IN THE SUPREME COURT OF IOWA

Supreme Court No. 18-2183
Monroe County No. LALA003789

LEMARTEC ENGINEERING & CONSTRUCTION n/k/a LEMARTEC CORPORATION

Third-Party Plaintiff-Appellant,

vs.

ADVANCE CONVEYING TECHNOLOGIES, LLC.
Third-Party Defendant-Appellee,

APPEAL FROM THE IOWA DISTRICT COURT FOR MONROE COUNTY
THE HONORABLE JOHN TELLEEN

THIRD-PARTY PLAINTIFF-APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

This interlocutory appeal presents novel questions of law related to both claim preclusion and issue preclusion. As such, it should be routed to the Iowa Supreme Court. Iowa R. App. P. 6.1101(3).

INTRODUCTION AND SUMMARY OF ARGUMENT

This is an appeal raising important and novel issues at the intersection of indemnity and *res judicata*. *Res judicata* is the overall name for the related common law doctrines of claim preclusion (in which final judgment in one case forecloses any future claims that should have been included) and issue preclusion (also known as collateral estoppel, which prevents an issue, having been litigated once, from being litigated in the future in that identical form). Indemnity is a common law or contractual right in which a litigant seeks to "pass-through" liability it incurs to a third party. As such, indemnity serves as a conduit by shifting liability for a given cause of action to a third party; the critical aspect of indemnity is the underlying liability to be shifted. Here, summary judgment has left Lemartec Engineering & Construction n/k/a Lemartec Corporation ("Lemartec"), unable to seek indemnity from its subcontractor, Advance Conveying Technologies, LLC ("ACT"), for defects claimed by the end user of a conveyor designed and fabricated by ACT. That

summary judgment misconstrued precedential and complex issues relating to the interaction between these two important doctrines.

Although this is not a fact appeal, the background must be set out before the issues make sense. Lemartec was one of several subcontractors involved in the construction of a hundred million dollar chlor alkali plant in Eddyville, Iowa (the "Project"). Lemartec itself subcontracted the design/manufacture of a salt conveyor system at the Project to ACT, and also the installation of that conveyor to Southland Process Group, LLC ("SPG"). The conveyor work encountered problems, overruns, and delays leading to a diversity federal lawsuit among Lemartec, ACT and SPG. Lemartec agreed to pay SPG in excess of its contract price to account for extra work and delays incurred by SPG in correcting deficiencies in some of the parts shipped by ACT. By way of example, a "deficiency" in this context might have been two metal plates with bolt-holes that did not line up, causing SPG to incur the time and expense to re-drill them. The federal suit was exclusively concerned with who was responsible for correcting and paying for issues necessary to get the conveyor in shape to be turned over to the customer.

The conveyor was ultimately turned over to the customer. Following the completion and turnover of the conveyor, the conveyor allegedly began

experiencing a separate set of issues. Thus, while the federal suit was pending, the end user of the Project, HF Chlor-Alkali, LLC, ("HFCA") instituted a state-court action involving multiple other contractors and subcontractors alleging that it uncovered latent defects in the entire Project's construction, including the conveyor.[1] Lemartec again impled ACT seeking, *inter alia*, indemnification if the end user proved any defects in the final product.

ACT won the federal suit and secured a judgment for over $300,000 in unpaid contract price and that specifically excused it from indemnifying Lemartec "for what Lemartec paid to SPG, the original plaintiff in this case." (App. pp. 686–687). Then, despite never complaining about facing two suits, and never having pled *res judicata* in either suit, ACT sought summary judgment in this case based on that doctrine.

The trial court granted claim preclusion in the face of procedural and substantive failures. Procedurally, ACT was barred from seeking claim preclusion by this Court's decision in *Noel v. Noel*, 334 N.W.2d 146 (Iowa 1983) recognizing a special rule for simultaneous lawsuits from the Restatement of Judgments. Where—as here—the two suits are pending at

[1] The end user (HFCA) sued its general contractor, a company called Conve, and Conve impled Lemartec, with which it had a contract. For simplicity, this brief will refer to the end-user claims without referencing Conve in every instance.

the same time, a defendant must object to claim-splitting and seek a procedural remedy. If no remedy is sought, a defendant will be deemed to have waived claim preclusion so that it cannot be asserted in the second case. Here, ACT never pled or even so much as objected to *res judicata* in either case until the federal case concluded. ACT then invoked it by motion (itself plainly barred when the defense has not been pled) in the state case. Every authority on point prevents this, and ACT supplied the trial court with a thoroughly unavailing excuse that, because Lemartec never notified it of claim splitting, it did not have to object. There is no such requirement in *Noel*, the Restatement, or elsewhere. Those authorities squarely place the onus on a defendant who perceives prejudicial claim splitting to address it, if at all, when something can be done about it. They simultaneously bar raising it as a "gotcha" tactic once the first suit concludes. Under binding authority that is on "all fours," ACT waived claim preclusion by failing to timely address it.

Substantively, ACT cannot secure claim preclusion because the end-user indemnity claim in state court did not accrue until ***after*** the federal complaint had been filed. The date of filing is a bright-line cutoff in virtually all jurisdictions designed to short-circuit complex questions of whether a complaint should (or could) be amended to add claims that crop up after the

initial complaint. Unlike *Noel*, this rule is not yet formalized in Iowa. But at least seven federal circuits and several states recognize a bright-line rule. The rule obviates the need for speculative inquiries into whether and when a plaintiff should have amended to account for new facts, and whether such amendment would have been allowed. This Court should adopt that rule, and its application here is clear. ACT did its best to confuse the issue as if the "claim" or issue was as broad as the availability of any indemnity for any reason. But, returning to doctrine, indemnity is only an empty vessel that conveys an underlying liability or claim from one party to another. Here, in state court, the "indemnity" at issue was responsibility for the end-user's claimed latent defects. According to multiple authorities, ***that*** indemnity did not arise until HFCA asserted it—some thirteen months after the federal suit was filed. It cannot be subject to claim preclusion under the federal/multi-state rule that this Court should adopt.

It is this same doctrinal confusion that ACT exploited to secure issue preclusion. The critical problem is that ACT prevailed upon the trial court to characterize the "issue" as "indemnity" in general. But the issue cannot be construed so broadly. Indemnity for the damages sought by SPG (again, the installer) and HFCA (the end user) for different time periods are entirely distinct such that the federal judgment no more decided HFCA's complaints

than it adjudicated some hypothetical tort by a worker who might later be injured on the ACT-made conveyor. HFCA listed its complaints via interrogatory answers only after the federal judgment, and it included alleged deficiencies such as corroded buckets and malfunctioning electronics. Not a single one of these allegations was so much as mentioned, let alone resolved, in federal court.

Unable to point to the resolution of specific complaints, ACT prevailed upon the district court to treat the issue as "indemnity" for the overall "transaction." Were this correct, the seller of products who challenged a manufacturer's contractual performance, and lost, would be issue-precluded from seeking indemnity if purchasers later uncovered a dangerous, latent defect. Indemnification provisions are not intended to cover only the first event; there are frequently multiple distinct causes of action that can arise under a single indemnity provision. The liability of Lemartec to its installer (SPG) for extra work needed to install the conveyor is not the same as the liability of Lemartec to resolve complaints by the end user (HFCA) in the event the conveyor manifests different problems after the turn-over. When it comes to indemnity, then, this Court needs to clarify issue preclusion law to make clear that the issue is not just "indemnity" for the entire transaction but rather indemnity for discrete liabilities to discrete

third parties. What matters is ***not*** the "vessel" carrying the liability to a third party, but rather the specific liability being transferred to the third party.

Overall, then, this case threatens the integrity of Iowa's common law of *res judicata* in a way destined to foment injustice. If ACT's position is accepted, Lemartec will be deemed to have forfeited valuable indemnity rights because it let a federal court resolve a modest dispute among its indemnitor (ACT), the installer (SPG), and Lemartec about overruns and delays during installation. Going forward, anyone owed indemnification would be forced to do the impossible—raise all potential future claims justifying indemnification when the first problem is sued on—whether known or unknown—or risk losing all future benefit. That is just not how indemnity—a doctrine that covers liability for long-hidden latent defects, among others—works. This Court should intervene to clarify Iowa *res judicata* doctrine such that Lemartec's understanding—that discrete pieces of indemnity can be subject to suit as they arise—is recognized, consistent with federal and multistate law.

STATEMENT OF THE CASE

A. The Nature of the Case

This case involves the alleged failed expectations and construction defects in a hundred-million-dollar chlor-alkali plant in Eddyville, Iowa (the

"Project") and includes numerous parties involved in construction of the Project. (*See* Appendix, pp. 13–14 at ¶17) Most relevant to this appeal, Third-Party Plaintiff Lemartec, a subcontractor involved in erecting a salt conveyor system for the plant, sued one of its own subcontractors, Third-Party Defendant ACT seeking recovery and/or indemnification of any amounts Lemartec may be found to owe as a result of any deficiencies in the conveyor system alleged by the customer, HFCA. (App. pp. 66–70)

B. Procedural History

Lemartec and ACT were also parties to a lawsuit in federal court regarding certain aspects of the Project. In that case, another of Lemartec's subcontractors, SPG sued both Lemartec and ACT. (App. pp. 372–434) Lemartec had retained SPG to install the conveyor system that ACT had designed and manufactured. SPG's suit in federal court was to recover costs resulting from delays and alleged pre-completion problems with some of the parts of the conveyor system. (App. p. 514 at ¶11; App. p. 658) Lemartec settled with SPG, and Lemartec's claims against ACT were litigated in a bench trial. The court issued a judgment to the effect that Lemartec was responsible for the pre-completion delays and damages. (App. 683–689) Lemartec is currently appealing that ruling to the United States Court of Appeals for the Eighth Circuit. (Lemartec Notice of Appeal to 8th Cir.)

ACT had never, at any point, claimed that the federal action in any way overlapped with this case, and it did not include a *res judicata* affirmative defense in its Answer in this case, even though the federal action had been pending for over a year and a half when its Answer was filed. (App. 117–132) Nevertheless, upon obtaining judgment in the federal case, ACT rushed to the district court below and sought summary judgment on the basis that the federal court's resolution of SPG's pre-completion claims precluded inquiry into the separate, post-completion claims brought by the customer of the Project. (App. 146–169)

C. Disposition of the Case in the District Court

The district court granted summary judgment to ACT, accepting its arguments that the federal action had both a claim preclusive and issue preclusive effect in this case. (App. p. 355) Further, the district court rejected Lemartec's arguments that ACT's summary judgment should be denied on multiple procedural grounds resulting from its belated "gotcha" assertion of the *res judicata* defense. (App. pp. 347–350) This is an interlocutory appeal from that Order of the Iowa District Court for Monroe County granting summary judgment in favor of ACT.

STATEMENT OF FACTS[2]

A. Conveyor System Design & Installation

On May 17, 2013, HFCA entered into a written agreement with Conve & AVS, Inc. ("Conve") to construct a chlor-alkali manufacturing facility (the "Project") in Eddyville, Iowa. (App. p. 12 at ¶9) Conve subcontracted various tasks on the Project. On August 1, 2013, Conve hired Lemartec to design and build the physical plant for the Project, which contained the salt conveyor system (the "conveyor system" or "conveyor"). (App. p. 59 at ¶182) Lemartec, in turn, subcontracted part of the work to two other entities. On December 18, 2013, Lemartec entered into a purchase order with ACT for the design and manufacture of the conveyor system (the "Purchase Order"). (App. p. 101 at ¶13; App. pp. 655, 658) Then, on October 24, 2014, Lemartec entered into a subcontract with SPG for the installation and erection of the conveyor system that ACT was designing and manufacturing. (App. p. 373 at ¶8; App. p. 101 at ¶13; App. pp. 655, 658)

Installation of the Conveyor System was beset by problems. SPG complained that it encountered issues with some of the component parts supplied by ACT. (App. pp. 660–661; App. pp. 372–383) Lemartec sent a

[2] For the convenience of the Court, a graphic timeline of some of the important events in the factual history of the case has been attached to this brief as Exhibit A.

Notice to Comply & Notice of Project Delay to ACT on March 24, 2015, in which it noted eleven pre-completion deficiencies in ACT's work. (App. p. 468) SPG eventually completed installation of the conveyor system in or about May of 2015, and it alleged that in doing so, it incurred significant additional expenses for which Lemartec and ACT were responsible. (App. p. 462; App. pp. 372–383)

B. The Federal and State Lawsuits

To recoup its alleged additional expenses, on October 16, 2015, SPG sued both Lemartec and ACT in *Southland Process Group, LLC v. Lemartec Corporation and Advance Conveying Technologies, LLC,* filed in the United States District Court for the Southern District of Iowa, Case No. 4-15-cv-353-CRW-HCA (the "Federal Suit"). (App. pp. 372–383) Lemartec and SPG ultimately settled their claims against each other, and the Federal Suit proceeded to trial between Lemartec and ACT with the claims at issue narrowed to: (a) Lemartec's claims to recoup the additional sums it paid SPG in connection with the installation of the conveyor, and (b) ACT's claims for alleged nonpayment of the balance owed on its Purchase Order. (App. p. 684)

Meanwhile, the completed Project was turned over to Conve, the prime contractor, on or about June 21, 2015, and Conve ultimately turned

the Project over to HFCA. HFCA was dissatisfied with numerous alleged construction defects and had ongoing complaints regarding essentially all aspects of the Project. On November 22, 2016, HFCA sued the general contractor, Conve, and four other entities involved in the design and construction of the Project in the District Court for Monroe County, Iowa, (App. p. 11), alleging generally, among other things, that after the conveyor system was installed, turned over and put into use, the system failed to perform to specifications (the "State Suit"). (App. 23 at ¶82(s)) Conve filed third-party claims against Lemartec for indemnity and contribution (App. pp. 41–65), and Lemartec filed third-party claims against ACT and SPG for indemnity, pursuant to their agreements with Lemartec. (App. pp. 66–70) By June 5, 2017, the date on which Lemartec filed its third-party claim against ACT, the Federal Suit had been pending for over a year and a half. Yet, when ACT filed its Answer to Lemartec's third-party claim, it did not reference the Federal Suit or attempt to raise a *res judicata* affirmative defense. (App. p. 117)

ACT had good reason for failing to do so, as the nature of the claims in the two cases was quite different. Lemartec's cross-claims against ACT for indemnification, breach of contract, and breach of various warranties in the Federal Suit were brought solely in response to, and in connection with,

SPG's underlying claim relating to excess costs incurred from approximately October of 2014 through May of 2015, the time period ***before*** the conveyor system was completed and turned over to Conve. (App. p. 684) By contrast, Lemartec's cross-claims against ACT for indemnification and breach of contract in the State Suit is limited to alleged defects that arose (or allegedly manifested themselves) ***after*** the Project (and, correspondingly, the conveyor system) was completed and turned over to HFCA. (App. p. 23 at ¶82(s))

HFCA clarified the nature of its complaints only in interrogatory responses served on June 14, 2018. (App. pp. 935–937 at 1b, 1e) According to those allegations, the conveyor system failed to perform as HFCA intended in that: the conveyor components corroded; the electrical system corroded and did not allow for automatic operation, the bucket system leaked, corroded, and fell apart; vibrations caused a rupture, and the conveyor system did not pass approval testing. (App. pp. 935–937 at 1b, 1e) These specific, post-completion issues were not raised and could not have been raised in the Federal Suit.

Both cases were proceeding along separate tracks for over a year. On April 9–12, 2018, the Honorable Charles R. Wolle conducted a bench trial in the Federal Suit; Judge Wolle characterized the "issues for trial" as "whether

either of [Lemartec and ACT] owes money to the other for money earned, but unpaid; project delays; and for additional work that was required to make the conveyor system functional." (App. p. 684) On May 21, 2018, Judge Wolle issued his Findings of Fact, Conclusions of Law and Judgment in favor of Cross-Defendant ACT and awarded ACT $317,467.07, plus interest. (App. p. 688) Lemartec is currently appealing the May 21, 2018, Ruling to the United States Court of Appeals for the Eighth Circuit. (Lemartec Notice of Appeal to 8th Cir.)

C. The Ruling Below

Less than three months after judgment was issued in the Federal Suit, ACT moved for summary judgment in this case on August 15, 2018. (App. p. 146) ACT had never before that point alleged that there was any commonality between the Federal and State Suits but, having obtained judgment in its favor in the Federal Suit, ACT sought summary judgment on the basis that the judgment in the Federal Suit compelled judgment in its favor in this case. When Lemartec pointed out in its Resistance that *res judicata* must be raised as an affirmative defense in an Answer, because parties are not allowed to opportunistically remain silent during the pendency of both cases and seek a "gotcha" result only after prevailing in one case (Lemartec Resist. Summ. J. p. 12), ACT acknowledged the

requirement. (App. p. 199) On October 31, 2018, ACT filed a motion to amend its Answer to include a *res judicata* affirmative defense. (App. p. 296) Lemartec opposed the motion. (App. p. 315)

The district court granted summary judgment to ACT. The court declined to impose the heretofore uniform procedural bar against parties remaining silent while allegedly similar cases are pending, then springing a *res judicata* defense only after prevailing in one suit because "Lemartec did not communicate any intent to split its claims . . . ." (App. p. 349) Accordingly, it granted ACT's motion to amend its Answer and add a thirteenth-hour *res judicata* defense. (App. pp. 355–356)

On the merits, the district court evaluated both claim preclusion and issue preclusion theories. With respect to claim preclusion, the court found the Federal and State actions sufficiently similar because both cases "are premised on the contractual relationship between Lemartec and ACT" regarding the conveyor system. (App. p. 342) With respect to issue preclusion, the court found the issues in the Federal and State cases identical because "the issue of indemnity rights arising under the Purchase Order has been raised and litigated in the prior federal action." (App. p. 351) The court granted ACT summary judgment under both theories. (App. p. 355) This interlocutory appeal followed.

ARGUMENT

I. ACT IS NOT ENTITLED TO CLAIM PRECLUSION

A. ACT's Failure to Object During the Pendency of Simultaneous Lawsuits Waived Claim Preclusion Under this Court's *Noel* Ruling

1. Preservation of Error

Lemartec resisted summary judgment (Lemartec Resist. Summ J. pp. 7–12) by arguing that ACT failed to object to Lemartec's third-party claim during the pendency of the Federal Suit and thus waived claim preclusion. The district court addressed this (App. pp. 347–349), and it is therefore preserved. Iowa R. App. P. 6.903(2)(g)(1).

2. Standard of Review

Appellate courts "review the district court's grant of summary judgment for correction of errors at law." *Sallee v. Stewart*, 827 N.W.2d 128, 132 (Iowa 2013) (citing *Ranes*, 778 N.W.2d at 685).

3. Discussion: *Noel v. Noel* is Directly on Point and Conditions Claim Preclusion on a Contemporaneous Objection that ACT Studiously Avoided

ACT cannot establish the substantive elements of claim preclusion, but there is no need to reach them because ACT is procedurally foreclosed from asserting the defense. In fact, ACT is procedurally barred by a rule and binding decision specific to cases such as this where two cases are

simultaneously pending. Where, as here, a litigant fails to contemporaneously invoke claim-splitting remedies, claim preclusion is barred under the Iowa Supreme Court's decision in *Noel v. Noel*, 334 N.W.2d 146, 148 (Iowa 1983), and by Section 26 of the Second Restatement of Judgments. The trial court's decision excuses this failing on a basis not recognized by case law or the Restatement—that Lemartec had to somehow notify ACT of claim splitting before ACT had to invoke remedies.

Claim preclusion typically arises when a party loses a lawsuit and, sometime later, seeks a second bite at the apple. In the rare circumstance—present here—that two suits are pending simultaneously, there is a requirement that a defendant contemporaneously object in the first suit on the grounds of claim-splitting or waive the defense. Because ACT failed to object in any manner—or even plead *res judicata* as an affirmative defense in its Answer, filed after the Federal Suit had been pending for a year and a half—prior to the judgment in the Federal Suit, ACT waived entitlement to claim preclusion. *Noel*, 334 N.W.2d at 149.

Noel adopts the Restatement (Second) Judgments § 26, cmt. *a*. providing:

> Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another is pending based on the same claim, judgment in one of the

> actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim.

Noel simply recognized this rule in Iowa. In *Noel*, a son sued his father to recoup improvements to a leasehold, but lost. 334 N.W.2d at 147. While that suit was pending, the father passed away, and the son also brought a probate action. *Id*. The Court explained:

> Faced with the two actions, the executor of the father's estate answered in the declaratory action and averred several defenses, and also disallowed the probate claim. In neither case, however, did he allege the pendency of the other case, *see* Iowa R.Civ.P. 103, or ask for consolidation of the cases.

Id. Later, the executor moved in the probate action to have it declared barred by the former adjudication, but the Court demurred:

> The executor was confronted by two cases arising from the same claim. For reasons of his own – a jury trial in the probate claim? - he did not move to consolidate them, nor did he plead in either case that another action was pending. Instead, he went to trial in the declaratory action. After he obtained judgment in that case he sought to interpose the judgment to the probate case as precluding prosecution of that claim.

Id. at 148–49.

The Court rejected this stratagem because the "decisions dealing with this situation hold that a party waives claim preclusion by failing to interpose it prior to judgment in the first case." *Id*. at 149 (citing Restatement (Second) Judgments § 27) (further citations omitted). And the Court

elaborated that "the executor waived claim preclusion by failing to interpose it appropriately before judgment in the declaratory action." *Id*.

Noel is on all fours with the present situation, and the Court clarified what it means to "interpose" the defense of *res judicata* "appropriately," by citing with approval *Brown v. Lockwood*, 76 A.D.2d 721 (N.Y.A.D. 1980) and *Nationwide Ins. Co. v. Steigerwalt*, 255 N.E.2d 570 (Ohio 1970). *Brown* found waiver because "if the defendant felt himself burdened by multiple suits he could have moved for consolidation or a joint trial," or "he could have moved to dismiss" the second suit. *Brown*, 76 A.D.2d at 740. Similarly, the Ohio decision cited by *Noel* deemed claim preclusion waived because "in neither case did the defendant avail himself of the first opportunity to act to avoid prosecution of the separate actions." *Nationwide*, 255 N.E.2d at 573.

The trial court's Ruling also cited *Pagel v. Notbohm*, 186 N.W.2d 638 (Iowa 1971), calling it "a prototypical example of acquiescence to claim splitting and waiver of *res judicata* as a defense." (App. p. 348) In *Pagel*, the defendant filed answers to both actions but did not move to consolidate or object to the simultaneous litigation. *Id.* (citing *Pagel*, 186 N.W.2d at 639). *Noel*, *Pagel*, *Nationwide*, and *Brown*, together with the Restatement, leave no doubt: claim preclusion is waived in simultaneous suits absent some

effort to contemporaneously address the situation, be it dismissal, consolidation, stay or otherwise. But this Court is not confronted with the need to draw any lines or clarify how much effort suffices to address the situation. That is because ACT literally did ***nothing*** before seeking summary judgment here; there was no objection, let alone any effort to seek a remedy. *Res judicata* was not even pled by ACT as an affirmative defense in the current case until after it filed its Motion for Summary Judgment.

Pleading *res judicata* as an affirmative defense is a separate and distinct requirement from *Noel* and *Pagel*. And, when Lemartec pointed out that the Iowa rules independently prevented ACT from even raising the defense for the first time by motion, ACT moved after the fact for leave to amend, and it was granted. This was independent error because, no matter the procedural motion used to address (and thus preserve) the defense, it must first have been raised by pleading.[3] But the trial court excused ACT's

[3] Iowa courts have determined "that a party who desires to set up a prior adjudication as a bar to a claim made by an opposing party must properly plead such adjudication before evidence is admissible in regard to it." *Bertran*, 232 N.W.2d at 531 (citing *Boone Biblical College v. Forrest*, 275 N.W. 132, 135 (Iowa 1938)). Iowa courts have further "declared that a plea of former adjudication is an affirmative defense, with the burden on defendant to plead and prove it." *Id.* (citing *Bloom*, 165 N.W.2d at 827; *In re Estate of Kaldenberg*, 127 N.W.2d 649, 651 (Iowa 1964)). Critical to this appeal, "*res judicata* is an affirmative defense to be asserted by answer and cannot be raised by motion to dismiss." *Id*. at 532 (quoting *Bickford v. Am. Interinsurance Exchange*, 224 N.W.2d 450, 454 (Iowa 1974)); *see also*

failure to object while both suits were pending by deeming Lemartec at fault for the situation.

The trial court's reasoning is wrong, directly contradicts all the authority cited, and rejects the Restatement. If allowed to stand, it amounts to direct negation of existing precedent in *Noel* and *Pagel*. The trial court faulted Lemartec because "Lemartec did not communicate any intent to split its claims because it asserted the same claim—indemnification from ACT for the same breach of contract—in both federal and state lawsuits." (App. p. 349) But there is no communication of "intent to split claims" in *Noel*,

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Swisher & Cohrt v. Yardarm, Inc., 236 N.W.2d 297, 299 (Iowa 1975); *Robbins v. Heritage Acres*, 578 N.W.2d 262, 265 (Iowa Ct. App. 1998); *Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 768 (Iowa 2002) (stating, under Iowa law, a defendant is required to raise an affirmative defense in its pleading). Allowing ACT to skirt around the procedural requirements of pleading *res judicata* as an affirmative defense prior to raising it by motion is prejudicial to Lemartec. Had ACT asserted the *res judicata* defense—at the latest when it filed its Answer to Lemartec's Amended Petition/Complaint—that would have allowed Lemartec to analyze its federal claims in conjunction with the asserted defense. ACT, by waiting until after it prevailed in the Federal Suit before asserting the *res judicata* defense, foreclosed Lemartec's ability to weigh its options in the Federal Suit to ensure its indemnity claims in the State Suit were not preempted. *See Clements v. Airport Auth. of Washoe Cty.*, 69 F.3d 321, 329 (9th Cir. 1995) (holding *res judicata* defense was waived for failing to timely raise it because it caused prejudice to the plaintiffs). ACT's failure to plead *res judicata* also bars its issue preclusion defense. *See, e.g.*, *Fischer v. City of Sioux City*, 654 N.W.2d 544, 548 (Iowa 2002) ("That is why, we believe, the general rule is that issue preclusion-whether offensive or defensive-must be pled and proved by the party asserting it.").

Pagel, *Brown*, or *Nationwide*, nor is it mentioned in the Restatement. Yet these authorities all mandate waiver in the absence of some effort on the part of defendants to address the multiple suits. Indeed, these cases recognize that the onus is squarely on ***defendants*** to object when faced with multiple suits. And, notice of multiple suits is effected, as it always is, by service of a summons and complaint. *See, e.g.*, *Rees v. City of Shenandoah*, 628 N.W.2d 77, 79 (Iowa 2004) (citing *Soike v. Evan Matthews & Co.*, 302 N.W.2d 841, 842 (Iowa 1981)).

American jurisprudence affords defendants notice of suits, but not any form of notice of the legal import of the suits, such as a "Notice of Claim Splitting." It is left for the defendants and their counsel to evaluate the multiple suits and seek a remedy ***if they perceive it to be appropriate and strategically advantageous***. As the New York court in *Brown* put it, "if the defendant felt himself burdened by multiple suits he could have moved for consolidation or for a joint trial." *Brown*, 76 A.D.2d at 740. Or conversely, as the *Noel* Court wryly observed, a defendant might perceive a tactical advantage in multiple suits. *See Noel*, 334 N.W.2d at 148–49 (speculating that executor's motive to acquiesce in two suits was to secure a jury trial). The overall point is that claim-splitting is a theoretical injury (or possibly benefit) to a defendant, and, ***if*** it is perceived as injurious, it must draw a

contemporaneous effort to cure. By contrast, if a defendant merely ignores the issue, it will be deemed to have acquiesced to the separate suits.

The trial court also reasoned that *Noel*, *Pagel*, and the Restatement do not apply because Lemartec asserted "the same claim" in both lawsuits. (App. p. 349) That is wrong for several reasons. First, none of those authorities turn on the identity of the claims. Second, Lemartec's claims, though both sounding in indemnity, are not remotely identical—the federal action sought indemnity for delay and cost overruns incurred by a single subcontractor during its pre-completion efforts, and the state action seeks pass-through indemnity for HFCA's (the end user's) later-alleged post-completion defects. To deem the suits "identical" the court had to overlook these facts, something antithetical to the basic summary judgment standard construing all facts against the movant. Third, conditioning waiver on whether or not claims are "identical" is a logical fallacy. That is, if waiver happened only where claims were not "identical," it would amount to waiver of claim preclusion only where claim preclusion would fail on its own elements. Identity of the claims is an element of claim preclusion. (*See infra* at 60–68.) To be meaningful, waiver by failure to object must be operative where the claims are "identical" because that is when claim preclusion would otherwise be effective. Waiving only non-identical claims would be

tantamount to waiving only where claim preclusion would ultimately fail on the merits.

ACT never objected in the Federal Suit to maintenance of the separate State Suit, let alone sought a remedy. ACT first raised the defense only after prevailing in the Federal Suit, in its summary judgment motion in this case. Any *res judicata* defense was, thus, waived.

B. ACT's Claim Preclusion Argument Is Substantively Wrong Because the Doctrine Does Not Apply to Claims Arising After Filing of the First Complaint.

1. Preservation of Error

Lemartec specifically argued in resistance to ACT's motion for summary judgment that *res judicata* does not apply because the allegations raised by HFCA/Conve pertaining to the conveyor system had not arisen at the time the Federal Suit was filed. (Lemartec Resist. Summ J. pp. 7–10). The district court addressed this issue (App. p. 346), and it is therefore preserved for appeal. Iowa R. App. P. 6.903(2)(g)(1).

2. Standard of Review

Appellate courts "review the district court's grant of summary judgment for correction of errors at law." *Sallee*, 827 N.W.2d at 132.

3. Discussion

There is a bright-line rule governing the timing of claims that Iowa has yet to recognize and that the trial court declined to apply. There is a broad consensus among the federal circuits and state courts that claim preclusion does not bar claims that arise ***after filing of the first complaint***. Here, Lemartec's claims for indemnity based on HFCA's underlying allegations of latent defects arose ***after*** SPG initiated the Federal Suit. Claim preclusion thus does not apply.

The district court disputed the premise that Lemartec's claim for indemnity for HFCA's complaint arose after the federal filing, accepting ACT's version that the new suit was akin to different "damages" for the same suit. That is incorrect as a matter of black-letter indemnity law that conditions accrual of an indemnity claim on payment of the indemnified obligation. Before considering its application here, it is necessary to expand upon the basis for this bright-line rule and why this Court should adopt it.

Wright & Miller notes that "[m]ost cases rule that an action need include only the portions of the claim due at the time of commencing that action, frequently observing that the opportunity to file a supplemental complaint is not an obligation." 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4409 (3d ed. 2017).

Iowa courts look to the same common law authorities as the federal courts (especially the Restatement (Second) of Judgments) and seek to harmonize Iowa and federal *res judicata* law. *Villarreal v. United Fire & Cas. Co.*, 873 N.W.2d 714, 719 (Iowa 2016) (quoting *Shumaker v. Iowa Dep't of Transp.,* 541 N.W.2d 850, 852 (Iowa 1995)) ("The Iowa law of claim preclusion closely follows the Restatement (Second) of Judgments."). "Accordingly, [the Iowa Supreme Court has] previously discussed and relied upon the Restatement (Second) of Judgments in determining whether an action is barred by claim preclusion." *Id.* (citing *Pavone v. Kirke*, 807 N.W.2d 828, 837 (Iowa 2011)).[4]

"To establish the bar under the doctrine of *res judicata*, the party asserting the bar must establish that the former case involved (1) the same parties or parties in privity, (2) the same cause of action and (3) the same issues." *Iowa Coal Min. Co.*, 555 N.W.2d at 440 (citing *Bloom v. Steeve*, 165 N.W.2d 825, 827–28 (Iowa 1969)). Typically, the doctrine is applied to a single set of facts/remedies arising from a single transaction—a first and second lawsuit address the same remedies twice in a way the doctrine prevents. *See Westway Trading Corp. v. River Terminal Corp.*, 314

[4] *Accord West v. Wessels*, 534 N.W.2d 396, 398 (Iowa 1995); *Leuchtenmacher v. Farm Bureau Mut. Ins. Co.*, 460 N.W.2d 858, 860 (Iowa 1990); *Lowery Inv. Corp. v. Stephens Indus.*, 395 N.W.2d 850, 853 (Iowa 1986); *Noel*, 334 N.W.2d at 148.

N.W.2d 398, 401 (Iowa 1982) (a party "is not entitled to a second day in court simply by alleging a new ground of recovery for the same wrong."). But, when the remedies arise one after the other, there is a specialized *res judicata* rule: causes of action that arise after the first complaint are ***not*** barred. Here, SPG initiated the Federal Suit on October 6, 2015, bringing claims against ACT and Lemartec. (App. p. 372) Lemartec's indemnity/breach of contract claims against ACT at issue in this State Suit arose only later and thus, contrary to the lower court's ruling, are not barred by *res judicata* under the federal/multistate approach.

This specific issue does not appear to have been addressed by the Iowa Supreme Court, but it is in line with Iowa law. *Braunschweig v. Fahrenkrog*, 773 N.W.2d 888, 893 (Iowa 2009) (quoting *Arnevik v. Univ. of Minn. Bd. of Regents*, 642 N.W.2d 315, 319 (Iowa 2002)) (*res judicata* does not "apply unless the party against whom preclusion is asserted had a 'full and fair opportunity' to litigate the claim or issue in the first action"). Federal and other state courts to specifically address this issue, however, consistently hold that claims arising after the first complaint are not barred.[5]

[5] *See Peda v. Fort Dodge Animal Health, Inc.*, 293 F. Supp. 2d 973, 982–83 (N.D. Iowa 2003) (citing *Baker Group, L.C. v. Burlington N. & Santa Fe Ry. Co.*, 228 F.3d 883, 886 (8th Cir. 2000)) ("[i]t is well settled that claim preclusion does not apply to claims that did not arise until after the first suit was filed"). As the Ninth Circuit observed, "a number of other

This is also the rule in California state courts, *id*. at 1040, and in Minnesota. *See Mach v. Wells Concrete Prods. Co.*, 866 N.W.2d 921, 925 (Minn. 2015) ("Claims are not considered the same cause of action if the right to assert the second claim did not arise at the same time as the right to assert the first claim."). At least seven Circuits—all to address the issue—have adopted the same rule.[6] Further, this approach is consistent with the United States Supreme Court's guidance in the area.[7]

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circuits have 'adopted a bright-line rule that *res judicata* does not apply to events post-dating the filing of the initial complaint.'" *Howard v. City of Coos Bay*, 871 F.3d 1032, 1039 (9th Cir. 2017) (quoting *Morgan v. Covington Twp.*, 648 F.3d 172, 177–78 (3d Cir. 2011)).

[6] *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 919 (2d Cir. 2010); *Smith v. Potter*, 513 F.3d 781, 783 (7th Cir. 2008); *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 529–30 (6th Cir. 2006); *Mitchell v. City of Moore*, 218 F.3d 1190, 1202 (10th Cir. 2000); *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992); *cf. Young-Henderson v. Spartanburg Area Mental Health Ctr.*, 945 F.2d 770, 774 (4th Cir. 1991) (suggesting without deciding that *res judicata* need not "preclude claims that could not have been brought at the time the first complaint was filed"); *Baker Group, L.C.*, 228 F.3d at 886.

[7] The Court has made clear that, although a previous judgment may preclude litigation of claims that arose "prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 328 (1955); *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016), as revised (June 27, 2016).

This bright-line rule is embedded, for example, in Minnesota common law. Under the same *res judicata* analysis as is found in Iowa,[8] in Minnesota "[c]laims are not considered the same cause of action if 'the right to assert the second claim did not arise at the same time as the right to assert the first claim.'" *Id.* (quoting *Care Institute, Inc.-Roseville v. City of Ramsey*, 612 N.W.2d 443, 447 (Minn. 2000)). Given the weight and breadth of authority, this Court should formally recognize the rule that claim preclusion does not bar any claims arising after the complaint is filed. Applying the rule to indemnity claims is clear-cut, too.

The key to applying claim preclusion to indemnity lies at the very core of that theory—it assigns liability for damages for which another has to answer. By its very nature, indemnity claims are hard-wired to, and only arise upon, the assertion of liability by a third party. This means that indemnity "does not accrue until the indemnitee's liability is fixed by judgment or settlement." *Kaydon Acquisition Corp. v. Custom Mfg., Inc.*,

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[8] Minnesota claim preclusion doctrine is materially identical to that of Iowa. As in Iowa, in Minnesota "[a] subsequent claim is precluded when 'a prior claim involved the same cause of action, there was a judgment on the merits, and the claim involved the same parties or their privies.'" *Id.* (quoting *Nelson v. Am. Family Ins. Grp.*, 651 N.W.2d 499, 511 (Minn. 2002)); *see Bennett*, 586 N.W.2d at 516 (quoting *Iowa Coal Mining Co.*, 555 N.W.2d at 440) (stating that according to *res judicata*, "a final judgment rendered by a court [] on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action").

301 F. Supp. 2d 945, 959 (N.D. Iowa), *order clarified on reconsideration*, 317 F. Supp. 2d 896 (N.D. Iowa 2004) (citing *Vermeer v. Sneller*, 190 N.W.2d 389, 392 (Iowa 1971); *Evjen v. Brooks*, 372 N.W.2d 494, 496 (Iowa 1985); *Becker v. Central States Health and Life Co.*, 431 N.W.2d 354, 357 (Iowa 1988); *Israel v. Farmers Mut. Ins. Ass'n*, 339 N.W.2d 143, 146 (Iowa 1983)). Stated another way, an indemnity claim "does not accrue until the party seeking indemnification is held liable and makes a payment." *Window Specialists, Inc. v. Forney Enterprises, Inc.*, 26 F. Supp. 3d 52, 57 (D.D.C. 2014) (citing *Casanova v. Marathon Corp.*, 256 F.R.D. 11, 14 (D.D.C. 2009); *see also* 42 C.J.S. Indemnity § 54 (2005) ("Generally, . . . an indemnitee is not entitled to recover under the agreement until he has made an actual payment or has otherwise suffered an actual loss.")). Lemartec's State Suit indemnity claims against ACT had therefore not accrued when the Federal Suit was filed—the State Suit was initiated by HFCA some thirteen months later.[9]

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[9] The pass-through nature of indemnity complicates its accrual and pleading rules. Even though the right to indemnity accrues upon making a payment that, via contract or equity, is owed by another (the "indemnitor"), such indemnitors are typically impled at the outset by a defendant because, among other reasons, impleading the indemnitor may prevent it from contesting liability in a second lawsuit. *See generally* 41 Am. Jur. 2d Indemnity § 34 *Prerequisites to Action; Demand and Notice* (2019). *See also, e.g., Hill v. Joseph Ryerson, Inc.*, 268 S.E.2d 296, 301-02 (W.Va. 1980) (discussing how notice to, and impleading of, indemnitors serves to

One of the only cases to apply the bright-line rule in the context of indemnity turns directly on this accrual doctrine. *In re Lehman Brothers Holdings Inc.* ("LBHI"), concerns whether contractual indemnification claims were barred by *res judicata*. 593 B.R. 166, 180–82 (Bankr. S.D.N.Y. 2018). LBHI's contractual indemnity claims did not accrue until LBHI's liability was fixed upon the approval of a prior 2014 settlement. *Id.* at 182. It was not until after that settlement, the court ruled, that LBHI could bring its contractual indemnity claim. *Id.* at 181–82. Just as in *Lehman Bros.*, the question here is whether Lemartec's indemnity claim in the State Suit accrued before or after ACT's federal complaint. The answer—thirteen months after—bars claim preclusion.

The lower court, here, relied heavily in its Ruling that, in both the Federal and State Suits, "Lemartec sought relief under the Purchase Order on a variety of theories" and "Lemartec asserted ACT's design and fabrication of the salt conveyor system was not adequate performance of its obligations under the Purchase Order." (App. p. 342) The district court concluded that "the identity of the entity that is the ultimate plaintiff suing

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bind indemnitors to single judgment, citing broad range of multi-state examples); *SCAC Transport v. SS Danaos*, 845 F.2d 1157, 1161-62 (2d Cir. 1988) (discussing reasons for, and rules governing, efforts to implead indemnitors to permit them to defend and citing broad range of federal examples).

Lemartec does not alter the terms of the parties' agreement or their respective performances of their duties." (App. p. 347). But it does alter the indemnity sought, and that is critical.

The Federal Suit dealt entirely with SPG's allegations that Lemartec's and ACT's performance delayed SPG's work in installing the conveyor system and increased its expense; whereas the State Suit involves HFCA's claims that the conveyor system, as installed, post-completion, is defective. *See Minch Family LLP v. Buffalo-Red River Watershed Dist.*, 628 F.3d 960, 966–67 (8th Cir. 2010) (citation omitted) ("claims cannot be considered the same cause of action if the right to assert the second claim did not arise at the same time as the right to assert the first claim").

Elsewhere, the lower court faulted Lemartec for not reconciling the two lawsuits. (App. p. 344 at n.9) This is legally and factually mistaken. Legally, the lower court fell into precisely the trap that the bright-line rule guards against. It is often difficult or impossible to Monday-morning-quarterback the question of whether a party could have amended or altered the proceedings in the first-filed case to sweep within their ambit the "new" claims. Multiple authorities thus endorse the bright-line approach as

avoiding such an inquiry.[10] The lower court got bogged down in it, when it is not even legally relevant.

Factually, the district court was mistaken in thinking that Lemartec had the obligation or even the ability to consolidate the two suits. The court suggested (App. 344 at n.9) that Lemartec should have moved to dismiss the Federal Suit on the grounds that HFCA was an indispensable party to a dispute between Lemartec and its subcontractors over pre-completion issues. But HFCA was not an indispensable party to the Federal Suit, which concerned only issues in the fabrication and installation phases of the Project. Lemartec could not have argued in good faith that HFCA was indispensable, and the federal district court fully resolved the issues before it without HFCA being a party there. Indeed, no one raised any suggestion that

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[10] *Morgan v. Covington Tp.*, 648 F.3d 172, 177 (3rd Cir. 2011) ("Five other Courts of Appeals have already adopted a ***bright-line rule*** that *res judicata* does not apply to events post-dating the filing of the initial complaint.") (emph. added); *Proctor v. LeClaire*, 715 F.2d 402, 412 (2d Cir. 2013) ("Acts committed after the filing of the complaint are not within the scope of the plaintiff's claim. And '[a]lthough a plaintiff may seek leave to file a supplemental pleading to assert a new claim based on actionable conduct which the defendant engaged in after a lawsuit is commenced, he is not required to do so…'") (citations omitted); *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 554 & n.2 (4th Cir. 2013) (to avoid *res judicata*, a plaintiff need not "expand its suit in order to add a claim that it could not have asserted at the time suit was commenced.") (citing *NBN Broad., Inc. v. Sheridan Broad. Networks, Inc.*, 105 F.3d 72, 78 (2d Cir.1997)).

the cases were in any way related until ACT, having procured a judgment in its favor in the Federal Suit, sought to leverage that result into a "gotcha" judgment here. If ACT truly believed the cases were related, it could have attempted the remedy the district court proposed while both cases were still pending. There is no basis in law to impute responsibility for raising an issue to Lemartec, when Lemartec has consistently argued that issue is not present.

The lower court, moreover, stated Lemartec was not prevented from fully litigating the issues relevant to the State Suit in the Federal Suit. (App. 343) That simply cannot withstand scrutiny, and especially not under the summary judgment standard that resolves all factual disputes against the moving party. *See, e.g.*, *Walls v. Jacob North Printing Co.*, 618 N.W.2d 282, 284 (Iowa 2000) ("we view the evidence in the light most favorable to the plaintiff, giving him the benefit of every legitimate inference the evidence will bear."). Further, ACT mischaracterized Iowa law in asserting that, because the claims in both suits arise from the Purchase Order, "all of the indemnity claims had 'arisen' when the Amended Cross Claims were filed for the purposes of claim preclusion." (App. p. 191) As shown above, accrual of indemnity claims is not keyed to the contract, but rather the assertion by a third party of damages requiring indemnity.

The district court's treatment of *Villarreal v. United Fire & Cas. Co*., 873 N.W.2d 714 (Iowa 2016), further exposes the problem with claim preclusion here. The court thought that *Villarreal* adopted the bright-line rule, but it did not. (App. p. 341). Instead, it found claim preclusion where an insured had to sue to recover under a policy, and then instituted a second suit to recover bad-faith damages. *Id*. at 714. The bad-faith claim was not an independent claim arising after filing of the underlying policy claim even though it required some new evidence. It is beyond dispute that a policyholder's primary claim, and any claim to bad-faith denial of that claim, both accrue by the time the primary claim is filed. But that does not apply to the claim in the Federal Suit (SPG having been put to delay and expense to cure ACT's deficiencies during installation) and the claim here (HFCA identifying alleged latent defects caused by ACT's deficient design or manufacture), as the HFCA claim did not arise until after the complaint in the Federal Suit had been filed.

In sum, this Court should formally adopt the bright-line rule of other jurisdictions and apply it to indemnity law because failure to do so would subject Iowa courts to a continual burden of second-guessing hypothetical litigation decisions and would deprive litigants of their day in court on newly-arisen claims. The result is that Lemartec's claim for indemnity from

HFCA's underlying asserted defects arose after the federal complaint, and it is thus not barred by claim preclusion as a matter of law.

C. ACT Failed to Establish the Elements of Claim Preclusion Because the State Suit is Materially Distinguishable from the Federal Suit

1. Preservation of Error

Lemartec resisted ACT's summary judgment, in full, arguing that ACT failed to establish the elements of claim preclusion (Lemartec Resist. to Summ. J. pp. 13–18). The district court addressed this specific issue (App. pp. 25–26), thereby preserving it for appeal. Iowa R. App. P. 6.903(2)(g)(1).

2. Standard of Review

Appellate courts "review the district court's grant of summary judgment for correction of errors at law." *Sallee*, 827 N.W.2d at 132 (citing *Ranes*, 778 N.W.2d at 685).

3. Discussion

"Claim preclusion is 'based on the principle that a party may not split or try his claim piecemeal, but must put in issue and try his entire claim or put forth his entire defense in the case on trial." *Iowa Coal Min. Co.*, 555 N.W.2d at 441 (quoting *B & B Asphalt Co.*, 242 N.W.2d at 286). "An adjudication in a former suit between the same parties on the same claim is final as to all matters which could have been presented to the court for

determination." *Id.* (quoting *B & B Asphalt Co.*, 242 N.W.2d at 286). "A party must litigate all matters growing out of his claim at one time and not in separate actions." *Id.* (quoting *B & B Asphalt Co.*, 242 N.W.2d at 286). "A party 'is not entitled to a second day in court simply by alleging a new ground of recovery for the same wrong.'" *Id.* (quoting *Westway Trading Corp.*, 314 N.W.2d at 401).

"To establish claim preclusion a party must show: (1) the parties in the first and second action are the same parties or parties in privity, (2) there was a final judgment on the merits in the first action, and (3) the claim in the second suit could have been fully and fairly adjudicated in the prior case (i.e., both suits involve the same cause of action)." *Pavone v. Kirke*, 807 N.W.2d 828, 836 (Iowa 2011) (citing *Arnevik*, 642 N.W.2d at 319).

"To determine whether the claim in the second suit could have been fully and fairly adjudicated in the prior case, that is, whether both suits involve the same cause of action, [Iowa courts] examine: '(1) the protected right, (2) the alleged wrong, and (3) the relevant evidence.'" *Id.* (quoting *Iowa Coal Mining Co.*, 555 N.W.2d at 441). "As to the third item—the relevant evidence—

> if it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider the identity of facts essential to their maintenance, or whether the same evidence would sustain both. If the same facts or evidence

> would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action. If, however, the two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other.

Iowa Coal Min. Co., 555 N.W.2d at 441 (quoting *Phoenix Fin. Corp.*, 20 N.W.2d at 461–62). Here, ACT's claim preclusion argument fails because the two causes of action, the alleged wrongs, and relevant evidence are materially different.

i. The present (state) action is materially distinguishable from the prior (federal) action.

The first step to asserting claim preclusion as a defense is to demonstrate that the present cause of action is the same as a prior cause of action. *See Arnevik*, 642 N.W.2d at 319 (analyzing whether the two causes of action were the same before applying the three-factor test). Lemartec's third-party claim in the Federal Suit was a claim for indemnity based on SPG's pre-completion allegations. The State Suit third-party claim is an indemnity claim based on HFCA's/Conve's post-completion allegations. The two suits, therefore, involve separate rights and different claims, damages, and evidence.

Two causes of action are the same if the "acts complained of, and the recovery demanded, are the same, or when the same evidence will support

both actions." *Whalen v. Connelly*, 621 N.W.2d 681, 685 (Iowa 2000); *see also B & B Asphalt Co. Inc.*, 242 N.W.2d at 287. Where a subsequent action deals with a separate right that was not litigated in the first action, the claim is not barred even if the evidence relates to the same agreement at issue in the first action. *Westway Trading Corp.*, 314 N.W.2d at 401.

The lower court relied, heavily, on the fact that Lemartec's third-party claims in both suits "are premised on the contractual relationship between Lemartec and ACT under the Purchase Order for the design and fabrication of a salt conveyor system." (Ruling 17) The court stated, "[t]he Purchase Order, and the parties' performance under that agreement, is undoubtedly the 'same transaction' underlying both federal and state court lawsuits." (Ruling 17) The court incorrectly opined, however, that "Lemartec asserts the same implied and equitable theories of indemnity as grounds for recovering from ACT under the same written agreement between them ***concerning the same conduct of ACT***." (App. p. 342 (emphasis added))

Lemartec noted in its resistance to summary judgment that the Federal Suit "was a compensation claim for extra work and project delays, and included nothing concerning the defective work claim at issue in" the State Suit. (Lemartec Resist. to Summ. J. p. 15) ACT proclaimed this statement "bold" and said it was "not true because [the] federal case comprehensively

litigated the claims of defects." (App. p. 194) ACT then catalogued the multiple times Lemartec used the word "deficiency" throughout the Federal Suit. (App. pp. 194–197) Again, Lemartec does not dispute, nor has it ever disputed, that the Federal Suit incorporated accusations that certain of the component parts of the conveyor system were defective when initially shipped to the site, ***but prior to completion of the conveyor***. However, ACT failed to inform the lower court that these deficiencies were all identified and addressed during SPG's installation of the conveyor system, prior to completion of the conveyor, and prior to turnover of the conveyor to the customer.

The lower court failed to analyze and compare the alleged wrongs in both causes of action. This Court should compare the federal court's ruling at trial to the allegations present in the State Suit.

The federal court ruled that "Lemartec failed to prove that ACT breached the purchase order. Other parties, and in large part Lemartec itself, caused the ***delays*** that Lemartec failed to prove were caused by ACT." (App. p. 686 (emphasis added)) The court went on to elaborate its reasoning for determining Lemartec failed to prove its case, stating

> Lemartec's insistence that ACT ship fabricate[d] parts before the designs were finished effectively implemented a fast-track project delivery methodology. By condensing the schedule, Lemartec assumed the cost overruns. (citation omitted) The

> purchase order included a range of weeks for ACT to complete [its] fabrication. Where a contract fails to include a precise shipment date, Iowa law imposes a standard of reasonableness. (citation omitted) The evidence is that ACT delivered product within a reasonable amount of time from Lemartec's implementation of the fast-track delivery system.

(App. p. 687)

The lower court ignored the fact that, as detailed by the federal court, Lemartec's claim against ACT in the Federal Suit was that ACT was responsible for the delays in getting the correct and properly manufactured conveyor system parts delivered to the project site on time so that SPG could install the system. Lemartec's third-party claim in the State Suit relies on HFCA's allegations—the conveyor system, as installed, failed to meet its expectations.

Allowing Lemartec's third-party claims against ACT to continue in the State Suit, contrary to the lower court's holding, would not lead to "the possibility of making contrary findings and arriving at a different conclusion than was already reached by Judge Wolle in the federal bench trial." (App. p. 343) All of the theories of recovery advanced in the Federal Suit, by both parties, related to extra work and project delays in getting the conveyor system installed. (*See* App. p. 684) Consistent with the Federal Suit being solely a claim for extra compensation, Judge Wolle's ruling is completely devoid of any discussion of defects in the ***completed*** conveyor system, nor

was there any finding of fact regarding whether ACT was liable for the defects that HFCA claims arose after the conveyor system was put into use, as no such issues were pled or tried. (*See* App. pp. 183–184 at III(1)–(9))

ii. The "same evidence" approach is consistent with Iowa law.

The lower court stated in its ruling that "the 'same evidence' approach emphasized by Lemartec is not the standard for *res judicata* under Iowa law." (App. p. 346 (citing *Villarreal*, 873 N.W.2d at 729 ("Perfect identity of evidence is not the standard in Iowa for whether claim preclusion applies."))).[11] The court continued, "different evidence should not be necessary to litigate the nature of the contractual rights and obligations between Lemartec and ACT because both actions ultimately hinge on the same written agreement and ACT's conduct." (App. p. 346) While it is true that the parties' obligations in the two lawsuits hinge on indemnification under the Purchase Order, the lower court incorrectly concluded the relevant evidence involving ACT's conduct in the two suits would be materially the same.

[11] The district court was not entirely consistent on this point. *See* Ruling 13–14 n.8 (noting that Iowa applied a "same evidence" approach to claim preclusion prior to the Restatement in 1982 and has continued to discuss and apply that test alongside the Restatement approach).

With respect to analyzing whether the same evidence will support both actions, the Iowa Supreme Court instructs that:

> if it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider the identity of facts essential to their maintenance, or whether the ***same evidence*** would sustain both. If the ***same facts or evidence*** would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action. If, however, the two actions rest upon ***different states of facts***, or if ***different proofs*** would be required to sustain the two actions, ***a judgment in one is no bar to the maintenance of the other***.

Iowa Coal Min. Co., 555 N.W.2d at 441 (quoting *Phoenix Fin. Corp.*, 20 N.W.2d at 461–62) (emphasis added); *but see Villarreal*, 873 N.W.2d at 729.

The discovery in the Federal Suit was largely limited to whether the component parts delivered by ACT to the Project were in accordance with the specifications. For example, a plate may have been shipped to the Project site by ACT with improperly aligned bolt holes. (*See* App. p. 598 (stating many of the component parts of the conveyor system fabricated by ACT did not fit together properly)) This would have been considered a defective part in the Federal Suit. During installation, to correct this issue, Lemartec had SPG drill new holes to properly align the bolt holes, which SPG alleged caused increased costs and delays, the crux of its federal claims. (*See* App. p. 598 (stating many of the component parts of the conveyor system delivered

to the project site by ACT had to be re-engineered or otherwise modified in the field)) Thus, in this example, the improperly aligned bolt holes were corrected during installation and no longer defective when the conveyor was ultimately turned over to the customer. (*See* App. pp. 616–620) These pre-completion defects are not relevant to the State Suit, because they had been fully resolved before HFCA, plaintiff in the State Suit, received the conveyor system. The evidence necessary to evaluate HFCA's claims in the State Suit will therefore differ substantially—if not entirely—from the evidence adduced in the Federal Suit.

iii. Lemartec is not precluded from maintaining separate actions pursuant to the same agreement.

One critical aspect of the ruling below is the lower court's apparent assumption that any contract can be violated only once. According to the court, "Lemartec cannot maintain an action on its contractual rights under the Purchase Order after previously bringing suit on an alleged breach of that same agreement." (App. p. 349 (citing Restatement (Second) of Judgments § 26 cmt. *g*, at 240) (noting that where a plaintiff sues ***for total breach of contract*** "a judgment extinguishing the claim under the rules of merger or bar precludes another action by him for further recovery on the contract") (emphasis added)). The court appears to have overlooked the

provision in the Restatement about "total breach of contract." It is of course true that, when a plaintiff sues for the entire value of the contract based on a total breach, the plaintiff does not get any future bites at the apple. But when a ***partial*** breach is alleged, there is no reason why a subsequent partial breach could not occur at a later point in time, entitling the same plaintiff to recover on the same contract against the same defendant. The same comment in the Restatement that the district court cited goes on to say that: "A judgment in an action for breach of contract does not normally preclude the plaintiff from thereafter maintaining an action for breaches of the same contract that consist of failure to render performance due after commencement of the first action." Restatement (Second) of Judgments § 26, cmt. g.

The fact that this case involves indemnification is particularly significant in this context. Indemnification is an obligation that survives completion of the project and anticipates that liability may arise multiple times from various sources. Parties could never receive true indemnification if the first claim, however minor, forever extinguished a party's right to receive indemnification for future-alleged harms.

The district court neglected the differences in Lemartec's third-party claims with respect to the conduct relevant to both. *See Geneva Corp. Fin. v.*

G.B.E. Liquidation Corp., 598 N.W.2d 331, 335 (Iowa Ct. App. 1999) ("The facts necessary to establish liability under the contract are different facts than those necessary to show a transfer made to defeat the collection of the judgment in the contract suit. Further events after the judgment in the arbitration award, including the failure of defendant to pay the judgment, were subsequent facts necessary to establish this claim."); *see also Leuchtenmacher*, 460 N.W.2d 858 (cited in *Geneva Corp. Fin.* as instructive, stating, "In *Leuchtenmacher*, plaintiff, decedent's estate, sued defendant Farm Bureau Mutual Insurance. . . . The suit sought recovery under the underinsured provisions of decedent's policy for damages as a result of decedent's death in a motor vehicle accident. The estate first recovered the limits of decedent's policy and then filed a second suit against Farm Bureau for bad faith in failing to settle the claim. . . . The Supreme Court [held], "[A] bad faith claim might well be based on events subsequent to the filing of the suit on a policy and therefore could not be based on the 'same' facts.").[12]

[12] The Court in *Villarreal* distinguished *Leuchtenmacher* on the basis that it concerned events arising after the filing of the breach-of-contract claim. *See Villarreal*, 873 N.W.2d at 721–22 (describing holding in *Leuchtenmacher* as being "that a bad-faith claim based on events subsequent to the filing of a breach-of-contract claim would not be precluded by a judgment in the breach-of-contract case") (citing *Leuchtenmacher*, 460 N.W.2d at 861).

Thus, the fact that Lemartec bases its two different indemnity claims on the same Purchase Order is not dispositive and not unusual. The caselaw cited above looks to the actual claims being made, the facts involved in the claims, and the relevant evidence necessary to substantiate the causes of action. These two lawsuits involve wholly separate issues, claims, evidence, and facts. Because both actions rest upon different sets of facts and involve unrelated evidence of pre-completion vs. post-completion defect allegations, the federal court's ruling is no bar to Lemartec maintaining this State Suit. *Iowa Coal Min. Co.*, 555 N.W.2d at 441.

II. ACT IS NOT ENTITLED TO ISSUE PRECLUSION BECAUSE THE ISSUES INVOLVED ARE DIFFERENT

A. Preservation of Error

Lemartec resisted ACT's summary judgment motion, in full, arguing that ACT failed to establish the elements of issue preclusion. (Lemartec Resist. Summ. J. pp. 18–20). The district court addressed this specific issue (App. pp. 349–353), and it is therefore preserved for appeal. Iowa R. App. P. 6.903(2)(g)(1).

B. Standard of Review

Iowa appellate courts review a district court's summary judgment ruling for correction of errors at law. *Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19, 36 (Iowa 2018). The court must view the record in

the light most favorable to the nonmoving party. *Id.* "Whether the elements of issue preclusion are satisfied is a question of law." *Id.* (quoting *Winger v. CM Holdings, L.L.C.*, 881 N.W.2d 433, 445 (Iowa 2016)).

C. Discussion

Issue preclusion prevents re-litigation of specific issues resolved in a prior cause of action. *Am. Family Mut. Ins. Co. v. Allied Mut. Ins. Co.*, 562 N.W.2d 159, 163 (Iowa 1997). The doctrine protects parties from the "vexation of re-litigating identical issues" and furthers the "interest of judicial economy and efficiency by preventing unnecessary litigation." *Id.* (citation omitted). The party asserting issue preclusion must establish four elements:

> (1) the issue in the present case must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment.

Soults Farms, Inc., 797 N.W.2d at 104 (quoting *Fischer v. City of Sioux City*, 654 N.W.2d 544, 547 (Iowa 2002)). The district court went astray in this case by taking far too broad a view of what the "issue" was in the Federal Suit. Once that error is corrected, it becomes clear that ACT is unable to satisfy any of the elements.

1) *The Issue In This Case Is Not Identical To The Issue In The Federal Suit*

Whenever the doctrine of issue preclusion is invoked, the parties and court must initially determine what issues, if any, were resolved by the first litigation. Sometimes, the question arises how narrowly or broadly the "issue" in the first case should be construed. The facts here provide a ready example. In the Federal Suit, Lemartec sued ACT seeking indemnification for damages alleged by SPG during the time period of getting the Conveyor ready to turn over to the customer. The federal district judge ruled that Lemartec was not entitled to indemnification for those claims (although, as noted above, that ruling is currently on appeal). In determining the preclusive effect to give that judgment, the district court in this case had to characterize how broad the ruling in the Federal Suit had been. Did the federal court rule that Lemartec was not entitled to receive indemnification ***for SPG's claims*** for alleged ***pre-completion delays and deficiencies***? Or did the court rule that indemnification was ***categorically unavailable*** to Lemartec?

In this case, the district court adopted the latter, broad view, noting "the issue of indemnity rights arising under the Purchase Order has been raised and litigated in the prior federal action." (App. p. 354; *see also* App. p. 354 ("Lemartec cannot prevail on its indemnity action because the critical

issue of whether ACT breached the duties it owed under the Purchase Order has already been decided against Lemartec.")) Under that view, the Federal Suit's holding was not a fact-bound resolution of rights to indemnity for payments made to a particular claimant (SPG) during a particular time period (alleged pre-completion delays and deficiencies), but rather a resolution of whether indemnity rights in general are available to Lemartec.

Respectfully, it is not possible to read the Federal Suit judgment in so broad a manner. Judge Wolle was quite clear in his ruling that the indemnity issue raised in that case was specific to the sums that Lemartec had actually paid to SPG: "Nor did Lemartec prove its claim that ACT should be required to indemnify Lemartec, whether expressly or equitably, ***for what Lemartec paid to SPG***, the original plaintiff in this case." (App. pp. 686–687 (emphasis added)). Judge Wolle was equally clear that he was resolving only issues limited to the pre-completion time period necessary to make the conveyor functional to turn over to the customer: "Pared down to essentials, the remaining issues for trial were whether either of the two remaining parties [*i.e.*, Lemartec and ACT] owes money to the other for money earned, but unpaid; project delays; and for additional work that was required to make the conveyor system functional." (App. p. 684)

Construing the issue overly broadly effectively causes issue preclusion to collapse into claim preclusion, which is an independent ground of legal error. *See, e.g.*, *U.S. Gypsum Co. v. Indiana Gas Co., Inc.*, 350 F.3d 623, 629 (7th Cir. 2003) ("The district court wrote that USG loses because 'the issue sought to be precluded—the improper creation and operation of ProLiance—is the same as that involved in [the] prior action that was before the' Commission. But 'the improper creation and operation of ProLiance' is not an 'issue'; that is far too lofty a level of generality. Putting the matter this way suggests that the district court has equated issue preclusion with claim preclusion."). Under these circumstances, it cannot be said that the issues involved in the two cases were ***identical*** in the manner necessary to invoke the doctrine of issue preclusion.

2) *The Issue In This Case Was Not Raised And Litigated In The Federal Suit*

"'The fundamental rationale of collateral estoppel or issue preclusion commands that the doctrine only be applied to matters that have been actually decided.'" *Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19, 51 (Iowa 2018) (quoting *City of Johnston v. Christenson*, 718 N.W.2d 290, 301 (Iowa 2006)). Here, this element turns on whether the issue involved in this case (*i.e.*, indemnity for alleged post-completion defects in the Conveyor asserted by end-user HFCA) was raised in the Federal Suit (which resolved

the issue of indemnity for alleged pre-completion delays and deficiencies in the conveyor asserted by subcontractor SPG). The issue here was never raised there, for two independent reasons.

The first reason the issue was never raised in the Federal Suit is that it concerns a distinct set of alleged defects that allegedly arose during a different time period. The Federal Suit was limited in scope to the pre-completion delays and deficiencies relating to the timing of the design, fabrication, and delivery of some of the conveyor's component parts, and the costs incurred by SPG (and ultimately Lemartec) to remediate those known issues. There was no suggestion in the Federal Suit that the parties intended to address any latent or unknown alleged defects that may surface later in time. Indeed, ACT admitted in its Proposed Final Order in the Federal Suit that "Lemartec has identified no latent defects at the time the conveyor system was turned over to HFCA." (App. p. 674)

By contrast, this case concerns issues that were identified as alleged defects only based on the customer's operation of the conveyor, such as alleged corrosion and breakdown of the conveyor after it was put into use. (App. pp. 935–937 at 1b, 1e). HFCA identified the specific alleged defects at issue in this case for the first time in its interrogatory answers provided on June 14, 2018—a month after the federal court issued its judgment in the

Federal Suit. In other words, this state-court case concerns issues that ***by definition were unknown to the parties in the Federal Suit*** because Lemartec, ACT, and SPG were litigating over who bore the financial responsibility for getting a compliant and functional conveyor to the customer. In Iowa, "actually litigated" necessarily requires that a party offer evidence on the precise issue subject to the preclusion claim. *Winnebago Industries, Inc. v. Haverly*, 727 N.W.2d 567, 572 (Iowa 2006) (citing Restatement (Second) Judgment § 27 cmt. e). Where, as here, these issues were unknown to the parties in the Federal Suit, they could not possibly have been raised and actually litigated there. Thus, issue preclusion is unavailable for the same time-based reasons that defeat claim preclusion. *See supra* at 49–60.

The second reason the issue was never raised in the Federal Suit is that indemnity claims, by their nature, are unique to the first-party plaintiff claiming injury. The right to indemnification does not fully mature until the indemnitee's liability is fixed by settlement or judgment. *See, e.g.*, *Kaydon*, 301 F. Supp. 2d at 959 (N.D. Iowa); *Evjen*, 372 N.W.2d at 496; *Becker*, 431 N.W.2d at 357; *Israel*, 339 N.W.2d at 146. In the Federal Suit, the first-party plaintiff was SPG, seeking recovery for pre-completion delays and deficiencies requiring resolution before the conveyor could be turned over to

the customer. In this case, the first-party plaintiff is HFCA, seeking recovery for alleged post-completion defects in the conveyor. Because HFCA's allegations as first-party plaintiff were not present in the Federal Suit—indeed those allegations were utterly unknowable to the parties in that suit—they cannot have been raised and litigated as part of that suit. As the Supreme Court has explained, "[a] question cannot be held to have been adjudged before an issue on the subject could possibly have arisen." *Third Nat'l Bank v. Stone*, 174 U.S. 432, 434 (1899).[13]

Issue preclusion exists to prevent parties from relitigating matters that have already been decided once. *Comes v. Microsoft Corp.*, 709 N.W.2d 114, 117-18 (Iowa 2006) ("In general, collateral estoppel prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issues raised and resolved in the previous action.").

[13] Other courts have held that issue preclusion is inappropriate when the second suit involves a later time period and different factual circumstances than the first suit. *See, e.g., Pfeil v. State Street Bank & Trust Co.*, 671 F.3d 585, 601 (6th Cir. 2012), abrogated on other grounds by *Fifth Third Bancorp. v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *U.S. Gypsum Co.*, 350 F.3d at 628-30; *Johnson v. Florida*, 348 F.3d 1334, 1348 (11th Cir. 2003); *see also* Moore's Federal Practice Vol. 18 § 132.02[2][e] (3d ed. 2004) ("The basic rule, that issue preclusion applies only if the issue in the prior litigation is identical to the issue in the subsequent litigation, entails the corollary that a difference in pertinent facts, sufficient to substantially change the issue, renders the doctrine of issue preclusion inapplicable.").

Where, as here, those issues have not yet been raised or litigated, issue preclusion is inappropriate as a matter of law.[14]

CONCLUSION

For the reasons stated herein, Lemartec respectfully requests that the summary judgment ruling be reversed and that the case be remanded for further proceedings.

REQUEST FOR ORAL ARGUMENT

Lemartec requests to be heard in oral argument.

[14] The final two elements of issue preclusion are that the issue must have been material and relevant to the disposition of the prior action and that the determination of the issue in the prior action must have been essential to the resulting judgment. *Soults Farms, Inc.*, 797 N.W.2d at 104. These elements are also not present here, although they are not satisfied more because the issues involved are different and were not raised or litigated rather than any technical issues of materiality, relevance, or essentiality.

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Robert J. Thole

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This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 13,111 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman.

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of the Final Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on the 17th day of June, 2019:

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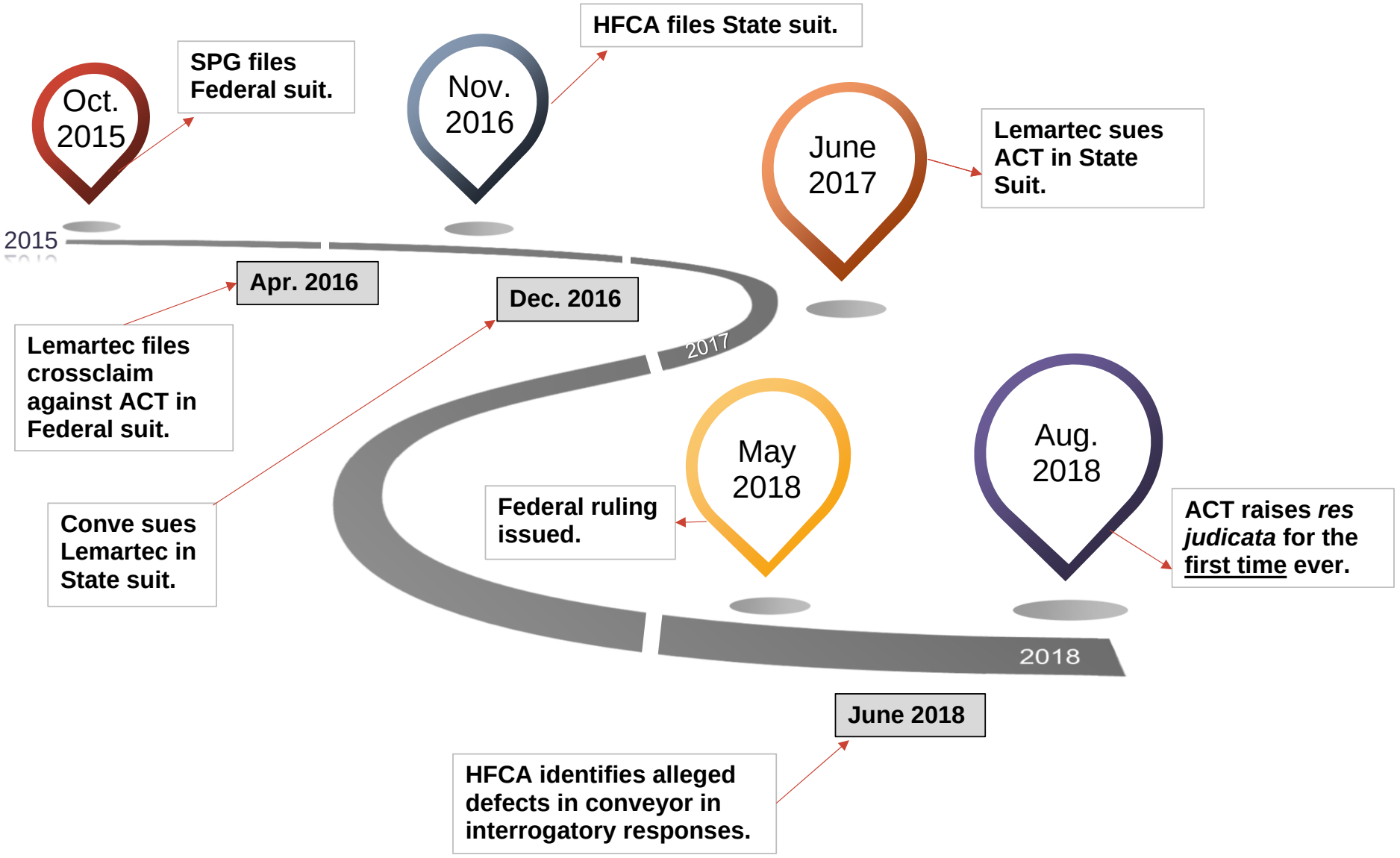
Oct. 2015
SPG files Federal suit.
Nov. 2016
HFCA files State suit.
June 2017
Lemartec sues ACT in State Suit.
2015
Apr. 2016
Lemartec files crossclaim against ACT in Federal suit.
Dec. 2016
2017
Conve sues Lemartec in State suit.
May 2018
Federal ruling issued.
Aug. 2018
ACT raises *res judicata* for the first time ever.
2018
June 2018
HFCA identifies alleged defects in conveyor in interrogatory responses.

EX. A