18-55810

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARROW ELECTRONICS, INC., a New York Corporation,

Plaintiff-Counter-Defendant-Appellant,

—v.—

LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts Corporation,

Defendant-Appellee,

TRAVELERS CASUALTY AND SURETY COMPANY,
FKA Aetna Casualty and Surety Company, AKA St. Paul Travelers,

Defendant-Counter-Claimant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR PLAINTIFF-COUNTER-DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiff-Appellant Arrow Electronics, Inc. discloses that it is publicly traded as "ARW." Arrow Electronics, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

This appeal presents one simple but immensely consequential question: did the District Court err by interpreting the parties' liability-insurance contracts with reference to California law, rather than Alabama law? If Alabama law applies, the defendant insurance companies must make good on their policies. By contrast, if California law applies—as the District Court concluded—the insurers can shirk millions of dollars of liability on a technicality.

Merely to state the facts of this lawsuit should make the answer obvious. Appellant seeks indemnification for losses it incurred because of a contamination incident at its industrial site in Alabama. The incident necessitated an investigation by Appellant in Alabama and triggered subsequent actions by Alabama regulators, who asserted violations of Alabama environmental law. Appellant resolved those claims by entering into an Alabama consent order requiring it to conduct monitoring and remediation activities in Alabama. Both the investigation and consent order have caused, and will cause, Appellant to incur significant costs in Alabama. The Alabama site where the incident occurred is expressly identified as a covered location in the relevant insurance policies. The policies also identify Appellant's Alabama employees and payroll, and they feature Alabama-specific riders defining certain terms for purposes of the insurers' Alabama obligations.

California's choice-of-law statute requires courts to interpret contracts with reference to the law of the state where the relevant contractual obligation was intended to be "performed." When it comes to liability-insurance contracts like those at issue here, California's courts have held that the "place of performance … is *the place of the insured risk*." Here, that place is Alabama—as the policies proclaim on their face. Moreover, as the state where the contamination occurred, and as the sovereign that asserted the underlying claims against Appellant, Alabama has, far and away, the greatest interest in applying its law to this dispute.

Yet, despite all this, the District Court applied the contradictory law of California—a state with no relationship to the underlying pollution incident and no interest in the availability of funds for its remediation, and whose only connection to this dispute is that the parties happened to sign the insurance policies there. This was error. The District Court's grant of summary judgment to the insurers should be reversed, and this case should be remanded with instructions to apply Alabama law to resolve the meaning of the disputed contract terms.

STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. § 1332(a) because this matter involves citizens of different states and the amount in controversy exceeds $75,000, exclusive of interest and costs. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because this is an appeal from a final judgment of a United

States district court. The District Court entered final judgment, disposing of all claims, on May 22, 2018. Arrow filed its notice of appeal on June 19, 2018, making this appeal timely pursuant to 28 U.S.C. § 2107(b).

STANDARD OF REVIEW

This is an appeal from the District Court's grant of a motion for summary judgment, which turned entirely on its choice-of-law determination. This Court reviews *de novo* both a district court's grant of summary judgment in general, and its choice-of-law analysis in particular. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 959 (9th Cir. 2017).

STATEMENT OF THE ISSUES

Did the District Court err in applying California's substantive law—rather than Alabama's—to interpret a contract insuring against liability at an industrial site in Alabama, in a dispute over recovery of costs incurred in Alabama in connection with alleged Alabama environmental-law violations at that Alabama site?

RELEVANT STATUTE

"A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Cal. Civ. Code § 1646.

STATEMENT OF THE CASE

A. The Contamination Incident At The Huntsville Facility

Wyle Laboratories ("Wyle"), a California company, formerly owned several manufacturing, research, and engineering facilities providing services for the aerospace, defense, and energy industries. ER 966–67. Among them was a 125-acre engineering and equipment-testing site located in Huntsville, Alabama (the "Huntsville Facility"). ER 966, 969–70. Plaintiff-Appellant Arrow Electronics, Inc. ("Arrow") is the successor-in-interest to Wyle, having acquired its stock and assets—including the Huntsville Facility—in 2000. *See* ER 39, 969.

At some point, Wyle's operations at the Huntsville Facility resulted in the unintended release of chemicals into the surrounding soil and groundwater. ER 84, 970. In 2000, the Alabama Department of Environmental Management ("ADEM"), a duly constituted agency of the State of Alabama, commenced an investigation into the incident pursuant to the Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 *et seq*. ER 82–83. ADEM contended that "[t]he release of chlorinated solvents at the [Huntsville] Facility represent[ed] a discharge of pollutants to waters of the State which is a violation of the Code of Alabama." ER 84. Between 2000 and 2015, ADEM required Wyle, and subsequently Arrow, to conduct regular groundwater and soil testing and monitoring. ER 82–85.

In 2015, Arrow entered into a Consent Order with ADEM "to resolve the alleged violations" of Alabama law. ER 85. ADEM agreed to the Consent Order "upon a determination that the terms [were] in the best interests of the citizens of Alabama." ER 84. Those terms required Arrow to, among other things, "continue semi-annual groundwater monitoring" at the Huntsville Facility; conduct "additional assessment activities"; and "undertake [contamination] abatement activities … until released in writing by [ADEM]." ER 85. Arrow has incurred, and expects to continue incurring, significant costs in connection with ADEM's investigation and its obligations under the Consent Order. ER 49–79, 972.

B. The Insurance Policies At Issue

To insure against risks arising from the operations at its facilities, including the Huntsville Facility, Wyle purchased comprehensive liability-insurance policies (the "Primary Policies") from Defendants-Appellees Aetna Casualty and Surety Company, now known as Travelers Casualty and Surety Company a/k/a St. Paul Travelers ("Aetna"), and Liberty Mutual Insurance Company ("Liberty") (together, the "Insurers"). The Primary Policies at issue here—20 in total—were issued for successive one-year periods between 1963 and 1986.[1]

[1] The portions of the Liberty Primary Policies lodged with the District Court appear at ER 106–505. The portions of the Aetna Primary Policies lodged with the District Court appear at ER 573–803. The parties stipulated below that the portions of the Policies not made part of the record are "not relevant" to the choice-of-law issue. D. Ct. Dkt. No. 83, ¶ 5.

As relevant here, the Primary Policies obligated the respective Insurer to "pay on behalf of [Wyle] all sums which [Wyle] shall become legally obligated to pay as damages because of … property damage" resulting from an "occurrence" (or, sometimes, an "accident") at a covered location. *See, e.g.*, ER 127, 580. Some, but not all, of the Primary Policies excluded coverage for damages arising from the release of contaminating chemicals or pollutants. However, each Policy containing such a pollution exclusion carved out an exception to that exclusion for contamination events that are "sudden and accidental" (*i.e.*, such events *would* be covered). *See, e.g.*, ER 123. The Insurers also agreed to "defend any suit against [Wyle] alleging" a covered instance of property damage. *See, e.g.*, ER 155, 580.[2]

Each of the Primary Policies, moreover, clearly obligated the Insurers to indemnify losses and defend claims arising out of Wyle's operations at the Huntsville Facility in particular. There is no doubt that the parties recognized and intended this at the time of contracting. Eighteen of the 20 Primary Policies explicitly named the Huntsville Facility in a "Schedule of [Insured] Locations." *See, e.g.*, ER 110, 575. The only two that did not—Aetna's 1970–71 Primary Policy, ER 751–803, and Liberty's 1981–82 Primary Policy, ER 349–84—made clear in other

[2] After 1986, the policies that the Insurers issued to Wyle contained an absolute pollution exclusion. *See, e.g.*, ER 910. Therefore, Arrow does not seek coverage under these policies. However, the absence of such an exclusion from the pre-1986 Primary Policies evidences that the parties did contemplate such coverage.

ways that the parties expressly contemplated coverage for the Huntsville Facility. The former (like most of the other Primary Policies) contained an endorsement defining "the Name of the Insured" as Wyle and its divisions, expressly including "Wyle Laboratories – Huntsville Facility." ER 783. And the latter (like many of the other Primary Policies) enumerated Wyle's Alabama payroll, ER 351; identified specific Alabama-based employees, ER 356; and amended definitions of certain terms specifically for purposes of the Insurer's Alabama obligations, ER 377.

To obtain coverage above the limits of the Primary Policies, Wyle obtained excess insurance policies from the Insurers (the "Excess Policies") (together with the Primary Policies, the "Policies") for a portion of the period at issue. From 1977 through 1986, Wyle obtained Excess Policies from Liberty that overlaid Liberty's own Primary Policies. ER 506–72. In addition, from 1980 through 1986, Wyle obtained Excess Policies from Aetna that overlaid Liberty's Excess Policies (which, in turn, overlaid Liberty's Primary Policies). ER 804–86. These Excess Policies covered the same risks as the underlying Primary Policies, except where expressly noted. *See, e.g.*, ER 522 (excluding from excess coverage "the Union Pacific Railroad contract"). The Huntsville Facility was not excluded from any of the Excess Policies.

None of the Policies contained a choice-of-law clause.

C. The Proceedings Below

Arrow notified the Insurers that the monitoring and remediation costs it had incurred in connection with ADEM's investigation and the resulting Consent Order qualified as covered "damages" under the Policies and called upon the Insurers to indemnify those losses. ER 88–105. The Insurers refused. Consequently, in July 2017, Arrow filed suit in the United States District Court for the Central District of California alleging breach of contract and seeking a declaratory judgment that Arrow is entitled to such indemnification.[3]

In April 2018, the Insurers moved for summary judgment on all of Arrow's claims. ER 961–63. They argued that Arrow's costs incurred in connection with the ADEM investigation and the Consent Order do not qualify as "damages."[4] Arrow cross-moved for partial summary judgment, arguing that these costs are indeed "damages."[5] ER 956–60. The parties agreed that the answer to this question depends on which state's law governs the interpretation of the Policies: under Ala-

[3] Arrow's original complaint included a claim that the Insurers had breached their covenant of good faith and fair dealing, which Arrow later withdrew.

[4] The Insurers also asserted two alternative grounds for summary judgment—*i.e.*, their double-recovery and allocation defenses. The District Court did not reach these arguments, and accordingly, they are not at issue here.

[5] Arrow also sought partial summary judgment as to two other issues—the viability of the Insurers' allocation defense and the event that "triggered" the Insurers' indemnification obligations. Again, however, the District Court did not reach these issues, and so they are not at issue here.

bama law, which Arrow advocated, such costs are considered "damages," while under California law, which the Insurers advocated, they are not.

On May 15, 2018, the District Court granted the Insurers' motion and denied Arrow's motion. It held—with barely a paragraph of analysis and no citations to authority—that the Policies (and thus, the term "damages") must be construed in accordance with California law. ER 19. The District Court recognized that, under California's choice-of-law rules, a contract must ordinarily be interpreted according to the law of the "place of performance." However, because the Policies covered Wyle facilities in multiple states, rather than just Alabama, the District Court concluded that they did not indicate *any* "place of performance"—and that California law governs as a fallback, because that is where the Policies were signed.

SUMMARY OF ARGUMENT

The District Court erred by applying the law of California, rather than that of Alabama, to interpret the Policies.

Under California's applicable choice-of-law statute, a contract is interpreted according to the law of the state where performance was anticipated at the time of contracting—except where neither the contract itself nor the surrounding circumstances give any indication of where performance was intended. Cal. Civ. Code § 1646. Where a liability-insurance policy insures against risk associated with a specified fixed location, "the intended place of performance … is *the place of the*

insured risk." *Frontier Oil Corp. v. RLI Ins. Co.*, 153 Cal. App. 4th 1436, 1461 (2007) (capitalization deleted) (emphasis altered).

Here, the Policies refer expressly to the Huntsville Facility as a covered location and contain various other indicia that the parties specifically intended coverage in Alabama. Thus, "[Alabama] was the intended place of performance of the contract with respect to" Arrow's claims in this suit, and Alabama law—not California law—"governs the interpretation" of the Policies. *Id.* at 1462. This conclusion is consistent with centuries of common-law jurisprudence and with the "most significant relationship" test of the Restatement (Second) Conflict of Laws.

The District Court was led astray by the fact that, in addition to covering the Huntsville Facility, the Policies also covered other risks in other states that are not at issue. Based on the Policies' multiple-risk nature, the District Court reasoned that they indicated *no* anticipated "place of performance" *at all*. This was error: when a contract imposes multiple obligations, the intended "place of performance" of each obligation must be assessed independently. Courts routinely acknowledge this principle in cases involving multiple-risk insurance policies like those at issue here. *See, e.g., Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.*, 14 Cal. App. 4th 637, 646–47 (1993) ("[w]here a multiple risk policy insures against risks located in several states," the policy must be construed in accordance with "the law

of the state of … the *particular risk involved*" in the dispute at bar (citations omitted) (emphasis added)).

The District Court may have concluded otherwise based on two unpublished federal district-court decisions that the Insurers cited in their briefing. Both are readily distinguishable, however, as they involved contracts that did not identify *any* covered location in the relevant states and did not provide *any* other indication that performance was anticipated in those states. The District Court may also have been influenced by the Insurers' argument that it would "create uncertainty" if the same contractual language could be interpreted differently in different jurisdictions. However, it is *the Insurers'* preferred rule (*i.e.*, place-of-contracting) that defeats settled expectations and creates greater unpredictability. Even more problematically, applying a place-of-contracting rule to multiple-risk insurance contracts deprives California's sister states of their sovereign power to regulate the business of insurance as it bears on accidents within their borders—a matter of exceptional importance in the context of environmental contamination.

ARGUMENT

I. BECAUSE ALABAMA WAS THE INTENDED "PLACE OF PERFORMANCE" OF THE INSURERS' RELEVANT OBLIGATIONS, ALABAMA LAW GOVERNS THEIR INTERPRETATION.

In California, a contract is interpreted according to the law of the state where performance was anticipated at the time of contracting—unless neither the lan-

guage of the contract nor the surrounding circumstances give *any* indication of where performance was intended. It is well-settled that a liability-insurance contract is "performed" where the underlying liability arises—at least when the liability is associated with a fixed location known to the parties at the time of contracting. That rule describes this case to a tee: the Policies expressly and unambiguously identified the Huntsville Facility as a covered location—thus indicating Alabama as a state where the Insurers could be called upon to perform their indemnity obligations. Consequently, those obligations should have been interpreted according to the law of Alabama, not California.

A. In California, A Contract Is Governed By The Law Of The Place Where Performance Was Anticipated.

Federal courts sitting in diversity must employ the choice-of-law rules of the forum state—here, California. *Welles v. Turner Entm't Co.*, 503 F.3d 728, 738 (9th Cir. 2007). As the District Court concluded and the parties agree, the relevant choice-of-law rule is Cal. Civ. Code § 1646 ("Section 1646"). *See Frontier Oil*, 153 Cal. App. 4th at 1449. That statute reads: "A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."

Even if a contract does not expressly identify where performance is to occur, it nonetheless "'indicate[s]' a place of performance … if the intended place of per-

formance can be gleaned from the nature of the contract and its surrounding circumstances." *Id.*; *see also Hale v. Bohannon*, 241 P.2d 4, 8 (Cal. 1952) ("[W]here no place of performance is expressly stipulated, [a contract] ought to be held performable in the place where the circumstances … indicate that the parties expected or intended it to be performed."). Thus, it should be rare that Section 1646's fallback place-of-contracting rule comes into play. Namely, this should occur only when neither the "express[]" language of the contract, nor the "nature of the contract," nor the "surrounding circumstances" at the time of contracting, give *any* information about where performance was expected to occur. *Cf. Cudd Pressure Control, Inc. v. N.H. Ins. Co.*, 645 F. App'x 733, 740 (10th Cir. 2016) (stating that Oklahoma's identically worded choice-of-law statute embodies "a strong preference … for applying the law of the place of performance").

Section 1646 is "based" on the longstanding "common law rule," *Frontier Oil*, 153 Cal. App. 4th at 1449–50, that "contracts made in one place to be executed [*i.e.*, performed] in another … are to be governed by the law of the place of performance," *Andrews v. Pond*, 38 U.S. 65, 77–78 (1839) (deeming this principle "well settled"); *see also Frontier Oil*, 153 Cal. App. 4th at 1449–50 (quoting 19th-century treatises to same effect). At common law, as under Section 1646, the place of performance did not have to be expressly specified in the contract, but could be gleaned from "the explanatory circumstances of its execution." *Pritchard v. Nor-*

ton, 106 U.S. 124, 137 (1882). The justification for this place-of-performance rule—and, by extension, for Section 1646—was that it effectuated the parties' "presumed intentions." *Frontier Oil*, 153 Cal. App. 4th at 1449–50 (collecting authorities); *see also Pritchard*, 106 U.S. at 136–38.

B. Alabama Was The Intended "Place Of Performance" Of The Insurers' Obligations With Respect To The Huntsville Facility.

"California courts have held that [liability] insurance policies are performed 'at the place of the insured risk,'" because that is where any covered liability is expected to arise. *Mike Rose's Auto Body, Inc. v. Applied Underwriters Captive Risk Assur. Co.*, 2016 U.S. Dist. LEXIS 133747, at *12 (N.D. Cal. Sept. 28, 2016) (quoting *Frontier Oil*, 153 Cal. App. 4th at 1461). Because the insured risk in this case—the Huntsville Facility—is in Alabama, the District Court should have applied Alabama law, not California law, to interpret the Policies.

The authoritative California decision is *Frontier Oil*. That case involved a contract to indemnify and defend personal-injury or property-damage claims arising out of the insured's production plant in California. The insurer argued that the contract should be interpreted according to Texas law, under which it had no obligation to defend the claims at issue. 153 Cal. App. 4th at 1445. The trial court agreed, reasoning that Texas law governed because the contract was "made and accepted between a Texas insurer and a Texas-based insured in Texas." *Id.* at 1446.

In its view, the fact that the "risk identified … in the[] contract" was located in California did not "compel the conclusion that California law governed." *Id.*

The Court of Appeal reversed. After determining that the law of the place of performance must govern, the court concluded that "the intended place of performance of a liability insurance policy is *the place of the insured risk*." *Id.* at 1461 (capitalization deleted) (emphasis altered); *see also Am. Motorists Ins. Co. v. Thomson Inc.*, 2011 Cal. App. Unpub. LEXIS 6537, at *18 (Aug. 29, 2011) ("[A]ccording to *Frontier Oil*, [liability] insurance contracts … are by their very nature presumed to have been intended to be performed at the location of the risks they insure …."). The *Frontier Oil* court reasoned that such a policy requires the insurer either to defend, or to pay money to resolve, third-party claims arising out of the insured's operations—and such claims "typically [are] prosecuted in the jurisdiction where the operations are located." 153 Cal. App. 4th at 1461. Moreover, the policy at issue "specifically refer[red]" to the California plant—demonstrating that "the parties anticipated" that the insurer could be called upon to defend or resolve claims arising there. *Id.* at 1461–62. Thus, "California was the intended place of performance of the contract with respect to those claims," and "California law govern[ed] the interpretation of the policy." *Id.* at 1462.

Frontier Oil is on all fours here. The operative policy language in this case is virtually identical. *Compare* 153 Cal. App. 4th at 1443 (agreeing to "pay those

sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' … caused by an 'occurrence'" and to "defend any 'suit' seeking [such] damages"), *with* ER 127 *and* ER 580 (agreeing to "pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage … caused by an occurrence" and to "defend any suit … seeking [such] damages"). Furthermore, as in *Frontier Oil*, the Policies refer expressly to the Huntsville Facility—in their "Schedule of Locations," their "Name of the Insured" endorsements, or both[6]—and contain other indicia that the parties anticipated claims in Alabama, such as listings of Alabama employees and Alabama-specific definitions of contract terms. *Supra* at 7. Thus, *Frontier Oil* dictates that "[Alabama] was the intended place of performance … with respect to" Arrow's claims in this suit, and that "[Alabama] law governs the interpretation" of the Policies. 153 Cal. App. 4th at 1462; *see also Am. Motorists*, 2011 Cal. App. Unpub. LEXIS 6537, at *22 ("[W]ith respect to the

[6] Below, the Insurers attempted to make hay of the fact that the Excess Policies—unlike the Primary Policies—did not expressly identify the Huntsville Facility. But this is irrelevant, since the intended place of performance can be "gleaned from the nature of the contract and its surrounding circumstances." *Frontier Oil*, 153 Cal. App. 4th at 1450. The "nature" of an excess insurance policy is to add to the coverage limit of the underlying primary policy, while maintaining the same coverage. And, of course, the Primary Policies are part of the "surrounding circumstances" of the Excess Policies. As such, the Primary Policies "must be consulted" in interpreting the intended place of performance of the Excess Policies. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 563 F.3d 777, 785 (9th Cir. 2009).

claims of pollution arising at the sites in Los Angeles and North Hollywood, [the parties intended that] the policies would be performed in California—the site of the insured risks and where the insured claims arose." (applying *Frontier Oil*)).

Because *Frontier Oil* resolves this appeal, the Court need go no further. Nevertheless, it is instructive that other states with provisions identical to Section 1646 also treat the state where the underlying liability arose as the place where a liability-insurance contract is "performed"—and thus, the state whose law governs the contract's interpretation. *See, e.g.*, *Kemp v. Allstate Ins. Co.*, 601 P.2d 20, 23–24 (Mont. 1979) (concluding, under Montana's identical choice-of-law statute, that Montana was the "place of performance" of a liability-insurance contract because the underlying liability arose from an accident in Montana). It also bears noting that courts have reached the same result applying the common-law rule that Section 1646 was intended to carry forward. *See Pritchard*, 106 U.S. at 138 (holding that, where an agreement "indemnif[ies] … against … loss or damage" arising at a specified location, the anticipated place of performance—and thus, the source of governing law—is the location where "[t]he antecedent liability" is incurred).

Finally, although the "most significant relationship" test of the Restatement (Second) Conflict of Laws ("Restatement") has not "supplant[ed] … [S]ection 1646" in California, *Frontier Oil*, 153 Cal. App. 4th at 1454, California courts sometimes consult it—and that test, too, compels the same result. *See Stonewall*,

14 Cal. App. 4th at 646 ("The validity of a contract of fire, surety, or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk ...." (quoting Restatement § 193)). The Restatement rule reflects not only the parties' presumed intent, but also that "the state where the insured risk … [is] located" has the greatest "interest in the determination of issues arising under the insurance contract." *Id.*; *see also Baybutt Constr. Corp. v. Comm. Union Ins. Co.*, 455 A.2d 914, 918–19 (Me. 1983).[7]

Indeed, a state's interest in having its own law applied to insurance disputes involving in-state risks is at its zenith where, as here, the dispute involves coverage for costs associated with remediating environmental contamination. As California's courts have recognized, "it is difficult to imagine any interest that [a state] could have that would be more compelling … than its interest in determining the availability of [insurance] funds for the cleanup of hazardous substances located

[7] The Insurers argued below that Alabama's interest in seeing its own law applied is illusory because, if Arrow had sued in Alabama, its courts would have applied California law. This misunderstands Alabama's choice-of-law rules. The Insurers noted that "the *general* choice-of-law rule in Alabama is … that 'a contract is governed … by the law of the place where it was made.'" Insurers' Summ. J. Br. at 13 (D. Ct. Dkt. No. 52) (emphasis added). Crucially, however, that "general" rule does not apply where, as here, performance was intended in a different state. *See J.R. Watkins Co. v. Hill*, 108 So. 244, 245 (Ala. 1926) ("Exceptions to the general [place-of-contracting] rule … [include] where the contract is to be performed in another jurisdiction … in which case the law of the other place and of performance will govern."). In reality, then, Alabama's choice-of-law rule would have pointed to Alabama law, just as Section 1646 does.

within its boundaries." *Ford Motor Co. v. Ins. Co. of N. Am.*, 35 Cal. App. 4th 604, 613 (1995); *see also Harleysville Mut. Ins. Co. v. Glenn A. Ford & Son Drilling Contr.*, 2011 U.S. Dist. LEXIS 110051, at *14 n.10 (W.D. Pa. Sept. 27, 2011) ("Pennsylvania has a clear policy interest in regulating insurance contracts … within its territories, especially as they might affect the rights and safety of its residents and natural resources."); *Sensient Colors, Inc. v. Allstate Ins. Co.*, 939 A.2d 767, 779 (N.J. 2008) (states have a "strong public policy interest in the remediation of environmental contamination within [their] borders," which "includes ensuring that an insurance policyholder is not wrongly denied funds for the clean-up of a hazardous-waste-ridden site"); *MAPCO Alaska Petroleum v. Cent. Nat'l Ins. Co.*, 795 F. Supp. 941, 944 (D. Alaska 1991) (states have an "especially" strong interest in the "[i]nterpretation of insurance contract provisions pertaining to an insured risk" when the contract "involves coverage for [in-state] environmental damage").

In sum, whichever choice-of-law test is employed—Section 1646, the common-law rule, or the Restatement's "most significant relationship" test—the outcome is the same. Arrow is calling upon the Insurers to indemnify it for costs that it has incurred, and will continue to incur, in Alabama. Those costs were triggered by an accident at an Alabama facility expressly named in the Policies. That accident led Alabama regulators to assert violations of Alabama statutory law. Arrow resolved those allegations via an Alabama Consent Order that requires it to con-

duct monitoring and remediation activities in Alabama until Alabama authorities say otherwise—a result those authorities found to be "in the best interests of the citizens of Alabama." ER 84. Alabama, therefore, is both the place of performance and the state with the overwhelmingly dominant interest in seeing its law applied. The District Court erred by applying the law of California instead.

II. THAT THE POLICIES ALSO INSURE AGAINST LIABILITY ASSOCIATED WITH FACILITIES IN OTHER STATES DOES NOT CHANGE THE FACT THAT ALABAMA LAW GOVERNS.

The District Court was led astray by the fact that the Policies cover Wyle facilities in multiple states, not just Alabama. Instead of recognizing that Alabama is the *relevant* "place of performance" for purposes of Arrow's claims in this lawsuit, the District Court concluded that the Policies indicate *no* "place of performance"—and thus, it selected California law under Section 1646's fallback clause. That was error: in a multiple-risk insurance policy, like those at issue here, the insurer's obligations with respect to each covered risk are construed according to the local law of the place of *that* risk. The Insurers' contrary arguments, which the District Court evidently found persuasive, are without merit.

A. A Multiple-Risk Insurance Contract Indicates *Multiple* "Places Of Performance"—Not *None.*

The District Court assumed that a contract must indicate either one singular "place of performance" or none at all. It cited no authority for this, and in fact, the law is to the contrary: "[i]f [a] contract is made up of several promises or obliga-

tions, each may have its own place of performance." 12 Cal. Jur. Conflict of Laws § 64 (West 2018). In such a scenario, Section 1646 requires application of the law of the *relevant* "place of performance"—that is, the place where the particular contractual obligation being sued upon was to be performed. *See Blair v. N.Y. Life Ins. Co.*, 104 P.2d 1075, 1078 (Cal. Ct. App. 1940) ("Liability for the breach of a contract partly performed in one state, and … partly performed in another, is fixed by the laws of the state wherein the breach occurred.").

Here, the particular contractual obligation at issue is the Insurers' promise to indemnify for property-damage claims associated with the Huntsville Facility. And, as discussed above, the place of performance of *that* obligation is indisputably Alabama. Thus, Alabama law applies here, irrespective of the fact that the Policies also require the performance of other obligations in other states. *Cf. Dominion Energy, Inc. v. Zurich Am. Ins. Co.*, 2015 U.S. Dist. LEXIS 25795, at *13–14 (D. Conn. Mar. 3, 2015) ("Nor … is the fact that the Policy covered a number of [other] risks nationwide a bar to the application of Massachusetts law [to claims involving] immovable risks in Massachusetts.").

Indeed, the precise question at issue here—which state's law governs in an insurance dispute involving a multiple-risk policy—has been litigated extensively, and the law is clear. California's courts have explained that "[w]here a multiple risk policy insures against risks located in several states," as the Policies here do,

the policy must be construed in accordance with "the law of the state of principal location of the *particular risk involved*" in the dispute at bar. *Stonewall*, 14 Cal. App. 4th at 646–47 (quoting Restatement § 193, cmt. f) (emphasis added); *see also Downey Venture v. LMI Ins. Co.*, 66 Cal. App. 4th 478, 514 (1998) ("A liability insurance policy issued on a nationwide basis may be construed in accordance with the law of the jurisdiction in which *a particular claim arises*." (emphasis added)). Courts across the country have held the same.[8] The District Court failed to recognize any of this authority, let alone distinguish it.

The facts of *Stonewall* are instructive. There, a California resident sued the manufacturer of a car battery that exploded and injured him. The battery was manufactured at a California factory owned by a Wisconsin corporation. The manufacturer was insured against personal-injury claims under several policies. *Id.* at 639–40. Although the policies themselves apparently did not mention the California factory, the "underwriting submission" that the manufacturer had made

[8] *See, e.g.*, *Baybutt*, 455 A.2d at 919 (Maine); *Dominion Energy*, 2015 U.S. Dist. LEXIS 25795, at *13–14 (Connecticut); *White v. Evanston Ins. Co.*, 2017 U.S. Dist. LEXIS 67431, at *14–16 (D. Ariz. May 1, 2017); *One Beacon Am. Ins. Co. v. Huntsman Polymers Corp.*, 276 P.3d 1156, 1168–71 (Utah Ct. App. 2012); *Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins. Co.*, 863 F. Supp. 1237, 1240–41 (D. Nev. 1994); *Diamond State Ins. Co. v. Chester-Jensen Co.*, 611 N.E.2d 1083, 1095 (Ill. Ct. App. 1993); *Chesapeake Utils. Corp. v. Am. Home Assur. Co.*, 704 F. Supp. 551, 555–56 (D. Del. 1989); *Crown Ctr. v. Occidental Fire & Cas. Co.*, 716 S.W.2d 348, 358–59 (Mo. Ct. App. 1986); *Consol. Mut. Ins. Co. v. Radio Foods Corp.*, 240 A.2d 47, 49 (N.H. 1968).

to the insurers to procure coverage had listed all the states where the manufacturer "operate[d] manufacturing facilities," including California. *Id.* at 647.

The *Stonewall* court held that, for purposes of that case, the policies were to be construed according to California law. Because they were "multiple risk" policies "insur[ing] against risks located in several states," it was appropriate to view each policy as a group of "separate policies, each insuring an individual risk" in a single state. *Id.* at 646–47. Once the contract was so construed, it was clear that California law applied, since California was the location of the *relevant* risk. *Id.* at 649. This outcome was consistent with the parties' "reasonabl[e] expect[ations]," since the insurers had "considered" the manufacturer's nationwide scope "at the time the policies were issued," and indeed, had been expressly informed about the California factory. *Id.* at 648.[9]

Here, too, the multi-state Policies may be viewed for choice-of-law purposes as a collection of "separate policies, each insuring an individual risk." One such "policy" insures the Huntsville Facility—and as explained above, *that* policy must be construed in accordance with Alabama law. As in *Stonewall*, this outcome is

[9] As noted in Point I above, *Stonewall* was decided under the Restatement's "most significant relationship" test, not Section 1646's place-of-performance rule. However, the particular choice-of-law rule that the court ultimately applied is beside the point for present purposes. What matters is that California courts recognize that multiple-risk insurance policies should be treated as groupings of individual-risk insurance policies in conducting a choice-of-law analysis.

consistent with the parties' reasonable expectations. The Policies' various schedules and endorsements demonstrate that the Insurers "considered" the broad scope of Wyle's operations at the time of contracting. More importantly, as in *Stonewall*, the Insurers were put on notice at the time of contracting that the Huntsville Facility, in particular, was a location where they could be called upon to defend or indemnify a damages claim. Indeed, as discussed above, the Policies proclaim this on their face in a number of different ways—making this an even easier case than *Stonewall*, where the California factory was mentioned only in a separate "underwriting submission." 14 Cal. App. 4th at 647.

B. The Insurers' Authorities Are Distinguishable.

Although the District Court cited no authority at all in refusing to apply *Frontier Oil* and *Stonewall*, it was apparently persuaded by the Insurers' briefing, which relied on two unpublished federal district-court decisions: *Store Kraft Mfg. v. Wausau Bus. Ins. Co.*, 2014 U.S. Dist. LEXIS 190353, at *9–13 (C.D. Cal. Mar. 24, 2014), and *Ameron Int'l Corp. v. Am. Home Assur. Co.*, 2011 U.S. Dist. LEXIS 61486, at *24–26 (C.D. Cal. June 6, 2011). Insurers' Summ. J. Br. at 9 (D. Ct. Dkt. No. 52). However, even assuming those non-binding cases were correctly decided, both are readily distinguishable.

In *Store Kraft*, a California resident was injured by a product manufactured by a Nebraska corporation, which sought coverage under its liability-insurance pol-

icy. The court held that the policy was governed by the law of Nebraska, the place of contracting—not the law of California, the state where the injury occurred. In so holding, however, the court stressed that the policy did not mention California or any California location—and, indeed, that the defendant did not even own any facilities in California. It was merely the state where the injury-causing product happened to end up. Since literally *nothing* in the contract affirmatively pointed to California (or any other jurisdiction) as a place where covered liability was expected to arise, the court concluded that "no place of performance [was] indicated," and that Section 1646's fallback place-of-contracting rule applied. 2014 U.S. Dist. LEXIS 190353, at *10–15; *but see Estate of Grace*, 88 Cal. App. 2d 956, 962–63 (1948) (finding that an adoption contract implicitly "indicate[d] a place of performance"—namely, "wherever the [adoptive parents] might take the child"—even though the contract did not specify which state that might be).

Ameron is similar. There, too, the court held that the policies were governed by the law of the place of contracting (California) because they "d[id] not indicate any particular place of performance." 2011 U.S. Dist. LEXIS 61486, at *13–14. The court rejected the argument that the policies should be governed by the law of the place where the underlying liability arose (Hawaii), because "the policies … d[id] not expressly provide coverage for a fixed location in Hawaii"; there were no "endorsements to the policies indicat[ing] that the parties contemplated" perfor-

mance in Hawaii; and "there [was] no evidence that while negotiating the terms of the policies the parties considered the complexity of [the insured's] activities." *Id.* at *12, *25–26. Thus, the court found "no basis … to conclude that the parties reasonably expected the policies to be governed by Hawaii law." *Id.* at *26.[10]

Here, unlike in *Store Kraft* and *Ameron*, the fact that a claim arose in Alabama was not fortuitous or unforeseeable. To the contrary, each of the Primary Policies expressly identifies Alabama as a covered location—by listing the Huntsville Facility in a "Schedule of Locations," including Wyle's Huntsville division in a policy endorsement, identifying Wyle's Alabama employees and its Alabama payroll, and/or expressly defining contractual terms for purposes of the Insurers' Alabama obligations. *Supra* at 7. The Policies and their many schedules and endorsements also demonstrate that the Insurers considered the complexity and geographic dispersion of Wyle's operations. Consequently, even assuming *Store Kraft* and *Ameron* were rightly decided, the opposite result is required here.

C. The Insurers' Policy Argument Is Meritless.

Though it did not say so explicitly, the District Court may also have been persuaded by the Insurers' argument that it would "create uncertainty" if the same contractual language could be interpreted differently in different jurisdictions.

[10] Like the District Court here, the *Ameron* court was under the impression that a contract can have no more than one "place of performance." 2011 U.S. Dist. LEXIS 61486, at *13. As discussed above, this is plainly incorrect.

Predictability and stability, the Insurers claimed, militate in favor of applying just one state's law—*i.e.*, the law of the place of contracting—to all risks under a multiple-risk insurance policy. Insurers' Summ. J. Br. at 11 (D. Ct. Dkt. No. 52).

That argument is without merit. As a threshold matter, "in these days of multistate insurers, multistate insureds, and instantaneous interstate transmission of voice and document, it is not easy to identify a [single] state of contracting"—so a place-of-contracting rule is not necessarily "predictable." *Johnson Matthey v. Pa. Mfrs. Ass'n Ins. Co.*, 593 A.2d 367, 372 (N.J. Super. App. Div. 1991). In any event, as discussed above, "the parties would naturally expect the local law of the state where the risk is … located to apply" to a dispute arising out of that localized risk, *Stonewall*, 14 Cal. App. 4th at 646—not the law of the place where signatures happened to be affixed (assuming a single such place can be identified). Thus, it is *the Insurers'* preferred rule—not Arrow's—that subverts expectations and creates "uncertainty." *See Clark Equip. Co. v. Liberty Mut. Ins.* Co., 1994 Del. Super. LEXIS 338, at *14–15 (Aug. 1, 1994) ("Certainty and predictability of outcome … would be more greatly enhanced if the law of the state where the [insured] site is located is applied, rather than the law of the states where the insurance contracts were formed …."); *Am. Motorists*, 2011 Cal. Unpub. LEXIS 6537, at *19 (same).

That a contract insures against risks in multiple states does not change the predictability calculus: "[w]here [a] policy covers many scattered risks, … the rea-

sonable expectation[] of the parties … [is that] policy language interpretation will follow the law at the site of the risk." *Johnson Matthey*, 593 A.2d at 372–73; *see also NL Indus. v. Comm. Union Ins. Co.*, 154 F.3d 155, 159 (3d Cir. 1998). Sophisticated multi-state businesses like Wyle—to say nothing of insurance companies—"understand" this convention. *Downey Venture*, 66 Cal. App. 4th at 514. That the parties understood as much here is evidenced by the Policies' various state-specific endorsements, some of which expressly acknowledge state-law variations.[11] Of course, if the parties to a particular multi-state contract "truly prize uniform interpretation," they are free to insert a choice-of-law clause; the fact that this was not done here "tends to show that uniform interpretation was not a conscious goal." *Gilbert Spruance Co. v. Pa. Mfrs. Ass'n Ins. Co.*, 603 A.2d 61, 64–65 (N.J. Super. App. Div. 1992), *aff'd*, 629 A.2d 885 (N.J. 1992); *see also Johnson Matthey*, 593 A.2d at 371–72 ("The insurers themselves have acted as though they do not value uniformity very highly. They have not taken the simple and obvious step toward uniformity of inserting choice-of-law provisions in their policies.").

[11] *See, e.g.*, ER 415 (Oregon-specific endorsement acknowledging that "[i]t is unlawful in Oregon for an insurer to promise to pay policyholder dividends for any unexpired portion of the policy term ...."); ER 699 (California-specific endorsement amending terms of uninsured motorist policy); ER 416–19 (Washington-, Illinois-, and New Jersey-specific endorsements amending terms relating to policy termination).

Finally, even if the Insurers were right that their approach had the virtue of predictability, it has a far greater vice: it deprives California's sister states of their sovereign right to regulate the business of insurance as it bears on accidents within their own borders. As discussed above, this concern looms especially large when it comes to insurance claims involving environmental contamination, which affect not just the private affairs of the insurer and insured, but also the state's own natural resources and the health and safety of its citizens. *Supra* at 18–19. Section 1646 should not be construed in a manner that undermines the vital interests of California's sister states without a compelling reason—and the Insurers' dubious claim of predictability does not suffice. As a New Jersey appellate court observed in another pollution-insurance case:

> It may seem counterintuitive to ascribe to the same policy language one meaning on the east bank of the Delaware and another on the west bank. That is not, however, a consideration [in the choice-of-law inquiry], unless uniform interpretation has sufficient value to overcome the significant governmental interest of the various jurisdictions where the insured risks are located, or where the insured entity predictably is going to incur legal liabilities. In our view, it does not.

Johnson Matthey, 593 A.2d at 371.

CONCLUSION

For the above reasons, the District Court's judgment should be reversed, and this case should be remanded with instructions to apply Alabama law to interpret the disputed contract terms.

August 20, 2018

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STATEMENT OF RELATED CASES

There are no other related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 7,252 words.

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CERTIFICATE OF SERVICE

I certify that on August 20, 2018, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit via the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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