EXHIBIT 1

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Superior Court of New Jersey

APPELLATE DIVISION File Copy

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DIAMOND SHAMROCK CHEMICALS COMPANY,

Plaintiff-Appellant,

—vs.—

THE AETNA CASUALTY & SURETY COMPANY, *et al.*,

Defendants-Appellees.

CIVIL ACTION

ON APPEAL FROM FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: MORRIS COUNTY, DOCKET NO. C-3939-84

SAT BELOW: HONORABLE REGINALD STANTON, A.J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT DIAMOND SHAMROCK CHEMICALS COMPANY

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PROCEDURAL HISTORY

Diamond commenced this action on September 18, 1984, asserting two principal claims (Pa 2356). First, Diamond sought a decree declaring and specifically enforcing the defense and indemnification responsibilities of the defendant insurers for Diamond's obligations under administrative directives for the remediation and containment of environmental damage on and off the Newark plant site. Second, Diamond sought to recover over $23 million that it paid in settlement of the veterans' class action entitled *In re "Agent Orange" Product Liability Litigation*, M.D.L. No. 381 (E.D.N.Y.). Part I of this brief relates to the Superior Court's rulings with respect to coverage for environmental damage. Part II of this brief relates to the Superior Court's rulings with respect to coverage for Diamond's Agent Orange settlement payment.

This action was tried without a jury before the Honorable Reginald Stanton, A.J.S.C., during September and October 1988. After further briefing and closing argument, the Court issued its written Opinion on April 12, 1989 (Pa 8). Following further proceedings, the final judgment appealed from was entered by the Court on July 1, 1989 in defendants' favor with respect to the environmental damage arising from the Newark plant (Pa 2500). Although the Superior Court ruled that Diamond has coverage for its settlement payment in the *Agent Orange* class action under policies having limits far in excess of the $23.4 million amount paid by Diamond, it adopted an arbitrary allocation scheme which affords Diamond only approximately $14 million (before interest) of indemnity and leaves Diamond unprotected for over $9 million (before interest). Timely motions for reconsideration were denied by order entered by the Superior Court on September 12, 1989 (Pa 2511).

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PART I

ENVIRONMENTAL DAMAGE COVERAGE ISSUES

STATEMENT OF THE FACTS

Operations at Diamond's Newark Plant

Diamond acquired and operated an agricultural chemical manufacturing plant at 80 Lister Avenue in Newark, New Jersey from 1951 until the plant ceased operations in 1969 (Pa 8). The plant was sold in 1971 (Pa 10, 35). Among the products manufactured at the Newark plant were phenoxy herbicides, including 2,4,5-T that contained minute quantities of dioxin as an unintended impurity (Pa 8-9). 2,4,5-T was an ingredient in the defoliants sold to the United States Department of Defense and referred to as "Agent Orange" (Pa 8). Between 1951 and May 1957 Diamond also manufactured DDT at 80 Lister Avenue (Pa 1733, col. I), ceasing to produce this widely used pesticide long before its environmental effects became known (Pa 2343-44).

Phenoxy herbicide products containing 2,4,5-T manufactured by Diamond (as well as by Dow Chemical Company, Monsanto Chemical Company, Hercules Powder Company and others) were intended for widespread dispersal into the environment (Pa 2210-12). The United States Department of Agriculture published bulletins encouraging their use and stating that they are not poisonous to man, domestic animals, fish or game and do not accumulate in the soil (Pa 1503). Substantial quantities of 2,4,5-T products were used for decades in this country for agricultural and other purposes, even after the United States Government began to purchase large quantities of 2,4,5-T in the 1960's for use in Agent Orange (Pa 1588). As Judge Stanton found, "[u]p until the time at which it made its last shipment of Agent Orange to the military in 1969, Diamond thought that Agent Orange was an effective herbicide and that it was reasonably safe. Diamond was at least arguably justified in so thinking" (Pa 43). At no time during the 18 years that Diamond operated the Newark plant did Diamond know or have reason to expect that its manufacture and sale of phenoxy her-

bicides and other products would cause damage to the environment. As Judge Stanton found "Diamond . . . *never* recognized the toxic risks that dioxin posed" (Pa 55; emphasis added).

Dioxin

During the manufacture of 2,4,5-T at the Newark plant, minute quantities of dioxin (less than 100 parts per million) were created as an unintended impurity (Pa 2208-9, Pa 2077, Pa 2071, Pa 2072. *See also* Pa 1298, Pa 2251-52). Some minute amount of dioxin was present as an impurity in all the 2,4,5-T products which Diamond manufactured and sold, including Agent Orange (Pa 2230-31. *See also* Pa 2209).

During the 1951-1969 period when Diamond operated the plant, dioxin was not thought to cause environmental damage (Pa 2353-55, Pa 2350-52). As Judge Stanton found, "[i]n late 1969, reports of deaths of laboratory animals led civilian regulatory authorities to forbid the use of phenoxy herbicides in agriculture" (Pa 45), yet "*in 1989* we are still not certain that dioxin is seriously dangerous to humans" (Pa 44; emphasis added).

There is no evidence that Diamond was aware at any time prior to mid-1983 that contamination of the environment by dioxin was occurring or had occurred at the plant site or at any off-site location (*See*, *e.g.*, Pa 2350-52, Pa 2353-55). Indeed, the Superior Court found that "[f]or a number of years, Diamond did not even realize that it was creating dioxin" and "[w]hen dioxin was identified and detected [in 1965], it was not perceived as being particularly toxic" (Pa 9). There is no evidence that Diamond had any knowledge that anyone living or working in the vicinity of the plant who was not employed at the plant had suffered any adverse health effect as a result of anything that occurred on the plant site (*See* Pa 2246, Pa 2218, Pa 2187, Pa 2200-01, Pa 2322, Pa 2296-97).

At Diamond's invitation representatives of the State of New Jersey Department of Health and the United States Public Health Service visited the plant on several occasions in 1962 and

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CONCLUSION

For all of the reasons set forth above, Diamond respectfully submits that the judgment of the Superior Court (a) with respect to coverage for environmental damage should be reversed on a direction that judgment be entered in Diamond's favor directing that defendants perform their contractual obligations to defend and indemnify Diamond for the Newark environmental damage claims, and (b) with respect to coverage for Diamond's Agent Orange settlement should be modified to direct that Diamond is to be reimbursed in full for its Agent Orange settlement payment, with pre-judgment interest at the prime rate until the date that the modified judgment is entered, and that Diamond recover from defendants the costs of this appeal.

Dated: October 30, 1989

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