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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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Part I

PAGE

PAGE

Statutes and Administrative Materials

Law Reviews and legal publications

Treatises

Part II

Cases

PAGE

PAGE

Treatises

PRELIMINARY STATEMENT

If the erroneous rulings of the Superior Court in this action with respect to environmental damage coverage were to be sustained, liability insurers would be released across-the-board from contractual liability for damages relating to cleaning up environmental damage in this State, effectively overruling controlling New Jersey precedents to the contrary. New Jersey businesses and municipalities would be required to bear these losses notwithstanding that they bought and paid for comprehensive general liability insurance coverage. If insureds were denied coverage under their insurance and lacked the assets to perform the required work, the cost would fall on the taxpayers.[1]

This case involves over 30 years (1951-1985) of standard form comprehensive general liability policies issued to Diamond Shamrock Chemicals Company ("Diamond"). Diamond's policies use the same relevant language that was used in the comprehensive general liability policies issued to virtually every other business or governmental insured in New Jersey. The Superior Court held that there is *no* coverage under *any* of these policies for *any* environmental damage arising out of the operations at Diamond's former Newark manufacturing site. Whereas the Appellate Division repeatedly has found coverage for environmental damage under insurance policies which contain the standard exclusion of coverage for pollution (other than "sudden and accidental" pollution) drafted and imposed by the insurance industry, the Superior Court ruled that there was no coverage even under policies which contained no pollution exclusion whatsoever. In so holding, the Superior Court

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1 The potential burden on taxpayers may be increased by private parties seeking contribution from municipalities, *see, e.g.*, Gaynor, *Municipalities as PRPs: Changing the Dynamics of Selecting the Remedy*," 3 BNA Toxics L. Rep. 375 (Aug. 17, 1988), and, indeed, from the State itself. *Pennsylvania* v. *Union Gas Co.*, ___ U.S. ___, 109 S.Ct. 2273 (1989) (holding states liable in damages under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U S.C. §§ 9601 *et seq.* (1982 & Supp. V 1987), as amended ("CERCLA")).

constructed a maze of rulings that no insured can expect to navigate successfully. These rulings are contrary to the letter and spirit of a strong line of controlling New Jersey Appellate Division precedents over the past thirteen years.

Due to the breadth, importance and impact of the legal rulings in this case, the ultimate decision of the New Jersey courts will likely be a seminal precedent in this State for a long time to come. It also will be closely watched in other states. The Superior Court single-handedly has attempted, both explicitly and implicitly, to turn the development of New Jersey's law on insurance coverage for environmental damage on a course 180 degrees from that heretofore followed by the Appellate Division. If insureds and taxpayers in New Jersey are to be left with any meaningful protection under comprehensive general liability insurance policies for the cost of environmental clean-up, the Superior Court's decision must be reversed.

The Superior Court's Opinion contains the following critical rulings:

> 1. Judge Stanton denied coverage under "accident" based policies (which was Diamond's coverage until February 1, 1960 (Pa 19-20) and remained the predominant type of general liability policy until 1966) for environmental damage that continues over a period of time, ruling that an "accident" is "a discrete fortuitous event which happens within a short time at a specific time and place" (Pa 25). Acknowledging that the operations at issue were not significantly different from those of other plants in the area during the 1950s and 1960s (Pa 18), Judge Stanton denied coverage because there was "a continuous process of discharging and spilling chemicals" which caused a "gradual degradation of the environment . . . not attributable to any definite event" (Pa 26). There is no New Jersey precedent to support this ruling; rather, the Appellate Division in *Broadwell Realty Services, Inc.* v. *Fidelity & Casualty Co.*, 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987), and the majority of cases in other jurisdictions have taken the view that an "accident" within the meaning

of a general liability policy need not be discrete in time or place. This ruling is discussed in Point I, pp. 18-21, *infra*.

2. Judge Stanton also construed the standard form non-negotiable pollution exclusion (which excepts from the exclusion coverage for "sudden and accidental" pollution damage) to deny coverage for unintended gradual pollution. This ruling is directly contrary to the carefully considered holding of the Appellate Division in *Broadwell*, *supra*, and to other controlling New Jersey precedents holding that "sudden" means "unexpected." Judge Stanton expressly stated his disagreement with these controlling precedents (Pa 33), and attempted to distinguish them on the basis that, like almost any corporate insured, Diamond was "highly knowledgeable" and had "bargaining power" and that one of Diamond's former brokers and a former risk manager had testified to an understanding that "gradual" pollution was not covered after 1970 (Pa 34-36). Judge Stanton thus construed the standard boilerplate exclusion drafted by the casualty insurance industry to deny coverage for environmental damage that was gradual and not discrete in time, ignoring the ambiguity created by the failure to define the key terms "sudden" and "accidental" and the expressed intention of the insurance industry in drafting the clause.[2] The insurance markets would not be able to function if standard industry terms, conditions and exclusions are given different meanings in different cases based on the trier of fact's perception of an individual policyholder's astuteness. It is irrelevant that a particular insured's risk manager or broker may have had a subjective belief that more restrictive coverage was provided than is granted by the objectively reasonable mean ing of the words drafted by the insurer, particularly where the operative language was not negotiated and the individual purchaser's subjective understanding could not have

2 The language of the standard pollution exclusion was drafted by the casualty insurance industry and was inserted by Aetna in all of Diamond's primary liability policies beginning with February 1, 1971 (Pa 2005A, Pa 2289-90).

affected the premium charged by the insurer for the standard form coverage provided. This ruling is discussed in Point II, pp. 22-37, *infra*.

3. Judge Stanton ruled that environmental damage caused by spills and leaks at the Diamond site is not covered because the spills and leaks were "expected or intended," exclusionary language that appears in Diamond's policies beginning with February 1, 1960 (Pa 20-21) and in almost every general liability policy issued after 1966 (as well as in many policies issued to corporations as early as the 1950s). While acknowledging that such spills and leaks "in isolation" might be accidental, he found that "in their totality" they were expected or intended (Pa 39). Judge Stanton denied coverage even though the insurers did not prove and the record did not show any knowledge or expectation by Diamond that leaks or spills in isolation or as a "totality" would cause environmental damage. This reasoning would bar coverage not only for virtually any manufacturing plant, but also for all third-party waste disposal sites, including municipal landfills. The Superior Court's ruling is not a correct view of general liability policies or the law, since insurers, in order to avoid liability under this exclusionary language, must show that damage to the environment was expected or intended. An automobile liability insurer cannot deny coverage to a corporate owner of vehicles for a particular accident on the ground that accidents to the vehicles in the corporate fleet "in their totality" occurred on a number of occasions and therefore the particular accident was expected. It is precisely a generalized "expectation" that accidents will occur that causes the fleet owner to purchase liability insurance, just as it is a similar expectation that causes the prudent owner of an operating plant to purchase liability insurance with respect to those operations. This ruling is discussed in Point III, pp. 38-47, *infra*.

4. In two instances Judge Stanton acknowledged that there were discrete events that met his criteria. He nonetheless *denied* Diamond recovery:

(a) In the first instance, he denied recovery on the basis that Diamond could not separately quantify the precise damage attributable to the particular discrete event, holding that the insurers could therefore totally escape liability for the admittedly covered damage (Pa 29). This ruling is discussed in Point IV, pp. 48-49, *infra*.

(b) Judge Stanton chose to ignore the second covered event because of "continuous and large-scale pollution" a mile distant (Pa 42). There is no precedent for denying an insured coverage to which it is entitled because it is not entitled to coverage for other damage elsewhere. This ruling is discussed in Point V, p. 50, *infra*.

The Superior Court's rulings as to insurance coverage, which we believe to be erroneous and contrary to law, may have been influenced by Judge Stanton's conclusion that Diamond's policy toward discharges into the Passaic River was "unacceptably wrong and irresponsible" (Pa 18).[3] The Superior Court did not identify any specific environmental damage that can be ascribed to these discharges and, indeed, he commented that "[c]hemical pollution of the Passaic River in the Newark area has been severe for at least the past 50 years" (extending at least a decade *before* Diamond's acquisition of the Newark plant) and that "there were so many other plants discharging chemical wastes into the Passaic River in the Newark area that it would have been severely contaminated if the Newark plant had not existed" (Pa 15). There is no showing that any of Diamond's discharges to the River had anything to do with the soil and groundwater contamination for which Diamond seeks coverage in this suit. Moreover, the issue is not whether Diamond was at all times and in all respects a model corporate citizen in its environmental policies; the issue is, rather, whether there is cover-

3 One fact that troubled the Superior Court was the apparent use of a warning system by which discharges from the plant to the river would cease when inspectors visited the plant (Pa 16). While such practice, which the evidence suggests stopped in 1956 (Pa 2341, Pa 2244-45, Pa 2220), is not to be condoned, it has nothing to do with the issue of whether the environmental damage at issue was expected or intended.

age under Diamond's comprehensive general liability insurance with respect to some or all of the environmental damage which is the subject of this suit. We note that, both in his own interest and in the public interest, a person who is negligent, or even a person who has violated the law (for example, by running a red light), is entitled to insurance coverage for the unintended damage his actions have caused.

Part II of this brief (pp. 51-73), which contains its own Statement of the Facts, discusses the issues raised by Diamond's appeal from the Superior Court's rulings that severely reduced Diamond's recovery for its Agent Orange settlement. Unlike the environmental damage coverage issues discussed in Part I hereof, this part of Diamond's appeal does not raise issues of similar broad public interest.

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).

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

1963 but never suggested that anything that was occurring there posed a threat to the environment or to the health of persons living or working in the vicinity of the plant (Pa 1421, Pa 1652, Pa 1655, Pa 1423, Pa 1425, Pa 1427, Pa 1429, Pa 1469, Pa 1434).[4]

During the entire relevant period, Diamond's primary liability insurer was The Aetna Casualty & Surety Company ("Aetna") (Pa 391). Aetna's inspectors visited the plant frequently each year throughout the 1951-1969 period (Pa 2331-32, Pa 2232-33, Pa 2191-2200, Pa 2185-86). Aetna inspectors entered each of the manufacturing buildings (Pa 2232-34, Pa 2213-14). Aetna's engineering inspections were directed towards improving worker safety, loss control efforts, and gathering information for Aetna's underwriters with respect to exposure appraisal and coverage renewal analyses (Pa 1669, Pa 1688, Pa 2286-87). Aetna's inspections included the evaluation of potential effects of the plant's emissions upon persons and property in the vicinity of the plant (Pa 1688, Pa 1669, Pa 1613).

Even though the Newark plant was considered a "problem" plant in terms of worker compensation claims for chloracne (Pa 1470), Aetna never suggested to Diamond that operations of the plant might result in damage to neighboring persons, property or the environment. Aetna elected to continue comprehensive general liability coverage throughout the period that Diamond owned the plant (Pa 2187, Pa 2196, Pa 2215-16). The excess insurers relied upon Aetna's assessment in their decisions to renew coverage as well (Pa 2303-04).

1983 Discovery of Dioxin Contamination and Diamond's Response

On June 2, 1983 Governor Thomas Kean signed Executive Order No. 40 which recited that dioxin had been detected at the plant site, that dioxin is "a substance known to be highly toxic

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4 The Superior Court found that "[e]ven to this day, chloracne among workers exposed to large amounts of dioxin is the only human health problem which is indisputably caused by dioxin" and that chloracne "is a significant nuisance to the worker affected by it, but it is not a dangerous condition" (Pa 9).

to humans," and that the New Jersey Department of Environmental Protection ("NJDEP") had reached the preliminary conclusion that a "potential hazard exists to the public health because of the possibility of transportation of contaminated substances off the described premises into immediately surrounding areas" (Pa 992).

On June 13, 1983 Robert E. Hughey, then Commissioner of the NJDEP, signed Administrative Order No. EO-40-6 ordering Diamond to cover all exposed areas at the plant (Pa 996). In March 1984 and December 1984 Diamond and the NJDEP entered into Administrative Consent Orders I and II ("ACO I and II") specifying studies and remediation and containment procedures to be undertaken by Diamond with respect to the plant site and numerous locations in its vicinity (Pa 997, Pa 1012).[5] A Record of Decision issued by the United States Environmental Protection Agency in 1987, in which the NJDEP has concurred, proposes that continuing migration of dioxin be contained through a system involving, *inter alia*, underground slurry walls, a ground water withdrawal system, a ground water treatment system and a surfical cap (Pa 1093).

As a result of investigations begun in 1983, fourteen years after the plant closed, it was learned that dioxin had entered the soil through cracks in the floors of the process buildings, concrete sumps and the industrial sewer in amounts in excess of 1 part per *billion*—the current "action level" established by the environmental authorities, a level that could not even be detected at the time the plant ceased operations in 1969 (Pa 1529-30, Pa 1707, Pa 2256-60, Pa 2270-72, Pa 2281)—and immediately began to migrate continuously, which it has continued to do to date (Pa 1528-32, Pa 2263-65, Pa 2266, Pa 2269, 2273-74, Pa 2282-84). Work done for the NJDEP identified dioxin contamination at numerous locations in the vicinity of the plant, some as far as a mile distant (Pa 1012). The mechanisms for the transport of dioxin offsite, particularly wind and surface water, operated from the time Diamond acquired the

5 Diamond reacquired the plant property in 1984 solely in order to facilitate compliance with ACO I and II (Pa 2223-24, Pa 1903).

plant and are likely to have continued to date despite the temporary containment measures undertaken by Diamond (Pa 2266, Pa 2277, Pa 2282-84). Unless and until the dioxin is contained or removed, it continues to represent a threat to the public and the environment, and the measures taken to date have not ended that threat (Pa 992, Pa 2263-65, Pa 1093).

The Presence of DDT and Other Chemicals At Diamond's Newark Plant Site

The Superior Court found that in addition to dioxin, there are "many other chemicals which are regarded as priority pollutants at scores of locations throughout the Newark plant site . . . which make a cleanup of the site necessary" (Pa 17-18). The only contaminant other than dioxin specifically referred to in the Superior Court's Opinion is DDT (*e.g.*, Pa 19).[6] It is important to note, however, that the Superior Court did not find that the presence on the plant site of any of these chemicals, including DDT, was the result of deliberate dumping or burial by Diamond. Indeed, the Superior Court made no finding as to how or from what source the chemicals other than dioxin or DDT got where they were found, or whether they were deposited during Diamond's operation of the plant from 1951 to 1969, or by others before or after that time.[7]

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6 The management of the plant had no reason to be concerned about any environmental consequences of its production of DDT. Substantial quantities of DDT were being manufactured and used in the United States into the late 1960's (Pa 1592-93). Diamond stopped making DDT at the plant in May 1957 (Pa 2343-44), long before Rachel Carson's *Silent Spring* (1962) called attention to the environmental consequences of DDT and other chemicals.

7 The plant was located in an area that had been utilized for industrial purposes for more than 100 years and was constructed (well prior to its acquisition by Diamond) on 6 to 8 feet of fill consisting of cinders, bricks, sand and rubble. (Pa 1104, Pa 1111, Pa 1102, Pa 2378-80). Prior to its acquisition by Diamond the site was operated, *inter alia*, by the Lister Agricultural Chemical Company and the Kolker Chemical Works, Inc. Kolker, at least, made many of the phenoxy herbicides and pesticides (including DDT) that Diamond subsequently manufactured on the site (Pa 1111).

The orders issued and the actions taken by environmental authorities with respect to 80 Lister Avenue were directed at dioxin. The uncontested evidence is that removal or containment of the dioxin at the Newark plant site will also result in the removal or containment of the other chemicals found there (Pa 2222, Pa 2276).

During the period when Diamond operated the plant, 1951-1969, Diamond could not have anticipated that the escape of organic compounds into the soil or ground water would give rise to environmental damage. The possibility that contamination of soil and ground water by any chemical would cause environmental damage was not a concern of industry (Pa 2254-55, Pa 1526-29) or of governmental regulation generally, until the mid-1970's when the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* (1982) ("RCRA") and similar state statutes were enacted (Pa 1528-29, Pa 2256, Pa 2268).

The Superior Court did not find and there is no evidence that chemicals were intentionally disposed of on the plant site by Diamond (*see*, *e.g.*, Pa 2347). Leaks or spills inside buildings would fall onto the concrete floor and from there would be washed down into floor trenches and, prior to 1956, discharged to the river.[8] In 1956, after the Passaic Valley Sewerage Commission ("PVSC") complained regarding a discharge of 2,4-D process waste waters to the river (Pa 1378, Pa 1377), discharges from the building in which the 2,4-D was manufactured (which included 2,4,5-T process waste waters (Pa 2334-37)) were routed to an industrial sewer (Pa 2327-29, Pa 2227).[9]

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8 Up to May 1957 when DDT production ceased the solids in the spent acid receiving tanks were shoveled out onto the soil but were cleaned up (Pa 2347).

9 2,4-D, another phenoxy herbicide manufactured at the Newark Plant, had a characteristically foul odor, which 2,4,5-T did not (Pa 2339). Up to 1960 the Newark Plant discharged 2,4,5-T process waste waters to the river. Although these discharges contained minute quantities of 2,4,5-T, which, in turn, contained even more minute quantities of dioxin (Pa 2334-37), there is no evidence of any complaint by the PVSC with respect to such discharges, which were odorless, non-

In 1960, following an explosion of the building in which TCP—an intermediate chemical in the 2,4,5-T manufacturing chain—was made, the facility was rebuilt and process waste waters discharged to the industrial sewer (Pa 2248-49, Pa 2228-29), although it appears that some chemical process waste waters—from a unit that made 2,4,5-T and 2,4-D esters—were discharged to the river up to the time the plant ceased operations (Pa 1751).

Diamond's Insurance

From 1951 to 1985 Diamond's primary comprehensive general liability insurance was issued by Aetna. Diamond also purchased following form excess comprehensive general liability insurance at various times from the London market, from Aetna and from the other domestic and foreign excess insurers who are defendants in this action. It was Diamond's intention in purchasing comprehensive general liability insurance to protect itself from the unexpected or unintended consequences of the actions of its employees and claims arising from the sale of its products (Pa 2183-84).

Prior to February 1, 1960 Diamond's primary insurance policies were issued on an "accident" basis, using standard industry wording (*i.e.*, "all sums which the Insured shall become legally obligated to pay as damages . . . caused by accident") (Pa 19-20).

Beginning on February 1, 1960, "occurrence" coverage was provided to Diamond, initially by an endorsement drafted by Aetna that replaced the word "accident" in the standard form coverage provision with the word "occurrence" (Pa 20), and subsequently using standard industry wording (Pa 21).

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viscous and relatively clear (Pa 2338-39). Because 2,4,5-T, its intermediates and DDT were expensive chemicals, there was a recovery system designed to recover from process waste waters as much of the chemicals as possible prior to discharge of the waste waters from the plant (Pa 2334-37, Pa 2346).

Beginning on February 1, 1960, Diamond's insurance expressly restricted coverage to injury "neither expected nor intended from the standpoint of the insured" (Pa 20-21).

All of the provisions of Diamond's insurances at issue were drafted by casualty insurance industry groups, such as the Insurance Rating Bureau (later the Insurance Services Office) or by individual insurers (Pa 2294, Pa 2016, Pa 2075-76, Pa 2006, Pa 2008). The operative language of these provisions was non-negotiable and Diamond had to accept these wordings in order to purchase liability insurance in the commercial markets (Pa 2319-20, Pa 1743-44, Pa 2291, 2292-93, Pa 2189-90).

The Pollution Exclusion

The first general pollution exclusion (*i.e.*, one not limited to oil or gas related pollution) in Diamond's primary insurances was imposed by Aetna by endorsement effective February 1, 1971 (Pa 2005A, Pa 2289-90).[10] Aetna's standard pollution exclusion reads as follows:

> "This insurance does not apply:
>
> To bodily injury or property damage arising out of the discharge, dispersal, release or escape of . . . toxic chemicals, liquids or gases, waste materials or other irritants, contaminants, or pollutants into or upon land, the atmosphere or any water course or body of water; but this

10 Diamond's following form excess insurance generally either contained no separate pollution exclusions or utilized exclusionary wordings the same or substantially similar to the Aetna standard exclusion. One exception is very high layer ($5 million excess of $20 million excess of Aetna) excess insurance policies issued by the London Market in 1970-1972 that contained the following provision:

> "It is hereby understood and agreed that all losses arising from Seepage and Pollution, however caused, are excluded absolutely from this insurance" (Pa 2099A, B).

No other exclusions in Diamond's insurance policies at issue that apply to Diamond's operations at the Newark plant contain this unambiguous statement of the insurers' intention to exclude all environmental damage.

exclusion does not apply if such discharge, disposal, release or escape is sudden and accidental" (Pa 20).

Diamond was advised by its brokers that it was not possible to delete this exclusion, which was imposed by the entire casualty insurance industry (Pa 1743-44, Pa 2318-20, Pa 2292-94, Pa 2189-90). The pollution exclusions in Diamond's excess insurances are the linguistic and legal equivalent of the Aetna standard form exclusion.

The Aetna standard pollution exclusion was intended to exclude only expected or intended pollution, as Aetna expressly confirmed to Diamond on several occasions (Pa 1616, Pa 1618, Pa 1665, Pa 1699, Pa 1702). None of the pollution exclusions at issue in any of Diamond's insurance policies uses the word "gradual" to define what is excluded. Rather, they affirm insurance coverage for "sudden" pollution. Standard dictionary definitions of "sudden" define it as the equivalent of "unexpected." *See, e.g., Webster's New Twentieth Century Dictionary of the English Language, Unabridged* (2d ed. 1983). If Diamond's insurers had intended to exclude unintentional contamination that happened over a period of time, they knew of and could have used clearer and more apt words, including the word "gradual."[11]

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11 The United States Environmental Protection Agency has expressed the view in a Notice of Proposed Rulemaking that "it is possible that the insurance industry inserted the pollution exclusion clause into the CGL policy aware of its potential ambiguity," 50 Fed. Reg. 33,901, at 33,905 (1985). A leading law review article argues that

> "the insurance industry's choice of the terms 'sudden and accidental' suggests a calculated effort to assure ambiguity. . . . [I]t is inexplicable why the insurance industry neglected to define the key pollution exclusion terms 'sudden' and 'accidential' when the standard form was revised in 1973." Chesler, Rodburg & Smith, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 38 Rutgers L.J. 9, 37 (1986) (hereinafter "*Patterns*").

The same article points out that the casualty insurance industry did redraft the standard pollution exclusion in 1986 to eliminate the words "sudden and accidental," *Patterns, supra*, 38 Rutgers L.J. at 37 n.149,

Defendants recognized that the language they drafted was ineffective to result in a blanket exclusion of environmental damage occurring over time but did nothing until 1986 to remedy their failure to choose clear and apt words to describe what they now argue was their intent with respect to coverage (*see*, *e.g.*, Pa 2013, Pa 1742, Pa 2300, Pa 2301-02). The Superior Court refused to accept evidence as to the insurers' public interpretation of their own pollution exclusion contained in filings with state insurance departments, although it admitted and relied upon evidence as to the personal surmises of a single Diamond risk manager and one of Diamond's brokers as to its meaning (*see* pp. 35-37, *infra*).

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thus limiting the impact of this case to insurance policies issued in the past with respect to past environmental damage. Therefore, there can be no public concern that a finding of insurance coverage for environmental damage under the policies at issue in this case will encourage future pollution.

ARGUMENT

I.

The Superior Court Misconstrued The Phrase "Caused By Accident" in Diamond's 1951-1960 Policies

Judge Stanton denied coverage for personal injury and property damage caused by soil and groundwater contamination at and in the vicinity of Diamond's Newark plant because in his view "accident" means "a discrete fortuitous event which happens within a short time at a specific time and place" (Pa 25). There is no decision by any New Jersey court that so construes the phrase "caused by accident" in a comprehensive general liability insurance policy.

The Superior Court ignored the decision of the Appellate Division in *Broadwell Realty Services, Inc.* v. *Fidelity & Casualty Co.*, 218 N.J. Super. 516, 532, 528 A.2d 76, 84 (App. Div. 1987), where it was noted that the 1966 change by the casualty insurance industry from "accident"-based coverage to "occurrence"-based coverage was in part an acquiescence in the judicial trend that interpreted "accident" as covering continuing injuries.[12] Here, as was true in *Broadwell*, Diamond's policies do

> "not define the word 'accident,' leaving that task to the courts. The courts generally defined 'accident' as 'an unexpected happening without intention or design' " (218 N.J. Super. at 532, 528 A.2d at 84).

See also Riker v. *John Hancock Mutual Life Insurance Co.*, 129 N.J.L. 508, 510-11, 30 A.2d 42, 44 (N.J. 1943) (" 'accidental means' was employed in the policy in its usual and popular sense, *i.e.*, as signifying a 'happening by chance; unexpectedly

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12 *See also American Home Products Corp.* v. *Liberty Mutual Insurance Co.*, 565 F. Supp. 1485, 1501 (S.D.N.Y. 1983), *mod. on other grounds*, 748 F.2d 760 (2d Cir. 1984):

> "This change adopted the result reached by courts that construed 'accident' to include injuries resulting from long exposures."

taking place; not according to the usual course of things; or not as expected' ").

The prevailing judicial view with respect to coverage for "gradual" injuries under pre-1966 "accident" liability policies is summarized by a leading law review article:

> "In numerous actions brought under CGL policies which insured against damages 'caused by accident,' the insureds sought liability coverage for injuries resulting from such long term processes as seepage of oil or wastes or air pollution. In those cases, insurance carriers often argued that the term accident was limited to a 'sudden, violent, castastrophic and specific act' and did not include events occurring over an extended period of time.
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> However, more often courts have held that 'accident is broader than the restricted definition of an event happening suddenly and violently,' and that the length of time during which the injury-producing incident or the injury itself took place was not dispositive of the issue of whether or not an accident had occurred. The courts expressed an early willingness to find that an entire process, or the 'transaction as a whole,' could constitute the accident required by the policies to trigger coverage."[13]

Many cases—not one of which is referred to in Judge Stanton's Opinion—hold squarely that gradual environmental damage claims are covered under "accident"-based general liability insurance policies. *See, e.g., Employers Insurance Co.* v. *Rives*, 264 Ala. 310, 87 So. 2d 653, 656-57 (1955) (property damage caused by oil leaking from an underground tank over several months); *Taylor* v. *Imperial Casualty & Indemnity Co.*, 82 S.D. 298, 144 N.W.2d 856, 859 (1966) (damage to neighboring property from seepage of gasoline from tank); *City of Kimball* v. *St. Paul Fire & Marine Insurance Co.*, 190 Neb. 152, 206 N.W.2d 632, 637 (1973) (seepage from sewage lagoon over three-year period caused contamination of water used for irrigation);

13 *Patterns, supra*, 38 Rutgers L.J. at 26-27 (footnotes omitted).

White v. *Smith*, 440 S.W.2d 497, 509-11 (Mo. Ct. App. 1969) (seepage of waste from pond over indeterminable period of time); *City of Myrtle Point* v. *Pacific Indemnity Co.*, 233 F. Supp. 193, 197 (D. Or. 1963) (negligent operation of sewage treatment plant over two-year period); *Moffat* v. *Metropolitan Casualty Insurance Co.*, 238 F. Supp. 165, 169-70 (M.D. Pa. 1964) (emanation of destructive gases caused by oxidation of coal refuse piles).[14]

The above cases are specific applications of the general principle that an "accident . . . need not be a blow but may be a process," *Travelers Indemnity Co.* v. *Humming Bird Coal Co.*, 371 S.W.2d 35, 38 (Ky. Ct. App. 1963); *see also Beryllium Corp.* v. *American Mutual Liability Insurance Co.*, 223 F.2d 71, 73-74 (3d Cir. 1955) (long-term exposure of employees' families to clothes contaminated with toxic metal); *Canadian Radium & Uranium Corp.* v. *Indemnity Insurance Co. of North America*, 411 Ill. 325, 332, 104 N.E.2d 250, 255 (1952) (extended exposure to radioactive materials); *McGroarty* v. *Great American Insurance Co.*, 43 A.D.2d 368, 373-74, 351 N.Y.S.2d 428 (2d Dep't 1974), *aff'd*, 36 N.Y.2d 358, 329 N.E.2d 172, 368 N.Y.S.2d 485 (1975) (acts occurring over 8 months that led to collapse of garage); *Wolk* v. *Royal Indemnity Co.*, 27 Misc. 2d 478, 482-83, 210 N.Y.S.2d 677, 682 (Sup. Ct. App. Term 2d Dep't 1961) (critical factor in determining existence of accident is not length of time involved but whether insured intended damage that occurred); *Farnow, Inc.* v. *Aetna Insurance Co.*, 33 Misc. 2d 480, 483, 227 N.Y.S.2d 634, 638 (Sup. Ct. Queens Co. 1962) ("[i]n determining whether there was an accident, the 'transaction as a whole' must be examined"); 2 *Richards on Insurance* § 219 (5th ed. 1952) ("[i]n the absence of any express policy provision in such respect, the

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14 *See also Benedictine Sisters* v. *St. Paul Fire & Marine Insurance Co.*, 815 F.2d 1209, 1211 (8th Cir. 1987):

> "The fact that an occurrence is the result of a continuing condition does not preclude it from being an accident where the insured was unaware of the dangerous condition. . . . [W]e are thus required to examine whether the Insured expected or intended the harm at the time it occurred."

inability to fix the exact time when and where an accident occurred does not preclude recovery under the policy").

Remarkably, in spite of Judge Stanton's insistence on a temporal meaning for "accident" in this part of his Opinion, he later recognized, when ruling that the standard pollution exclusion precludes coverage, that "the reality is that the temporal aspect of the word [accident] had slipped somewhat in the course of everyday usage and of judicial construction" (Pa 33).[15] Nowhere in discussing "accident"-based policies does Judge Stanton give Diamond the benefit of this reality.

Judge Stanton's assertion that the concept of "accident" in certain worker's compensation cases decided between 1914 and 1960 is "*clearly applicable* to the concept of accident in a comprehensive general liability policy" (Pa 26; emphasis added) is totally without support.[16]

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15 In this later part of his Opinion Judge Stanton characterizes the temporal construction of "accident" that he used in the earlier part of his Opinion as "a precise, technical reading" (Pa 32).

16 The most recent of these cases, decided in 1960, defined the word "accident", as used in New Jersey's Worker's Compensation Act, as importing something unexpected:

> " 'Accident' . . . is an 'unlooked-for mishap or untoward event which is not expected or designed.' " *Dudley* v. *Victor Lynn Lines, Inc.*, 32 N.J. 479. 490, 161 A.2d 479, 485 (1960).

The Court in *Dudley* indicated that it would "save, for a time which it may be required, an attempt to resolve the inconsistencies that have grown up in the law around the term 'by accident' " (*id.* at 491, 161 A.2d at 486) since in that case the death in question was clearly both unexpected and traceable to a definite occasion.

II.

The Superior Court Improperly Refused To Apply Controlling Appellate Precedents In Construing The Standard Form Pollution Exclusions In Diamond's 1971-1985 Policies

Judge Stanton expressed in no uncertain terms his disagreement with "a number of reported decisions of the Appellate Division and of New Jersey trial courts" and his intention "to urge correction of a mistake so that justice will be served" (Pa 29-30). Judge Stanton went on to state his view that "[t]he approach to the pollution exclusion taken in *Broadwell* and the cases it followed is flawed in several ways" (Pa 30-31), and that

> "[i]f I think that the Appellate Division made a mistake in deciding *Broadwell* (as I do), then I can (as I have) point out the mistake in the hope that it will hereafter be corrected by the Appellate Division or by the Supreme Court" (Pa 33).

Recognizing, however, that he is bound to apply *Broadwell* and the other New Jersey decisions with which he disagrees, Judge Stanton argued that these decisions "do not control my decision in our present case" because of a supposed exception for "a highly knowledgeable purchaser of insurance with a substantial amount of bargaining power" (Pa 34). This exception, if upheld, would swallow the *Broadwell* holding and overturn an unbroken line of precedent in New Jersey requiring strict construction of exclusions and limitations on coverage in favor of all insureds, particularly where standard form provisions drafted by the insurance industry are involved.

The exact same language used by the very same insurers should not be given different meanings because of the trier of fact's perception of the astuteness of the individual who purchased the coverage, nor should its meaning vary because a particular employee or broker of the insured may have subjectively believed that the standard form language drafted and imposed by the insurance industry provided less coverage than the objective meaning conveyed by the words used. As insurance law has

developed over the past two centuries, standard terms and conditions have been given standard interpretations as a matter of law. Any other approach would lead to uncertainty and chaos in the drafting, underwriting, rating, interpretation and application of liability insurance policies.

A. The Controlling Law With Which The Superior Court Disagreed

Under a long line of decisions by the courts of New Jersey, the various pollution exclusions relied upon by defendants do not as a matter of law unambiguously exclude coverage for gradual environmental damage claims. Beginning with the landmark decision in *Lansco, Inc.* v. *Department of Environmental Protection*, 138 N.J. Super. 275, 283, 350 A.2d 520, 524 (Ch. Div. 1975), *aff'd per curiam*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *certif. denied*, 73 N.J. 57, 372 A.2d 322 (1977), the meaning of the "sudden and accidental" exception in the pollution exclusion has been held to be the equivalent of the "neither expected nor intended" exception in the comprehensive general liability insurance policy definition of occurrence.

Shortly after *Lansco* was decided, the Superior Court in *Jackson Township Municipal Utilities Authority* v. *Hartford Accident & Indemnity Co.*, 186 N.J. Super. 156, 451 A.2d 990 (Law Div. 1982), granted partial summary judgment for the insured, holding the pollution exclusion there to be "a reaffirmation of the principle that coverage will not be provided for intended results of intentional acts but will be provided for the unintended results of an intentional act" (186 N.J. Super. at 164, 451 A.2d at 994). The Court found that while the insured intended to deposit liquid wastes at its landfill, it "never expected or intended that the waste would seep into the aquifer resulting in damage and injury to others," and as a result an "ambiguity thus exists" which the insurer could have cured by more precise drafting (186 N.J. Super. at 164, 451 A.2d at 994).

New Jersey courts have applied these principles consistently to defeat insurers' attempts to rely upon pollution exclusions to

deny coverage for unintended environmental contamination. As the Appellate Division noted in *Broadwell Realty Services, Inc.* v. *Fidelity & Casualty Co.*, *supra*:

> "The principal thrust of [the carrier's] contention is that the word 'sudden' has a temporal meaning and that the exclusionary clause thereby bars recovery for losses caused by pollution except where the damage is the result of an unexpected and instantaneous catastrophe.
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> "We disagree. The identical argument has been considered and rejected in several reported New Jersey decisions. . . . In these cases, our courts have construed the word 'sudden' in terms of an 'unexpected,' 'unforeseen' or 'fortuitous' event. This definition is consistent with the common meaning of the word in everyday parlance. *See Webster's New International Dictionary* (2d ed. unabridged 1954). *See also Black's Law Dictionary* (4 ed. 1968).
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> "In our view, the pollution exclusion focuses upon the intention, expectation and foresight of the insured. If an insured knows that liability incurred by a foreseeable polluting event is covered by his policy, he is tempted to diminish his precautions and relax his vigilance. Conversely, we perceive no sound basis anchored in the policy language which requires prescience or clairvoyance on the part of the insured. Where the insured has taken reasonable precautions against contaminating the environment and the dispersal of pollutants is both accidental and unforeseen, we are of the view that the 'sudden and accidental' exception to the exclusion is applicable and the loss is thereby covered by the policy" (218 N.J. Super. at 530-35, 528 A.2d at 83-86; citations omitted).

See also State of New Jersey, Department of Environmental Protection v. *Signo Trading International, Inc.*, 235 N.J. Super. 321, 332 n.1, 562 A.2d 251, 257 n.1 (App. Div. 1989) (listing the pollution exclusion among "the clauses . . . that require that, to be covered under the policies, the result of an

event not be 'expected or intended' from the standpoint of the insured''); *Summit Associates, Inc.* v. *Liberty Mutual Fire Insurance Co.*, 229 N.J. Super. 56, 63, 550 A.2d 1235, 1239 (App. Div. 1988) (''our courts have consistently interpreted [the standard pollution] exclusion to constitute the equivalent of an occurrence and to eliminate coverage only where such damages appear to be expected or intended on the part of the insured''); *Solvents Recovery Service of New England, Inc.* v. *Midland Insurance Co.*, Dkt. No. L-025610-83, slip op. at 8 (N.J. Super. Ct. Law Div. Dec. 21, 1984), *reprinted in* 1985 Mealey's Insurance Litigation Reports 220, 224, *vacated on other grounds*, 1985 Mealey's Insurance Litigation Reports 493 (App. Div. Feb. 1985) (rejecting insurer's argument that pollution exclusion applies because insured's ''engineers and chemists . . . , in light of their technical knowledge, should have foreseen possible pollution'' on ground that ''[i]nsurance was purchased precisely for such a risk''); *CPS Chemical Co.* v. *Continental Insurance Co.*, 199 N.J. Super. 558, 569, 489 A.2d 1265, 1270 (Law Div. 1984), *rev'd per curiam on other grounds*, 203 N.J. Super. 15, 495 A.2d 886 (App. Div. 1985) (''the words 'sudden' and 'accidental' have been interpreted by recognized dictionary definitions to include unexpected and unintended events'').[17]

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17 Judge Stanton quotes two dictionary references for the word ''sudden'',—a 1978 *Funk & Wagnalls* edition and *Webster's New Collegiate Dictionary* (1981) (Pa 31-32). We attach as Addendum A a more comprehensive selection of references. Typical is the entry in the *Webster's New Twentieth Century Dictionary of the English Language, Unabridged* (2d ed. 1983):

> ''*sud'den* (sud'n), a. [M.E. *sodain*; OFr. *sodain, sudain*, L. *subitaneus*, sudden, extended from *subitus*, pp. of *subire*, to go stealthily; *sub-*, and *ire*, to go or come.]
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> ''1. happening without previous notice; coming or appearing unexpectedly; not foreseen or prepared for; as, a *sudden* emergency.
>
> ''2. done, coming, or taking place quickly or abruptly; hasty.
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> * * *
>
> ''Syn. - unanticipated, unexpected, unlooked-for.''

(footnote continued)

The *Broadwell* Court relied on, among other things, the flat statement in the "Commentary on Comprehensive General Liability Policies and Their Development" contained in an Appendix to Long's *The Law of Liability Insurance* that the pollution exclusion "eliminates coverage for damages arising out of pollution or contamination, where such damages appear to be expected or intended on the part of the insured and hence are excluded by [the] definition of 'occurrence.' " (3 R. Long, *The Law of Liability Insurance* App.-65 (1988).[18] That Appendix also contains a "Latest Revision" (1986) of the policy, which does not appear in any of Diamond's policies, which was adopted "[i]n response to the problem of courts finding that many discharges were sudden and accidental" and which specifically excludes coverage if the pollution emanates from the insured's premises or a waste disposal or treatment facility; this provision has no "sudden and accidental" exception (App.-65-66). As is pointed out below (p. 35 & n.26, *infra*) there is extensive material in the drafting history of the pollution exclusion supporting the view expressed by Long and adopted by *Broadwell, supra.*

Finally, Judge Stanton's characterization of his view as the "prevailing" one (Pa 38) is both irrelevant and questionable. In the jurisdictions to which he refers and elsewhere there is sub-

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The New Roget's Thesaurus in Dictionary Form (rev. ed. 1978) lists "unexpected" as the first synonym for "sudden" and "expectation" as the first reference for antonyms for "suddenness" (*id.* at 470).

The usual indicia of the meanings of words establish that the word "sudden" is at the least sufficiently ambiguous to invoke the principle requiring construction against the insurer. *See, e.g., Allen* v. *Metropolitan Life Insurance Co.*, 44 N.J. 294, 305, 208 A.2d 638, 644 (1965) ("where several interpretations were permissible, we have chosen the one most favorable to the [insured]").

18 *Broadwell, supra*, cited to Long's 1966 edition at p. App.-58 (218 N.J. Super. at 533, 528 A.2d at 85).

stantial authority that interprets the standard pollution exclusion as have the New Jersey courts.[19]

19 *See, e.g.*, *United States Fidelity & Guaranty Co.* v. *Specialty Coatings Co.*, 180 Ill. App. 3d 378, 535 N.E.2d 1071, 1077 (1st Dist. 1989) *rev. denied.*, Dkt. No. 68605 (Ill. Sup. Ct. 10/5/89) ("any unintentional or unexpected contamination would still be covered as an 'occurrence' under the policy"); *Avondale Industries, Inc.* v. *Travelers Indemnity Co.*, 697 F. Supp. 1314, 1317 (S.D.N.Y. 1988), *aff'd*, Dkt. No. 89-7035 (2d Cir. 1989) (finding duty to defend pollution claims under New York law where no allegations that insured intentionally polluted); *Claussen* v. *Aetna Casualty & Surety Co.*, 259 Ga 333, 380 S.E.2d 686, 688 (1989) (since "it appears that 'sudden' has more than one reasonable meaning . . . the meaning favoring the insured must be applied, that is, 'unexpected' "); *American Universal Insurance Co.* v. *Whitewood Custom Theaters, Inc.*, 707 F. Supp. 1140, 1147 (D.S.D. 1989) ("the test is whether or not an insured expected or intended the harm at the time it occurred"); *Grinnell Mutual Reinsurance Co.* v. *Wasmuth*, 432 N.W.2d 495, 498 (Minn. Ct. App. 1988) ("[t]he insured should not be able to seek coverage for knowingly polluting the environment"); *Wagner* v. *Milwaukee Mutual Insurance Co.*, 145 Wis. 2d 609, 616, 427 N.W.2d 854, 857, *rev. denied*, 147 Wisc. 2d 889, 436 N.W.2d 30 (1988) ("[t]he length of time that elapsed before the leak was discovered is irrelevant as to the suddenness of the discharge"); *New Castle County* v. *Hartford Accident & Indemnity Co.*, 673 F. Supp. 1359, 1364 (D. Del. 1987) ("the term 'sudden' means a discharge, dispersal, release or escape of pollutants that is unexpected") (footnote omitted); *Pepper's Steel & Alloys, Inc.* v. *United States Fidelity & Guaranty Co.*, 668 F. Supp. 1541, 1549 (S.D. Fla. 1987) ("where a spill or release of chemical substances, in this case the release of PCBs into the aquifer beneath the site, is neither intended nor expected from the insured's point of view, it follows that it was 'sudden and accidental' "); *Shapiro* v. *Public Service Mutual Insurance Co.*, 19 Mass. App. 648, 477 N.E.2d 146, 150, *rev. denied*, 395 Mass. 1102, 1105, 482 N.E.2d 328 (1985) ("it does not appear that the escape of oil was a 'dramatic catastrophe' . . . but that is not the ordinary meaning of the word 'sudden' . . . . '[it] need not be limited to an instantaneous happening' "); *Jonesville Products, Inc.* v. *Transamerica Insurance Group*, 156 Mich. App. 508, 512, 402 N.W.2d 46, 48 (1986), *app. denied*, 428 Mich. 897, 402 N.W.2d 46 (1987) ("[i]t is possible that the releases could have been sudden, *i.e.*, unexpected, and accidental, *i.e.*, unintended, and thus outside the exclusion"); *Kipin Industries, Inc.* v. *American Universal Insurance Co.*, 41 Ohio App. 3d 228, 231, 535 N.E.2d 334, 338, (1987), ("an event is 'sudden and accidental' and thus not excluded from comprehensive coverage if the

B. Standard Exclusions Drafted By Insurers Should Not Be Construed Less Strictly Because of the Perceived "Sophistication" of the Insured

The "sophisticated insured" argument (Pa 34) cannot be used to circumvent the rules of construction of standard language in general use, drafted by the insurance industry, which was not specifically formulated by negotiations between the parties. Judge Stanton acknowledged that Diamond's insurance personnel were no more knowledgeable than similar individuals employed by other commercial insureds, who would typically employ brokers to assist them in purchasing liability insurance:

> "[n]one of the risk managers had advanced formal academic training in risk management, insurance underwriting or in insurance law. None of them came to Diamond after having worked in the insurance industry. They were basically general purpose, middle level executives who were assigned to risk management by Diamond. They learned about risk management and its insurance component on the job" (Pa 23-24).

As the Superior Court observed (Pa 22), a rule of construction favoring coverage that the New Jersey courts use in interpreting insurance policies is that the court should seek to give effect to the " 'objectively reasonable expectations' " of the average insured. *Meier* v. *New Jersey Life Insurance Co.*, 101 N.J. 597, 612-13, 503 A.2d 862, 869-70 (1986). Application of

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damaging result is neither expected nor intended by the insured"); *United Pacific Insurance Co.* v. *Van's Westlake Union, Inc.*, 34 Wash. App. 708, 710, 664 P.2d 1262, 1264 (1983) ("the pollution exclusion clause . . . was intended to deprive active polluters from coverage, and not to apply where, as here, the damage caused was neither expected nor intended"); *Allstate Insurance Co.* v. *Klock Oil Co.*, 73 A.D.2d 486, 488-89, 426 N.Y.S.2d 603, 605 (4th Dep't 1980) ("regardless of the initial intent or lack thereof as it relates to causation, or the period of time involved, if the resulting damage could be viewed as unintended . . . the total situation could be found to constitute an accident").

the rule leads to the "basic tenet of insurance law that . . . ambiguities should be construed against the insurer and in favor of the insured," 101 N.J. at 612-13, 503 A.2d at 870 (footnote omitted).

In applying the "objectively reasonable expectations" principle, courts will not give effect to the individualized expectations of the particular insured where standard form wordings drafted by the insurance industry are involved. In *City of Newark* v. *Hartford Accident & Indemnity Co.*, 134 N.J. Super. 537, 550, 342 A.2d 513, 519-20 (App. Div. 1975), the Court held that the insured's "inter-office memorandum as to the interpretation of [its] policy" relied upon by the insurer to show non-coverage was not "in any way conclusive" despite the fact that the memorandum expressed the opinion of the City's attorney that there was "*no coverage to anybody*" in the circumstances in issue (Plaintiff's App. 63a). *See also DiOrio* v. *New Jersey Manufacturers Insurance Co.*, 79 N.J. 257, 273, 398 A.2d 1274, 1282 (1979) (Pashman, J., dissenting) ("it is the expectations of the *average* insured which are considered, not those of the particular insured involved in the specific dispute") (emphasis in original). Otherwise, standard policy wordings that are underwritten and rated on the basis of the average insured would be subject to varying meanings depending upon the peculiar circumstances of each individual insured. *See Meier* v. *New Jersey Life Insurance Co.*, *supra*, 101 N.J. at 613 n.11, 503 A.2d at 870 n.11. Standard insurance contract wording should be consistently interpreted and applied.

Insurers seeking to avoid coverage by relying on exceptions and exclusions in their policies bear a very heavy burden of persuasion, with any doubt to be resolved in favor of coverage. The Supreme Court put the matter succinctly in *Butler* v. *Bonner & Barnewall, Inc.*, 56 N.J. 567, 576, 267 A.2d 527, 532 (1970):

> "Also to be kept in mind is the general rule of construction that if the controlling language of a policy will support two meanings, one favorable to the insurer and the other to the insured, the interpretation favoring coverage

> should be applied, as well as the subsidiary rule that if the clause in question is one of exclusion or exception, designed to limit the protection, a strict interpretation is in order."

See also Sparks v. *St. Paul Insurance Co.*, 100 N.J. 325, 338, 495 A.2d 406, 412 (1985); *Kopp* v. *Newark Insurance Co.*, 204 N.J. Super. 415, 420, 499 A.2d 235, 238 (App. Div. 1985); *Broadwell Realty Services, Inc.* v. *Fidelity & Casualty Co.*, *supra*, 218 N.J. Super. at 523-24, 528 A.2d at 80; *City of Cape May* v. *St. Paul Fire & Marine Insurance Co.*, 216 N.J. Super. 697, 524 A.2d 882 (App. Div. 1987); *NPS Corp.* v. *Insurance Co. of North America*, 213 N.J. Super. 547, 551, 517 A.2d 1211, 1213 (App. Div. 1986).

Moreover, as the Appellate Division held in the context of environmental damage claims in *CPS Chemical Co.* v. *Continental Insurance Co.*, 222 N.J. Super. 175, 189-90, 536 A.2d 311, 318 (App. Div. 1988), "[t]hese principles are no less applicable merely because the insured is itself a corporate giant. The critical fact remains that the ambiguity was caused by language selected by the insurer."[20]

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20 For example, the principle that ambiguities are to be construed in favor of the insured has been applied in favor of commercial insureds in a wide variety of cases: *United Deliveries, Inc.* v. *Norwich Union Fire Insurance Society, Ltd.*, 133 N.J.L. 393, 398, 44 A.2d 185, 186 (Ct. Err. & App. 1945) (common carrier with respect to motor carrier's cargo liability policy); *Bryan Construction Co.* v. *Employers' Surplus Lines Insurance Co.*, 60 N.J. 375, 377, 290 A.2d 138, 140 (1972) (per curiam) (general contractor with respect to umbrella liability policy); *National Newark & Essex Bank* v. *American Insurance Co.*, 76 N.J. 64, 76, 385 A.2d 1216, 1222 (1978) (bank with respect to fidelity bond); *Reese Cadillac Corp.* v. *Glens Falls Insurance Co.*, 59 N.J. Super. 118, 125, 157 A.2d 331, 335 (App. Div. 1960) (automobile agency with respect to employee fidelity policy); *see also Fidelity & Deposit Co.* v. *Hudson United Bank*, 653 F.2d 766, 772 n.8 (3d Cir. 1981) (applying New Jersey law in favor of bank with respect to fidelity bond); *Pan American World Airways, Inc.* v. *Aetna Casualty & Surety Co.*, 505 F.2d 989, 1002-03 (2d Cir. 1974) (a major airline with respect to all risks property policy); *London Assurance Corp.* v. *Thompson*, 170 N.Y. 94, 62 N.E. 1066 (1902) (an insurance company with respect to a reinsurance policy).

The holding in *Werner Industries, Inc.* v. *First State Insurance Co.*, 112 N.J. 30, 38-39, 548 A.2d 188, 191-92 (1988) (per curiam) (Pa 23) is not to the contrary. That case dealt with the rule that even the plain meaning of an unambiguous policy may be disregarded in favor of the insured where that course of action is necessary to fulfill his objectively reasonable expectations. *Werner* held only that the plain meaning of the policy there in question would not be disregarded where it provided "neither unrealistic nor inadequate coverage" and "there has been no showing whatsoever that this policy did not meet [the insured's] expectations" (112 N.J. at 38, 548 A.2d at 192). The Court noted that, even in those circumstances, it might be more inclined to ignore the plain meaning of the policy as a matter of public policy if the insurance policy were one of personal insurance coverage rather than a commercial one negotiated by sophisticated parties. But the Court's observation in no way detracts from the rule that, in all cases, ambiguous language (which was not present in *Werner*) is to be construed against the insurer. In *Broadwell*, as well as in other cases construing the pollution exclusion, the insureds were commercial entities or municipalities and the same exclusions at issue here were held to be ambiguous. *Werner* provides no basis for a different result.[21]

The Superior Court also attempted to distinguish *Broadwell* on the basis that

> "in the mid-1970's and early 1980's, Diamond usually did not give notice of the claims [involving gradual pollution of the environment] to its comprehensive liability insurers. The first carefully articulated notice of pollution claims appears to have been given in 1983 when the dioxin problems at the Newark plant site surfaced. The inference to be

21 *Zuckerman* v. *National Union Fire Insurance Co.*, 194 N.J. Super. 206, 476 A.2d 820 (App. Div. 1984), *aff'd*, 100 N.J. 304, 495 A.2d 395 (1985) (Opinion at 29) is no more apposite than *Werner*. The Court in *Zuckerman*, in a two-to-one decision, found that "[i]t is absolutely clear that the provisions of the policy relevant here are not ambiguous" (*id.* at 211, 476 A.2d at 823), and thus denied coverage where the insured, although required by the policy to file a claim during the policy period, had "voluntarily elected" not to do so and had not acted reasonably or in good faith in failing to do so.

drawn is that Diamond did not give prompt notice of these claims . . . because it did not think it had liability coverage for them" (Pa 36).

The factual premise of this argument is incorrect and the inference drawn is legally impermissible.

The record reveals only two instances between February 1, 1971 and June 1, 1983 when the existence of insurance coverage for environmental damage claims against Diamond was considered by Diamond's insurance department.[22] The first, a suit by the State of Illinois alleging air, soil and groundwater contamination by pesticides from Diamond's former Atlanta, Illinois plant (Pa 1623), was promptly submitted to Aetna (Pa 1649, Pa 2041, Pa 1651). The second instance, a third party complaint in 1983 arising out of the Lone Pine landfill in New Jersey (Pa 1707), was not submitted to Aetna by Mr. Stauffer, Diamond's risk manager, because he was advised by Diamond's Legal Department that the third-party claim against Diamond had been dismissed (Pa 2316-17). No determination was made that the situation was not covered under Diamond's general liability insurance (*id.*).[23]

Moreover, even accepting, *arguendo*, the factual premise that Diamond "usually" did not give notice of gradual pollution sit-

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22 Under the provisions of Diamond's liability insurance, only notice of events known to Diamond's risk manager was required to be given to Diamond's liability insurers (*e.g.*, Pa 2010, Pa 1876).

23 The circumstance referred to by the Superior Court (Pa 35-36) also did not involve a determination by Diamond that environmental damage claims were not covered. In late 1982, Diamond's insurance department received an environmental risk assessment that for the first time called several past environmental problems to the risk manager's attention (Pa 2307-2312). The assessment was obtained solely in connection with Diamond's consideration of purchasing an environmental impairment liability policy in order to satisfy the financial responsibility requirements of RCRA (Pa 2306). Mr. Stauffer's failure to address the question of whether the information he received in the risk assessment should have been given to Diamond's insurers perhaps bespeaks a non-sophisticated approach to insurance claims handling (*see* Pa 2308). There was no evidence suggesting that this failure to notify the insurers derived from any determination by him that the environmental events involved were not covered (Pa 2314-15).

uations to its liability insurers, it is improper to find that Diamond's conduct, which was at worst inconsistent, works a forfeiture of Diamond's insurance coverage for environmental damage at its former Newark plant, as to which Diamond gave what Judge Stanton acknowledges was "carefully articulated notice . . . in 1983" (Pa 36). Forfeiture of insurance coverage is not favored under New Jersey law. *See, e.g., Cooper* v. *Government Employees Insurance Co.*, 51 N.J. 86, 95 n.3, 237 A.2d 870, 874 n.3 (1968) ("[s]ince in substance we are dealing with forfeitures, we believe the ultimate burden of persuasion should rest with the carrier"). Diamond's at most equivocal conduct with respect to giving notice of pollution claims is not grounds for forfeiture here.

Judge Stanton's finding that Diamond had "a substantial amount of bargaining power in the insurance markets" (Pa 24) is totally irrelevant to construction of the pollution exclusion. The uncontradicted evidence is that the language of the coverage provisions and the various "pollution" exclusions in Diamond's insurance was selected by the defendants and that Diamond had no choice but to accept that language if it was to obtain insurance.[24] Defendants chose the operative terms in their exceptions and exclusions—*i.e.*, "seepage," "pollution," "contamination," "sudden," "accidental"—and defendants chose not to define these terms any more precisely. Any result-

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24 For example, one of Diamond's risk managers testified:

> "Also contrary to what I've heard here, we did not go into the insurance market and say we're offering to you to take a pollution exclusion, quite the contrary. We were being told that, you know, this was it, take it or leave it and if we wanted the rest of the coverage, we had no choice but to accept it" (Pa 2319).

Diamond's broker testified similarly:

> "And we soon found that it was impossible to negotiate anything, I'm talking in general now, relative to the pollution exclusion with the various carriers on our various accounts. So I would think almost our immediate response was that it wasn't negotiable. We may have tried, but we never got anywhere. I was never successful in taking it off or bending it" (Pa 1743-44).

Defendants' witnesses testified to the same effect (Pa 2288-94, Pa 1712, Pa 2300-2302).

ing ambiguity must be resolved in favor of coverage, and once a proper construction is chosen, it should be applied uniformly in all cases to all insureds.[25]

25 Judge Stanton's reliance (Pa 34) upon a few non-probative statements by Mr. Purdy, Diamond's former risk manager, and by Mr. Greening, Diamond's former broker, as to what each believed to have been excluded by the standard pollution exclusion first imposed by Aetna in 1971 is misplaced. Each testified that he could not recall what understanding, if any, he had had during the 1970's. Mr. Purdy's testimony is illustrative—*e.g.*, "I really don't remember what my thoughts were at that time" (Pa 2031); "I would say that today. Then I don't know what I thought" (Pa 2032); "[t]hat's my understanding today" (Pa 2033). Indeed, Mr. Purdy testified that he believed that it was appropriate to submit the Atlanta, Illinois claim to Aetna (Pa 1749, Pa 2038). Neither Mr. Purdy nor Mr. Greening testified about the substance of any negotiations or discussions with Aetna about the exclusion (*See*, *e.g.*, Pa 2017, Pa 2020, Pa 2022-2024, Pa 2025-2026, Pa 2030-2033, Pa 2036). Both made it clear that imposition of the exclusion by Aetna was non-negotiable (Pa 1743-46, Pa 2030)—a reality confirmed by Aetna's witness (Pa 2292-93).

Mr. Purdy's 1982 report to Diamond's Audit Committee (Pa 34-35), never uses the phrase "gradual pollution," but speaks only of "non-sudden and accidental seepage and pollution" (Pa 1761). When asked to exemplify his current understanding of what would be excluded by the standard pollution exclusion, Mr. Purdy gave the example of repeated visible emissions from a smokestack where it would be obvious that further damage would be expected (Pa 2034-35). Mr. Greening testified to much the same effect (Pa 2018-19).

C. The Superior Court Improperly Excluded Or Ignored Evidence Demonstrating Diamond's And Aetna's Contemporaneous Interpretation Of The Standard Pollution Exclusion

The Superior Court improperly excluded or ignored evidence demonstrating that not only Diamond's "objectively reasonable expectation" but Diamond's and Aetna's actual understanding was that the Aetna standard pollution exclusion did not preclude coverage for unexpected and unintended gradual pollution claims.

For example, although Judge Stanton was extremely critical of *Broadwell*'s holding that the standard pollution exclusion is a restatement of the "unless expected or intended" exception to the "occurrence" coverage wording (Pa 30-33), he excluded at trial evidence demonstrating that the casualty insurance industry represented in public filings with state insurance departments that the pollution exclusion was intended to have this very effect (Pa 2348-49). Diamond proffered authenticated copies of filings made by the Insurance Rating Bureau (of which Aetna was a member) and other carriers with the Insurance Commissioner of the State of West Virginia (Pa 1718, Pa 1715). These documents evidence the casualty insurance industry's publicly expressed representation that the pollution exclusion was not a reduction in coverage but simply restated the exclusion of expected or intended injury contained in the occurrence coverage language. The West Virginia Insurance Commissioner expressly found and relied upon the representation in approving the use of the standard pollution exclusion (Pa 2492-99). It cannot be irrelevant in determining an insured's objectively reasonable expectation as to the meaning of standard form language that the insurers secured the approval of regulatory authorities by representing that the language did not reduce coverage. It was precisely evidence of this sort that the Appellate Division found persuasive in *Broadwell*, *supra*, 218 N.J. Super. at 533-34, 528 A.2d at 85.[26]

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26 *See also Claussen* v. *Aetna Casualty & Surety Co.*, *supra*, 259 Ga. at _____, 380 S.E.2d at 689 ("[d]ocuments presented by the Insurance

Another example of Judge Stanton's refusal to consider relevant evidence that supported the *Broadwell* Court's construction of the pollution exclusion is his rejection of Diamond's proffer of Aetna engineering inspection reports, generated *after* Aetna had imposed the standard pollution exclusion on Dia-

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Rating Board (which represents the industry and on which Aetna participated) to the Insurance Commissioner when the 'pollution exclusion' was first adopted suggest that the clause was intended to exclude only intentional polluters''); *Kipin Industries, Inc.* v. *American Universal Ins. Co.*, *supra*, 41 Ohio App. 3d at 232, 535 N.E.2d at 338 (the Court referred to and relied "on a 1970 circular to the members of the Insurance Rating Board that, in discussing exclusion (f) [the standard-form pollution exclusion], states that the clause is intended to clarify the definition of 'occurrence' so as to exclude coverage for expected or intended results'').

A number of commentators have marshaled evidence from the casualty insurance industry's drafting history of the "occurrence" language and the pollution exclusion, showing that the insurers intended to cover gradual pollution damage that was not expected or intended. *E.g.*, Pendygraft, Plews, Clark and Wright, *Who Pays for Pollution Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 Ind. L. Rev. 117, 141, 154 (1988) ("contemporaneous industry commentary on the 1966 CGL policy does not support the insurers' present contention that there was any intent to avoid coverage, even for extended pollution claims. . . . The Jackson court's equation of the pollution exclusion with the requirement in the definition of occurrence that the damage be neither expected nor intended is supported by mounting evidence concerning the drafting and regulatory history of the exclusion''); Price, *Evidence Supporting Policyholders in Insurance Coverage Disputes*, 3 Natural Resources & Environment 17, 48 (1988) ("[t]hese contemporaneous statements by the insurance industry-wide organization that drafted the pollution exclusion clause are clear that the clause was intended to clarify the occurrence definition and to exclude coverage of pollution-related damage only if the damage is expected or intended by the insured''); Anderson and Luppi, *Environmental Risk Insurance: You Can Count on It*, Risk Management 70, 72 (Oct. 1987) ("[t]he judges who have decided the pollution liability insurance cases in favor of the policyholders simply did exactly what the insurance industry told the State of West Virginia and other states was the right and proper thing to do. . . . The drafting history is clear: The policyholder may fully intend to discharge the pollutants and nevertheless be covered if the resulting damage is unintended or unexpected'').

mond, that reviewed potential environmental damage situations at other Diamond plants (*see*, *e.g.*, Pa 1725-26, Pa 1723-24, Pa 2491). Aetna's interest in gathering pollution exposure information when considering renewal of Diamond's coverage after the pollution exclusion was imposed is obviously consistent with Diamond's (and Aetna's) understanding that unintended environmental damage was covered.

Judge Stanton ignored substantial other evidence that was inconsistent with his ruling. For example, a series of events in 1979 that were contemporaneously memorialized demonstrated Diamond's and Aetna's understanding that the pollution exclusion did not eliminate coverage for unintended environmental harm. In March 1979, William R. Greening, Diamond's broker, wrote to Joseph Hartney of Aetna, at Diamond's request, to seek clarification of "Aetna's attitude towards the manner that coverages [*sic*] provided for waste disposal" (Pa 1612). Mr. Hartney answered that coverage was possible (Pa 1618). Clark Fitzgibbons, then Diamond's casualty insurance administrator, understood Aetna's response to acknowledge that Aetna covered waste disposal claims (Pa 1737-39).

One specific situation that was discussed between Diamond and Aetna at a meeting on March 21, 1979 (*see* Pa 1720) was "[p]ollution claims arising out of [Diamond's] plant operations in the Houston area" (Pa 1665). The substance of the discussion is recorded in Aetna's renewal analysis, dated September 13, 1979:

> "We handle most of these air pollution claims under a non-waiver. The insured has reluctantly gone along with this based on the 'sudden and accidental' concept. *If the pollution is to be expected, coverage is then very doubtful. The key to this is it must be 'unintended'. If one expects and does nothing then* [sic] *there is no coverage*" (*Id.*; emphasis added).

III.

The Superior Court Misapplied New Jersey Law With Respect To The "Expected Or Intended" Exception In Diamond's 1960-1985 Policies

In concluding that the environmental damage for which Diamond sought coverage was "expected or intended" the Superior Court ignored the simple, straightforward rule in New Jersey that "coverage will not be provided for intended results of intentional acts but will be provided for the unintended results of an intentional act." *Jackson Township Municipal Utilities Authority* v. *Hartford Accident & Indemnity Co.*, *supra*, 186 N.J. Super. at 164, 451 A.2d at 994.

The rule has been applied consistently in determining liability insurance coverage for environmental damage claims under New Jersey law. In addition to *Jackson Township*, the pertinent cases include *Broadwell Realty Services, Inc.* v. *Fidelity & Casualty Co.*, *supra*, and *Township of Gloucester* v. *Maryland Casualty Co.*, 668 F. Supp. 394 (D.N.J. 1987). The same principle has been applied to find coverage for environmental damage claims in other jurisdictions. *See, e.g., Atlantic Cement Co.* v. *Fidelity & Casualty Co.*, 91 A.D.2d 412, 459 N.Y.S.2d 425 (1st Dep't 1983), *aff'd*, 63 N.Y.2d 798, 471 N.E.2d 142, 481 N.Y.S.2d 329 (1984); *Grand River Lime Co.* v. *Ohio Casualty Insurance Co.*, 32 Ohio App. 2d 178, 289 N.E.2d 360 (1972). *See also* Rynearson, *Exclusion of Expected or Intended Personal Injury or Property Damage Under the Occurrence Definition of the Standard Comprehensive General Liability Policy*, 19 The Forum 513 (Summer 1984).

The governing principle is that harm is accidental and not expected or intended, even if caused by the insured's volitional act

> "if the insured did not specifically 'intend to cause the resulting harm or [was] not substantially certain that such harm w[ould] occur' " (*Broadwell*, *supra*, 218 N.J. Super. at 532, 528 A.2d at 84; brackets in original).

The quotation which is included in the above excerpt from *Broadwell* was taken from *Quincy Mutual Fire Insurance Co.* v. *Abernathy*, 393 Mass. 81, 84, 469 N.E.2d 797, 799 (Sup. Jud. Ct. 1984). In the *Quincy* case the court reasoned as follows:

> "The difficulty that courts have had with the definition of the word 'expected' in this context leads us to the conclusion that we should resolve the ambiguity of this language against the insurance company. Our cases have concluded that an injury is nonaccidental only where the result was actually, not constructively, intended, *i.e.*, more than recklessness. This standard required a showing that the insured knew to a substantial certainty that the bodily injury would result. Thus, we conclude the word 'expected' brings no change to our well-defined concept of 'accident.' Had the insurer intended a different result, it could have used more appropriate language in the exclusion clause" (393 Mass. at 86, 469 N.E.2d at 800; citations omitted).

Judge Stanton discussed neither these authorities nor the principle which they establish in holding that Diamond's occurrence-based policies between 1960 and 1970 (that do *not* have a pollution exclusion) do not cover the Newark environmental damage claims (Pa 38-41). Nor did Judge Stanton discuss what the words "expected or intended" mean or what it is that the insured must "expect" or "intend" in order to forfeit coverage.

The flaws in Judge Stanton's approach to this issue are apparent from the reasoning process reflected in his Opinion. From a finding that "Diamond's management accepted the spills and leaks as part of the normal routine of operating a chemical manufacturing plant" he drew the conclusion that "[a]ccordingly, its acts of pollution should be treated as conduct which was at least knowing" (Pa 39). This argument involves an unsupported succession of inferences upon inferences: (1) an inference that Diamond expected that the material leaked or spilled during the plant's operation would reach the ground in significant quantity rather than being deposited on

the plant's cement floor and then cleaned up; (ii) an inference that Diamond expected that, having reached the ground, the material would migrate to nearby soil or groundwater in significant quantities; (iii) an inference that Diamond knew that the material had toxicity that would cause environmental damage in the quantities in which it might be expected to migrate; and (iv) an inference that Diamond knew that the material would be resistant to degradation or neutralization so that it would be necessary to clean it up to prevent environmental damage from occurring. There were no findings which would bridge these gaps and there was no evidence to support such inferences. The burden of adducing such evidence was on Diamond's insurers.

The record in this case makes it impossible to conclude that Diamond "knew to a substantial certainty" that the environmental damage which is the subject of this suit would result from its actions. It was the uncontradicted testimony that it was industry practice to build plants on cement pads or floors which would be the repository for leaks and spills (Pa 2256, 2261-63). The evidence showed that the floors at the Newark plant were periodically repaired or replaced (Pa 2235-42, Pa 2324, Pa 2344, Pa 1301-15, Pa 1318, Pa 1334-1336, Pa 2048, Pa 2052) and Judge Stanton so found (Pa 40).[27] Even if Diamond had been negligent in these efforts that would not, of course, result in a forfeiture of insurance coverage (*see* pp. 42-47, *infra*). Insurance covers damage or injury resulting from the insured's negligence.

The uncontradicted evidence also showed that neither Diamond nor anyone else during the period 1951-1969 (the years when Diamond operated the plant) was aware that leaks and spills of the materials Diamond was handling would cause envi-

27 The record contradicts Judge Stanton's statement, for which he cites no evidence, that the *only* purpose for the repair or replacement of floors was to permit ease of movement (Pa 40)—it was plainly intended to preserve the ability of the floors to contain spills and leaks (*e.g.*, Pa 2235-36, Pa 2325-26, Pa 1298, Pa 1318-22, Pa 1324, Pa 2048, Pa 2052).

ronmental damage. Indeed, Judge Stanton specifically found that:

—"phenoxy herbicides . . . were used widely throughout the United States for decades (Pa 8);

—"The general view in the chemical industry and in the United States Department of Agriculture was that it was safe to dispense phenoxy herbicides into the environment in controlled agricultural applications" (*id.*);

—"For a number of years, Diamond did not even realize that it was creating dioxin" and "[w]hen dioxin was identified and detected, it was not perceived as being particularly toxic" (Pa 9);

—"Over the years, dioxin and other contaminants migrated off the site. There is a sense in which some of this migration was accidental or fortuitous, at least as to the specific mechanisms by which it occurred" (Pa 41-42);

—"Up 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);

—"Diamond distributed this product [Agent Orange] without knowing that it was defective" (Pa 45); and

—Diamond "never recognized the toxic risks that Dioxin posed" (Pa 55).

Up to June 1983 Diamond did not receive any complaint or warning from any source that contamination at 80 Lister Avenue had created or would cause environmental damage (Pa 2354-55, Pa 2351-52).

In the face of these facts, Judge Stanton's conclusion that environmental damage at 80 Lister Avenue was expected from Diamond's standpoint (Pa 40-41) is simply wrong as a matter of law.

An examination of the fact patterns in other cases confirms that, on the facts of this case, Judge Stanton's conclusion was unwarranted.

The insurance in *Jackson Township*, *supra*, defined an "occurrence" as an accident "neither expected nor intended" from the standpoint of the insured. Even though the Township had intentionally deposited liquid waste in the landfill site, insurance coverage was held to be available because the Township "never expected or intended that the waste would seep into the aquifer resulting in damage and injury to others" (186 N.J. Super. at 164, 451 A.2d at 994).

Relying upon *Jackson Township*, the court in *Township of Gloucester*, *supra*, concluded that the Township's insurers under its comprehensive general liability insurance policies were required to indemnify it for the cost of the closure and cleanup of a landfill mandated by law. Consistent with the cited New Jersey cases, it ruled that "[t]he basic principle underlying the determination of an occurrence has been expressed as follows: '[C]overage will not be provided for intended results of intentional acts but will be provided for the unintended results of an intentional act.' . . . Pollution by means of gradual permeation is no less an occurrence than that emitted by way of a sudden release" (668 F. Supp. at 401).

Consistent with these New Jersey authorities, and sharply in contrast to Judge Stanton's approach, is the very recent decision of the United States Court of Appeals for the Second Circuit applying New York law in *City of Johnstown, New York* v. *Bankers Standard Insurance Co.*, 877 F.2d 1146 (2d Cir. 1989). The Court there reversed a summary judgment granted by the District Court that the insurers had no duty to defend the City with respect to damage resulting from its operation of a landfill. The Court of Appeals found a duty to defend the City even though the evidence showed that the City had been warned that the landfill posed a "potential environmental hazard" and that groundwater contamination had occurred. The Court said:

> "The evidence demonstrated that the City was warned that the landfill apparently was contaminating the local

groundwaters. As we have noted, however, proof of warnings of possible physical damages is not enough to show that as a matter of law the damages ultimately incurred were expected or intended.

"In opting to keep the landfill in operation, the City took a calculated risk, much as the insured did in *McGroarty* v. *Great American Insurance Company*. . . .

"Here, by analogy, the record suggests that the City was aware of potential contamination, but not that the City *intended* the resulting damage, nor that the City, intending harm, *knew* that the extensive damages alleged in the CERCLA complaint would flow directly and immediately from the City's intentional acts. The evidence relied upon on appellees' motion for summary judgment thus failed to show that 'as a matter of law that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify' the insured" (*id.* at 1152; emphasis in original).

Also directly on point is *Atlantic Cement Co.* v. *Fidelity & Casualty Co.*, *supra*, where the New York Appellate Division reversed a jury verdict in the insurers' favor and directed judgment for the insured with respect to damages recovered against it in an underlying action by property owners alleging that the insured's operation of a cement plant had resulted in property damage, despite the insured's extensive efforts to prevent emissions and discharges from the plant. The Court rejected the argument that since the underlying judgment against the insured on the basis of nuisance included a finding of intentional invasion of the interests of the property owners, the damages were for intentional injuries for liability insurance purposes. The Court held:

"We hold however that 'intentional' as used in the exclusionary clauses in these policies does not have the broad sweep and expansive meaning of 'intentional' as that word is used in the law of nuisance and conclude that Atlantic was entitled to a directed verdict indemnifying it

for the damages recovered against it in the *Kinley* action, said damage having been 'accidentally caused'.

* * *

"It is well established in our jurisprudence that it is not 'legally impossible to find accidental results flowing from intentional causes, *i.e.*, that the resulting damage was unintended although the original act or acts leading to the damage was intentional' (*McGroarty* v. *Great Amer. Ins. Co.*, 36 NY2d 358, 364). Indeed the classic example frequently cited in support of this proposition is that of the motorist who 'intentionally' runs the red light and causes an intersection collision, considered thereafter by all and sundry to have been an 'accident' " (91 A.D.2d at 417-18, 459 N.Y.S.2d at 428).

See also Grand River Lime Co. v. *Ohio Casualty Insurance Co.*, *supra*, 32 Ohio App. 2d at 185, 289 N.E.2d at 365:

"while the activity which produced the alleged damage may be fully intended, and the residual results fully known, the damage itself may be completely unexpected and unintended.

"As an example, the plaintiff Grand River was certainly aware of its particular manufacturing activity, and was undoubtedly aware of the residual emission of smoke, dust, etc., but yet it is quite questionable whether Grand River expected or intended the damaging results to the property owners, at least in the sense that the policy uses such terms."

Even illegality of an insured's conduct does not bar coverage. In one of the examples referred to by Judge Cardozo in *Messersmith* v. *American Fidelity Co.*, 232 N.Y. 161, 164-66, 133 N.E. 432, 432-33 (1921), the fact that an insured fails to stop on signal does not preclude coverage for the unintended consequence of that illegal act (*i.e.*, property damage to another vehicle).[28]

28 The insurance policy in *Messersmith* v. *American Fidelity Co.*, *supra*, indemnified the insured " 'against loss or expense . . . acciden-

The same distinction was testified to by one of Diamond's brokers (Pa 2203-04).

To the same effect is *Burd* v. *Sussex Mutual Insurance Co.*, 56 N.J. 383, 399, 267 A.2d 7, 15 (1970), where, under a homeowner's policy providing comprehensive personal coverage, the Court held that a criminal conviction for assault does not preclude, without more, coverage under the policy, despite an express exclusion for 'bodily injury or property damage caused intentionally by or at the direction of the insured'. The Court noted that "the insured, in his own right, is . . . entitled to the maximum protection consistent with the public purpose which the exclusion [of intentional injury] is intended to serve" and that the "burden is the carrier's to bring the case within the policy exclusion."

The Superior Court apparently allowed personal disapproval of what it perceived in hindsight to be Diamond's insensitivity to the environmental consequences of its discharges to the Passaic River at the Newark plant in the 1950's and 1960's[29] to color its application of the controlling law. There is no New Jersey decision that has applied the "expected or intended" exception to defeat comprehensive general liability coverage on the ground of the insured's indifference to the consequences of an intentional act. New Jersey law applies a subjective test to the "expected or intended" exception and requires a finding that the insured specifically expected or intended the damage to result from its conduct. *See, e.g.*, *Lyons* v. *Hartford Insurance Group*, 125 N.J. Super. 239, 245, 310 A.2d 485, 488 (App. Div.

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tally suffered by any person or persons by reason of' " the operation of a covered automobile (187 A.D. 35, 40, 175 N.Y.S. 169, 173 (4th Dep't 1919)). Just like Diamond's "accident" policies in force prior to February 1, 1960, the policy in *Messersmith* did not contain an express exclusion for intentional damage. As the cases discussed in this section make clear, the addition of the express exclusion of expected or intended damage from coverage adds nothing to the extent of coverage that would otherwise apply, apart from emphasis.

29 For example, the Superior Court introduced its discussion of Diamond's environmental damage claims with the following comments concerning Diamond's discharges to the Passaic River:

1973), *certif. denied*, 64 N.J. 322, 315 A.2d 411 (1974).[30] It is not enough to show that the insured should have foreseen the consequences that ensued. *See* the Magistrate's decision in *J.T. Baker, Inc.* v. *Aetna Casualty & Surety Co.*, No. 86-4794, slip op. at 13-14 (D.N.J. Feb. 14, 1989), *reprinted in* 1989 Mealey's Insurance Litigation Reports, 2/28/89, C-1 at C-7 ("[i]f the policy holder were to be told that the words of the 'occurrence' definition . . . actually mean that coverage is also lost for damage which a prudent person 'should have' foreseen, there would be no point to purchasing a policy of liability insurance").

To equate foreseeability with intention would effectively eliminate liability insurance coverage for most torts. This error was flatly rejected in *Minkov* v. *Reliance Insurance Co.*, 54 N.J. Super. 509, 514-15, 149 A.2d 260, 263 (App. Div. 1959):

"By the standards of the 1950's and 1960's, Diamond's attitudes and conduct were not nearly as blatant and as outrageous as they would be by today's standards. However, even by the standards of the 1951-1969 period, Diamond's conduct in operating the Newark plant was unacceptably wrong and irresponsible. Diamond always put its narrowly perceived economic interest first. It deliberately and persistently cheated on the limited environmental regulations which were in place" (Pa 18-19).

This appears to be the "grossness" and "callousness" test Judge Stanton announced at the hearing on the Tier II substantive pretrial motions (Pa 2174). As we note above, no such test is recognized by the New Jersey courts.

30 Judge Stanton (Pa 41) relied upon *Morton Thiokol, Inc.* v. *General Accident Insurance Co. of America*, No. C-3956-85, slip op. at 13-14 (N.J. Super. Ct. Ch. Div. Aug. 27, 1987), *reprinted in* 1987 Mealey's Insurance Litigation Reports 4,949, 4,957-58. However, that decision was grounded upon the insured's knowledge of the dangerous properties of mercury and its knowledge at the time the mercury discharges occurred that they were causing injury to the land and to Berry's Creek. The identical circumstances resulted in a finding of no duty to defend in *Technicon Electronics Corp.* v. *American Home Assurance Co.*, 74 N.Y.2d 66, 72, 542 N.E.2d 1048, 1049, 544 N.Y.S.2d 531, 532 (1989) (insured "conceded it had intentionally . . . discharged production wastes [including mercury] . . . into a creek"). Here, Judge Stanton expressly found that Diamond "never recognized the toxic risks that dioxin posed" (Pa 55).

> "Simply because the damage resulted from negligence, a concept which carries with it the element of foreseeability, does not deprive the occurrence of its accidental nature. . . . To give the word 'accident' the meaning for which defendant argues would manifestly defeat the purpose of the policy, which is to protect against liability in circumstances like those here present."

Here the record does not even show that Diamond foresaw, or should have foreseen, in any sense, that whatever leaks or spills occurred at the Newark plant would cause environmental harm nor does it show that Diamond exhibited a callousness toward such environmental harm. Certainly the record does not support a finding of intention to cause environmental damage that would satisfy the requirement of the controlling authorities.

IV.

The Superior Court Erroneously Misplaced The Burden Of Proof In Denying Diamond Coverage For The Cost Of Remediating Dioxin Contamination Concededly Caused By A Covered Accident

On February 20, 1960, there was an explosion of the pressure vessel in which TCP was made, TCP being the intermediate product from which Diamond's 2,4,5-T phenoxy herbicide products were manufactured (Pa 1529, Pa 2228-29, Pa 2206-08); Judge Stanton found that property damage caused by dioxin dispersed in the explosion would have been covered under both Diamond's "accident"-based policies—"because the explosion was an 'accident' in the most straightforward sense of that word" (Pa 28)—and Diamond's "occurrence"-based policies—"because the concept of 'occurrence' includes an 'accident' as well as gradual exposure to conditions" (*id.*). However, Judge Stanton went on to find

> "that there is, in fact, no coverage under the policies in force in 1960 for the dioxin contamination caused by the explosion, because it is now physically impossible to identify and quantify the contamination caused by the explosion" (Pa 29).

This ruling turns New Jersey law governing the resolution of insurance coverage disputes on its head. Once the insured has shown that a covered loss has occurred, the burden falls on the insurer to demonstrate that the insured loss is excluded from coverage, with all doubts to be resolved in favor of coverage. *United Rental Equipment Co.* v. *Aetna Life & Casualty Insurance Co.*, 74 N.J. 92, 99, 376 A.2d 1183, 1187 (1977) ("[w]hen an insurance carrier puts in issue its coverage . . . by relying on an exclusionary clause, it bears a substantial burden of demonstrating that the loss falls outside the scope of coverage"); *see also Butler* v. *Bonner & Barnewall, Inc.*, *supra*. 56 N.J. at 576, 267 A.2d at 532; *Burd* v. *Sussex Mutual Insurance Co.*, *supra*, 56 N.J. at 397, 267 A.2d at 15; *Mazzilli* v. *Accident & Casualty Insurance Co.*, 35 N.J. 1, 7-8, 170 A.2d 800, 803-04 (1961);

CPS Chemical Co. v. *Continental Insurance Co.*, *supra*, 222 N.J. Super. at 189, 536 A.2d at 318.

Courts outside New Jersey have held that where some covered loss is shown, the burden is on the *insurer*, not the insured, to prove what portion of the loss is not covered. *See Eagle-Picher Industries, Inc.* v. *Liberty Mutual Insurance Co.*, 829 F.2d 227, 237 (1st Cir. 1987); *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1225 (6th Cir. 1980); *Dayton Independent School District* v. *National Gypsum Co.*, 682 F. Supp. 1403, 1410-11 (E.D. Tex. 1988), *appeal pending*. There is no New Jersey decision indicating that any different result should be reached under the rules applied in *United Rental*, *Butler*, *Burd*, *Mazzilli* and *CPS*.

V.

The Superior Court Had No Basis For Denying Coverage To Diamond For Discrete Contamination Which Could Be Attributed To A Specific Time And Place

The lengths to which Judge Stanton was prepared to go in order to deny any coverage to Diamond for environmental contamination is underscored by his ruling that "all of the migration [of dioxin] should be treated as non-accidental and as being expected from the standpoint of the insured" (Pa 42). He concluded that all dioxin contamination is excluded from coverage, including that occurring in 1981 at a site about one mile distant from 80 Lister Avenue as a result of an incident discrete in time and place.

The Superior Court reached this conclusion despite the findings that some migration of dioxin from the Newark plant site "was accidental or fortuitous" (*e.g.*, by action of the wind and rain) and that some "was very discrete—for example, the transportation of scrap metal . . . to the Brady Iron Works in 1981 [10 years after Diamond sold the Newark plant] which resulted in the contamination of the Brady property" (Pa 42). The only apparent explanation for so sweeping and unwarranted a ruling is Judge Stanton's strong disagreement with the controlling New Jersey precedents that find liability insurance coverage for environmental damage. His rulings individually and taken as a whole would, if upheld, make it virtually impossible for any insured in New Jersey to recover for environmental damage claims under its comprehensive general liability policies.

PART II
AGENT ORANGE SETTLEMENT ISSUES
STATEMENT OF THE FACTS

The "Agent Orange" Class Action

Claims were made on behalf of a class of hundreds of thousands of purported victims of Agent Orange. The claims of injury made in complaints, depositions and interrogatory answers in the *Agent Orange* case (*see* Pa 102, Pa 170, Pa 322, Pa 348, Pa 363, Pa 376) are for the most part silent or inconclusive as to the circumstances and timing of injury, except for the general assertion that injury occurred upon exposure and continued thereafter (Pa 376).

The $23.4 million that Diamond irrevocably and unconditionally paid was in settlement of the claims of a class, defined as "those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides . . . . The class also includes spouses, parents, and children of the veterans born before January 1, 1984 directly or derivatively injured as a result of the exposure." *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 729 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S. Ct. 695, 98 L. Ed. 2d 648 (1988).

The class plaintiffs claimed it was enough that "each veteran plaintiff was physically present in South Viet Nam and was exposed to the material in some amount . . ." (Pa 365-66), that class members assertedly suffered from well over 100 ailments (Pa 366-67, Pa 378-382), and that:

> "The intracellular changes that are occasioned by dioxin exposure (that is, receptor binding) occur very soon after said exposure (minutes to hours)";
>
> "[C]ertain categories of illness have short-term symptomology";

> "Certain problems, such as carcinogenesis, immunological and hematological toxicity and certain reproductive problems (particularly gonadotoxicity) may take longer to be diagnosable"; and
>
> "[A]ll of the effects of exposure are increased over time, and after exposure ceases" (Pa 384-86).

The Superior Court found that it is not possible to connect Diamond's Agent Orange with any class member's alleged injury (Pa 51) and, indeed, that

> "Diamond does not know precisely what happened to its Agent Orange after delivery to the armed forces. In general, its shipments were mingled by the military with each other and with shipments of other manufacturers before being sprayed by the military on the Vietnamese countryside. Most of Diamond's Agent Orange was probably applied in Vietnam between 1962 and 1970. The government had considerable stocks of unused Agent Orange in at least two storage depots at the end of the war, and it may be that some of Diamond's Agent Orange was never used" (Pa 12).

Diamond's Insurance

During the period 1960-1971 Diamond purchased both primary and excess policies on a three-year basis rather than on an annual basis. Beginning in 1971, Diamond purchased primary coverage one year at a time, although it continued to purchase excess insurance on a three-year basis until 1975 (Pa 391).

From February 1, 1960 onwards, Diamond's primary comprehensive general liability insurance policies provided, with immaterial differences, that Aetna would pay on Diamond's behalf

> "all sums which [Diamond] shall become legally obligated to pay as damages because of bodily injury . . . caused by an occurrence" (Pa 19-21).

"Occurrence" is defined in the same policies prior to February 1, 1966, as "an event which causes injury during the policy period"; from 1966-69, as "an accident, or continuous or repeated exposure to conditions which results, during the policy period, in injury to a person"; and, thereafter, as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury" (Pa 20-21). Each of these policies promised to pay "all sums" up to their limits of liability if a covered occurrence caused bodily injury during the policy period.

The primary policies issued to Diamond by Aetna up until 1969 also contained the following provision:

> "Three Year Policy—*A policy period of three years is comprised of three consecutive annual periods.* Rates for hazards described in divisions 1, 2 and 3 of the Description of Hazards are subject to amendment for the second and third annual periods in accordance with the Company's rules and rating plans. Amended rates shall be stated by endorsement issued to form a part of the policy. Computation and adjustment of earned premium shall be made at the end of each annual period. *Aggregate limits of liability as stated in this policy shall apply separately to each annual period*" (Pa 434; emphasis added).

The printed form policy jacket that was part of the Aetna policy that incepted February 1, 1969, and for every year thereafter, contains a slightly revised wording:

> "If this policy is issued for a period of three years, the limits of the Company's liability shall apply separately to each consecutive annual period thereof" (Pa 472).

The above language unambiguously provides, and Aetna and the other affected defendants and Judge Stanton agreed, that the per occurrence limits of the primary policies in question are applicable separately for each year of a three-year policy (Pa 970-972).

As the Superior Court found (Pa 37), Diamond's excess insurers issued following form excess liability policies. There-

fore, they agreed to pay losses in accordance with the terms of the underlying Aetna primary policies, including, Diamond submits, annual per occurrence limits.

For example, American Re-Insurance Company ("American Re") Policy No. 6031-0004, that covered Diamond for $3 million per occurrence excess of Aetna from February 1, 1966 to February 1, 1969, contains the following Coverage provision:

> "The Company hereby agrees . . . subject to the terms, conditions and limitations hereinafter mentioned, to indemnify the Assured for any and all sums which the Assured shall by law . . . become liable to pay and shall pay or by final judgment be adjudged to pay on account of Personal Injuries . . . arising out of occurrences happening during the contract period . . . resulting from hazards . . .
>
> "(a) covered by and as defined in the Policy/ies issued by various Insurance Companies, (hereinafter called 'Primary Insurance' and 'Primary Insurers' respectively) listed in Schedule 'A' attached hereto" (Pa 435).

The policy also provides, under the heading "LIMIT OF LIABILITY—UNDERLYING LIMITS," that:

> "The Company shall only be liable for the Ultimate Net Loss in excess of the amount recoverable under underlying insurances or self-insured limits as set out in the attached schedule . . . , and then only up to a further $3,000,000 (U.S. Dollars) in all in respect of each occurrence" (Pa 435).

Finally, the policy, provides that:

> "It is the intent of this Contract that in the event of claim or suit which is otherwise insured, the Assured hereon will be indemnified for any loss suffered by it in excess of Primary Limits . . ." (Pa 436).

Diamond's other excess insurances contain the same or substantially similar provisions to the above (*see* Pa 428-429, Pa 439-464). None of Diamond's excess policies states that it deviates

from the Aetna policy provisions quoted above, *i.e.*, that a three-year policy is "comprised of three consecutive annual periods" with limits that "shall apply separately to each annual period."

THE DECISION OF THE SUPERIOR COURT

The Superior Court found that Diamond is entitled to coverage for its *Agent Orange* settlement payment (Pa 45). In determining how Diamond's $23.4 million settlement payment was to be allocated to particular insurance policies, the Superior Court adopted (Pa 52-53) the allocation formula used by Judge Weinstein in *Uniroyal, Inc.* v. *Home Insurance Co.*, 707 F. Supp. 1368 (E.D.N.Y. 1988), *appeal pending*, Dkt. No. 89-7555 (2d Cir. 1989). Under this formula it is assumed that injury occurred "on a date exactly four calendar months after the date of shipment," and then loss is allocated by gallonage of shipments (Pa 52). Thus, the allocation is premised upon the assumptions that each gallon shipped was sprayed and that each gallon sprayed produced the same dollar amount of injury. The effect of this is to allocate $19.9 million of loss (before interest) into the 1966-69 policy period. Diamond's per occurrence limits during this period were slightly in excess of $10 million, and the Superior Court's ruling that only one limit applies under the excess policies for the entire three-year period, plus a one-month extension, leaves Diamond with an uninsured loss of over $9 million (over $12 million with interest).

The Superior Court found that there is no way to determine when the alleged injuries happened to the hundreds of thousands of persons who were in military service in Vietnam and other members of the *Agent Orange* class (Pa 51). As the Superior Court said:

> "The truth is that we don't really know whether actually anybody was injured by applying Agent Orange in Vietnam and we have no idea really about how individual servicemen related to the Agent Orange produced by this particular manufacturer. Simply have no way of doing it" (Pa 95).

Nonetheless, the Superior Court adopted a very precise allocation system, the effect of which is to let many of the insurers in the implicated period escape liability entirely. When Judge Stanton originally adopted the scheme, he believed that "there

probably was full coverage for the $23 million less a deductible or two because it was my impression that there was ample excess coverage for all of the years in question . . . " (Pa 93-94). Thus, the Superior Court did not consider, in addressing this issue, the application of such established doctrines as construction of policy ambiguities against the insurer or the fulfillment of the objectively reasonable expectations of the insured.

As noted above, the allocation scheme was based on facts found and a stipulation made in the *Uniroyal* case (Pa 50-51) in which neither Diamond nor all but a few of its insurers were parties. There was no evidence offered or received on these matters in this case. As Judge Stanton said, he "copied" the formula from Judge Weinstein, the judge in the *Uniroyal* case (Pa 94). Judge Stanton said that "I think that it is appropriate for me to accept [the *Uniroyal* findings] as facts in the case before me" (Pa 51), but did not indicate any basis for doing so. It was incumbent on an insurer wishing to escape liability to adduce appropriate proof in this case. Judge Stanton also failed to take account of the fact that the use of the formula adopted in *Uniroyal* resulted in full indemnity for the insured in that case.

In denying Diamond's cross-motion for reconsideration, the Superior Court confirmed the arbitrary nature of the allocation scheme it imposed:

> "The truth is that we don't really know whether actually anybody was injured by applying Agent Orange in Vietnam and we have no idea really how individual servicemen related to the Agent Orange produced by this particular manufacturer. Simply have no way of doing it.
>
> * * *
>
> "Even if I now know that there were 11 batches that weren't used and if at the time I wrote the opinion I knew that there was some undefined or undetermined amount that had not been used, the point of the allocation was not to get mathematical exactitude.
>
> * * *
>
> "The allocation is, of course, a fiction in the literal, technical sense but it's a useful, sensible fiction it seems to me.

> "I did think when I first adopted the allocation that it probably would give more coverage than it turns out that I've given but that's just too bad for Diamond" (Pa 95, Pa 97-98).

Even under the allocation scheme adopted by the Superior Court, Diamond would obtain full indemnity if the limits of the excess policies were applied on an annual basis in the same manner as in Diamond's underlying primary policies. Diamond, its primary insurer and the Superior Court all agreed that the per occurrence limits set out in each three-year primary policy applied separately in each year of the three-year policy. The excess policies, which were also three-year policies covering the same periods that were covered by the underlying primary policies, were "follow form" policies that provided "[i]n each policy year . . . successive layers of excess coverage over the primary Aetna policy" (Pa 48). Nonetheless, the Superior Court held that the limits of the excess policies apply once per three-year policy, not separately for each annual period. This result is inconsistent with the language of the policies and the structure of Diamond's insurance program. Again, in reaching this result the Superior Court did not give effect to Diamond's objectively reasonable expectation that it would obtain full indemnity for its loss.

ARGUMENT

I.

Insurers During the Period of Continuing Bodily Injury Caused by a Single Occurrence Are Jointly and Severally Responsible To Indemnify the Insured

Judge Stanton cited no authority in rejecting the concept of joint and several liability under consecutive liability policies triggered by the single continuing occurrence he found here (Pa 47-48, Pa 53). The totality of the Superior Court's reasoning was as follows:

> "However, even if there is only one occurrence, there is no basis for joint and several liability. In each policy year, there are successive layers of excess coverage over the primary Aetna policy. In general, each of the excess policies clearly requires exhaustion of the policy or policies under it before it comes into play. There is no justification for ignoring these clearly expressed limitations on coverage" (Pa 48).

However, the requirement that underlying limits be exhausted, relied on by Judge Stanton, is entirely consistent with the decisions holding that insurers with liability policies in effect during a period of continuing indivisible bodily injury caused by a single occurrence are jointly and severally responsible to indemnify the insured.

The Superior Court accepted the insurers' argument that New York law should apply to all aspects of Diamond's Agent Orange claim, rejecting Diamond's argument that New Jersey law should apply (Pa 42).[31] Judge Stanton did this on the ground that:

> "[I]t seems to me that the focus of our concern for choice of law should be the place of the making of the insurance contract. And although that's not a matter entirely free of

31 The Superior Court ruled on the other hand, that New Jersey law governed Diamond's environmental damage coverage claim (Pa 22).

> doubt, it does seem clear to me that the focus for putting the insurance together in this case is New York City where many of the . . . insurance companies, had major offices and where the broker Alexander and Alexander had its major office where it was dealing with the policies and putting them together" (Pa 501-502).

This conclusion was wrong both as a matter of fact and as a matter of law.

As a matter of fact, it is probable that few, if any, of the contracts were made in New York. Diamond had its headquarters first in Ohio (prior to 1980) and then in Texas (Pa 562, Pa 568, Pa 572, Pa 581). Aetna, the primary insurer, had its home office in Connecticut (Pa 562, Pa 572). The London Market excess insurers had their offices in London and their policies were negotiated in London through a London broker and executed by the underwriters and companies in London (Pa 562, Pa 593, Pa 613-14, Pa 618-19, Pa 624-26). The remaining excess insurers had their principal place of business in twelve different states, including five in New Jersey (Pa 562, Pa 391).

In any event New Jersey, whose choice of law rule applies, has accepted, with respect to insurance contracts, the rule of Section 193 of the Restatement (Second) of Conflict of Laws (1971) to the effect that the governing law is the law of the state " 'which the parties understood was to be the principal location of the insured risk . . .' " *State Farm Mutual Automobile Insurance Co.* v. *Estate of Simmons*, 84 N.J. 28, 35, 417 A.2d 488, 491-93 (1980). Here the insured risk was, and was expected to be, in New Jersey. That is where the Agent Orange was manufactured (Pa 8) and where it was delivered to the United States Government (Pa 675). As Judge Stanton found, "the insured occurrence took place in the United States when the product was delivered to the military" (Pa 56). Delivery was at Diamond's plant in New Jersey (Pa 675).

It has been consistently held both under New York law and under New Jersey law that a policy is triggered with respect to a continuing injury when some of the injury takes place during the policy period. *E.g.*, *Solvents Recovery Service of New England, Inc.* v. *Hartford Insurance Co.*, No. L-25610-83, slip

op. at 19 (N.J. Super. Ct. Law Div. Dec. 4, 1986), *reprinted in* 1987 Mealey's Insurance Litigation Reports 3,624 at 3,633; *Sandoz, Inc.* v. *Employer's Liability Assurance Corp.*, 554 F. Supp. 257, 265 (D.N.J. 1983); *Lac D'Amiante du Quebec, Ltee.* v. *American Home Assurance Co.*, 613 F. Supp. 1549, 1558 (D.N.J. 1985), *rev'd in part on other grounds*, 864 F.2d 1033 (3d Cir. 1988); *McGroarty* v. *Great American Insurance Co.*, 43 A.D.2d 368, 381, 351 N.Y.S.2d 428, 440 (2d Dep't 1974), *aff'd*, 36 N.Y.2d 358, 329 N.E.2d 172, 368 N.Y.S.2d 485 (1975); *National Casualty Insurance Co.* v. *City of Mount Vernon*, 128 A.D.2d 332, 337, 515 N.Y.S.2d 267, 270 (2d Dep't 1987); *Levine* v. *Lumbermens Mutual Casualty Co.*, 147 A.D.2d 423, 538 N.Y.S.2d 263 (1st Dep't 1989); *American Home Products Corp.* v. *Liberty Mutual Insurance Co.*, 748 F.2d 760 (2d Cir. 1984), *affirming as mod.*, 565 F. Supp. 1485 (S.D.N.Y. 1983).

The district court in *American Home*, *supra*, held that "[t]he policies at issue in this case explicitly cover liability for injuries, sicknesses, or diseases that occur during each period of coverage" (565 F. Supp. at 1513). After analyzing the history and purpose of the occurrence-based comprehensive general liability standard form policy first made generally available by the casualty insurance industry in 1966,[32] the district court concluded that the liability insurance industry intended to cover liability for cumulative injuries that resulted from long exposures and thus "permit the insured to pyramid the limits of multiple policies when injuries occurred in more than one policy period" (565 F. Supp. at 1502).

It has also been generally held in New Jersey and elsewhere that where successive policies are triggered by a continuing indivisible injury, each insurer is jointly and severally liable for the entire injury up to the limits of coverage specified in its policy. *See, e.g.*, *Solvents Recovery Service of New England, Inc.* v. *Hartford Insurance Co.*, *supra*, slip op. at 19, *reprinted in*, 1987 Mealey's Insurance Litigation Reports at 3,633 (insurer for less than five months held "liable for the full amount of

32 By endorsement Aetna provided "occurrence" coverage for bodily injury to Diamond at least from February 1, 1957 (Pa 905-909).

plaintiff's loss to be collected from any insurer whose coverage is triggered, subject to contribution or in accordance with any 'other insurance' clauses in the policies''); *Lac d'Amiante du Quebec, Ltee.* v. *American Home Assurance Co.*, *supra*, 613 F. Supp. at 1562-63 (''[t]he plain language of these policies requires that each triggered policy shall respond in full . . . . [T]his court believes that the Supreme Court of New Jersey would impose a joint and several coverage obligation for the full amount of plaintiff's loss to be collected from any insurer whose coverage is triggered, subject to contribution or in accordance with any 'other insurance' clauses in the policies''); *Sandoz, Inc.* v. *Employer's Liability Assurance Corp.*, *supra*, 554 F. Supp. at 266 (insurers' responsibility to insured is joint and several, although contribution among insurers on pro rata basis might be appropriate); *A CandS, Inc.* v. *Aetna Casualty & Surety Co.*, 764 F.2d 968, 974 (3d Cir. 1985) (''if a plaintiff's damages are caused in part during an insured period, it is irrelevant to the [the insured's] legal obligations and, therefore, to the insurer's liability that they were also caused, in part, during another period''); *Gruol Construction Co.* v. *Insurance Co. of North America*, 11 Wash. App. 632, 524 P.2d 427, *review denied*, 84 Wash. 2d 1014 (1974) (where dry rot due to excessive backfilling against foundation of building commenced during construction and continued during two subsequent policy periods, insurers for all three periods held responsible).[33]

Two recent insurance coverage cases have applied this principle. In *Dayton Independent School District* v. *National Gypsum Co.*, 682 F. Supp. 1403 (E.D. Tex. 1988), *appeal pending*, the federal district court, finding coverage under comprehen-

33 These cases are specific applications of the general principle that, where two or more parties are jointly and severally obligated to indemnify a third party, the indemnitee may seek full recovery from any oneor more of the indemnitors. *See, e.g.*, *Franklin National Bank* v. *Phoenix Insurance Co.*, 15 Misc. 2d 145, 178 N.Y.S.2d 700 (Sup. Ct. Nassau Co. 1958); *Pennsylvania Greyhound Lines, Inc.* v. *Rosenthal*, 14 N.J. 372, 386, 102 A.2d 587, 593 (1954); *Hartford Accident & Indemnity Co.* v. *Selected Risks Indemnity Co.*, 65 N.J. Super. 328, 167 A.2d 821 (App. Div. 1961); 1 T. Sedgwick, *Sedgwick on Damages* § 36a, at 39 n.128 (9th ed. 1912).

sive general liability insurances for amounts to be paid in settlement of asbestos property damage claims, held that the claim settled "was for continuous property damage existing during the policy period of each of the Carrier's policies. Each policy is 'triggered' to provide coverage . . ." (*id.* at 1409). The court also held that each triggered policy is required to

> "indemnify [the insured] for the whole of its liability to the Plaintiffs, without any proportional allocation of liability to [the insured] for property damage taking place during prior or subsequent periods, subject only to the limits of coverage set forth in each policy" (*id.* at 1410-11); footnotes omitted).

The court concluded that the insured could designate the policies that would cover the settled claim subject to the policies' stated limits (*id.* at 1411).[34]

Finally, the *Dayton* court held that while excess insurers "are not obligated to indemnify [the insured] until the limits of the underlying insurance have been exhausted," once the underlying limits in a particular year are exhausted, the next layer excess insurer is obligated to pay without the insured's being obligated to first exhaust all underlying insurance in every triggered policy period, since the "requirement of exhaustion applies only to those policies which share the same policy period" (*id.* at 1411, n.23). This is a complete answer to the sole objection articulated by the Superior Court to joint and several liability.

In *Reading Co.* v. *Travelers Indemnity Co.*, No. 87-2021 (E.D. Pa. Feb. 18, 1988), *reprinted in* 1988 Mealey's Insurance Litigation Reports, Vol. 2, No. 10, Sec. B, the federal district

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34 Of course, the insurers' joint and several responsibility to indemnify the insured does not preclude their rights of contribution from one another. The *Dayton* court discussed the effect of "other insurance" clauses in the policies selected by the insured, noting that

> "these provisions relate only to the rights of each Carrier against the other and . . . do not establish a basis for allocation to the insured" (*id.* at 1411 n.21).

court held that the insured was not required to join insurers providing coverage in other years during which covered injuries allegedly occurred in order to recover against certain of its primary and excess insurers. The court expressly held "each insurer jointly and severally liable" (*id.* at 6) and noted that "the insured is free to select a window period of coverage and the defendant insurers can seek contribution from insurers with like liability in a subsequent or third-party action. This common tort procedure is sufficient to protect the rights of all the parties" (*id.* at 9).

There is simply no basis for the Superior Court's rejection of defendants' joint and several responsibility to indemnify Diamond.

II.

The Superior Court Erred in Adopting an Arbitrary Allocation Scheme That Resulted in Less Than Full Indemnity for Diamond

The Superior Court simply copied the allocation formula used by Judge Weinstein in the *Uniroyal* case (Pa 49-50; Pa 94). In adopting the *Uniroyal* formula, the Superior Court ignored a number of important considerations:

—Since, as has been demonstrated in Point I, the liability of all insurers who had policies in effect during the period of continuing injury is joint and several, no allocation formula of any kind is appropriate in determining the amount of the insured's recovery.

—The application of the formula by Judge Weinstein in *Uniroyal* resulted in indemnifying the insured for its entire loss; it does not follow that the application of such an arbitrary formula should be used to deprive an insured of indemnity. To do so runs contrary to the principle that the courts should effectuate the purpose of liability policies, *i.e.*, to provide indemnity.

—The use of the formula was based on evidence, stipulations and colloquy in the *Uniroyal* case (Pa 50-51); there is neither stipulation nor evidence in this case to justify its use. If the insurers wished to limit their liability to Diamond here by the use of such a formula, they had the duty to adduce evidence to support it. They did not.

Judge Stanton conceded that any allocation scheme based on the dates of Diamond's shipments of Agent Orange is entirely arbitrary:

> "We do not know how many servicemen were actually exposed to Agent Orange in Vietnam. We do not, of course, know how many were exposed to Agent Orange manufactured by Diamond. Indeed, we are not even sure whether all of Diamond's Agent Orange was sprayed in Vietnam" (Pa 51).

In fact, defendants conceded at trial that at least eleven of the 133 lots of Diamond's Agent Orange were never sprayed in Vietnam (Pa 911). As the Superior Court found (Pa 12), other evidence indicated the likelihood that an additional unquantifiable amount of Diamond's Agent Orange was also not sprayed (Pa 915).

The formula used by Judge Weinstein in *Uniroyal* and adopted by the Superior Court here was based on the following assumptions:

—injury occurred one week after exposure;

—exposure took place one week after spraying;

—spraying took place "most probably" within a week after arrival of Agent Orange in Vietnam;

—the batches "probably" arrived in Vietnam three months after shipment from the West Coast;

—each gallon produced the same amount of exposure as every other gallon; and

—each exposure produced the same dollar amount of injury as every other exposure.

There was no basis to make any of these assumptions in this case.

Thus, the calculation of Diamond's recovery is based on what the Superior Court acknowledged to be a fiction (Pa 98), one that uses assumptions which are either entirely arbitrary and incapable of proof one way or the other or are known to be wrong, and which are, in any event, unsupported by anything in the record. While there may be some virtue in selecting an arbitrary allocation system to determine the liability of the insurers among themselves, such an arbitrary allocation should not be used to deprive the insured of part of the coverage which has been adjudicated to exist.

In a similar situation where allocation of damages to particular policy periods was impossible, the court held all possibly

implicated insurers liable in *Sandoz, Inc.* v. *Employer's Liability Insurance Corp.*, *supra*, 554 F. Supp. at 266-67:

> "The court adopts an approach that makes each insurer liable to indemnify for the damages resulting from the bodily injury that occurred during its policy periods. . . . The liability of any insurer should not be affected by the existence or non-existence of any prior or subsequent coverage, except to the extent that such other coverage might provide for contribution or credits in accordance with the terms of the policy.
>
> "Some hypothetical examples may help to illustrate: Hypothesize a two-year period of drug ingestion by a claimant; insurer A's policy covers the first year and insurer B's policy covers the second. . . . If there was no way of allocating the damages caused in the first and second years, then insurers A and B would each be liable for the total damages sustained. Their liability would be joint and several as to the insured. Under such circumstances, . . . as between the companies a pro-rata allocation and contribution would be appropriate. However, the right to such contribution does not reduce their respective obligations to their insured."

Analogously, joint and several liability is imposed on tort-feasors who acted neither in concert nor concurrently, where the resulting injury is not capable of reasonable allocation among the tort-feasors. *See, e.g., Ravo* v. *Rogatnick*, 70 N.Y.2d 305, 310, 520 N.Y.S.2d 533, 536, 514 N.E.2d 1104, 1107 (1987):

> "It is sometimes the case that tort-feasors who neither act in concert nor concurrently may nevertheless be considered jointly and severally liable. This may occur in the instance of certain injuries which, because of their nature, are incapable of any reasonable or practicable division or allocation among multiple tort-feasors" (citations omitted).

This principle is applied broadly in a variety of contexts where the nature of the injury prevents a reasonable allocation of liability.[35]

In this case, the class is defined to include persons in Vietnam during 1961 to 1972.[36] Even adopting the finding of the Court below that exposure to dioxin is an injury in fact (Pa 51), all insurers from 1961 to 1972 should be held jointly and severally responsible for Diamond's entire loss.

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35 *See also Kelly* v. *Thomas Solvent Co.*, 714 F. Supp. 1439, 1448 (W.D. Mich. 1989):

> "Courts have consistently held that except where harm is divisible, liability under CERCLA is joint and several. This joint and several liability is not dependent on a showing of concert of action among defendants. Under traditional and evolving principles of common law which CERCLA incorporates, where two or more defendants are responsible for an indivisible harm, each is subject to liability for the whole harm" (footnote omitted).

36 *In re "Agent Orange" Product Liability Litigation, supra*, 100 F.R.D. at 729.

III.

The Superior Court Misconstrued Diamond's Liability Insurance Program in Applying One Per Occurrence Limit For Each Three-Year Excess Policy When The Three-Year Primary Policy to Which The Excess Policies Followed Form Indisputably Applied Its Occurrence Limits Separately For Each Year

In directing that the allocation of Diamond's Agent Orange settlement payment be made in accordance with the procedure outlined by Judge Weinstein in *Uniroyal, Inc.* v. *Home Insurance Co.*, *supra*, the Superior Court did not expressly address the question of how the per occurrence limits of Diamond's three-year excess liability policies were to apply. Indeed, it appeared as if Judge Stanton understood that the excess limits were to apply annually over the Aetna primary limits (Pa 53). However, upon the parties' motions for clarification, the Superior Court ruled that the excess policies' limits applied per three-year policy rather than per year (although the Aetna three-year policy limits to which the excess insurers followed form were held to apply per year) (Pa 971-77). Diamond was thus deprived of over $8 million (over $11.5 million with prejudgment interest) in coverage for its Agent Orange settlement.

There is no basis for drawing a meaningful distinction between Diamond's having purchased three consecutive one-year excess policies and its having purchased a single three-year excess policy, apart from the administrative convenience of avoiding annual renewals. Indeed, as the Superior Court found, "[i]n each policy year, there are successive layers of excess coverage over the primary Aetna policy" (Pa 48).

Diamond's objectively reasonable expectation could not have been that it paid a three-year premium for one per occurrence limit excess of three separate annual primary per occurrence limits. A simple example demonstrates the unreasonableness of such a result. Assume a three-year primary policy with a per occurrence limit of $100,000 and a three-year excess policy with a per occurrence limit of $1 million. Under Judge Stanton's holding, if a single occurrence resulted in bodily injury in each

of the three years of $1.1 million, Diamond would recover only $1.3 million of its $3.3 million loss. In contrast, if it purchased three consecutive one-year excess policies in the same amount with the same limits, in the above example it would recover its entire $3.3 million loss. The result reached by the Superior Court does not conform with "public expectations and commercially reasonable standards," *Sparks* v. *St. Paul Insurance Co.*, 100 N.J. 325, 338, 495 A.2d 406, 414 (1985).

The heart of the Superior Court's ruling is his conclusions that

> "when the excess policies came to speak in terms of the limits of liability, they did not refer to the excess [in context, obviously "primary"] policies. They referred to their own limits. . ." (Pa 973)

and that

> "when we get to fixing the upper limit of liability on each of the excess policies which is triggered, it seems to me that we have to fix it in terms of that language in the excess policy, and without reference to the way in which Aetna set limits on dollar liability with respect to . . . per occurrence amounts . . . per policy year" (Pa 974).

However, the excess policy provisions to which the Superior Court refers are expressly and categorically tied to the way in which the underlying Aetna policy applies its limits. First, the heading of the limits section of the excess policies states in full: "Limit of Liability—Underlying Limits" (Pa 435). Second, the language of that section begins with the following express reference to the underlying policy's limits:

> "The Company shall only be liable for the Ultimate Net Loss in excess of the amount recoverable under underlying insurances . . . , and then only up to a *further* [dollar amount] in all in respect to each occurrence" (*id.*; emphasis added).

Finally, that same section concludes with the following statement:

"It is the intent of this Contract that . . . the Assured hereon will be indemnified for any loss suffered by it in excess of Primary Limits" (Pa 436).

IV.

The Superior Court Erred in Finding That Diamond Purchased No Additional Coverage for a Continuing Occurrence When It Paid an Additional Premium for a One-Month Extension of Its Excess Insurance Policies

Diamond purchased a one-month extension of its excess insurance policies that otherwise would have expired on February 1, 1969, in order to permit its brokers to secure policies from insurers that had not previously participated in Diamond's first layer excess coverage. The Superior Court concluded, again without reference to a single authority, that

> "[t]here is no increase in coverage that results from that one month extension" (Pa 978).

This ruling is contrary to Diamond's objectively reasonable expectations and fails to conform with public expectations and commercially reasonable standards. It results in depriving Diamond of another $1.2 million before interest in coverage of its Agent Orange settlement payment.

The Aetna primary insurance policy that went into effect on February 1, 1969 (Pa 466) had a different, higher per occurrence limit for bodily injury than the expiring policy. A one-month American Re policy provided excess coverage above the Aetna policy that incepted on February 1, 1969 (Pa 397, Pa 2070). Plainly the one-month American Re excess policy did not and could not provide excess coverage above the Aetna policy that expired on February 1, 1969. It provided new excess coverage and thus provided a new per occurrence limit.

The same issue was addressed by Judge Brown in *Asbestos Insurance Coverage Cases*, No. 1072, Tentative Decision Concerning Phase IV Issues, slip op. at 6-8 (Cal. Super. Ct. Aug. 29, 1988), *reprinted in* 1988 Mealey's Insurance Litigation Reports, 9/14/88, A-1:

> "The short-term policy portion of Phase IV involves policies . . . which were either canceled prior to expira-

> tion or extended beyond the original expiration date and, therefore, were in effect for some fraction of a year.
>
> * * *
>
> "The Court concludes that the annual aggregate limits of the short-term policies should not be prorated. Full aggregate limits are available to the policyholder for each annual period or portion thereof that the policies were in effect" (*id.* at 6).

Judge Brown went on to note that the "insurers could have stated plainly that . . . an 'annual period' is 13 months in the case of [a policy extended for one month], but failed to do so" (*id.* at 7). Diamond's excess policies at issue here also contain no such provision.

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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ADDENDUM

Addendum A

Standard dictionary references for "sudden":

1. Webster's New Twentieth Century Dictionary of the English Language, Unabridged (2d ed. 1983):

> *sud'den* (sud'n), a. [M.E. *sodain*; OFr. *sodain*, *sudain*, L. *subitaneus*, sudden, extended from *subitus*, pp. of *subire*, to go stealthily; *sub-*, and *ire*, to go or come.]
>
> 1. happening without previous notice; coming or appearing unexpectedly; not foreseen or prepared for; as, a *sudden* emergency.
>
> 2. done, coming, or taking place quickly or abruptly; hasty.
>
> * * *
>
> Syn.—unanticipated, unexpected, unlooked-for.

2. Webster's Third New International Dictionary of the English Language, Unabridged (3 ed. 1961):

> *sudden* . . . *adj* [ME *sodain*, *sodein*, fr. MF *sodain*, *sudain*, fr. L. *subitaneus*, fr. *subitus*, sudden, unexpected, fr. past part. of *subire* to come up, occur unexpectedly, fr. *sub*-up + *ire* to go . . .] *1a*: happening without previous notice or with very brief notice: coming or occurring unexpectedly: not foreseen or prepared for < caught out walking by a ~ thundershower > took a ~ almost miraculous turn for the better > *b*: changing angle or character all at once: PRECIPITOUS slopes gradually downward toward the drop of the icefall—John Hunt and Edmund Hillary: ABRUPT this ridge forms an important and break ~ between the land of abundant groundwater . . . and the dry land—P.E. James *c*: come upon or met with unexpectedly < watching for ~ turns in the road > *2a*: characterized by or manifesting hastiness: RASH, HEADLONG < a red setter . . . too ~ to be a friend—May Sarton > *b* obs: characterized by swift action: FAST-MOVING, QUICK, ALERT appearing goodly to the ~ eye—John Milton > *3a* archaic: made, provided, brought about, or

acting in a short time: PROMPT, IMMEDIATE < he acquaints the citizens with the king's peril . . . and requests their ~ assistance—John Cleveland > < hire assassins or put poison in my evening drink—P.B. Shelley > *b* obs: < executed or executing on the spur of the moment: > IMPROMPTU, EXTEMPRE < do it without invention, suddenly, as I with ~ speech purpose to answer—Shak. > *c* obs: shortly to come or to be: EARLY, SOON < tomorrow, in my judgment, is too ~ —Shak. > *syn* see PRECIPITATE

3. Black's Law Dictionary (5th ed. 1979):

Sudden. Happening without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen; unprepared for. Hagaman v. Manley, 141 Kan. 647, 42 P.2d 946, 949

4. The American Heritage Dictionary of the English Language (1981):

sud-den (sud'n) adj. 1. Happening without warning, unforeseen. 2. Characterized by hastiness, abrupt; rash. 3. Characterized by rapidity; quick; swift.—See Synonyms at *impetuous.—all of a sudden*. Very quickly and unexpectedly; suddenly. [Middle English *soadan(e)*, from Norman French *sodein*, *sudein*, from Late Latin *subitanus*, variant of Latin *subitaneus*, from *subitus*, sudden, past participle of *subire*, to approach secretly, steal upon: *sub-*, secretly + *ire*, to go * * *—*sud'den-ly* adv.—*sud'den-ness* n.

5. The New Roget's Thesaurus of the English Language in Dictionary Form (rev. ed. 1978):

SUDDENNESS. I. *Nouns*. *suddeness*, precipitance, impetuosity, impulsivity, impulse.

* * *

III. *Adjectives*. *sudden*, unexpected, swift, abrupt, impulsive, impetuous, spasmodic, acute; precipitous, precipitant.

* * *

Antonyms—See EXPECTATION, PLAN, PREPARATION, SLOWNESS

6. The Compact Edition of the Oxford English Dictionary (1971):

Sudden * * *

A. adj. 1. Of actions, events, conditions. Happening or coming without warning or premonition; taking place or appearing all at once.

In some contexts the implication is rather 'Unexpected, unforeseen, unlooked-for,' or 'Not prepared or provided for.'

* * *

2.a. Of actions, feelings: Unpremediated, done without forethought. *obs.* or *arch.*

* * *

3. Performed or taking place without delay; speedy; prompt; immediate. *Obs.* exc. of death.

* * *

4. Of persons: Swift in action, quick to perform, prompt, expeditious. Also, peremptory, sharp. *Obs.*

* * *

5. Made, provided or formed in a short time. *Obs.* or *arch.*

* * *

6. Prompt in action or effect, producing an immediate result. *poet.*

* * *

7. Done, performed, or prepared on the spur of the moment; extempore, impromptu. *Obs.*

* * *

8. Brief, momentary, lasting only a short time.

* * *

9. Happening at an early date; shortly to come or to be. *Obs.* (*Cf.* SUDDENLY 4.)

7. The Random House Dictionary of the English Language (2d ed. 1987):

sud-den (sud'n), adj. 1. happening, coming, made, or done quickly, without warning, or unexpectedly: *a sudden attac*K. 2. occurring without transition from the previous form, state, etc.; abrupt: a *sudden turn*. 3. impetuous; rash. 4. *Archaic*. quickly made or provided. 5. *Obs.* unpremeditated—adv. 6. *Literary*. suddenly.—n.7 *Obs.* an unexpected occasion or occurrence. 8. *all of a sudden*, without warninq; unexpectedly; suddenly. Also, *on a sudden*. [1250-1300; ME *sodain* (adj. and adv.) MF L. *subitaneus* going or coming stealthily, equiv. to *subit(us)* sudden, taking by surprise (see *subito*) + *-aneus* composite adj. suffix, equiv. to *an(us)* -an + *-ens* -EOUS] — *sud'den-ly*, *adv.*—*sud'den-ness*, n. —*Syn.* 1, 2. unforeseen, unanticipated. SUDDEN, UNEXPECTED, ABRUPT describe acts, events or conditions for which there has been no preparation or gradual approach. SUDDEN refers to the quickness of an occurrence, although the event may have been expected: *a sudden change in the weather*. UNEXPECTED emphasizes the lack of preparedness for what occurs or appears: *an unexpected crisis*. ABRUPT characterizes something involving a swift adjustment; the effect is often unpleasant, unfavorable, or the cause of dismay: *He had an abrupt change in manner*. —*Ant.* . 1, 2. gradual, foreseen.

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