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SUPERIOR COURT  
OF NEW JERSEY

SEP 19 1984

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JOHN M. MAYSON  
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Morristown, New Jersey 07960-1945  
(201) 267-3333  
Attorneys for Plaintiff

C 3939 84

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DIAMOND SHAMROCK CHEMICALS COMPANY

Plaintiff,

-against-

THE AETNA CASUALTY AND SURETY COMPANY,  
ACCIDENT AND CASUALTY INSURANCE  
COMPANY OF WINTERTHUR (Successor to  
Accident and Casualty Company),  
AIU INSURANCE COMPANY,  
ALLIANZ INTERNATIONAL INSURANCE  
COMPANY LIMITED,  
AMERICAN CENTENNIAL INSURANCE COMPANY,  
AMERICAN EXCESS INSURANCE COMPANY,  
AMERICAN HOME ASSURANCE COMPANY,  
AMERICAN RE-INSURANCE COMPANY,  
ARGONAUT - NORTHWEST INSURANCE  
COMPANY LTD.,  
ARROW LIFE INSURANCE COMPANY (Successor  
to Slater Walker Insurance Company),  
ASSICURAZIONI GENERALI S.p.A.,  
ASSICURAZIONI GENERALI DI TRIESTE  
E VENEZIA S.p.A.,  
ATLANTA INTERNATIONAL INSURANCE COMPANY,  
BELLEFONTE REINSURANCE COMPANY  
(Successor to Bellefonte Insurance  
Company),  
BELLEFONTE INSURANCE COMPANY  
(U.K. BRANCH),  
THE BERMUDA FIRE AND MARINE INSURANCE  
COMPANY LIMITED,

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION,  
MORRIS COUNTY

DOCKET NO. \_\_\_\_\_

CIVIL ACTION  
COMPLAINT

PA2356

BRITISH NATIONAL INSURANCE LIMITED :  
 (Successor to British National Life :  
 Insurance Society Limited), :  
BRITTANY INSURANCE COMPANY LTD., :  
BRYANSTON INSURANCE COMPANY LTD., :  
CALIFORNIA UNION INSURANCE COMPANY :  
CNA RE INSURANCE OF LONDON LIMITED, :  
COMMERCIAL UNION INSURANCE COMPANY :  
 (Successor to Employers Liability :  
 Assurance Corporation Ltd.), :  
COMPANIA AGRICOLA DE SEGUROS S.A. :  
 (Colombia), :  
COMPAGNIE D'ASSURANCES MARITIMES :  
 ARIENNES ET TERRESTRES, :  
COMPAGNIE EUROPEENNE D'ASSURANCES :  
 INDUSTRIELLES S.A., :  
DART AND KRAFT INSURANCE COMPANY :  
 LIMITED, :  
DART INSURANCE COMPANY LTD., :  
THE DOMINION INSURANCE COMPANY LTD., :  
EL PASO INSURANCE COMPANY LTD., :  
EMPLOYERS MUTUAL CASUALTY COMPANY, :  
EVANSTON INSURANCE COMPANY, :  
EXCESS INSURANCE COMPANY LIMITED :  
FIREMAN'S FUND INSURANCE COMPANY, :  
FIRST STATE INSURANCE COMPANY, :  
FOLKSAM INTERNATIONAL INSURANCE :  
 COMPANY (UK) LTD., :  
GENERAL REINSURANCE CORPORATION, :  
GENERALI, :  
GIBRALTAR CASUALTY COMPANY, :  
GRANITE STATE INSURANCE COMPANY, :  
GREAT SOUTHWEST FIRE INSURANCE COMPANY, :  
HAFEZ INSURANCE COMPANY (TEHERAN, IRAN), :  
HARTFORD ACCIDENT AND INDEMNITY COMPANY, :  
HELVETIA ACCIDENT SWISS INSURANCE :  
 COMPANY, :  
HIGHLANDS INSURANCE COMPANY, :  
THE HOME INSURANCE COMPANY, :  
IMPERIO COMPANHIA DE SEGUROS, :  
INSCO LIMITED, :  
INTEGRITY INSURANCE COMPANY, :  
LA ROYALE BELGE I.R. S.A. :  
D'ASSURANCES, :  
LATINO AMERICANO DE :  
REASEGUROS, S.A. ("LARSA"), :  
LEXINGTON INSURANCE COMPANY, :  
LONDON AND EDINBURGH GENERAL :  
 INSURANCE COMPANY LTD., :  
LONDON GUARANTEE AND ACCIDENT COMPANY :  
 OF NEW YORK, :  
LOUISVILLE INSURANCE COMPANY LTD., :  
MENTOR INSURANCE COMPANY (U.K.) LTD., :

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MIDLAND INSURANCE COMPANY,  
MUTUAL REINSURANCE COMPANY LTD.,  
NATIONAL CASUALTY OF AMERICA LTD.,  
NATIONAL CASUALTY COMPANY,  
NATIONAL UNION FIRE INSURANCE COMPANY  
OF PITTSBURGH, PA.,  
NORTH ATLANTIC INSURANCE COMPANY  
LIMITED,  
NORTH STAR REINSURANCE CORPORATION,  
PACIFIC AND GENERAL INSURANCE  
COMPANY LTD.,  
PACIFIC EMPLOYERS INSURANCE COMPANY,  
PRUDENTIAL REINSURANCE COMPANY,  
RANGER INSURANCE COMPANY,  
REPUBLIC INSURANCE COMPANY,  
ROYAL INDEMNITY COMPANY,  
SOVEREIGN MARINE & GENERAL  
INSURANCE COMPANY LTD.,  
SOVEREIGN MARINE & GENERAL  
INSURANCE COMPANY LTD. 'C' ACCOUNT,  
SOVEREIGN MARINE & GENERAL  
INSURANCE COMPANY LTD. H.D.N. ACCOUNT,  
ST. KATHERINE INSURANCE COMPANY PLC.,  
ST. KATHERINE INSURANCE COMPANY PLC.  
(NO. 2 ACCOUNT),  
ST. KATHERINE INSURANCE COMPANY PLC.  
(X ACCOUNT),  
STOREBRAND INSURANCE COMPANY  
(U.K.) LTD.,  
STRONGHOLD INSURANCE COMPANY LIMITED,  
THE SUMITOMO MARINE & FIRE  
INSURANCE COMPANY LTD.,  
SUMITOMO MARINE AND FIRE INSURANCE  
COMPANY (EUROPE) LTD.  
SUMITOMO MARINE AND FIRE INSURANCE  
COMPANY LTD. TOKYO,  
THE TAISHO MARINE AND FIRE  
INSURANCE COMPANY (U.K.) LIMITED,  
TERRA NOVA INSURANCE COMPANY LTD.,  
THE TOKIO MARINE AND FIRE INSURANCE  
COMPANY (U.K.) LTD.,  
TRANSIT CASUALTY COMPANY,  
TUREGUM INSURANCE COMPANY,  
TUREGUM INSURANCE COMPANY LTD.,  
TUREGUM INSURANCE COMPANY LTD.  
NO. 5 ACCOUNT,  
TWIN CITY FIRE INSURANCE COMPANY,  
UNITED STATES FIRE INSURANCE COMPANY,

PA2358

UNDERWRITERS AT LLOYD'S LONDON IN THE :  
 SYNDICATES LISTED ON EXHIBIT B HERETO, :  
 WALBROOK INSURANCE COMPANY LTD., :  
 "WINTERTHUR" SWISS INSURANCE COMPANY, :  
 and YASUDA FIRE & MARINE INSURANCE :  
 CO. (U.K.) LTD., :  
 Defendants. :  
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Plaintiff Diamond Shamrock Chemicals Company ("Diamond"), for its complaint against the defendants (the "Insurers"), and each of them, alleges:

The Parties

1. Diamond is a Delaware corporation with its principal place of business at 351 Phelps Court, Irving, Texas 75038. Diamond is authorized to do business in the State of New Jersey and operates an administration, sales and research facility in Morris Township, New Jersey and three chemical manufacturing plants in Carlstadt, Harrison and Jersey City, New Jersey. Diamond (originally named Diamond Alkali Company) was named Diamond Shamrock Corporation until 1983, when it was renamed Diamond Shamrock Chemicals Company and became a wholly-owned subsidiary of a newly-formed corporation named Diamond Shamrock Corporation.

2. The Insurers comprise the underwriters and insurance companies, and their successors and assigns,

subscribing to primary and excess policies of liability indemnity insurance issued to or for the benefit of Diamond (the "Policies"). The Insurers and the Policies are identified in Exhibits A through E hereto. The Insurer providing Diamond's primary liability indemnification insurance has been defendant The Aetna Casualty and Surety Company ("Aetna"), a Connecticut corporation with its principal place of business in Hartford, Connecticut. Each of the Insurers is a corporation, partnership, syndicate, unincorporated business association or other business entity existing under the laws of one or more of the United States or another sovereign power or is an individual underwriting member of and is represented by a Lloyds syndicate.

The Nature of the Action

3. Until 1971 Diamond was the owner of a tract of land and industrial buildings thereon located at 80 Lister Avenue, Newark, New Jersey (the "Newark Plant"). Until August 1969, Diamond produced certain herbicides at the Newark Plant including 2,4,5-trichlorophenoxyacetic acid ("2,4,5-T"). Diamond used 2,4,5-T in the production of other herbicides and also sold 2,4,5-T for use as a herbicide. Beginning in 1961, Diamond sold 2,4,5-T to the United States Government as a principal component of herbicides referred to as Agent Pink, Agent Purple and Agent Orange (collectively "Agent Orange

Herbicides"). All of the Agent Orange Herbicides sold by Diamond to the United States Government were manufactured at the Newark Plant.

4. This action seeks a declaration pursuant to N.J.S.A. 2A:16-50 et seq. of the rights and duties of Diamond and its Insurers under the Policies in respect of claims against Diamond for bodily injury and property damage allegedly caused by a family of compounds referred to as dibenzo-para-dioxins ("dioxin") allegedly created in the manufacture of 2,4,5-T and other chemicals at Diamond's Newark Plant. This action also seeks the rescission of an agreement between Diamond and Aetna pertaining to the costs of defense against certain of these claims and imposition of a constructive trust and restoration to Diamond of the amounts paid by Diamond to Aetna thereunder with interest. This action further seeks a temporary and permanent injunction against the prosecution by Aetna or any other Insurer in any forum of a proceeding for a declaration with respect to the rights and duties of Diamond and of Aetna or any other Insurer under any of the Policies such as is sought by Diamond herein. This action also seeks an award to Diamond of its attorneys fees in this action against the Insurers or Aetna pursuant to R. 4:42-9(a)(6).

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First Count

5. Diamond repeats and realleges each of the allegations of paragraphs 1 through 4 hereof.

Product Liability Dioxin Claims

6. Claims have been asserted and actions filed in federal and state courts including the Superior Court of New Jersey against Diamond and other former manufacturers of Agent Orange Herbicides alleging that dioxin had been created in the manufacture of Agent Orange Herbicides and that its presence in Agent Orange Herbicides sold by Diamond allegedly caused bodily injury to individuals who had served in Vietnam, to their spouses, to their children (born, unborn or as yet not conceived) and to others (such claims asserted or that might be asserted are referred to collectively as the "Product Liability Dioxin Claims").

7. The United States District Court for the Eastern District of New York (the "Eastern District Court") certified a plaintiff class in In re "Agent Orange" Product Liability Litigation, Ryan, et al. v. Dow Chemical Company, et al., MDL No. 381 ("Product Liability Litigation") 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

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phenoxy herbicides, including those composed in whole or in part of 2,4,5-trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. 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."

8. In May, 1984, the parties to the Product Liability Litigation agreed to a settlement, subject to court approval, of the claims of the members of the defined plaintiff class (the "Settlement Agreement"). Under the terms of the Settlement Agreement, Diamond is obliged to pay the amount set forth in a sealed agreement submitted to the Eastern District Court.

9. Aetna has contested the amount for which it is liable in respect of the Product Liability Dioxin Claims, and the other Insurers have purported to reserve the right to deny, for such reasons as they have asserted, or have refused to admit their coverage of Diamond in respect of the Product Liability Dioxin Claims. As is alleged in the Second Count, Aetna also has failed to pay for the defense of Diamond against the Product Liability Dioxin Claims as required by the primary Policies issued by Aetna. In its complaint in a declaratory judgment action brought by it in Hartford, Connecticut on August 30, 1984, as is alleged in the Third Count, Aetna for



itself and its subsidiary American Re-Insurance Company, one of the excess Insurers, admitted coverage of the Product Liability Dioxin Claims subject to the Settlement Agreement but put forward an interpretation that limits their obligation and that of the other Insurers to indemnify Diamond to substantially less than half of Diamond's obligation under the Settlement Agreement.

#### Newark Dioxin Claims

10. In 1983, the New Jersey Department of Environmental Protection and the United States Environmental Protection Agency stated that soil at the Newark Plant contained dioxin at high levels and that detectable levels of dioxin had been found in nearby areas.

11. Claims have been asserted and actions filed by residents, property owners, employees and others in the vicinity of the Newark Plant and relief has been sought by the environmental authorities based on alleged bodily injury and property damage assertedly resulting from dioxin allegedly created in the manufacture of herbicides at the Newark Plant (the "Newark Dioxin Claims").

12. Aetna has undertaken to defend Diamond in respect of Newark Dioxin Claims, but has done so only under a purported reservation of rights and has raised what it asserts

are "serious questions concerning possible insurance coverage" in respect thereof. Aetna's position creates uncertainty and insecurity not only under its primary Policies but also under the excess Policies of the other Insurers. The interests of the excess Insurers under the Policies would be affected by a declaration of the rights and duties of Diamond and Aetna under the primary Policies.

Declaratory Relief

13. Diamond is entitled to a declaration of the rights and duties of Diamond and the Insurers under the Policies concerning defense and indemnification of Diamond in respect of the Product Liability Dioxin Claims and the Newark Dioxin Claims.

Second Count

14. Diamond repeats and realleges each of the allegations of paragraphs 1 through 13 hereof.

15. Aetna was and is obliged under the primary Policies issued by it to defend and indemnify Diamond against the Product Liability Dioxin Claims and the Newark Dioxin Claims and owed and owes Diamond a duty to act in the utmost good faith as Diamond's insurer and in the interpretation of the policies issued by Aetna to Diamond.

16. In 1980 Aetna refused to pay the total defense costs of the Product Liability Dioxin Claims as required by its primary Policies unless Diamond would accept Aetna's attribution of the costs of defense of any and all of the Product Liability Dioxin Claims solely to policy years commencing February 1974 and represented that this refusal and attribution was based upon a uniform, reasoned and good faith interpretation of its Policies as required by the duty owed Diamond by Aetna as Diamond's insurer. The attribution required by Aetna would have forced Diamond to incur the risk that all defense costs paid by Aetna would have been charged against the high deductibles applicable to the post-February 1974 period so that all defense costs would have been borne by Diamond.

17. Diamond was induced by Aetna's said representation to assent in January 1981 to an agreement (the "Herbicide Defense Cost Agreement") with Aetna (extended through December 1984) whereby Diamond would pay Aetna, in derogation of Aetna's obligation under its primary Policies to pay for the defense of Diamond, fifty percent of the costs of defense of the Product Liability Dioxin Claims. Under the Herbicide Defense Cost Agreement, Diamond has paid to Aetna in excess of \$4.7 million and expects that by the end of 1984 Diamond will have paid to Aetna well in excess of \$5 million for such costs of defense which absent such agreement Aetna was obliged to pay under its primary Policies.

18. Aetna's said representation that said refusal and attribution was based upon a uniform, reasoned and good faith interpretation of its Policies was materially false in violation of the duty of utmost good faith owed Diamond by Aetna, as Aetna, after having received the bulk of the benefit of the Herbicide Defense Cost Agreement, has admitted since the Settlement Agreement was entered into on May 7, 1984. Aetna so admitted, first, in stating its readiness to adjust its portion of the Product Liability Dioxin Claims loss for \$10.8 million on the basis that only policy years prior to 1974 are pertinent to the Product Liability Dioxin Claims and, second, after its proposed adjustment was rejected by Diamond, in taking the position in the Hartford Action (as defined in the Third Count) that policy years from 1965 to 1983 are pertinent and claiming (despite its earlier proposed adjustment) that it owes Diamond only \$7.87 million of such loss (with interest as provided in the Settlement Agreement). Each of these positions of Aetna was directly contrary to Aetna's earlier unequivocal position and representation that only policy years since 1974 would be considered by it as applicable to the Product Liability Dioxin Claims.

19. Aetna has engaged in a pattern and practice of changing interpretations of its Policies, the purpose and effect of which has been to deny Diamond the insurance

protection for which Diamond contracted in violation of Aetna's obligation to act towards Diamond in the utmost good faith.

20. Diamond is entitled to rescission of the Herbicide Defense Cost Agreement and to imposition of construction trust over and restoration of the payments made pursuant thereto by Diamond with interest thereon.

Third Count

21. Diamond repeats and realleges each of the allegations of paragraphs 1 through 20 hereof.

22. While purporting to be engaged in the process of adjusting the amount of its indemnification of Diamond in respect of the Product Liability Dioxin Claims loss and having stated its readiness to adjust its share of the loss at \$10.8 million, Aetna instituted on August 30, 1984 an action (the "Hartford Action") in the United States District Court for the District of Connecticut sitting in Hartford, Connecticut against Diamond Shamrock Corporation, which, as alleged in paragraph 1 above, was incorporated in 1983 and is the parent company of Diamond.

23. Aetna's complaint in the Hartford Action admits that the Product Liability Dioxin Claims subject to the Settlement Agreement are covered by the primary Policies issued by

Aetna and excess policies issued by its subsidiary American Re-Insurance Company ("American Re-Insurance"), but puts forward an interpretation of the Policies that would determine the extent of the obligation of all of Diamond Shamrock's insurers combined as \$8.52 million (with interest as provided in the Settlement Agreement).

24. Although Aetna's interpretation of the Policies recognizes an indemnification obligation under excess Policies, no excess Insurers are made party to the Hartford Action and certain of the excess Insurers, including American Re-Insurance, could not be made party to the Hartford Action because federal diversity jurisdiction is absent.

25. The Hartford Action does not provide for the resolution of other issues under the Policies of Aetna and the other Insurers with respect to Product Liability Dioxin Claims that are not subject to the Settlement Agreement. The Hartford Action also does not provide for the resolution of issues under the Policies of Aetna and the other Insurers with respect to the Newark Dioxin Claims.

26. In contrast to the Hartford Action, the instant action seeks the resolution among Diamond and all its Insurers of all issues relating to the Product Liability Dioxin Claims and the Newark Dioxin Claims. Diamond would be irreparably injured and would have no adequate remedy at law if Aetna or

any other Insurer prosecutes piecemeal resolution of the issues under the Policies with respect to the Product Liability Dioxin Claims or the Newark Dioxin Claims.

27. Contemporaneously with the filing of the instant action Diamond is moving to dismiss the Hartford Action for want of personal jurisdiction or for a stay of the Hartford Action pending determination of the instant action. Even if such relief is granted, Aetna and the other Insurers should be enjoined by this Court from prosecuting in any forum any proceeding for a declaration with respect to the rights and duties of Diamond and Aetna or any other Insurer under the Policies such as is sought by Diamond herein.

Fourth Count

28. Diamond repeats and realleges each of the allegations of paragraphs 1 through 27 hereof.

29. Diamond is entitled to the benefits of its Policies, but has been compelled to institute this action to obtain these benefits.

30. Diamond is therefore entitled under R. 4:42-9(a)(6) to recover from the Insurers or from Aetna Diamond's attorneys fees in this action.

WHEREFORE, Diamond respectfully requests judgment as follows:

1. With respect to the First Count, declaring the rights and duties of Diamond and the Insurers under the Policies in respect of the Product Liability Dioxin Claims and the Newark Dioxin Claims;
2. With respect to the Second Count, rescinding the Herbicide Defense Cost Agreement between Diamond and Aetna and decreeing the imposition of a constructive trust over and restoration to Diamond of the amounts paid by it pursuant thereto with interest;
3. With respect to the Third Count, issuing a temporary and permanent injunction against the prosecution by Aetna or any other Insurer in any forum of a proceeding for a declaration of the rights and duties of Diamond and Aetna or any other Insurer under the Policies such as is sought by Diamond herein;
4. With respect to the Fourth Count, awarding Diamond its attorneys fees in this action;
5. Awarding Diamond the costs of this action; and



6. Granting Diamond such other and further relief as the Court may determine is necessary or proper.

Dated: September 19, 1984

PITNEY, HARDIN, KIPP & SZUCH

By James C. Pitney  
James C. Pitney  
and  
William H. Hyatt, Jr.

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