsic evidence when construing an ambiguous contract); *Brandon Apparel Group*, 382 Ill. App. 3d at 286 (stating that, if the instrument at issue can be understood in more than one sense, evidence of extrinsic facts and circumstances is needed to determine the parties' intent).

¶ 22 The extrinsic evidence consisted of two other August 16, 1988, bills of sale, a management services agreement, and deposition testimony. We begin with the bills of sale and the management services agreement, as they shed light on the surrounding circumstances and were highly indicative of the parties' intent in executing the bill of sale at issue—the Rex-PT bill of sale. See *Gallagher*, 226 Ill. 2d at 233 ("We further note the long-standing principle that instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction are regarded as one contract and will be construed together.").

¶ 23 On the same day it executed the Rex-PT bill of sale, Rexnord Inc. also executed a bill of sale to ChemRex, to sell the assets of its chemical products division, and with Envirex, to sell the assets of its wastewater treatment division. Each of the three bills of sale, though not all involving Rex-PT, were part of the same overall plan to liquidate certain divisions of Rexnord Inc. The introductory paragraph of each bill of sale states that it was "made in connection with the [p]lan of

complete liquidation." Both the Envirex and the ChemRex bills of sale contain the same broadly worded section 1.2 as the Rex-PT bill of sale. Under Rexnord's reading of the Rex-PT bill of sale, all three entities (Rex-PT, Envirex, and ChemRex) would be entitled to rights under the policies at issue by virtue of the broad, general language. Rexnord contends that this was possible because each entity would have rights with respect to only its business (*i.e.*, the mechanical power division for Rex-PT, the wastewater treatment division for Envirex, and the chemical products division for ChemRex). Yet, as the trial court observed, this interpretation would be inconsistent with the language of section 1.2(j)(iv) in the Rex-PT bill of sale itself, which purports to transfer "*all* rights of *** the insured under the insurance policies set forth on the [s]chedule *** attached hereto ***."[7] (Emphasis added.) Clearly, all three entities could not each acquire all of the insured's rights.

¶ 24 Also on the same date that Rexnord Inc. executed the three bills of sale, it executed a management services agreement with Rex-PT. This agreement refers to Rexnord Inc.'s merger into Rexnord Holdings Inc., as well as to the bill of sale with Rex-PT. Services covered by the management services agreement included payroll, accounting, taxes, and insurance administration. Specifically, Rexnord Holdings Inc. (now Fairchild) was to obtain insurance coverage for Rex-PT (now Rexnord) either as an additional insured or under separate policies in exchange for Rexnord's payment. The agreement stated that "[m]any of the employees, assets and rights relating to these services were excluded from the [b]ill of [s]ale and transferred by Rexnord Inc. to [Rexnord] Holdings in the [m]erger."

¶ 25 Rexnord argues that the management services agreement pertained to only future insurance policies and had no bearing on the parties' intent as to the already-expired AEIC and Wausau

[7]Section 1.2(j)(iv) of the Envirex sale contained identical language and no attached schedule.

policies. Rexnord also notes that insurance policies were not listed as retained assets in section 1.3 of the Rex-PT bill of sale. Rexnord's construction requires that we read the retained assets described in section 1.3 of the Rex-PT bill of sale as exclusive, which is inconsistent with the clear language of the management services agreement describing particular assets as "excluded from the [b]ill of [s]ale and transferred by Rexnord Inc. to [Rexnord] Holdings in the [m]erger."

¶ 26 While not dispositive, the bills of sale and management services agreement, taken together, support the conclusion that there was no intent to transfer rights under any insurance policies. The discrete asset sales of three of the corporation's numerous divisions transferred only those assets related to each respective division's business. The merger of the remaining divisions, in conjunction with the management services agreement, whereby (what is now known as) Fairchild continued providing a significant amount of administrative services, including insurance, to (what is now known as) Rexnord indicate an intent to continue the practice of obtaining insurance as a corporate whole with the spun-off divisions (Rex-PT, Envirex, and ChemRex) to be covered thereunder after the asset sales.

¶ 27 Moreover, the deposition testimony in the record provides overwhelming evidence of an intent not to transfer any insurance policies. Initially, we note Rexnord's contention that the deposition testimony was inadmissible on the issue of the parties' intent. In support of its position, Rexnord relies on *Rakowski v. Lucente*, 104 Ill. 2d 317 (1984), *Saddler v. National Bank of Bloomington*, 403 Ill. 218 (1949), and *Meister v. Henson*, 151 Ill. App. 3d 1059 (1987). In each of these cases, the court, faced with an unambiguous contract, held that the parties' intent must be determined from the face of the document without resort to extrinsic evidence. *Rakowski*, 104 Ill. 2d at 323; *Saddler*, 403 Ill. at 228-29; *Meister*, 151 Ill. App. 3d at 1063-64. In contrast to these

cases, the trial court in the present case properly considered extrinsic evidence to ascertain the parties' intent in light of the ambiguous bill of sale. See *Gallagher*, 226 Ill. 2d at 233 (the court may consider extrinsic evidence when construing an ambiguous contract).

¶ 28 The deposition testimony included that of Michael Alcox.[8] Alcox was Banner's chief financial officer. He testified that Banner acquired Rexnord Inc. in late 1987. For tax purposes, Banner planned to sell some of Rexnord Inc.'s 60-plus divisions to pay the debt it incurred in making the acquisition. The liquidation plan was not an arm's length transaction. Alcox explained that Banner controlled both sides of the transaction, stating, "We were dealing with ourselves."

¶ 29 The plan included the creation of three subsidiary corporations—Rex-PT, Envirex, and ChemRex. Three separate bills of sale were executed as "mirror transactions." Each of the three subsidiaries was to acquire the assets necessary to operate the business of the specific division from which it was derived. Alcox had the ultimate authority as to what assets were necessary to operate the subsidiaries as "stand[-]alone" businesses. The bills of sale were drafted as "cookie-cutter" documents before any details were known. Alcox testified that, even once the details were known, there was no need to delete irrelevant sections such as section 1.2(j)(iv) because "if there was no schedule attached, no insurance policies would have been conveyed." Alcox further explained that, although the corporation's insurance was generally obtained through master policies covering the entire entity, there could have been transferrable insurance policies that covered only one division, such as a worker's compensation policy. Simultaneously with the creation of the three subsidiaries,

[8]Alcox testified at a discovery deposition on September 11, 2006, and at a video-taped evidence deposition on March 16, 2009. Because his testimony was consistent between the two, we synthesize them.

Rexnord Holdings Inc. was created so that all of the remaining divisions could be merged into it. Rexnord Holdings, as the parent corporation to the subsidiaries, would continue to provide administrative services to the subsidiaries as Rexnord Inc. had previously done for the divisions.

¶ 30 Alcox testified that, at the time of the transactions, the then-current insurance policies remained in effect, and insurance continued to be obtained in master policies covering the corporation as a whole—including the subsidiaries. Alcox said that there was no intent to transfer any master policies, either current or historic, to a single division or subsidiary. Alcox further noted that such an assignment would have violated bank loan agreements because the banks "wouldn't have allowed any insurance coverage for the entire corporation to be passed to any individual component." He testified that, because Rexnord Inc. retained any past environmental liability, the idea of transferring historic policies that potentially covered that liability "begs to be ridiculous almost." Alcox said that if there had been a schedule of insurance policies that included a master policy, he would have "immediately objected." He explained:

> "Again, it just wasn't the intent of the deal to transfer master agreements. I have no stake in this. I mean, I don't really care who wins on this deal. But you're beating a dead horse. It was not the intent of the company to transfer master insurance policies covering 60 different corporations to one specific entity while retaining the environmental liabilities. I just don't even understand why you could assume that's the basis."

¶ 31 David Keen, in-house counsel for Rexnord Inc., testified that he recalled discussions about whether there were any insurance policies that could be transferred in the asset sales. He said that Rexnord Inc. would have been "loathe" to transfer policies potentially responsive to liabilities it was retaining. Keen said that he had no reason to believe that a schedule of insurance policies to be

transferred ever existed. He also testified that if transfer of a blanket policy to a single subsidiary had been attempted, it would have been "administratively difficult."

¶ 32 Ralph Adams, Rexnord's risk manager during the relevant time period, testified that he had prepared claims histories for prospective buyers as part of the due diligence process during the asset sales. He never saw a schedule of insurance policies to be transferred and was never asked to prepare one. It would have been unusual for someone else to have prepared the schedule without his knowledge. Adams believed that the schedule was never attached because of attorney error. Adams testified that he thought that both Rexnord and Fairchild could make claims under the historic policies, depending on which entity was found to be liable.

¶ 33 John Flynn, who characterized himself as Alcox's successor, testified that his understanding of the transaction was that either Fairchild or Rexnord had rights under the insurance policies depending upon who was liable for the claim at issue.

¶ 34 John Peterson was an attorney from an outside law firm involved in the due diligence process. He testified about a memo he had written in which he indicated that he had spoken with David Keen. Peterson wrote that Keen had informed him that insurance for the subsidiaries would be continued at the Banner level so there was no need for due diligence work on this aspect of the transaction.

¶ 35 We conclude that the extrinsic evidence overwhelmingly evinces a lack of intent to transfer the insurance policies at issue. Alcox's testimony was unequivocal and unrefuted. As Banner's chief financial officer, Alcox was the person with the ultimate authority as to which assets transferred in the transaction that was wholly controlled by Banner. Alcox explained that the intent was to transfer only those assets necessary to the subsidiary to operate as a stand-alone business.

Alcox testified that there was never any intent to transfer insurance policies covering the entire corporation to a single subsidiary. He explained that he would have objected to any attempt at such a transfer because it would have violated bank loan agreements. Alcox further testified that to think that the intent was to transfer historic insurance policies while retaining any past environmental liability almost "begs to be ridiculous."

¶ 36 We also note that Alcox's testimony that there was no intent to transfer master insurance policies was consistent with the Rex-PT bill of sale itself. Under section 3.2(a)(i) of the Rex-PT bill of sale, Rexnord Inc. (now Fairchild) retained undisclosed environmental liabilities, and, under section 4.1, it was obligated to indemnify Rex-PT (now Rexnord) against such loss. It would seem to defy common sense to agree to these provisions while simultaneously assigning away assets that could cover the liability. See *Quemetco, Inc. v. Pacific Automobile Insurance Co.*, 29 Cal. Rptr. 2d 627, 632 (Cal. Ct. App. 1994) (rejecting a claim of assignment for lack of the insurer's consent and noting that the assignment would have left the assignor without insurance to cover environmental claims for which it remained responsible). Furthermore, Alcox's testimony that only the assets necessary to operate the mechanical power division as a "stand[-]alone" subsidiary was consistent with section 1.2 of the bill of sale, which limited the assets transferred to those relating to the business and with section 1.1's definition of the business as that conducted as the mechanical power division. Similarly, Alcox's testimony that there was no intent to transfer master policies was consistent with the management services agreement wherein the parties treated insurance, payroll, accounting, and tax services, among other services, as shared assets that were excluded from the bill of sale.

¶ 37 Moreover, Alcox's testimony was corroborated by other deponents. Rexnord Inc.'s in-house

counsel, Keen, testified that, although there were discussions about whether any insurance policies could be transferred, Rexnord Inc. would have been "loathe" to transfer policies potentially responsive to liabilities it was retaining. Due-diligence attorney Peterson testified that, as reflected in a memo he wrote, although insurance was an item considered, the decision was made to continue insurance for the subsidiaries at the Banner level. Rexnord's risk manager, Adams, testified that he was never asked to prepare a schedule of insurance policies and that it would have been unusual for someone else to have done so without his knowledge, which further corroborates Alcox's testimony that there was no intent to transfer the policies.

¶ 38 Rexnord argues that the extrinsic evidence created a genuine issue of material fact as to the parties' intent. Rexnord points to Alcox's inability to remember specific details of the bills of sale, and Adams' and Flynn's belief that either Fairchild or Rexnord could make a claim on the policies. Alcox's inability to recall specific details, of whether a blank schedule or no schedule was attached, or the exact language of the ChemRex bill of sale,[9] had no bearing on the parties' intent regarding transfer of master policies, potentially covering retained liabilities, to subsidiaries. And, the belief expressed by Adams and Flynn, besides being purely speculative, was inconsistent with the language of section 1.2(j)(iv) assigning "all rights of *** the insured." Rexnord also points to several other documents prepared in connection with the asset sales such as the due diligence outline and closing document list, which indicate that insurance was considered. However, that the parties considered insurance for transfer does not mean that they ultimately decided to transfer it. Indeed, these documents are consistent with Keen's and Peterson's testimonies that the transfer of insurance

[9]While the Envirex bill of sale contained a section 1.2(j)(iv) identical to the Rex-PT bill of sale, Alcox's belief, that the ChemRex bill of sale did as well, was faulty.

policies was considered and rejected. Rexnord cites no evidence to contradict Alcox's clear testimony. Consequently, the evidence did not create a genuine issue of material fact as to the parties' intent about insurance policies. See *Illinois State Bar Ass'n Mutual Insurance Co. v. Frank M. Greenfield & Associates, P.C.*, 2012 IL App (1st) 110337, ¶ 17 ("[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." (quoting *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999))). Rather, the evidence overwhelmingly demonstrated a lack of intent to transfer the AEIC and Wausau insurance policies. Accordingly, Fairchild and AEIC were entitled to summary judgment on this issue as a matter of law. See *Richard W. McCarthy Trust Dated September 2, 2004 v. Illinois Casualty Co.*, 408 Ill. App. 3d 526, 535-36 (2011) ("[U]nder the unique circumstances of the present case, an exception to the general rule applies and summary judgment may be granted because the extrinsic evidence submitted by the parties leaves no genuine issue of material fact in dispute.").

¶ 39 Finally, Rexnord contends that the trial court erred in not applying the estoppel doctrine because AEIC's coverage defense, that it was not an insured under the policies, was subject to estoppel. An insurance company's obligation to provide a defense for its insured depends upon the allegations in the underlying complaint and the applicable provisions of the insurance policy. *Pekin Insurance Co.*, 2012 IL App (2d) 110195, ¶ 30. If the facts alleged are potentially within the policy's coverage, the duty to defend is triggered. *Pekin Insurance Co.*, 2012 IL App (2d) 110195, ¶ 30. An insurer cannot refuse to defend its insured once the duty to defend is triggered. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 150 (1999). Rather, the insurer must either defend under a reservation of rights or seek a declaratory judgment that there is no coverage. *Employers Insurance of Wausau*, 186 Ill. 2d at 150. An insurer that fails to take either of these steps

and is later found to have wrongfully denied coverage will be estopped from raising policy defenses to coverage. *Employers Insurance of Wausau*, 186 Ill. 2d at 150-51. It is important to note that the estoppel doctrine prohibits an insurer from refusing to defend *its insured* once the duty to defend is triggered. Thus, "two conditions must be met before an insurer's duty to defend arises: (1) the action must be brought against an insured, and (2) the allegations of the complaint must disclose potential coverage under the policy." *Employers Mutual Cos./Illinois Emcasco Insurance Co. v. Country Cos.*, 211 Ill. App. 3d 586, 591 (1991).

¶ 40 Here, the earliest complaint that could possibly have triggered AEIC's duty to defend Rexnord was the third-party complaint for contribution filed against Rexnord by the defendant in LeClercq v. The Lockformer Company (No. 00-C-7164, N.D. Ill.), which Rexnord tendered to AEIC on June 10, 2002.[10] The relevant portion of the complaint includes allegations against Rexnord Corporation, "an Illinois corporation." Yet, under the AEIC insurance policies, Rex Chainbelt, Inc., in Wisconsin (and its subsidiaries), was the named insured. Comparison of the complaint and the policies at issue reveals no indication whatsoever that the complaint was brought against an insured. See *Pekin Insurance Co.*, 2012 IL App (2d) 110195, ¶ 36 ("Illinois adheres to an 'eight corners' analysis when determining a carrier's duty to defend, where the court compares the four corners of

[10]We note Rexnord's February 28, 2002, tender to AEIC of a letter from the U.S. EPA requesting information regarding the groundwater contamination. However, the letter was not a suit that would trigger the duty to defend. See *Lapham-Hickey Steel Corp. v. Protection Mutual Insurance Co.*, 166 Ill. 2d 520, 532-33 (1995) (holding that a " 'suit' refers to a proceeding in a court of law" and that neither a "PRP" [potentially responsible person] letter from the EPA, a draft consent order, nor a no-action letter constituted a suit that could have triggered the insurer's duty to defend).

the underlying complaint with the four corners of the insurance policy to determine whether facts alleged in the underlying complaint fall within or potentially within coverage."). Similarly, from what we can glean from the record (and Rexnord does not argue otherwise), none of the subsequently-filed underlying suits was brought against Rex Chainbelt or a subsidiary. Rather, they were filed against either Rexnord Corporation, Rexnord Inc., or Rexnord Industries Inc. Thus, the duty to defend was not triggered. See *Employers Mutual Cos.*, 211 Ill. App. 3d at 591 ("If the allegations of the complaint reveal that the action was not brought against an insured or that there was no potential for coverage under the policy, there is no duty to defend the underlying action, and the insurer can justifiably refuse to defend."); *Federal Insurance Co. v. Economy Fire & Casualty Co.*, 189 Ill. App. 3d 732, 736 (1989) (holding that the court would not infer coverage from a complaint brought against the insured's son); *Murphy v. Peterson*, 129 Ill. App. 3d 952, 958 (1984) (same). Accordingly, the estoppel doctrine did not apply. *Employers Insurance of Wausau*, 186 Ill. 2d at 151 ("This estoppel doctrine applies only where an insurer has breached its duty to defend.").

¶ 41 Rexnord argues that, because AEIC took four years to decide that it was not an insured, the complaints in the underlying cases did not clearly exclude Rexnord from potential coverage under the policies. Rexnord asserts that, "as a matter of law," AEIC violated its duty to defend and was estopped from asserting that it was not an insured under the policies. Rexnord's argument misses the mark because it mischaracterizes the identity of the insured as a policy defense rather than as a threshold requirement necessary to trigger the duty to defend. In other words, Rexnord ignores that the underlying complaint tendered for defense must have been brought against an insured. Under the eight-corners rule, had AEIC compared the third-party LeClercq complaint with the policies and immediately denied coverage, it would have been in the right because the duty to defend was not

triggered where nothing indicated that the complaint was brought against an insured. That AEIC conducted a lengthy investigation, which became subsumed in the discovery process under the complicated facts of this case, does not compel the conclusion that AEIC was in the wrong.

¶ 42 Moreover, none of the cases upon which Rexnord relies involved underlying complaints brought against noninsureds. See *West American Insurance Co. v. J.R. Construction Co.*, 334 Ill. App. 3d 75 (2002) (when general contractor was sued and tendered its defense to its subcontractor's insurer, the court held that the insurer had a duty to defend because the general contractor was an additional named insured under the subcontractor's policy); *Aetna Casualty & Surety Co. v. O'Rourke Brothers, Inc.*, 333 Ill. App. 3d 871 (2002) (the issue was whether the claims brought in the underlying complaint against the named insured were covered occurrences under the policy); *Korte Construction Co. v. American States Insurance*, 322 Ill. App. 3d 451 (2001) (the issue was whether estoppel applied to an insurer that sought declaratory judgment in its affirmative defenses, rather than in a separate action of its own); *Central Mutual Insurance Co. v. Kammerling*, 212 Ill. App. 3d 744 (1991) (the issue was the allocation of defense costs between two insurers for an optometrist's defense in a malpractice suit brought against him and the vision center where the optometrist was a named insured).

¶ 43 Rexnord further relies on *La Grange Memorial Hospital v. St. Paul Insurance Co.*, 317 Ill. App. 3d 863 (2000). In *La Grange Memorial Hospital*, the underlying worker's compensation suit was brought by a therapist working in the hospital's physical therapy department, which was operated by Rehabilitation Services of Mid-America (RSMA) under a contract with the hospital. *La Grange Memorial Hospital*, 317 Ill. App. 3d at 865-66. Under the contract between RSMA and the hospital, RSMA agreed to indemnify the hospital for liability arising out of the contract. *La*

Grange Memorial Hospital, 317 Ill. App. 3d at 866-67. RSMA was insured by St. Paul. *La Grange Memorial Hospital*, 317 Ill. App. 3d at 867. The RSMA policy with St. Paul expressly covered not only RSMA as the named insured but also third-party beneficiaries, such as the hospital, that had a contract with RSMA. *La Grange Memorial Hospital*, 317 Ill. App. 3d at 870. The hospital filed a declaratory judgment action, arguing that St. Paul had a duty to defend it under the RSMA policy. *La Grange Memorial Hospital*, 317 Ill. App. 3d at 868. The trial court granted summary judgment to the hospital, and the appellate court affirmed. *La Grange Memorial Hospital*, 317 Ill. App. 3d at 865.

¶ 44 The appellate court noted that the policy did not require the named insured to seek approval of its indemnification contracts, to disclose the identities of the third parties it agreed to indemnify, or to require RSMA to name the third parties as additional insureds. *La Grange Memorial Hospital*, 317 Ill. App. 3d at 870. The court concluded, "St. Paul thus assumed the responsibility of providing defenses for certain unknown and unnamed third-party beneficiaries." *La Grange Memorial Hospital*, 317 Ill. App. 3d at 870. The court determined that, because it was clear that the underlying complaint was potentially covered under the policy, St. Paul's duty to defend had been triggered. *La Grange Memorial Hospital*, 317 Ill. App. 3d at 870. Given St. Paul's failure to either defend the hospital under a reservation of rights or file a declaratory judgment action, the court held that St. Paul had breached its duty to defend and was therefore estopped from asserting any defenses of noncoverage. *La Grange Memorial Hospital*, 317 Ill. App. 3d at 870.

¶ 45 Here, unlike in *La Grange Memorial Hospital*, AEIC did not assume any responsibility for any entities other than its named insured, Rex Chainbelt and subsidiaries. The underlying suits that Rexnord tendered to AEIC for defense did not name Rex Chainbelt or its subsidiaries as a defendant.

Nothing within the eight corners of the complaint and the policies indicated a potential for coverage. In contrast, in *La Grange Memorial Hospital*, the underlying suit named the hospital as the defendant, and the explicit terms of St. Paul's policy with RSMA provided for coverage of entities not expressly named in the policy. Thus, Rexnord's reliance on this case is misplaced.

¶ 46 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 47 Affirmed.