

EXHIBIT 77

HMaxus Energy Corp. v. **Occidental** Chemical Corp.
Tex.App.-Dallas,2008.

Court of Appeals of Texas,Dallas.
MAXUS ENERGY CORPORATION, Appellant
v.
OCCIDENTAL CHEMICAL CORPORATION,
Appellee.
No. 05-06-01299-CV.

Feb. 1, 2008.


Background: Seller of chemical company's stock and buyer's affiliate filed competing declaratory judgment claims, after dispute arose over interpretation of indemnity provision of stock purchase agreement as to whether time limit applied to seller's indemnity obligation. The 14th Judicial District Court, Dallas County, [Mary Murphy](#), J., entered judgment on jury verdict in favor of buyer's affiliate. Seller appealed.

Holdings: The Court of Appeals, [Lang-Miers](#), J., held that:

- (1) indemnity provision was ambiguous as to whether time limit applied to seller's indemnity obligation, such that submission to jury of interpretation of disputed language in agreement was warranted;
- (2) seller was not entitled, under Delaware law, to instructions that indemnity provision of agreement was to be narrowly construed in favor of indemnitor, or that language of an indemnity contract had to be clear and unequivocal; and
- (3) question posed in jury charge as to whether indemnification requests by buyer's affiliate were limited by stock purchase agreement did not improperly shift burden of proof.

Affirmed.

West Headnotes

[1] Contracts 95  **176(2)**

[95](#) Contracts
[95II](#) Construction and Operation
[95II\(A\)](#) General Rules of Construction

[95k176](#) Questions for Jury

[95k176\(2\)](#) k. Ambiguity in General.

Most Cited Cases

Under Delaware law, the determination of whether a contract is ambiguous is a question of law.

[2] Appeal and Error 30  **842(8)**

[30](#) Appeal and Error

[30XVI](#) Review

[30XVI\(A\)](#) Scope, Standards, and Extent, in

General

[30k838](#) Questions Considered


[30k842](#) Review Dependent on Whether

Questions Are of Law or of Fact

[30k842\(8\)](#) k. Review Where

Evidence Consists of Documents. **Most Cited Cases**

In context of lawsuit involving dispute over interpretation of indemnity provision of stock purchase agreement, Texas standards of appellate review applied, though Delaware law applied in interpreting the agreement. [V.T.C.A., Civil Practice & Remedies Code § 71.031](#) (b, c).

[3] Contracts 95  **147(1)**

[95](#) Contracts

[95II](#) Construction and Operation

[95II\(A\)](#) General Rules of Construction

[95k147](#) Intention of Parties

[95k147\(1\)](#) k. In General. **Most Cited**

Cases

Under Delaware law, court's role when interpreting a contract is to effectuate the parties' intent.

[4] Contracts 95  **152**

[95](#) Contracts

[95II](#) Construction and Operation

[95II\(A\)](#) General Rules of Construction

[95k151](#) Language of Instrument

[95k152](#) k. In General. **Most Cited Cases**

Under Delaware law, when interpreting a contract, if the court can glean the parties' intent from the clear and unequivocal language of the contract, it is bound to give the contract's terms their plain meaning.

[5] Contracts 95  **143.5**

[95](#) Contracts

[95II](#) Construction and Operation

[95II\(A\)](#) General Rules of Construction

[95k143.5](#) k. Construction as a Whole. [Most](#)

[Cited Cases](#)

Under Delaware law, the court, when interpreting a contract, must rely on a reading of all of the pertinent provisions of the contract as a whole, and not on any single passage in isolation.

[\[6\]](#) [Contracts 95](#)  [143.5](#)

[95](#) Contracts


[95II](#) Construction and Operation

[95II\(A\)](#) General Rules of Construction

[95k143.5](#) k. Construction as a Whole. [Most](#)

[Cited Cases](#)

Under Delaware law, the court is to interpret a contract in a way that does not render any provision illusory or meaningless.

[\[7\]](#) [Contracts 95](#)  [143\(2\)](#)

[95](#) Contracts

[95II](#) Construction and Operation

[95II\(A\)](#) General Rules of Construction

[95k143](#) Application to Contracts in General

[95k143\(2\)](#) k. Existence of Ambiguity.

[Most Cited Cases](#)

Under Delaware law, a contract is ambiguous only when its provisions are reasonably or fairly susceptible of different interpretations, or may have two or more meanings.

[\[8\]](#) [Contracts 95](#)  [143\(2\)](#)

[95](#) Contracts

[95II](#) Construction and Operation

[95II\(A\)](#) General Rules of Construction

[95k143](#) Application to Contracts in General

[95k143\(2\)](#) k. Existence of Ambiguity.

[Most Cited Cases](#)

Under Delaware law, a contract is not rendered ambiguous simply because the parties do not agree upon its proper interpretation; the true test is not what the parties intended the contract to mean, but what a reasonable person in the position of the parties would have thought it meant.

[\[9\]](#) [Evidence 157](#)  [448](#)


[157](#) Evidence

[157XI](#) Parol or Extrinsic Evidence Affecting Writings

[157XI\(D\)](#) Construction or Application of Language of Written Instrument

[157k448](#) k. Grounds for Admission of Extrinsic Evidence. [Most Cited Cases](#)

Under Delaware law, the court may not consider extrinsic evidence in deciding whether a contract is ambiguous.

[\[10\]](#) [Contracts 95](#)  [143.5](#)

[95](#) Contracts

[95II](#) Construction and Operation

[95II\(A\)](#) General Rules of Construction

[95k143.5](#) k. Construction as a Whole. [Most](#)

[Cited Cases](#)

Under Delaware law, the court will not interpret a contract in such a way that renders language mere surplusage.

[\[11\]](#) [Declaratory Judgment 118A](#)  [368](#)

[118A](#) Declaratory Judgment

[118AIII](#) Proceedings

[118AIII\(F\)](#) Hearing and Determination

[118Ak368](#) k. Questions for Jury. [Most Cited](#)

[Cases](#)

Indemnity provision of stock purchase agreement between buyer and seller, in which seller agreed to indemnify buyer and its affiliates for certain matters related to chemical company's prior chemicals business, was ambiguous with respect to whether time limit applied to seller's indemnity obligation, and, thus, submission to jury of interpretation of disputed language in agreement was warranted, in context of suit involving competing declaratory judgment claims by seller and buyer's affiliate; both parties presented reasonable arguments supporting their views as to how specific language contained in provision should be interpreted, but both interpretations rendered other language in agreement meaningless, and, as such, disputed language in agreement was reasonably or fairly susceptible of different interpretations.

[\[12\]](#) [Appeal and Error 30](#)  [969](#)

[30](#) Appeal and Error

[30XVI](#) Review

[30XVI\(H\)](#) Discretion of Lower Court

[30k969](#) k. Conduct of Trial or Hearing in General. [Most Cited Cases](#)

Appeal and Error 30  [974\(.5\)](#)

[30](#) Appeal and Error

[30XVI](#) Review

[30XVI\(H\)](#) Discretion of Lower Court

[30k974](#) Submission of Issues or Questions to Jury

[30k974\(.5\)](#) k. In General. [Most Cited](#)

[Cases](#)

Appellate court reviews submission of instructions and jury questions under an abuse of discretion standard.

[13] [Appeal and Error 30](#)  [216\(2\)](#)

[30](#) Appeal and Error

[30V](#) Presentation and Reservation in Lower Court of Grounds of Review

[30V\(B\)](#) Objections and Motions, and Rulings Thereon

[30k214](#) Instructions

[30k216](#) Requests and Failure to Give Instructions

[30k216\(2\)](#) k. Further or More Specific Instructions. [Most Cited Cases](#)

Seller of chemical company stock preserved for appeal issue of whether trial court erred in refusing to submit additional jury instructions relating to the interpretation of indemnity provision of stock purchase agreement, in context of suit involving competing declaratory judgment claims by seller and buyer's affiliate concerning interpretation of this provision, as seller both objected to trial court's jury charge and tendered the instructions.

[14] [Indemnity 208](#)  [103](#)


[208](#) Indemnity

[208V](#) Actions

[208k103](#) k. Instructions. [Most Cited Cases](#)

Seller, as indemnitor under stock purchase agreement governing sale of 100 percent of chemical company's stock to buyer, was not entitled, under Delaware law, to instructions that indemnity provision of agreement

was to be narrowly construed in favor of indemnitor, or that language of an indemnity contract had to be clear and unequivocal, in context of suit involving competing declaratory judgment claims by seller and buyer's affiliate concerning interpretation of indemnity provision, as buyer's affiliate, which was an indemnitee, was not seeking indemnification for its own acts, but was seeking indemnification for chemical company's acts prior to execution of the stock purchase agreement.

[15] [Declaratory Judgment 118A](#)  [364](#)


[118A](#) Declaratory Judgment

[118AIII](#) Proceedings

[118AIII\(F\)](#) Hearing and Determination

[118Ak364](#) k. Mode and Conduct in General.

[Most Cited Cases](#)

Trial 388  [234\(7\)](#)

[388](#) Trial

[388VII](#) Instructions to Jury

[388VII\(C\)](#) Form, Requisites, and Sufficiency

[388k231](#) Sufficiency as to Subject-Matter

[388k234](#) Evidence and Matters of Fact in General

[388k234\(7\)](#) k. Presumptions and Burden of Proof. [Most Cited Cases](#)

Question posed by trial court in jury charge as to whether indemnification requests by buyer's affiliate were limited by stock purchase agreement did not improperly shift burden of proof, in context of suit involving competing declaratory judgment claims by seller and buyer's affiliate concerning whether there was a time limit with respect to seller's indemnity obligation under the agreement, as both parties sought affirmative relief, such that each had the burden to prove that it was entitled to that relief, and instruction for question one required jury's answer to be based on a preponderance of the evidence, whether that answer was "yes" or "no," such that burden was placed on each party to prove its respective position by a preponderance of the evidence.

[16] [Declaratory Judgment 118A](#)  [341.1](#)

[118A](#) Declaratory Judgment

[118AIII](#) Proceedings

[118AIII\(E\)](#) Evidence

[118Ak341](#) Presumptions and Burden of Proof

[118Ak341.1](#) k. In General. [Most Cited Cases](#)

Under Delaware law, burden of proof in a declaratory judgment action is on the party seeking to prove it is entitled to affirmative relief.

[\[17\]](#) Trial [388](#)  [234\(7\)](#)

[388](#) Trial

[388VII](#) Instructions to Jury

[388VII\(C\)](#) Form, Requisites, and Sufficiency

[388k231](#) Sufficiency as to Subject-Matter

[388k234](#) Evidence and Matters of Fact in General

[388k234\(7\)](#) k. Presumptions and Burden of Proof. [Most Cited Cases](#)

To properly place the burden of proof, the court's jury charge must be worded so that the jury's answer indicates that the party with the burden of proof on that fact established the fact by a preponderance of the evidence.

[\[18\]](#) Appeal and Error [30](#)  [215\(1\)](#)

[30](#) Appeal and Error

[30V](#) Presentation and Reservation in Lower Court of Grounds of Review

[30V\(B\)](#) Objections and Motions, and Rulings Thereon

[30k214](#) Instructions

[30k215](#) Objections in General

[30k215\(1\)](#) k. Necessity of Objection in General. [Most Cited Cases](#)

Seller of chemical company stock preserved for appeal issue of whether question trial court posed in jury charge improperly shifted burden of proof to seller, in context of suit involving competing declaratory judgment claims by seller and buyer's affiliate concerning whether there was a time limit with respect to seller's indemnity obligation under stock purchase agreement, as seller objected to question posed to jury on basis that it improperly shifted burden of proof. [Vernon's Ann.Texas Rules Civ.Proc., Rule 274.](#)

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Before Justices [RICHTER](#), [FRANCIS](#), and [LANG-MIERS](#).

OPINION

Opinion by Justice [LANG-MIERS](#).

This appeal involves the interpretation of an indemnity provision in a stock purchase agreement. **Maxus** Energy Corporation appeals the trial court's judgment in favor of **Occidental** Chemical Corporation. We affirm the judgment.

*878 BACKGROUND

On September 4, 1986, **Maxus**, then known as Diamond Shamrock Corporation, sold one hundred percent of the stock of Diamond Shamrock Chemicals Company (DSCC) to Oxy-Diamond Alkali Corporation pursuant to a stock purchase agreement. In that agreement, **Maxus** agreed to indemnify the buyer and its affiliates, including **Occidental**, for certain matters related to DSCC's prior chemicals business. Those prior matters are referred to in the stock purchase agreement as the Inactive Sites and the Historical Obligations. The Inactive Sites include chemical plants and commercial waste disposal sites whose use had been discontinued before the execution of the agreement; the Historical Obligations include Agent Orange litigation pending at the time the agreement was executed and other liabilities and obligations associated with the discontinued businesses of DSCC.

Occidental claims that **Maxus** breached its obligations because it refused to indemnify **Occidental** for lawsuits filed by third parties relating to the Inactive Sites and Historical Obligations. **Occidental** contends that there is no time limit on **Maxus's** obligation to indemnify **Occidental** for litigation relating to the Inactive Sites and Historical Obligations. Conversely, **Maxus** contends that there is a time limit on its obligation to indemnify **Occidental** and that it is not obligated to indemnify **Occidental** for any litigation relating to the Inactive Sites and Historical Obligations that was commenced after September 4, 1998, twelve years after the sale.

The parties filed competing declaratory judgment claims and motions for summary judgment on those claims, arguing that the contract language unambiguously supports their respective positions. The trial court initially agreed with **Maxus** and rendered a final judgment in its favor. Upon reconsideration, however, the trial court concluded that the indemnity provision is ambiguous, vacated its judgment, and submitted the interpretation of the contract language to the jury. The jury found in favor of **Occidental**. **Maxus** appeals, arguing that the contract language is not ambiguous, and that the trial court erred by submitting the interpretation of the contract to the jury.^{FN1} In two additional issues, **Maxus** argues jury charge error.

^{FN1}. **Maxus** does not challenge the sufficiency of the evidence to support the jury's verdict.

INTERPRETATION OF THE CONTRACT

A. Standard of Review

[1] The parties agree that Delaware substantive law controls our review of the contract language at issue in this appeal. See TEX. CIV. PRAC. & REM.CODE ANN. § 71.031(c) (Vernon Supp.2007). Under Delaware law, the determination of whether a contract is ambiguous is a question of law. Emmons v. Hartford Underwriters Ins. Co., 697 A.2d 742, 744-45 (Del.1997).

[2] Although we apply Delaware law to interpret the contract, we apply Texas standards of appellate review. TEX. CIV. PRAC. & REM.CODE ANN. § 71.031(b) (Vernon Supp.2007); see Brown v. Pennzoil-Quaker State Co., 175 S.W.3d 431, 435 (Tex.App.-Houston [1st Dist.] 2005, pet. denied); Robin v. Entergy Gulf States, Inc., 91 S.W.3d 883, 885 (Tex.App.-Beaumont 2002, pet. denied). Under Texas law, we review questions of law de novo. See In re D. Wilson Constr. Co., 196 S.W.3d 774, 781 (Tex.2006); First Trust Corp. TEE FBO v. Edwards, 172 S.W.3d 230, 233-34 (Tex.App.-Dallas 2005, pet. denied).

B. Standards for Interpreting a Contract

*879 [3][4][5][6] Under Delaware law, our role when

interpreting a contract “is to effectuate the parties' intent.” Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 739 (Del.2006) (citations omitted). If we can glean the parties' intent from the clear and unequivocal language of the contract, we are bound to give the contract's terms their plain meaning. *Id.* We must “rely on a reading of all of the pertinent provisions of the [contract] as a whole, and not on any single passage in isolation.” O'Brien v. Progressive N. Ins. Co., 785 A.2d 281, 287 (Del.2001). We are to interpret the contract “in a way that does not render any provision ‘illusory or meaningless.’ ” *Id.* (citations omitted).

[7][8][9] “A contract is ambiguous only when its provisions are reasonably or fairly susceptible of different interpretations, or may have two or more meanings.” Lorillard Tobacco Co., 903 A.2d at 739 (quoting Rhone-Poulenc v. Am. Motorists Ins. Co., 616 A.2d 1192, 1195-96 (Del.1992)). A contract is not rendered ambiguous simply because the parties do not agree upon its proper interpretation. *Id.* The true test is not what the parties intended the contract to mean, but what a reasonable person in the position of the parties would have thought it meant. *Id.* at 740. Under Delaware law, we may not consider extrinsic evidence in deciding whether a contract is ambiguous. O'Brien, 785 A.2d at 289.

C. The Indemnity Provision

The specific language in dispute is found in section 9.03(a) of the stock purchase agreement:

Section 9.03 *Indemnification*.

Subject to the terms and limitations set forth in Sections 9.01, 9.02, 9.04 and 9.05 hereof:

(a) Seller [**Maxus**] shall indemnify ^{FN2}... [**Occidental**] ... from and against any and all claims, demands or suits ... losses, liabilities, damages, obligations, payments, costs and expenses, paid or incurred, whether or not relating to, resulting from or arising out of any Third Party Claim (including, without limitation, the reasonable cost and expenses of any and all actions, suits, proceedings, demands, assessments, judgments, settlements and compromises relating thereto and reasonable attorneys' fees in connection therewith), and whether for property damage, natural resource

damage, bodily injury (including, without limitation, damage and injury related to products and injury to any person living or dead on the date hereof or born hereafter), governmental fines or penalties (including, without limitation, for the violation of permits), pollution, threat to the environment, environmental remediation, or otherwise (individually and collectively “Indemnifiable Losses”) relating to, resulting from or arising out of any of the following:

[FN2.](#) This language defines Indemnifiable Losses.

...

(ii) any Litigation,^{[FN3](#)} whether commenced before or after the Closing Date but prior to the expiration of 12 years following the Closing Date, relating to any actions or omissions of any Diamond Company (including, without limitation, any DSCC Company) or any predecessor-in-interest thereof prior to the Closing Date, or any occurrences, accidents, incidents or events prior to the Closing Date, *880 relating to the business or activity of any Diamond Company (including, without limitation, any DSCC Company) or any predecessor-in-interest thereof, including, without limitation, the Litigation identified in Schedule 2.07, but excluding (A) matters expressly covered by Section 9.03(a)(i) which do not involve Third Party Claims, Section 9.03(a)(iii) or Article X hereof and (B) all matters with respect to which Litigation is commenced after the expiration of 12 years following the Closing Date.

[FN3.](#) The stock purchase agreement elsewhere defines Litigation as “any action, suit, claim, proceeding, investigation or written governmental inquiry.”

...

(iv) the “Inactive Sites” (which for purposes of this Agreement, shall mean those former chemical plants and commercial waste disposal sites listed on Schedule 9.03(a)(iv) and all other properties which were previously, but which, as of the Closing Date, are not owned, leased,

operated or used in connection with the business or operations of any Diamond Company, including, without limitation, any DSCC Company, or any predecessor-in-interest thereof), including, without limitation, any matter relating to any of the Inactive Sites for which (A) any Diamond Company (including, without limitation, any DSCC Company) on or prior to the Closing Date agreed to indemnify, defend or hold harmless any Entity, or (B) any Diamond Company may otherwise be held liable;

...

(viii) the Historical Obligations and any other obligations or liabilities (absolute or contingent) of any Diamond Company (including, without limitation, any DSCC Company prior to the Closing) or any predecessor-in-interest thereof or of any DSCC Company unrelated to the Chemicals Business, including, without limitation, obligations and liabilities arising out of, resulting from or incurred in connection with, any ownership, use or operation of the business or assets of any Diamond Company other than a DSCC Company, whether before or after the Closing Date;

...

D. Is the Language Ambiguous?

To determine whether the trial court erred in deciding that the language is ambiguous, we must first determine whether the language is reasonably or fairly susceptible to two or more meanings. See [Lorillard Tobacco Co., 903 A.2d at 739](#). Both parties argue that the language is unambiguous and supports their respective positions.

1. Maxus's Position

Maxus argues that all litigation relating to Indemnifiable Losses is subject to the twelve-year limit contained in subsection (ii) of section 9.03(a). To support this argument, it notes that subsection (ii)(A) of section 9.03(a), “any Litigation,” specifically and only excludes subsections (i) and (iii) and Article X of the stock purchase agreement from the twelve-year time limit. It contends that the parties would not have

excluded subsections (i) and (iii) and Article X from the twelve-year limit unless they intended the twelve-year limit in subsection (ii) to also apply to subsections (iv), the Inactive Sites, and (viii), the Historical Obligations, the subsections at issue here.^{FN4} *881 **Maxus** further argues that additional language in subsection (ii)(B) demonstrates that indemnification for all litigation relating to Indemnifiable Losses is subject to the twelve-year time limit because that subsection bars indemnity for Litigation for “all matters with respect to which Litigation is commenced after the expiration of 12 years following the Closing Date.” We agree that this is one reasonable interpretation of the language.

FN4. **Maxus** argues we should apply the principle of *expressio unius est exclusio alterius* (“the expression of one is the exclusion of the other”). See *Am. Legacy Found. v. Lorillard Tobacco Co.*, 831 A.2d 335, 345 (Del.Ch.2003). That principle, however, is more often applied by Delaware courts in statutory construction, as opposed to the “contractual, interpretive process” of gleaning the intent of two potentially adverse clients. See *Delmarva Health Plan v. Aceto*, 750 A.2d 1213, 1216 n. 12 (Del.Ch.1999) (mem.op.) (citing *Walt v. State*, 727 A.2d 836, 840 (Del.1999)).

Another reasonable interpretation is that this paragraph means that **Maxus** is obligated to indemnify **Occidental** for all litigation filed within those first twelve years except for litigation regarding the three exclusions. As a result, it is reasonable to conclude that the exclusions were limits on the types of litigation that were subject to indemnification during those first twelve years, not a limit on the types of litigation subject to indemnification after those first twelve years. It is also reasonable to conclude that if the parties had intended subsection (ii)(A) & (B) to limit indemnification relating to litigation for all Indemnifiable Losses, they would have said so. Consequently, the language is fairly susceptible to two or more interpretations.

Maxus also argues that its interpretation allows indemnity for “claims” for Inactive Sites and Historical Obligations, but not for “indemnity claims for lawsuits concerning those types of claims.” **Maxus** contends that if **Occidental** is

entitled to indemnification for “claims” and “suits” commenced after twelve years, the limit on Litigation contained in subsection (ii) is meaningless. Conversely, **Occidental** claims that **Maxus's** interpretation would render a significant portion of the language that defines Indemnifiable Losses meaningless. Consequently, we cannot interpret this language as unambiguously supporting either party because to do so would render other language meaningless. See *O'Brien*, 785 A.2d at 287.

Maxus also contends that section 12.10, which requires both parties to maintain books and records for twelve years, supports its position. It argues that the parties would have required indefinite retention, or an outright transfer, of those records if the parties had intended indemnity in perpetuity. **Occidental**, however, contends that the purpose of the twelve-year record retention provision was to allow the parties to determine which of them was responsible under the reciprocal indemnity obligations of section 9.03 for claims arising out of the active chemicals business that **Occidental** would continue to operate. It contends that if the claims arose from conduct occurring before the closing, **Maxus** would be responsible, as long as the litigation commenced within twelve years of closing; and if the claims arose from conduct occurring after the closing, **Occidental** would be responsible. Both parties present reasonable arguments. We agree, however, that this provision lends some support to **Maxus's** interpretation.

2. Occidental's Position

Occidental contends that **Maxus's** interpretation rewrites the other subsections in the indemnity provision to insert a twelve-year limit on indemnification that is not in the express language of those other subsections. It agrees that it may not seek indemnification under subsection (ii) more than twelve years after the sale, but argues that the nine subsections in the indemnity*882 provision are each independent, stand-alone indemnification obligations.

Specifically, **Occidental** contends that its interpretation is supported by the use of the word “any” in the indemnity provision: that provision states that **Maxus** shall indemnify **Occidental** for Indemnifiable Losses “relating to, resulting from or arising out of any of the following,” and then lists the nine subsections. **Maxus** argues, however, that this

interpretation requires us to change the contract from “any of the following” to “any one of the following without regard to the other.” We conclude, reading the indemnity provision as a whole, that **Occidental's** interpretation of the word “any” in this context is reasonable.

[10] **Occidental** also argues that the following language in section 9.01(b) supports its interpretation: “all covenants contained in this Agreement shall survive the Closing and remain in effect indefinitely” unless otherwise provided.^{FN5} **Maxus** disagrees, contending that section 9.01(b) does not apply to the indemnity provision and, instead, refers to the representations and warranties in section 9.01(a). But if that is true, then subsection (b) is mere surplusage, because the time limits on the representations and warranties are specifically addressed in subsection (a). And we will not interpret a contract in such a way that renders language mere surplusage. See *Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 851 (Del.1998).

FN5. Section 9.01, in its entirety, provides:

Section 9.01 *Survival of Representations and Warranties.*

(a) Each of the representations and warranties contained in Articles II and III hereof shall survive and remain in full force and effect after the Closing for the periods set forth in Schedule 9.01, or shall terminate and be of no further force and effect after the Closing, in each case as set forth in Schedule 9.01.

(b) Unless a specific period is set forth in this Agreement (in which event such specified period shall control), all covenants contained in this Agreement shall survive the Closing and remain in effect indefinitely.

Maxus also contends that **Occidental's** interpretation is wrong because section 9.01(b) refers only to the covenants contained in article VIII of the stock purchase agreement and does not apply to the indemnification provision in section 9.03. We again disagree. If the parties had intended that result, there would have been no reason for them to include the

language at the beginning of the indemnity provision, section 9.03, “Subject to the terms and limitations set forth in Section 9.01....” We agree that the language of section 9.01 tends to support **Occidental's** interpretation that the parties intended **Maxus's** indemnity obligations for the Inactive Sites and Historical Obligations to have no time limit.

3. Our Conclusion

[11] Both parties present reasonable arguments supporting their views of how the specific language in dispute should be interpreted. Both interpretations, however, render other language in the stock purchase agreement meaningless. For these reasons, we conclude that the disputed language in the stock purchase agreement is “reasonably or fairly susceptible of different interpretations, or may have two or more meanings.” See *Lorillard Tobacco Co.*, 903 A.2d at 739. As a result, we conclude that the agreement is ambiguous and the trial court properly submitted the interpretation of the disputed language in the contract to the jury.

We overrule **Maxus's** first issue.

CLAIMED JURY CHARGE ERROR

In its second and third issues, **Maxus** argues that the trial court erred (1) by *883 refusing to instruct the jury on the proper standards for the interpretation of the indemnity provision, and (2) by improperly shifting the burden of proof to **Maxus** to prove the twelve-year limit applies to **Occidental's** requests for indemnity.

A. Standard of Review and Applicable Law

[12] We apply Texas procedural law to our review of jury charge error. See *Penny v. Powell*, 162 Tex. 497, 347 S.W.2d 601, 602 (1961). *Texas Rule of Civil Procedure 277* requires a trial court to submit instructions and definitions to the jury as are necessary to enable the jury to render a verdict. *TEX.R. CIV. P. 277*; *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 451-52 (Tex.1997). We review the trial court's submission of instructions and jury questions under an abuse of discretion standard. See *Nicolau*, 951 S.W.2d at 452.

B. Jury Instructions

[13][14] In its second issue, **Maxus** contends that the trial court erred by refusing to submit additional jury instructions relating to the interpretation of the indemnity provision. **Maxus** contends that Delaware law required the court to instruct the jury (1) to construe the indemnity provision narrowly in favor of the indemnitor, and (2) that language in an indemnity contract must be clear and unequivocal.^{FN6} Conversely, **Occidental** contends that Delaware law supports its position that these heightened jury instructions were not required.

FN6. **Occidental** initially contends **Maxus** did not preserve error on this issue. We disagree. We conclude **Maxus** both objected to the court's jury charge and tendered the instructions. As a result, this issue is properly before us.

The cases **Maxus** cites to support its argument that these additional instructions are required by Delaware law are cases in which the indemnitee was seeking indemnification for its own acts.^{FN7} Here, **Occidental** is seeking indemnification for DSCC's acts prior to the execution of the stock purchase agreement, not **Occidental's** own acts. **Maxus** argues, however, that when **Occidental** merged with DSCC after the execution of the stock purchase agreement, the two companies "became one company" and DSCC's actions are **Occidental's** "own acts" for purposes of prospective indemnification claims. But **Maxus** does not cite any provision of the agreement or legal authority to support this argument. And the agreement expressly provides for **Maxus's** indemnification of **Occidental**, specifically referring to those obligations in terms of DSCC's former chemical plant operations and commercial waste disposal sites without any reference to a merger of those prior acts into **Occidental's** own acts.

FN7. **Maxus** cites *Fina, Inc. v. ARCO*, 200 F.3d 266, 271-73 (5th Cir.2000); *Gloucester Holding Corp. v. U.S. Tape & Sticky Products, LLC*, 832 A.2d 116, 129 (Del.Ch.2003); *Rhone-Poulenc*, 616 A.2d at 1195-96; *Rock v. Delaware Elec. Co-op., Inc.*, 328 A.2d 449, 453-54 (Del.Super.Ct.1974); and several Delaware cases not designated for publication.

In summary, **Maxus** has not shown that DSCC's actions should be imputed to **Occidental**. And we have not found any Delaware case that requires the trial court to submit a heightened standard of proof in the jury instructions in a case where the indemnitee is not seeking indemnification for its own acts. See, e.g., *Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160, 1165 (Del.1978) (in which court interpreted indemnity provision in typical indemnity case and did not reference heightened jury instructions).

We overrule **Maxus's** second issue.

C. Claim that Burden of Proof Shifted to Maxus

*884 [15][16][17] In its third issue, **Maxus** complains that question one of the jury charge improperly shifted the burden of proof. Neither **Maxus** nor **Occidental** cite any decision applying Delaware law on the issue of the burden of proof in a declaratory judgment action. Our review of Delaware law, however, indicates our sister state places the burden of proof in a declaratory judgment action on the party seeking to prove it is entitled to affirmative relief. See *Am. Legacy Found. v. Lorillard Tobacco Co.*, 886 A.2d 1, 18 (Del.Ch.2005), *aff'd*, 903 A.2d 728 (Del.2006). To properly place the burden of proof, the court's jury charge must be worded so that the jury's answer indicates that the party with the burden of proof on that fact established the fact by a preponderance of the evidence. See *Turk v. Robles*, 810 S.W.2d 755, 759 (Tex.App.-Houston [1st Dist.] 1991, writ denied).

Question one asked:

Are **Occidental's** section 9.04 requests for indemnity or defense for obligations under sections 9.03(a)(iv) and 9.03(a)(viii) limited by section 9.03(a)(ii) of the Agreement?

In answering this question, it is your duty to interpret the language of the Agreement attached hereto.

You must decide the meaning by determining the intent of the parties at the time of the Agreement. Consider all the facts and circumstances surrounding the making of the

Agreement, the interpretation placed on the Agreement by the parties and the conduct of the parties.

You are further instructed that your answer must be based upon a preponderance of the evidence.

Answer “yes” or “no.”

Answer: *No*

[18] **Maxus** contends that **Occidental** had the burden of proof because it was the party seeking indemnification.^{FN8} And it contends that this question improperly placed the burden of proof on **Maxus** as the party advocating that subsection (ii) limited indemnification for lawsuits brought regarding the Inactive Sites and Historical Obligations to those lawsuits brought within twelve years.

FN8. **Occidental** contends that **Maxus** did not preserve error on this issue because its objection is not specific enough to inform the court of the error. We do not agree. **Maxus** objected to question one because it improperly shifted the burden of proof. Its objection is sufficient to preserve error. See [TEX.R. CIV. P. 274](#); [Bargsley v. Pryor Petroleum Corp.](#), 196 S.W.3d 823, 830 (Tex. App.-Eastland 2006, pet. denied); [Turk v. Robles](#), 810 S.W.2d at 759 (citing [City of Austin v. Powell](#), 156 Tex. 610, 613, 299 S.W.2d 273, 274-75 (1957)).

But, as we construe the parties' pleadings, **Maxus** and **Occidental** both sought affirmative relief and each had the burden to prove that it was entitled to that relief. **Occidental** sought affirmative relief by its request for a declaration that **Maxus** is obligated to indemnify **Occidental** indefinitely for lawsuits relating to the Inactive Sites and Historical Obligations. **Maxus**, on the other hand, sought affirmative relief by its request for a declaration that the agreement contains a twelve-year limit on indemnity for all litigation arising from all nine subsections of the indemnity provision.

The instruction for question one required the jury's answer to be based on a preponderance of the

evidence, whether that answer was “yes” or “no.” This did not place the burden solely on **Maxus**. Instead, it placed the burden on each party to prove its respective position by a preponderance of the evidence. As a result, we conclude that the trial court did not *885 improperly shift the burden of proof on this issue.

We overrule **Maxus's** third issue.

CONCLUSION

We affirm the trial court's judgment.

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