5/14/90

Superior Court of New Jersey

APPELLATE DIVISION

DOCKET NO. A-694-89T1

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.

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT DIAMOND SHAMROCK CHEMICALS COMPANY

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PART I: ENVIRONMENTAL DAMAGE COVERAGE ISSUES

Introductory Statement

Critical, undisputed facts and findings require reversal of Judge Stanton's decision denying coverage under thirty-five years' of comprehensive general liability insurance for environmental damage caused by dioxin in the soil and groundwater beneath and adjacent to Diamond's former plant at 80 Lister Avenue.

Cognizant of the numerous errors of law which pervade Judge Stanton's Opinion, defendants make only a half-hearted effort to support the Superior Court's legal arguments. Rather, they attempt to persuade this Court that the findings and record in this case compel a ruling of non-coverage even if the correct legal rules are applied (Db 3-15).[1] That effort cannot succeed. It is based on an obfuscation of the real issues, an attempt to read present-day attitudes toward environmental protection back into the historic past and the substitution of shrill and hypocritical condemnation of past industrial practices for a reasoned interpretation of the standard-form language of Diamond's comprehensive liability policies in the light of settled principles of New Jersey insurance law. Thus would these insurers seek to escape from making the contribution which their contracts obliged them to make to the environmental clean-up which New Jersey so urgently requires.

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1 References herein to "Db" are to the Brief of Defendants-Respondents/Cross-Appellants, filed on April 11, 1990. This Reply Brief ("Prb") is also responsive to all of the briefs filed by the defendants, including the separate briefs filed by Defendants-Appellees/Cross-Appellants London Market Insurers ("Lb") and Defendants-Respondents National Union Fire Insurance Company of Pittsburgh, Pa., et al. ("Lex. Br.") and to the Amicus Brief filed by the Insurance Environmental Litigation Association ("IELA Br."). Copies of evidence and published materials cited herein but not reproduced in Diamond's Appendix ("Pa") are contained in Diamond's Reply Appendix ("Pra") filed herewith.

The bulk of the defendant insurers' statement of facts, like the bulk of Judge Stanton's factual discussion and findings, deals with various discharges into the Passaic River. As is pointed out in Diamond's main brief (Pb 5), those facts are irrelevant to the insurance coverage Diamond seeks or to any issue presented by this appeal.

The harm for which Diamond seeks insurance coverage is not damage to the river. Diamond has not been ordered to clean up the river. No one is suing Diamond for damage to the river or for damages sustained by virtue of exposure to water flowing in the river.[2]

Diamond may or may not be subject to criticism for its historical discharges in the 1950s and 1960s of various substances into the river, in which Judge Stanton found chemical pollution "has been severe for at least the past 50 years" and as to which he found that it "would have been severely contaminated even if the Newark plant had not existed" (Pa 15). Diamond may or may not have been correct in its assumption, shared by many at the time, that the materials discharged to the river would be rendered harmless by dilution (Pra 500-506). Discharge of effluents into the Passaic River is not, however, what this case is about.

This case is about the unknown, unintentional and unexpected contamination with dioxin of the soil at 80 Lister Avenue, its migration into groundwater and onto nearby property owned by others and the discovery in 1983, nearly 15 years after the plant was closed, that dioxin had reached and persisted in the soil and groundwater in amounts now thought to be hazardous and to require remedial action.

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2 The only expense Diamond has incurred to date with respect to the Passaic River is the cost of sampling the river for dioxin pursuant to the first Administrative Consent Order entered into with the N.J. Department of Environmental Protection ("DEP"). The DEP has not ordered any action with respect to the river and has not decided what, if any, action may ultimately be necessary (Pra 253). If such a decision is made and that decision results in Diamond's incurring expense, it will be time enough to consider whether that expense is covered under Diamond's policies.

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There is not a shred of evidence in this voluminous record which suggests that Diamond expected or intended, or even that it was aware, that this environmental damage might take place.[3]

The Superior Court denied coverage under Diamond's comprehensive general liability insurance policies because it found that from 1951 to 1969 (when Diamond closed the 80 Lister Avenue plant), Diamond discharged acids or effluents containing other chemicals into the Passaic River; or allowed chemicals to spill onto the ground; or operated its plant in a manner that permitted leaks and spills to occur and allowed the leaked or spilled materials to find their way into the "environment".[4] Nowhere in the Superior Court's opinion is there any finding that Diamond was aware of even the possibility of the occurrence of the environmental damage that was discovered in 1983—nearly 15 years after the 80 Lister Avenue plant closed.[5]

Rather, as Judge Stanton specifically found:

—"For a number of years, Diamond did not even realize that it was creating dioxin" and "[w]hen dioxin

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3 Defendants cite to certain testimony for the proposition that Diamond's labels warned "that improper introduction of the products into the environment could have harmful consequences" (Db 13). The testimony cited provides no support for defendants' statement.

4 Defendants refer to venting of chemicals to the atmosphere (Db 8), but they ignore the facts that in the 1960s the regulatory authorities, on one occasion, approved of the opening the roof of the 2, 4, 5-T Acid building to release emissions containing chemical fumes to the air as a means of dealing with the chloracne problem and, on another occasion, licensed the operation of a scrubber even though they were informed that it would release to the atmosphere small quantities of 2, 4, 5-T and 2, 4-D (Pra 1-6, 7, 8, 9, 10-20, 21, 22-29; Pa 1427, 1429).

5 Defendants stress Judge Stanton's finding that some of Diamond's effluent discharges to the river were illegal (Db 3). There is, however, no finding that any such violation caused any of the environmental damage for which Diamond seeks liability insurance coverage. Moreover, where conduct causes unintended harm, coverage is not defeated by a finding that the conduct was negligent, intentional or illegal (*see* Pb 44-47).

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was identified and detected, it was not perceived as being particularly toxic" (Pa 9);

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

These findings should be dispositive.[6] There is no evidence—*none* cited by the Superior Court, and *none* cited in defendants' brief—from which the Superior Court could have concluded that Diamond knew (or even should have known) in the 1950's and 1960's that its manufacturing activities would cause the long-term environmental harm which resulted in its liability for clean-up costs.

Defendants stress the importance of Judge Stanton's findings and the alleged heavy burden Diamond must bear to overturn them (Db 4). The critical fact findings made by Judge Stanton, however, support coverage rather than non-coverage. Thus, as is noted above, the findings as to the dioxin-caused harm to the soil and groundwater around the Newark plant, which is the subject of this suit, demonstrate that Diamond did not expect or intend the environmental damage which has resulted in its being burdened with clean-up costs.[7]

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6 Defendants seek to dismiss these findings on the basis that Judge Stanton was referring only to the use of dioxin in "controlled agricultural applications" (Db 15-22). The findings were not so limited (*e.g.*, Pa 9). Moreover, there is no evidence that Diamond had any more reason to believe that its operations would result in concentrations of its herbicides that were dangerous to the environment than it had to believe that there was environmental danger in the amounts spread across the country by years of repeated intentional agricultural and other applications endorsed and encouraged by governmental authorities.

7 Defendants suggest that the dioxin damage may have resulted from Passaic River flooding of the plant site (Db 12n.12). The evidence showed only that there may have been one flood sometime between 1951 and 1969 (Da 1202-03). Of course, there is no evidence that Diamond expected or intended the flood or any of its consequences, let alone that it would deposit dioxin that Diamond would have to clean up.

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The findings which defendants stress and on which they rely are either irrelevant or too vague to support the conclusion that coverage is not available for this damage.[8] As to chemicals other than dioxin, there are no findings, and defendants presented no evidence which would support such findings, as to how those chemicals got where they were found, who caused them to be there, when they got there, or what steps would be required to remove them if dioxin were not also present. There were no findings, and no evidence, that Diamond knew that whatever spillage occurred at its plant would produce environmentally harmful concentrations of any chemicals anywhere.[9] The spillage and leakage in the 1950's and 1960's described by Judge Stanton happened at a time when there was little awareness of the risks of environmental harm and when the techniques for identifying and measuring the concentrations and migration of possible contaminants were far less developed than they are now.[10]

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8 Defendants describe as "transparently disingenuous" (Db 4) Diamond's argument that Judge Stanton wrongly denied coverage for the dissemination of dioxin as a result of a 1960 explosion which he found to be "sudden and accidental," arguing that Diamond adduced evidence that there was no such dissemination because the dioxin was consumed by fire (Db 5). They fail, however, to inform the Court that Judge Stanton was not persuaded by this evidence. Thus, he found that "we now know that the explosion must have spread dioxin contamination throughout the plant site and onto nearby properties" (Pa 28). It is defendants' stratagem that is "transparently disingenuous."

9 The "poor housekeeping" that Judge Stanton found (Pa 17-19) and which defendants emphasize (Db 8) does not amount to the expected or intended causation of environmental damage which will defeat insurance coverage. Even if the "housekeeping" were negligent it would not have the effect of forfeiting coverage.

10 Today, society has made the determination that most kinds of environmental damage are an unacceptable consequence of commercial activity and that it is socially desirable to incur the costs necessary to prevent them. But as Diamond demonstrated through the testimony of its expert, Dr. Anthony Wolfskill, this knowledge and sensitivity was lacking in the 1950's and was only beginning to develop in the latter 1960's (Pa 1526-29, 2254-55, 2261, 2268; Pra 31-34, 35, 37, 39-41, 42-43). Dr. Wolfskill's testimony was uncontradicted. Defendants did not put on any expert witness on this subject.

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Defendants rely heavily on Judge Stanton's finding that Diamond "did know the nature of the chemicals it was handling" (Pa 40), but this truism is irrelevant. Certainly many chemicals are dangerous, even toxic in concentrated form. Concentrated sulfuric or hydrochloric acid would have an immediate and undoubtedly serious and permanent effect, if ingested or spilled on the skin. On the other hand, chlorine—one of the chemicals cited by defendants (Db 6)—is widely used in appropriate concentrations in swimming pools as a disinfectant. There is no evidence or finding that Diamond knew that the chemicals it was handling would reach into and through the soil in concentrations that would produce environmental damage.

As to many of the chemicals on the EPA's "priority pollutant" list to which defendants refer, there was not even any evidence that they were ever used by Diamond or at the Diamond site.[11] The Diamond plant was located in a heavily industrialized area where all kinds of chemicals were used by many business enterprises, including chemical, paint and dye manufacturing enterprises (Pra 44, 46-52). The chemical whose presence was linked to Diamond's activities and which provided the fulcrum for the imposition of strict statutory liability on Diamond was dioxin. Defendants did not demonstrate that Diamond performed volitional acts from which it can be concluded that it expected or intended the environmental damage from migration of dioxin to the soils and groundwater at issue.[12]

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11 Phrases like "priority pollutants" and "action levels" had, of course, not even been invented during the period when Diamond owned the plant.

12 The looseness with which defendants use the word "toxic" is evident from their statement with respect to Diamond's products that "their utility lies in their toxicity" (Db 6). It is obvious that not everything that is toxic to some form of plant or animal life in some circumstances must be kept out of the environment. If that were so all weed killers and pesticides would be banned and their benefits forfeited. Moreover, the need for limiting the amount of some of these substances in the environment was much less widely perceived, if at all, in the 1950's and 1960's than it is now.

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Diamond's right to indemnity under the insurance coverage it purchased should not be declared forfeit to an individual trial court's philosophical disagreement with the prevailing law of New Jersey. Defendants should be held to the interpretations which the courts in New Jersey have given the standard-form language which they drafted and made part of their policies and to the formal and informal representations which they made to state insurance regulators and purchasers of comprehensive general liability insurance as to what their policies covered. Diamond is entitled to the comprehensive general liability insurance it paid for.

ARGUMENT

I.

THE DAMAGE FOR WHICH DIAMOND SEEKS INSURANCE COVERAGE WAS NOT "EXPECTED OR INTENDED" BY DIAMOND (Db 6-25)

Judge Stanton's legal position is based on several contentions, each of which is contrary to the law of New Jersey. The IELA amicus brief (IELA Br. 8-19) adopts the legal propositions that are the underpinnings of Judge Stanton's "expected or intended" ruling. Defendants' brief, apparently recognizing that the Superior Court's rulings are simply not in accord with the law of New Jersey and are contrary to sound policy, makes little effort to support them. Rather, defendants pin their hopes almost entirely on an effort to show that Diamond was "substantially certain" that the dioxin damage at issue here would occur (Db 7-24)—a finding that Judge Stanton did *not* make.

A. Under New Jersey Law "Expected Or Intended" Is a Subjective Test

Contrary to the position of IELA (IELA Br. 8), New Jersey law is clear that the "expected or intended from the standpoint of the insured" test is subjective, not objective. It refers to a specific intent harbored in the mind of the insured.

This was made clear most recently in *Allstate Insurance Co.* v. *Schmitt*, 238 N.J. Super. 619, 570 A.2d 488 (App. Div. 1990), where the Court distinguished between "expected or intended from the standpoint of the insured," the language in Diamond's policies, and " 'damage which may reasonably be expected to result from the intentional or criminal acts of an insured person,' " the language of a homeowners liability policy which was before it in that case. In finding that the language before it excluded coverage, the Court said:

> "Conspicuously absent are the words 'intended' and 'from the standpoint of the insured,' words that can reasonably be said to connote a subjective element hinging upon the actual desire to inflict injury harbored by the insured" (238 N.J. Super. at 626, 570 A.2d at 491).

In reaching this conclusion in *Schmitt*, the Court relied in part on *Lyons* v. *Hartford Insurance Group*, 125 N.J. Super. 239, 310 A.2d 485 (App. Div. 1973), *certif. denied*, 64 N.J. 322, 315 A.2d 411 (1974), where the Court construed language identical to that in Diamond's insurance. In reversing a judgment of non-coverage where the insured contended that his shot which killed a man was intended as a warning, the *Lyons* Court commented that a holding that coverage did not exist where the insured was "without any specific intent to cause death or bodily harm" would be "at war with the authorities" it had analyzed (125 N.J. Super. at 247, 310 A.2d at 489). *See also Garden State Fire & Casualty Co.* v. *Keefe*, 172 N.J. Super. 53, 410 A.2d 718 (App. Div.), *certif. denied*, 84 N.J. 389, 420 A.2d 317 (1980); *Tal* v. *Franklin Mutual Insurance Co.*, 172 N.J. Super. 112, 410 A.2d 1194 (App. Div.), *certif. denied*, 85 N.J. 103, 425 A.2d 267 (1980).

In *Schmitt* the Court also relied on the concurring opinion of Justice Pashman (for himself and another Justice) in *Ambassador Insurance Co.* v. *Montes*, 76 N.J. 477, 486, 388 A.2d 603, 608 (1978). In that case, after a careful analysis of the authorities, Justice Pashman concluded that under the "expected or intended from the standpoint of the insured" language the insured should be charged with intent to cause the injury for which coverage was sought only if causing the injury "was his subjective desire" (76 N.J. at 489, 388 A.2d at 609).

The above authorities definitively state the law of New Jersey on this point.[13] The evidence in this case did not establish

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13 *See also* Diamond's main brief (Pb 45-46) and *the Amicus Brief of The American Petroleum Institute, et al.* ("API Br.") 29-36.

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that Diamond had a "subjective desire" to cause the environmental damage here at issue.

B. "Knew Or Should Have Known" That There Was "Substantial Probability" Of Harm Is Not The Proper Test

Defendants (Db 24n.25) and IELA (IELA Br. 8-19) are also wrong in their contention that the proper test in New Jersey is whether the insured "knew or should have known that there was a substantial probability" that the harm for which coverage is sought will occur. This contention is at war with the principle of the *Lyons*, *Ambassador* and *Schmitt* cases.

Courts have sometimes attempted to formulate language which defines the circumstances where objective evidence will be sufficient to prove the "subjective desire" which the language of the policy requires. When courts have done so, however, they have not used the formulation which IELA proffers. Thus, in *Broadwell Realty Services, Inc.* v. *Fidelity & Casualty Co.*, 218 N.J. Super., 516, 528 A.2d 76 (App. Div. 1987), the Court said that harm is not "expected or intended"

> "if the insured did not specifically 'intend to cause the resulting harm or [was] not substantially certain that such harm [would] occur' " (218 N.J. Super. at 532, 528 A.2d at 84).[14]

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14 *See also* Pb 38-39 and API Br. 35-36. As the above quotation indicates, the IELA amicus brief is wrong in saying that the Court in *Broadwell* applied an objective test and held that "expected or intended" means that the insured "knew or should have known of a substantial probability of the harm" (IELA Br. 8). While the Court in *Summit Associates, Inc.* v. *Liberty Mutual Fire Insurance Co.*, 229 N.J. Super. 56, 550 A.2d 1235 (App. Div. 1988), used the phrase "knew or should have known" in passing (229 N.J. Super. at 62, 550 A.2d at 1239), it relied on *Broadwell* and there is no indication that it intended to alter the standard carefully formulated in that case. As Diamond has noted (Pb 46n.30), *Morton Thiokol, Inc.* v. *General Accident Insurance Company of America*, No. C-3956-85, slip op. (N.J. Super. Ct. Ch. Div. Aug. 27, 1987), reprinted in 1 Mealey's Insurance Litigation Reports No. 63 at 4,949 (Sept. 8, 1987) (Db 24n.26; IELA Br. 10) was a case in which the insured knew that

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In *Hanover Insurance Group* v. *Cameron*, 122 N.J. Super. 51, 60-61, 298 A.2d 715, 721 (Ch. Div. 1973), a decision cited and relied upon by Justice Clifford in his concurring opinion in *Rova Farms Resort, Inc.* v. *Investors Insurance Company of America*, 65 N.J. 474, 508, 323 A.2d 495, 514 (1974), the Superior Court stated:

> "[T]his court accepts the definition of 'intent' as used in Restatement, Torts 2d, § 8a (1965):
>
> The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.
>
> Thus, the distinction is that to be intentional the consequences must be substantially certain to result, and while only probably certain, to result in wanton acts. As comment (b) to the Restatement notes, as the probability that the consequences will follow decreases and becomes less than substantial certainty, the actor's conduct loses the character of intent and becomes mere recklessness.

See also Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Inju-*

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its mercury discharges were causing injury to the land and to Berry's creek; indeed, it had had that knowledge "years prior to the inception of any policy in issue" (slip opinion, p. 17). This was also true in *W.A. Cleary Chemical Corp.* v. *Insurance Company of North America*, No. W-048192-88 (N.J. Super. Ct. April 28, 1989), upon which IELA also relies (IELA Br. 9). The other cases relied on by IELA, aside from being in courts other than those of New Jersey, are, for the most part, similarly distinguishable on their facts. Some of the cases support Diamond's position. Thus, *Munzer* v. *St. Paul Fire and Marine Insurance Co.*, 145 A.D.2d 193, 199, 538 N.Y.S.2d 633, 636-37 (3d Dep't 1989), applied the "substantial certainty" test and in *American Universal Ins. Co.* v. *Whitewood Custom Theaters, Inc.*, 707 F. Supp. 1140, 1147 (D.S.D. 1989), the Court said:

> "The Court held that the test is whether or not an insured expected or intended the harm at the time it occurred. This is determined by inquiring whether the insured knowingly created the harm and permitted it to exist."

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ries Intended or Expected by Insured, 31 A.L.R. 4th 957 (1984); *General Accident Insurance Company of America* v. *Manchester*, 116 A.D.2d 790, 792, 497 N.Y.S.2d 180, 182 (3d Dep't 1986); *Continental Insurance Co.* v. *Colangione*, 107 A.D.2d 978, 979, 484 N.Y.S.2d 929, 930-31 (3d Dep't 1985); and *Auster Oil & Gas, Inc.* v. *Stream*, 891 F.2d 570, 580 (5th Cir. 1990).[15]

The test prescribed by the law of New Jersey is a far cry from the "should have known" and "substantial probability" test that the IELA asks this Court to adopt. There is no evidence that Diamond was "substantially certain" that environmental harm from dioxin would occur. Indeed, the State did not determine that any such harm had happened until 15 years after the plant was closed.

C. Acceptance of Defendants' Position Would Emasculate Defendants' Liability For Negligently Caused Harm, Thereby Vitiating The Principal Purpose For Buying Liability Insurance

The courts of New Jersey, like those elsewhere, have recognized that the insurers "should have known"/"substantial probability" test would cut the heart out of liability insurance by eliminating coverage for the consequences of negligent acts. Such coverage is, of course, the principal protection that buyers of such insurance believe they are purchasing.

Oddly enough, the IELA amicus brief in support of defendants recognizes this precise point:

> "Negligence is generally ascertained by a common law standard of reasonably prudent behavior. Liability insurance coverage, in contrast is governed by the policy's terms and conditions. The concepts address fundamen-

15 Justice Pashman's concurring opinion in *Ambassador Insurance Co.*, *supra*, suggests that even the "substantial certainty" test strays too far from the "subjective desire" requirement (76 N.J. at 486-92, 388 A.2d at 608-10).

> tally different issues. Care should be taken to avoid confusing tort precepts with contractual provisions." (IELA Br. 17-18)

It is for this reason that it is inappropriate to read the phrase "expected or intended from the standpoint of the insured" as meaning that the insured "knew or should have known that there was a substantial probability that [damage would occur]". To do so would read out of liability insurance policies coverage for negligently caused harm.

This Court said in *Minkov* v. *Reliance Insurance Co.*, 54 N.J. Super. 509, 149 A.2d 260 (App. Div. 1959):

> "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. Although an intentional or willful tort would negative the existence of an accident, an act attributable solely to negligence may be an accident. It cannot seriously be contended in the present case that the damage was intentional on the part of plaintiff's employees. 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" (54 N.J. Super. at 514-15, 149 A.2d at 263).

As Justice Pashman said in his concurring opinion in *Ambassador Insurance Company* v. *Montes*, *supra*:

> "I fully agree with the prevailing view that negligence standards of foreseeability do not govern the law of liability insurance exclusions" (76 N.J. at 491, 388 A.2d at 610).

Judge Cardozo made the same point in *Messersmith* v. *American Fidelity Co.*, 232 N.Y. 161, 133 N.E. 432 (1921), when he said:

> "To restrict insurance to cases where liability is incurred without fault of the insured would reduce indemnity to a shadow" (232 N.Y. at 163, 133 N.E. at 432).

And, in the same vein, the court in *United Services Auto Ass'n* v. *Elitzky*, 358 Pa. Super. 362, 517 A.2d 982 (1986), *app. denied*, 515 Pa. 600, 528 A.2d 957 (1987), said:

> "We do not believe that a layman would reasonably expect that as a result of the inclusion of such a phrase ["expected or intended"] in his insurance contract he might not be insured for negligent acts. These are the very acts which insurance is purchased to protect against" (358 Pa. Super. at 379, 517 A.2d at 991).

See also Collum v. *State Farm Fire & Casualty Co.*, ____ A.D. 2d ____, 547 N.Y.S.2d 423, 425 (2d Dep't 1989):

> "[E]ven if the conduct was intentional as that term is used in nuisance law, that does not mean that bodily injury or property damages as a result of that conduct was intended or expected within the meaning of the insurance policy. . . ."

Judge Stanton's position would vitiate the insurance which Diamond reasonably believed it had purchased.

II.

"ACCIDENT" COVERAGE IS NOT LIMITED TO DAMAGE RESULTING FROM A SINGLE INSTANTANEOUS EVENT (Db 27-30)

Judge Stanton's ruling that Diamond's "accident"-based policies provided no coverage for the environmental damage in Newark was based entirely on his reasoning that "accident" encompasses only a "discrete fortuitous event which happens within a short time at a specific time and place" and therefore does not cover damage resulting from a "continuous process" (Pa 25-26). Nevertheless, defendants attempt to support the ruling almost entirely on the basis that there was no accident because there was no "fortuitous" event (Db 27-28). Defendants' lack of confidence in the reasoning on which Judge Stanton relied is well founded.

In support of the "no fortuity" argument defendants rely only on wrongful-discharge-from-employment cases which reach the unsurprising result that a wrongful discharge is not an accident (Db 27-28). Defendants attempt to derive from these cases the proposition that an intentional act which causes unintentional harm is not an accident. The cases do not support that proposition, which is directly contradicted by the numerous authorities cited in Diamond's main brief (Pb 38-47).

To support Judge Stanton's argument that an "accident" does not include harm that results from a gradual process, defendants are able to add only the comment that if accident coverage is the same as occurrence coverage "there would have been no need to change the standard policy language" (Db 29). This disingenuously overlooks the very point made in *Broadwell*, *supra*, 218 N. J. Super. at 532, 528 A.2d at 84, that the change was made for clarification, *i.e.*, to make more explicit the meaning which the courts had given "accident".

Defendants say not a word about the many authorities cited in Diamond's main brief (Pb 18-21) and in the amicus

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brief filed by The American Petroleum Institute, *et al.* (API Br. 13-25) demonstrating that Judge Stanton's ruling is contrary to the settled law in New Jersey and elsewhere.

The IELA amicus brief (IELA Br. 19-20) relies on four cases decided in a workmens' compensation context, two of which were also relied on by Judge Stanton (Pa 25-26). Those cases were fully considered in Diamond's main brief (Pb 21) and in the amicus brief filed by the American Petroleum Institute, *et al.* (API Br. 22-25).[16] Nothing further need be said about them. They plainly provide no authority for the result reached by Judge Stanton.

Long before the issuance of the policies at issue here, it had been generally recognized in the casualty insurance industry that the word "accident" was ambiguous as it appeared in liability insurance policies and that the courts had widely refused to read into it any limitation to events discrete in time and place.

Thus, The Insurance Journal (1949) reprinted a paper presented to the Pacific Chapter of the Society of Chartered Property and Casualty Underwriters on June 29, 1949 entitled *Accident and Occurrence in Liability Policies.* In the fourth installment, which appeared on October 1, 1949 (Pra

16 Cases in other jurisdictions have specifically rejected the Workmens' Compensation Act construction of "accident" in interpreting a liability policy. *Beryllium Corp.* v. *American Mutual Liability Insurance Co.*, 223 F.2d 71 (3d Cir. 1955); *Canadian Radium & Uranium Corp.* v. *Indemnity Insurance Company of North America*, 411 Ill. 325, 104 N.E.2d 250 (1952). In other workmen's compensation cases in New Jersey the courts have emphasized the unexpected or unforeseen nature of the injury and found an accident to exist in situations involving a period of prolonged strain. *E.g.*, *Van Meter* v. *E.R. Morehouse, Inc.*, 13 N.J. Misc. 558, 558-59, 179 A. 678, 679 (Sup. Ct. 1935) ("prolonged exertion" caused something "unforeseen, unexpected or unusual"); *Ciocca* v. *National Sugar Refining Company of New Jersey*, 124 N.J.L. 329, 332, 12 A.2d 130, 132 (Ct. Err. & App. 1940) ("decedent's death was due to an accident in the sense that it was unexpected . . .' " resulting from "unusual strain, effort or exertion"); *Carpenter* v. *Calco Chemical Division of American Cyanamid Company of Bound Brook*, 4 N.J. Super. 53, 66 A.2d 177 (1949).

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255), the authors discuss coverage for continuing damages under "caused by accident" policies as follows:

> "There are a multitude of cases supporting the view that an accident (*i.e*, damage) does not have to be sudden and immediate. 7-Appleman-320 supports this view" (Pra 255).

The authors conclude:

> "Therefore, it appears the requirement that the occurrence or damages be sudden in order to qualify as an accident does not have much force when applied to liability insurance policies. 'When used without restriction or qualification in insurance contracts the term "accident" has been held broader than the restricted definition of an event happening suddenly and violently.' 7 Appelman 320" (*id.*).

In 1954, a subcommittee of the Casualty Committee of the International Association of Insurance Counsel issued a report, published under the title *Caused by Accident* in Insurance Counsel Journal 33 (Jan. 1956) (Pra 258) which stated:

> "An examination of the cases, however, discloses that the word 'accident' does not have a fixed meaning, and that the confusion in the cases virtually renders the term meaningless or rather that it has too many meanings" (Pra 258-59).

In discussing the *Canadian Radium* case (Pb 21n.16, *supra*), the subcommittee expressed the view that "[t]he holding of the Illinois Supreme Court appears to be the majority view" (Pra 263). The subcommittee's report concluded with the following recommendation:

> "We submit, therefore, that the term 'accident' should either be eliminated and some other term substituted (one with fewer definitions) or, in the alternative, 'accident' should be specifically defined in the policy. Whatever remedial action is decided upon, the present

confusion should improve. It is difficult to visualize how it could become worse" (Pra 268).

Finally, R.J. Wendorff, *The New Standard Comprehensive General Liability Insurance Policy*, A.B.A. Sec.Ins.Neg.& Comp.L.Prac. 250, 253 (1966) (Pra 269), explained the casualty insurance industry's change from the "caused by accident" to the "caused by occurrence" coverage wording as follows:

> "Many courts held that bodily injury or property damage resulting from a gradual exposure to conditions was 'caused by accident' within the meaning of the policy. The decision of the underwriters to provide occurrence coverage was undoubtedly influenced by the fact that many courts were interpreting 'caused by accident' policies to give occurrence coverage" (Pra 272).[17]

Diamond's insurers were on notice when Diamond's "accident" based policies were issued that the courts had taken this view.

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17 *See, also*, J.W. Wheeler, *"Caused by Accident" As Used In Comprehensive Liability Policies*, 1956 Ins. L.J. 87, 10 (1956); G.L. Bean, *The Accident Versus The Occurrence Concept*, 1959 Ins. L.J. 550, 555 (1959).

III.

THE STANDARD FORM POLLUTION EXCLUSION DRAFTED BY THE INSURANCE INDUSTRY DOES NOT BAR COVERAGE (Db 30-44; Lb 6-14)

Defendants' brief, like Judge Stanton's opinion, is based largely on a refusal to follow and apply the clear teaching of a long line of authority in this state construing the pollution exclusion.

Since the filing of Diamond's main brief this Court has once again reaffirmed its adherence to the rule which Judge Stanton rejected. In *Du-Wel Products, Inc.* v. *United States Fire Insurance Co.*, 236 N.J. Super. 349, 565 A.2d 1113 (App. Div. 1989), the Court applied Michigan law in determining whether the pollution exclusion barred coverage for environmental damage occurring over a period of time due to the escape of toxic waste from a landfill. The Court commented, however, that "Michigan law is . . . not materially different from New Jersey's" (236 N.J. Super. at 357, 565 A.2d at 1117). It ruled that "applicability of the exception to the pollution clause is not precluded by a long-term or continuous exposure" and that

> "[a]ll that is required to qualify for the exception to the exclusion [*i.e.*, for there to be coverage] is that the continuous discharge of the pollutants be unintended (*i.e.*, accidental) and unexpected (*i.e.*, sudden)" (*id.*).

Defendants rely exclusively on cases applying the law of states other than New Jersey, particularly decisions in New York of which *Technicon Electronics Corporation* v. *American Home Assurance Co.*, 74 N.Y.2d 66, 542 N.E.2d 1048, 544 N.Y.S.2d 531 (1989), is typical. The cases on which defendants rely are distinguishable on their facts and, in any event, do not state the law of New Jersey.

Even if the rule in New Jersey were the same as the one enunciated in *Technicon*, *i.e.* that the pollution exclusion bars coverage where the discharge of pollutants is intentional even

though the resulting damage is unintentional, coverage would still exist here. We submit that, even applying *Technicon*, a court would find coverage where the insured did not know that it was discharging environmentally harmful material.[18] For many years Diamond did not know that the material leaked or spilled at its plant contained dioxin at all, and it never knew that dioxin would produce environmental harm. As Judge Stanton found, Diamond "never recognized the toxic risks that Dioxin posed" (Pa 55).[19] The materials that leaked or spilled on the floors of Diamond's plant were, after all, intermediates in the production of herbicides which were spread over farmlands, highways, and railroad and powerline rights of way across the country with governmental approval and encouragement.

Defendants also seek to avoid the New Jersey rule, as did Judge Stanton, by arguing that Diamond, as a "sophisticated insured" is not entitled to the rule's benefit.[20] Diamond dem-

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18 In *Avondale Industries, Inc.* v. *Travelers Indemnity Co.*, 887 F.2d 1200 (2d Cir. 1989) the Court interpreted *Technicon* in this way. *See also State* v. *Aetna Casualty & Surety Co.*, _____ A.D.2d _____, 547 N.Y.S. 2d 452, 453 (3d Dep't 1989) ("the Court of Appeals [in *Technicon*] did not define the word 'sudden' other than by stating that it must be distinct from 'accidental'. . . .")

19 By way of contrast, *Technicon* intentionally discharged mercury-containing wastes which it knew to be harmful to the environment.

20 Defendants magnanimously concede that Diamond's level of sophistication was no more than that of a "typical Fortune 500 company" (Db 33). It is evident that Diamond's level of sophistication was not materially different from that of any commercial enterprise so that acceptance of defendants' argument would result in the adoption of a whole new set of rules of construction for all such enterprises.

Defendants' arguments (Db 15-17) in support of Judge Stanton's "sophisticated insured" finding (Pa 24) only underscore the complete irrelevance of this proposition to the issues raised by Diamond's appeal. Defendants cannot point to a single instance where Diamond successfully obtained modification of the operative language of the pollution exclusions, the definition of occurrence, or the CGL coverage clause. As was pointed out in Diamond's main brief (Pb 15-17), all of the exclusions, limitations and exceptions relied upon by defendants

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onstrated in its main brief the lack of merit in a contention that standard form language drafted by insurers should have different meanings for different insureds based on differing perceptions as to their degree of sophistication (Pb 28-34). The cases cited by defendants do not persuasively hold to the contrary. Thus, in *McNeilab, Inc.* v. *North River Insurance Co.*, 645 F. Supp. 525 (D.N.J. 1986), *aff'd*, 831 F.2d 287 (3d Cir. 1987) (Db 33-34n.36), the court found that there was no ambiguity in the policy before it (645 F. Supp. at 547). The court noted that:

> "It is the interpretation that the ordinary public purchasing similar policies would apply that the courts must ascertain" (*id.* at 543).

The importance to the insurance industry of using standard form language that is consistently interpreted and applied has long been recognized. For example, an article by J.B. Donovan, *Hardy Perennials of Insurance Contract Litigation*, Insurance Law Journal 163 (March 1954) (Pra 284), in discussing the history of the drafting of standard policy provisions, pointed out that organizations like the National Bureau of Casualty Underwriters

> "were founded upon the premise that collaboration among casualty insurers was necessary in order to calculate and to maintain reasonable rates. It was apparent from the outset that unless companies combining loss experience afforded substantially the same coverages, the reported statistics would vary from minor distortions of true experience to an almost meaningless potpourri. To assure the accuracy of rate-making data, companies combining experience accordingly agreed to offer substantially similar coverages for such lines" (Pra 288-89).

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were drafted by them and imposed on Diamond. The "specifications" prepared by Diamond's brokers (Db 17), were scrutinized by defendants' underwriters, who insisted that the material provisions of the policies they issued conform to their standard terms and conditions (Pra 53-58, 59-66).

The article concluded by noting that "[b]y now [*i.e.*, 1954] the national standard provisions are almost universally used and accepted in the United States" (Pra 290). The benefits of this standardization would obviously be lost if standard form language were given different meanings for different insureds by adjusting the meaning to reflect a court's perception of individual degrees of sophistication, levels of bargaining power and the like.

The Supreme Court of Washington recently discussed the impropriety of construing standard policy language differently as applied to the "sophisticated insured." *Boeing Co.* v. *Aetna Casualty & Surety Co.*, 113 Wash. 2d 869, ____, 784 P.2d 507, 514 (1990):

> "The critical fact remains that the policy in question is a standard form policy prepared by the company's experts, with language selected by the insurer. The specific language in question was not negotiated, therefore, it is irrelevant that some corporations have company counsel. Additionally, this standard form policy has been issued to big and small businesses throughout the state. Therefore, it would be incongruous for the court to apply different rules of construction based on the policyholder because once the court construes the standard form coverage clause as a matter of law, the court's construction will bind policyholders throughout the state regardless of the size of their business."

In determining what meaning should be given to the standard form pollution exclusion drafted and adopted by the insurance industry, Judge Stanton should not have ignored, and this Court should not ignore, the views expressed by and known to the insurance industry in connection with the drafting process. As H.C. Foster, a "research underwriter with many years of experience in the development and promulgation of casualty insurance policies," wrote in *Humpty Dumpty*, 28 Ins. Couns. J. 130 (1961) (Pra 292),

> "[t]he *intent* of the underwriters should be made known to you by company employees, articles in the insurance press, addresses at various meetings or conventions and in other ways which will occur to you" (Pra 293; emphasis in original).

Diamond's main brief summarized evidence of this sort that Diamond offered to Judge Stanton but which he refused to receive (Pb 35-37). The literature contains other material to the same effect.

Thomas L. Ashcraft, Secretary of the Policyholders Service Division of defendant Insurance Company of North America, participated in a panel discussion before the annual convention of the Federation of Insurance Counsel in 1970. Panel Discussion, *Ecology, Environment, Insurance and the Law*, 21 *Fed'n of Ins. Counsel Q.* 37 (1970-71) (Pra 295). He recognized the inherent ambiguity of the phrase "sudden and accidental" in the exception to the pollution exclusion:

> ". . . just what is or is not sudden and accidental has puzzled insurance men since the advent of liability insurance" (Pra 314).

In discussing the practice of insurers at that time he said:

> "Insurance companies interpreting existing liability policy language as it applies to claims for pollution damage have taken what I believe to be a fairly clear cut position; that is, the policies cover most sudden and accidental pollution damage but not damage arising out of willful contamination of the environment. However, because the whole subject of pollution damage claims is so new, and because existing policy language was created prior to their emergence, further clarification in the form of an environmental pollution endorsement has been adopted" (Pra 312-13).

Prior to its incorporation into the pollution exclusion the phrase "sudden and accidental" had been widely used in boiler and machinery insurance. Hoey, *The Meaning of*

"Accident" in Boiler and Machinery Insurance and New Developments in Underwriting, THE FORUM Spring 1984, Vol. XIX, No.3, p. 467 (Pra 333) comments:

> "At first glance one might believe the term 'sudden' to refer to damage which occurs over a very short time or instantaneously. Courts have, however, given this term, as it is used in the boiler and machinery policy, a different meaning" (Pra 334).

Hoey discusses the decision of the Supreme Court of Washington in *Anderson & Middleton Lumber Co.* v. *Lumbermen's Mutual Casualty Co.*, 53 Wash. 2d 404, 333 P.2d 938 (1959), as follows:

> "In rejecting the insurer's argument that the loss was not sudden the court queried:
>
> > Is it more reasonable to assume that it was placed there to show an intent to exclude coverage of a break which did not happen instantaneously, or to exclude coverage of a break which was foreseen and therefore avoidable?
>
> The Court answered its own question stating:
>
> > It seems to us that the risk to the insurer would be the same whether a break was instantaneous or began with a crack which developed over a period of time until the final cleavage occurred, as long as its progress was undetectable.
>
> In brief 'sudden' was defined not as meaning instantaneous, but rather unforeseen and unexpected." (Pra 335).

See also, *New England Gas & Electric Ass'n* v. *Ocean Accident and Guaranty Corp.*, 330 Mass. 640, 116 N.E. 2d 671 (1953); *Cyclops Corp.* v. *The Home Insurance Co.*, 352 F. Supp. 931, 934-35, 937 (W.D. Pa. 1973). These cases belie the defendants' argument that when they inserted the words "sudden and accidental" into the pollution exclusion they were entitled to believe that they had unambiguously conveyed a temporal element.

Finally, Francis X. Bruton, Jr, who participated on Aetna's behalf in drafting the casualty insurance industry's standard pollution exclusion, described the intent of that exclusion in a speech reprinted by the American Bar Association in 1971:

> "The [pollution] exclusion eliminates coverage if bodily injury or property damage arises out of the discharge, release or escape of pollutants *unless*, and a very important *unless*, the discharge, dispersal, release or escape is sudden and accidental. The *unless* clause of this exclusion in the opinion of the underwriters allows them to perform their traditional function as insurers of the unexpected event or happening and yet does not allow an insured to seek protection from his liability insurer if he knowingly pollutes." F.X. Bruton, Jr., *Historical, Liability & Insurance Aspects of Pollution Claims*, reprinted in PROBLEMS ARISING FROM ENVIRONMENTAL LITIGATION & LEGISLATION 303, 310-11 (ABA Sec. Ins.Neg.& Comp.L. 1971) (Pra 354-55; emphasis in original).

Mr. Bruton's understanding of the coverage provided by the "sudden and accidental" exception is the same as this Court's interpretation of the exclusion in *Broadwell*, etc.—*i.e.*, "sudden and accidental" means "unexpected and unintended."[21]

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21 Ignoring, as did Judge Stanton, the contemporaneous public expressions by Diamond and its insurers of their common understanding of the meaning of the standard pollution exclusion (Pb 35-37), defendants continue to defend the irrelevant testimony from one of Diamond's former risk managers and one of its former brokers (Db 18n.19). In purporting to refute Diamond's criticism of this evidence, defendants glide silently over the crucial testimony by these same witnesses that Diamond cited (Pb 34n.25)—*i.e.*, (1) that Mr. Purdy, the former risk manager, believed it was appropriate to submit his department's only post-1970 environmental damage claim (prior to the Newark dioxin claim) to Diamond's insurers; (2) that neither he nor Mr. Greening, the former broker, testified about any substantive negotiations of the pollution exclusion, and (3) that both confirmed that imposition by Aetna

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The courts have held that insurers' expressions of intent of this sort are highly relevant in construing policy language. For example, in *Meier* v. *New Jersey Life Insurance Co.*, 195 N.J. Super., 478, 486n, 480 A.2d 919, 923n (App. Div. 1984), *aff'd*, 101 N.J. 597, 503 A.2d 862 (1986), the Court relied on an internal memorandum of the insurer-defendant and said:

> "Where two constructions are possible, the construction given clauses of a life policy by the company itself must be considered as very persuasive."

As is pointed out in Diamond's main brief (Pb 35-36 and n. 26), both the *Broadwell* Court and courts in other states have relied on materials of this kind in construing the pollution exclusion.

The London Market Insurers' brief (Lb 6-14) and the National Union Fire Insurance Company of Pittsburgh, Pa. *et al.* brief (Lex Br. 8-10) deal with the differently worded pollution exclusions in the policies issued by those insurers. The pertinent London Market pollution exclusion, N.M.A. 1685, is quoted at Lb 4. The relevant portion provides that it does not apply where the "seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening". Since the phrase "sudden, unintended and unexpected" is the linguistic equivalent of "sudden and unexpected", most of the London brief is refuted by what has been said above. The London Insurers' emphasis on the word "happening" does not advance their position, which is based on a distortion of the opinion in *Independent Petrochemical Corp.* v. *Aetna Casualty & Surety Co.*, Civ. Action No. 83-3337 (D.D.C. Sept. 7, 1988), *reprinted in* 2 Mealey's Insurance Litigation Rep. F-1 (Sept. 14, 1988) to support their argument that the required "happening" could only have

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of the pollution exclusion in 1971 was non-negotiable. This undisputed evidence, together with the basic proposition that standard form language ought not to mean different things for different insureds, make the testimony on which defendants rely irrelevant.

occurred prior to the cessation of Diamond's Newark operations in 1969. The *IPC* court made it clear, however, that the "happening" may consist not only of an original dissemination of a substance like dioxin by, for example, spraying, but may be a "subsequent process that produced the claimant's exposure" such as, for example, "the movement of dioxin-tainted soil and water drainage" (slip op. at 182-84), precisely the sort of thing that happened at Diamond's Newark plant.[22]

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22 Nor are the London Insurers helped by their reliance on Peter Wilson's testimony. He testified that "seepage" could be either a sudden process or a non-sudden process, depending upon the circumstances (Pa 2300) and told a gathering of risk managers and financial executives of United States chemical and pharmaceutical companies in September 1984 that the "terms 'sudden' and 'accidental' or 'unintended' and 'unintentional' are likewise weak" (Pra 68). Given the opportunity on cross-examination to explain this comment, Mr. Wilson testified:

> "Weak perhaps was a bad word used in that speech. The purpose of the speech was to draw people's attention to the fact that the words were clearly understood in the minds of insurers, but they were not, obviously, that clear in the minds of others, and possibly all of us should move towards something which we would all understand" (Pa 2301-02).

The ambiguity is also demonstrated by an exhibit that Judge Stanton declined to receive in evidence at the trial (Pra 69-70) consisting of an authenticated copy of a filing on behalf of Underwriters at Lloyd's, London of pollution exclusions, including N.M.A. 1685, with the Illinois Department of Insurance in March 1970 (Pra 71). The filing describes the "sudden, unintended and unexpected happening" exception in N.M.A. 1685 as "the 'buy-back' of the clean-up costs on an accident basis" (Pra 73). Thus, the London Market Insurers made the same representation as to the intent of N.M.A. 1685 as their domestic counterparts did with respect to the standard form pollution exclusion in their filings with state insurance regulatory authorities. This conceded ambiguity in the exclusions imposed on Diamond by the London Market Insurers requires a finding of coverage.

The alleged "negotiation" of the London pollution exclusion was directly contradicted by Diamond's risk manager ("if we wanted the rest of the coverage, we had no choice but to accept it"; Pa 2319) and by an American broker who participated in two renewals of Diamond's London Market coverage:

(footnote continued on following page)

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IV.

DIAMOND'S OBLIGATION FOR CLEANUP OF ENVIRONMENTAL DAMAGE ARISING FROM DIOXIN AT ITS FORMER PLANT CONSTITUTES SUMS WHICH DIAMOND IS LEGALLY OBLIGATED TO PAY AS DAMAGES BECAUSE OF PROPERTY DAMAGE (Db 50-53)

The Superior Court made the following dispositive factual findings that defendants do not even purport to challenge:

> "Diamond Shamrock is not cleaning up the 80 Lister Avenue site or any of the related properties or it's not planning to clean it up because Diamond Shamrock wants to do that for its own benefit so that it can continue to enjoy that property in a productive way.
>
> "Diamond Shamrock is being made to clean up Lister Avenue and its environs by other people who feel themselves aggrieved by what Diamond Shamrock has in some senses permitted to occurred [*sic*] at 80 Lister Avenue.
>
> "In short what is going on here is very much more closely related to traditional third party damage concepts than to traditional first party insurance coverage" (Pa 2171).

All of Diamond's comprehensive general liability policies at issue in this case provided that the insurers agree to

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(footnote continued from previous page)

> "Q. Am I right in my sense that you were told to speak only if spoken to?
>
> "A. Something like that" (Pra 78).

As to the Lexington brief, admittedly there was no exception to the exclusions dealt with there. As to certain of them, however, the references to "subsidence caused by sub-surface operations" and "sub-surface oil, gas or any other substance" are suggestive that the exclusion as a whole was intended to apply only to oil and gas operations.

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> "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage" (Pa 21).

Judge Stanton, applying well-established New Jersey law to the undisputed facts, ruled that Diamond's responsibility under New Jersey and federal environmental statutes to pay for the cleanup of environmental damage arising from the presence of dioxin that escaped from Diamond's former plant at 80 Lister Avenue into the soil and groundwater constitutes "sums which the insured [is] obligated to pay as damages" within the meaning of the above insuring agreement (Pa 2173). *See, e.g., Broadwell Realty Services, Inc.* v. *Fidelity & Casualty Co.*, 218 N.J. Super. 516, 527-28, 528 A.2d 76, 82 (App. Div. 1987); *CPS Chemical Co.* v. *Continental Insurance Co.*, 222 N.J. Super. 175, 183-186, 536 A.2d 311, 316 (App. Div. 1988); *Summit Associates, Inc.* v. *Liberty Mutual Insurance Co.*, 229 N.J. Super. 56, 65, 550 A.2d 1235, 1240 (App. Div. 1988); *Lansco, Inc.* v. *Department of Environmental Protection*, 138 N.J. Super. 275, 284-86, 350 A.2d 520, 525 (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); *see also Township of Gloucester* v. *Maryland Casualty Co.*, 668 F. Supp. 394, 398-400 (D.N.J. 1987).

Many other courts, including the highest courts in two states, have recently reached the same legal conclusion. For example, the Supreme Court of Washington ruled *en banc* in *Boeing Co.* v. *Aetna Casualty & Surety Co.*, *supra*, that

> "under Washington law, the environmental response costs paid or to be paid by the insureds, as the result of action taken by the United States and the State of Washington under CERCLA, . . . constitute 'damages' within the meaning of the comprehensive general liability policies issued by the insurers" (113 Wash. 2d at ——, 784 P.2d at 509).

The Court declined to give a narrow technical meaning to the word "damages" in the standard coverage agreement and refused to apply such a special meaning in the case of corporate as opposed to individual insureds (113 Wash. 2d at ____, 784 P.2d at 514).

The Court summarized the basis of its holding as follows:

> "The occurrence of the hazardous wastes leaking into the ground contaminating the groundwater, aquifer and adjoining property constituted 'property damage' and thus triggered the 'damages' provision of the policies carried by the policyholders. The costs assessed against the policyholders by the underlying lawsuits are covered by the subject policies to the extent that these costs are because of property damage. This duty to pay money is no different from the legal obligation that burdens a party who has been held liable to restore property to the condition it was in prior to the occurrence of the tortfeasor's conduct or damages consisting of amounts necessary to restore property to its status quo" (113 Wash. 2d at ____, 784 P.2d at 516).

To the same effect is the recent decision of the North Carolina Supreme Court in *C.D. Spangler Construction Co.* v. *Industrial Crankshaft & Engineering Co.*, 326 N.C. 133, 388 S.E.2d 557 (1990), which held that the coverage provisions of standard form comprehensive general liability insurance policies protect the insured against losses incurred in complying with lawful orders of a state agency to remove hazardous waste from its premises. Having concluded that the contamination of the State's natural resources such as groundwater and soil on the insureds' land is property damage within the meaning of the policies, the Court held that

> "the better reasoned decisions find that the term 'damages' as used in the coverage provisions of liability policies includes the type of expenditures under consideration" (326 N.C. at ____, 388 S.E.2d at 566).

Just as did the Supreme Court of Washington, the North Carolina Supreme Court rested its decision on the basis that the term "damages" is not used in its legal and technical sense in the insurance policies (326 N.C. at ____, 388 S.E.2d at 568). Many other decisions have reached the same result.[23]

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23 *See also, e.g., United States Fidelity & Guaranty Co.* v. *Specialty Coatings Co.*, 180 Ill. App. 3d 378, 535 N.E.2d 1071 (1st Dist.), *appeal denied*, 127 Ill.2d 643, 545 N.E.2d 133 (1989); *Braswell* v. *Roche*, 299 S.C. 181, 383 S.E.2d 243 (Ct. App. 1989); *Aerojet General Corp.* v. *San Mateo County Superior Court*, 211 Cal. App. 3d 233, 257 Cal. Rptr. 621, 631, *reh. denied*, 211 Cal. App. 3d 216, 258 Cal. Rptr. 684 (1st Dist. 1989); *Upjohn Co.* v. *New Hampshire Insurance Co.*, 178 Mich. App. 706, 444 N.W.2d 813 (1989); *Avondale Industries, Inc.* v. *Travelers Indemnity Co.*, 887 F.2d 1200, 1207 (2d Cir. 1989); *National Indemnity Co.* v. *United States Pollution Control, Inc.*, 717 F. Supp. 765, 766-67 (W.D. Okla. 1989); *Compass Insurance Co.* v. *Cravens, Dargan & Co.*, 748 P.2d 724, 730 (Wyo. 1988); *United States Fidelity & Guaranty Co.* v. *Thomas Solvent Co.*, 683 F. Supp. 1139, 1168 (W.D. Mich. 1988); *Chesapeake Utilities Corp.* v. *American Home Assurance Co.*, 704 F. Supp. 551 (D. Del. 1989); *New Castle County* v. *Hartford Accident & Indemnity Co.*, 673 F. Supp. 1359 (D.Del. 1987); *United States* v. *Conservation Chemical Co.*, 653 F. Supp. 152, 193-94 (W.D. Mo. 1986); *United States Aviex Co.* v. *Attorney General*, 125 Mich.App. 579, 587-90, 336 N.W.2d 838, 843 (1983); *Chemical Applications Co.* v. *Home Indemnity Co.*, 425 F. Supp. 777, 779 (D. Mass. 1977).

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V.

NEW JERSEY LAW IS THE LAW APPLICABLE TO THE NEWARK ENVIRONMENTAL DAMAGE CLAIM (Db 45-49)

Defendants argue that if the Court is unwilling to alter the New Jersey law to suit them it should apply New York law instead. While Diamond would be entitled to environmental coverage under New York law, Diamond believes that New Jersey law is properly applicable.

Judge Stanton set out his reasons for selecting New Jersey law as follows:

> "On the question of the disposition of issues relating to the Diamond Shamrock industrial site on Lister Avenue in Newark, the law of New Jersey will be applied. The reason for that is that the tort involved there, assuming of course that this is a tort, I am not prejudging that, but for the purposes of attacking the problem we're dealing with an environmental tort, at least an alleged environmental tort, the tort involved there impacts with enormous burden upon the geography of the State of New Jersey and also upon the people who live and work in New Jersey.
>
> The State of New Jersey has an overwhelming interest, a predominant interest to the exclusion of all other state interests or interests of all other states in seeing to it that its law applies, not only to the underlying toxic environmental tort allegedly involved, but also to questions of insurance coverage concerning that tort.
>
> New Jersey obviously on behalf of its physical land and on behalf of people who live and work in the State, has a critical interest in the question of insurance, and that interest is vastly more important than the interests of any other state. That interest therefore requires that the law of New Jersey be applied with respect to the environmental tort allegedly committed in this State, and

> I would note in passing that the same would go, it seems to me for any other site.
>
> So, if there's a factory—there are three factories in fact in New Jersey right now we're concerned with with the Lister Avenue site in Newark, but it would go for the other two sites in New Jersey and it would go for manufacturing sites in Texas, Kentucky. It seems to me the same reasoning would apply in those states with respect to any environmental tort centered on their state would have a right to apply their own law." (Pa 497-98)

This analysis is precisely in accord with the law of New Jersey, the principles established by the *Restatement (Second) of Conflict of Laws* (1971) and the rule consistently applied in other states.

In *State Farm Mutual Automobile Insurance Co.* v. *Estate of Simmons*, 84 N.J. 28, 417 A.2d 488 (1980), the Supreme Court adopted the approach of the Restatement, particularly Sections 188 and 193, and commented that the rule calling for the application of the law of the place of the contract "should not be given controlling or dispositive effect" (84 N.J. at 37, 417 A.2d at 493). The Court applied the law which comported "with the reasonable expectations of the parties concerning the principal situs of the insured risk during the term of the policy . . ." (84 N.J. at 37, 417 A.2d at 492).

Section 193 of the *Restatement (Second) of Conflict of Laws*, cited and relied on in *Simmons*, says:

> "*Contracts of Fire, Surety or Casualty Insurance*
>
> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the

transaction and the parties, in which event the local law of the other state will be applied" (p. 610).

Comment *f* provides:

"*Multiple Risk Policies.*

A special problem is presented by multiple risk policies which insure against risks located in several states. A single policy may, for example, insure dwelling houses located in states X, Y and Z. These states may require that any fire insurance policy on buildings situated within their territory shall be in a special statutory form. If so, the single policy will usually incorporate the special statutory forms of the several states involved. Presumably, the courts would be inclined to treat such a case, at least with respect to most issues as if it involved three policies, each insuring an individual risk. So, if the house located in state X were damaged by fire, it is thought that the court would determine the rights and obligations of the parties under the policy, at least with respect to most issues in accordance with the local law of X. In any event, that part of a policy which incorporates the special statutory form of a state would be construed in accordance with the rules of construction of that state" (pp. 613-14).

These principles have been generally applied by the courts. In *Diamond International Corp.* v. *Allstate Insurance Co.*, 712 F.2d 1498 1502 (1st Cir. 1983), the court said:

"[I]t is clear that the Allstate policy is a multiple risk policy, and that the principal location of risk with respect to Diamond's Groveton subsidiary is New Hampshire. We are therefore persuaded that a New Hampshire court would apply New Hampshire's law in construing the policy."

In *Raymond* v. *Monsanto Co.*, 329 F. Supp. 247, 250 (D.N.H. 1971), the court concluded:

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> "To hold that the law of the state where the insurance contract happened to be executed is the law that controls the defense of a case, regardless of the forum, would be to totally ignore the interests of the separate states in the conduct of litigation properly within their jurisdiction. I rule that since the accident giving rise to these cases took place in New Hampshire, since the plaintiffs are New Hampshire residents, and since the forum is the District of New Hampshire, the extent of Hartford's duty to furnish a defense under the terms of its policy is to be determined in accord with the law of New Hampshire."

Similarly, the court in *Crown Center Redevelopment Corp.* v. *Occidental Fire & Casualty Company of North Carolina*, 716 S.W.2d 348, 358 (Mo. App. 1986), interpreting comprehensive liability policies with respect to the skywalk collapse at the Hyatt Hotel in Kansas City, Missouri, said:

> "Comment f to § 193 discusses multiple risk policies which insure against risks located in different states, as is the case here, *i.e.* insurance policies cover Hyatt hotels located in some 28 states. The *Restatement* approach would treat each insured risk as though it were insured by a separate policy and would apply the law of the state where the risk was located. In the instant case, the location of the insured risk, the Kansas City Hyatt Regency, is in Missouri. * * * Applying the law of the state in which the insured risk is located rather than that in which the contract was made is further warranted when there exists a possibility the court would have to apply the law of numerous states in interpreting over 20 contracts which insure the identical risk. Damages occurred and the claims were filed in the forum state of Missouri" (citation omitted).

In *Jones Truck Lines* v. *Transport Insurance Co.*, 19 Env't Rep. Cas. (BNA) 1606, 1610 (E.D. Pa. 1989), the court concluded:

> "Based on consideration of the relevant factors as outlined above, and mindful that the location of the insured risk is to be given greater weight than any other single contact, the court concludes that Missouri substantive law is the correct choice of law in this action. This conclusion is consistent with the Restatement's teaching that multiple risk policies are to be construed as though they involve separate policies each insuring an individual risk. Additionally the court finds that Missouri, as the site of the insured (and now dioxin-contaminated) property involved, has the most significant interest in the outcome of this litigation."

To the same effect are *Independent Petrochemical Corp.* v. *Aetna Casualty & Surety Co.*, 654 F. Supp. 1334, 1356 (D.D.C. 1986) ("Courts have noted . . . that for policies covering multiple risks, each risk may be treated as though it was insured by a separate policy, and the location of the risk at issue is deemed the principal risk for purposes of choice-of-law analysis"); *Cunninghame* v. *Equitable Life Assurance Society of the United States*, 652 F.2d 306, 308 n.1 (2d Cir. 1981) ("the principal location of the insured risk is given particular emphasis in determining the choice of the applicable law"); *Ellis* v. *Royal Insurance Cos.*, 129 N.H. 326, 332, 530 A.2d 303, 307 (1987) ("the fact remains that the policy covered a multitude of risks located in various States. Though it is a New Jersey corporation Purolator's business and insurance coverage extend to a number of States, including New Hampshire. The risk at issue in this particular instance was located in New Hampshire. Therefore, New Hampshire law governs"); *Grand Sheet Metal Products Co.* v. *Aetna Casualty & Surety Co.*, 500 F. Supp. 904, 909 (D.Conn. 1980) ("Thus, the Restatement, as applied to multiple risk policies, would counsel application of the law of the locus of each risk"); *Chesapeake Utilities Corp.* v. *American Home Assurance Co.*, *supra*, 704 F. Supp. at 557 ("In summary, the claims relating to [cleanup costs at] the Maryland site will be

analyzed under Maryland law, while Delaware law will govern those claims pertaining to the Delaware site").[24]

Defendants ignore Judge Stanton's findings, quoted above, and the Supreme Court's adoption in the *Simmons* case of Sections 188 and 193 of the *Restatement (Second) of Conflicts* as governing choice-of-law with respect to casualty insurance policies. Defendants rely almost entirely on the decision of this Court in *Westinghouse Electric Corp.* v. *Liberty Mutual Insurance Co.*, 233 N.J. Super. 463, 559 A.2d 435 (1989), where, however, the Court noted that "the choice-of-law issue has never been reached" and that "it was neither briefed nor argued in the trial court nor in this court" (233 N.J. Super. at 475-77, 559 A.2d at 441-42). The Court was primarily concerned with whether the doctrine of *forum non conveniens* justified dismissing claims relating to non-New Jersey environmental sites from the coverage case. This case, unlike the *Westinghouse* case, involves only a single site located in New Jersey. Without the benefit of briefing or argument, the Court in *Westinghouse* commented that we "cannot conceive that the operative contract language in a single set of insurance policies issued by a group of insurers for the purpose of providing integrated comprehensive coverage for nationwide risks could mean something different in every state of the union" (233 N.J. Super. at 476, 559 A.2d at 441-42). Yet Section 193 and comment *f*, and the many cases following it, require precisely such a state-by-state analysis for the very good reasons that the state in which a particular risk is located has a predominant interest in the extent to which that risk is covered by insurance and that it is not unreasonable to suppose that, if the parties had thought

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24 *See also, Eagle-Picher Industries Inc.* v. *Liberty Mutual Insurance Co.*, 829 F.2d 227, 247-48 (1st Cir. 1987); *Great Lakes Container Corp.* v. *National Union Fire Insurance Co.*, 727 F.2d 30, 31 (1st Cir. 1984); *St. Paul Fire & Marine Insurance Co.* v. *Protection Mutual Insurance Co.*, 664 F. Supp. 328, 334 n.10 (N.D. Ill., 1987); *City of Northglenn* v. *Chevron U.S.A., Inc.*, 634 F. Supp. 217, 222 (D. Colo. 1986); *Kisting* v. *Westchester Fire Insurance Co.*, 290 F. Supp. 141, 144-45 (W.D. Wis. 1968), *aff'd*, 416 F.2d 967 (7th Cir. 1969).

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about it, they would have assumed that the law local to a risk would govern its coverage.[25]

Nor was the *Westinghouse* decision correct in assuming that rejection of the law of the location of the risk would permit the application of the law of a single state to the interpretation of the language of the policies. While the language of the many policies at issue here is to a very great extent standard and identical, the place of contracting, issuance or execution is not. There is thus the prospect of the same standard form provision being applied to the same risk differently for different insurers. As was pointed out in Diamond's main brief (Pb 60), it is probable that few if any of the insurance contracts at issue were actually made in New York. In holding New York law applicable to the Agent Orange claim, Judge Stanton conceded that the place of making of the contracts was not "entirely free of doubt" (Pa 501),[26] but argued that "many" of the insurance companies (unidentified) had "major offices" in New York (*id.*) and that Diamond's broker had its major office in New York (Pa 502). Judge Stanton did not further analyze either the place of making or center of gravity of each of the hundreds of insurance con-

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25 Indeed, this is the choice that the casualty insurance industry made in declining to expressly address whether punitive damages are covered by standard form comprehensive general liability policies. *See, e.g.*, R. Pomerantz, *Punitive Damages: An Insurer's View*, Insurance Law Journal 21, 29 (1980); *see also* Pra 80-81.

26 Aetna has argued variously that its insurance contracts with Diamond were made in Connecticut, New York and Ohio (Pa 570, 578). After 1972 all of the Aetna policies were prepared in Hartford (Pa 581-82). Even before 1972 the Aetna policies recited that they were executed on behalf of Aetna in Hartford (Pa 583). With respect to the London policies, the London insurers required that all negotiations be conducted in London through a London broker (Pa 585-97; Pra 89-91, 95-98, 101-115). Premium checks for Diamond's policies were processed through its broker's accounting office in Maryland (Pra 117). Diamond's headquarters, including its insurance department, was located throughout the relevant period either in Ohio or in Texas.

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tracts and there were not facts enough before him to permit him to do so.

Diamond submits that New Jersey law is the appropriate law to govern its environmental damage coverage claim.

VI.

PUBLIC POLICY WILL NOT BE SERVED BY ALLOWING THE INSURERS TO AVOID PAYMENT OF THE INDEMNIFICATION WHICH THEY PROMISED (Db 5-6)

The defendants and their amicus association purport to take the position that the interpretation of their policies which they urge on the Court is not designed to save themselves money which they agreed to pay, but rather to advance the public weal (Db 5-6; IELA Br. 27-29). Putting aside the hypocrisy in this position, the public interest strongly requires that Diamond's position be sustained.

Defendants' argument that making them pay will encourage irresponsible behavior by insureds has no more application here than it does in any other situation where an insured buys insurance against the risk that he may cause unintended harm by his own negligent, reckless, or even unlawful conduct. This is what third-party liability insurance is all about. Indeed, the risk that this Court's interpretation of the policies at issue will encourage future irresponsible behavior is even less than it would otherwise be since the harm for which coverage is sought is all past harm and comparable coverage is no longer being written.

The agencies and authorities actually charged with the responsibility of protecting and advancing the public interest take a view very different from that of the defendants. They have widely urged that the insurers should be held to their bargain. The reasons for that position have been recently and eloquently stated by the Attorney General of the State of New Jersey in behalf of the Department of Environmental Protection in a Supplementary Brief in the Supreme Court of New Jersey in *State of New Jersey, Department of Environmental Protection* v. *Signo Trading International*, Dkt. No. 30,960 (Pra 356):

> "The issues in this case regarding insurance coverage for environmental cleanups and the scope of the 'owned property' exclusion in Comprehensive General Liability

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('CGL') insurance policies are of vital importance to the public and to the State in its ongoing efforts to restore and protect natural resources.

* * *

Despite the Department's legislative mandate to effect restoration of [contaminated] sites and to prevent the contamination of other sites, the Department's cleanup efforts have to date been severely hampered by litigation and uncertainty between responsible parties and their insurance carriers regarding coverage for cleanup costs. Such litigation and uncertainty deters responsible parties from taking timely cleanup actions, and restricts the number of responsible parties who are financially able to meet cleanup requirements or willing to settle with the Department. One of the results is that numerous contaminated sites remain unremedied, thereby damaging the State's natural resources and posing a constant and continuing threat to the health and welfare of its citizens.

Several of the issues involved in this matter, namely whether costs incurred by an insured or awarded to the DEP to prevent further environmental damage to adjacent property are recoverable under a CGL insurance policy, and the interpretation of the standard 'pollution exclusion' in such policies, were previously addressed by the Appellate Division in well reasoned cases. * * * Although in the instant case the decision below did not alter the holdings of those cases, the Department nevertheless submits that if this Court affirms the decision of the Appellate Division or narrows the holdings of *Broadwell* and *CPS, supra*, it will adversely affect the Department's ability to effectuate cleanups and to prevent damages to the State's resources and harm to the public across-the-board. Moreover, such a ruling will be inconsistent with the Legislature's determination that swift cleanups of contaminated sites are vital to the people of this State. *See N.J.S.A.* 58:10-23.11; *N.J.S.A.* 13:1K-7.

> Accordingly, the Department urges this court to resolve the instant case in a manner that will address the present uncertainty regarding insurance coverage, that will retain the insurance coverage for cleanup costs found in *Broadwell* and *CPS*, and that will be consistent with the State's broad statutory responsibilities to remediate past contamination and to prevent its spreading or recurrence" (Pra 360-62; citations omitted).

These same views are echoed in briefs filed by public authorities across the country. *See, e.g.*, Amicus Curiae Brief of the Insurance Commissioner of West Virginia, filed on January 17, 1990 in *Liberty Mutual Insurance Co.* v. *Triangle Industries, Inc.* No. CC999 (W. Va. Sup. Ct.) (Pra 384); Motion for Leave of State of Indiana to File Amicus Curiae Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, filed on December 28, 1989 in *Ulrich Chemical, Inc.* v. *American State Insurance Co.*, No. 73C01-8901-CP016 (Ind. Cir. Ct.) (Pra 401).

A very recent filing is the Brief of Amicus Curiae State of Delaware and Commonwealth of Pennsylvania in Support of Appellee Newcastle County, filed on April 6, 1990 in *New Castle County* v. *Continental Casualty Co.*, Nos. 89-3814, 90-3012 & 90-3030 (3rd Cir.) (Pra 416). That brief refers to twenty-five or more similar briefs which have been filed by governmental authorities in support of policyholders (Pra 430). The brief collects materials from across the country reflecting representations by insurers that the pollution exclusion does not exclude coverage of gradual pollution (Pra 446-58). The brief strongly urges rejection of the insurers' arguments as to the pollution exclusion as well as adverse treatment for the "sophisticated insured."

The insurers' positions, if accepted, would shift the burden the insurers were paid to assume to the insured or, when the insured is insolvent or a governmental unit or public utility, to the state and its taxpayers.

CONCLUSION AS TO PART I

For the reasons stated, the judgment as to Diamond's environmental damage claim should be reversed.

PART II: AGENT ORANGE SETTLEMENT COVERAGE ISSUES

I.

THE WAR RISK EXCLUSION IS INAPPLICABLE TO DIAMOND'S AGENT ORANGE SETTLEMENT (Db 59-70)

Defendants' 11-page argument is striking for what it fails to address. Although, defendants suggest that the Superior Court's entry of summary judgment following completion of all discovery somehow denied them the opportunity to present evidence at trial to support their defenses based on the war risk exclusion, their brief is entirely silent with respect to any evidence they claim they were prevented from offering on this issue. Their factual arguments are based entirely on decisions by Judge Weinstein in the underlying *"Agent Orange" Products Liability Litigation*. However, they fail to acknowledge Judge Weinstein's decision in *Uniroyal, Inc.* v. *Home Insurance Co.*, 707 F. Supp. 1368 (E.D.N.Y. 1988), *appeal dism'd by agreement* (2d Cir. 1989), which granted summary judgment against an insurer there on the same war risk exclusion defense to coverage for another manufacturer's Agent Orange settlement.

Defendants also distort the Superior Court's holding and conveniently ignore the express geographical limitation in their exclusion, which renders it inapplicable to occurrences taking place in the United States.

The war risk exclusion reads as follows:

> "[The contract shall not apply,] *except in respect of occurrences taking place in the United States of America, its territories or possessions*, to any liability of the Assured directly or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation of [sic] nationalization or requisition or destruction of or damage to

> property by or under the order of any government or public or local authority" (Da 602-04; emphasis added).

The geographic limitation upon the exclusion—"except in respect of occurrences taking place in the United States of America, its territories or possessions"—makes it inapplicable to the Agent Orange litigation. Diamond's legal obligation for alleged injury caused by Agent Orange was occasioned by the delivery of an allegedly defective product in the United States.[27]

Not only is the war risk exclusion inapplicable by virtue of its express territorial restriction, it is also conceptually inapplicable to the Agent Orange litigation. Diamond's liability was for defective manufacture of a product—a products liability risk, not a war risk. The Superior Court's oral opinion striking all defenses based upon the war risk exclusions contained in Diamond's policies correctly concluded:

> "[T]he problem with the product [Agent Orange] was not that it was being used by one human being to strike out at another, the problem with the product was that it was defectively made, so that even when used as intended, it inflicted injury on the people who were using it or on those people who were friendly to them" (Pa 531).

The Superior Court also rejected the argument that all alleged injuries were caused by the war in Vietnam because they would not have occurred but for that war:

> "The reality is that, of course, none of the servicemen who were allegedly injured by Agent Orange would have been injured if there had not been a war in Vietnam and

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27 Although his ruling is not expressly based on the geographical limitation, Judge Stanton ruled that the war risk exclusion was inapplicable because "the problem with the product, was that it was defectively made" (Pa 531). The Superior Court also agreed with Judge Weinstein's decision in *Uniroyal, Inc.* v. *Home Insurance Co.*, *supra*, 707 F. Supp. at 1390, that the occurrence took place upon delivery of the defective product to the government in the United States (Pa 50, 56).

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> they had not been in the military service in Vietnam. So, this is a kind of ultimate Adam and Eve causation in which none of this would have happened if there had not been a war in Vietnam . . . . But the injuries that occurred here did not occur because of the special kind of unpredictable out-of-the-ordinary risk that occurs in a war" (Pa 529).

The Superior Court's analysis underscores the limited scope of war risk exclusions in third-party liability policies, because an insured is not likely to be held liable in tort for war-caused injury.[28] If there is any ambiguity in the exclusions, it should be resolved in favor of coverage.[29] War risk exclusions apply only to certain specific, narrowly-defined risks in the context of third-party liability policies. That Diamond's insurers understood this is confirmed by documents obtained by Diamond from the Insurance Services Office ("ISO") in discovery.[30]

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28 This distinguishes the life insurance cases (Db 61-62) and first-party property insurance cases (Db 68-69) on which defendants rely. As Judge Stanton observed, none of the few cases construing war risk exclusions involve product liability claims under a third-party liability insurance policy (Pa 528-29).

29 The war risk exclusion was a typical boilerplate provision imposed by insurers upon insureds. Anthony N. Christian, an excess lines underwriter with defendant Home during the period of the applicable policies, testified that during the period of his employment Home never knowingly issued an excess policy that did not contain a war risk exclusion:

> Q. So that if a broker had come to you with a proposed excess form that didn't have a war risk exclusion in it, what would you have done?
>
> A. I don't even have to tell him because if he was a professional, he understood, our policy would have a war risk. And then when we issued it. If he didn't like it, he comes back and we cancel the policy. Very simple" (Pra 120).

30 ISO and its predecessors, such as the National Bureau of Casualty Underwriters, the Mutual Insurance Rating Bureau and the Insurance

In 1978, a member of ISO's Ad Hoc Comprehensive Rules and Forms Subcommittee reviewed the history of the war risk exclusion in general liability policies as reflected in some twenty meetings of the General Liability Rules and Forms Committee and its predecessors during the period 1950-1956 (Pra 126). This review revealed that in September 1952 the Committee adopted the conclusions contained in a memorandum on the war risk exclusion prepared by a Committee member,

> " 'reaffirm[ing] its original position that a war risk exclusion should apply only for contractual liability, medical payments (including immediate medical payments) and all collision insurance' " (Pra 126).

The memorandum adopted by the Ad Hoc Committee, dated July 15, 1952 (Pra 130), was prepared by Hugh Harbison, an attorney at one time employed by The Travelers Insurance Company. Mr. Harbison concluded with respect to the then current practice with regard to liability insurance that:

> "[I]t has never seemed necessary to exclude injury caused by war because liability policies only cover injury for which the insured is liable at law for damages. He is not liable for war-caused injury and therefore nothing would be gained and much confusion might be caused by adding an exclusion wording which could have no applicability. Medical coverages and unlimited contractual liability present a different problem" (Pra 130).

Mr. Harbison amplified his conclusions in a supplemental memorandum dated July 31, 1952 (Pra 133). Other ISO doc-

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Rating Board, were and are casualty insurance industry associations that drafted and filed with state insurance regulatory authorities standard form liability insurance policies and endorsements. Diamond's primary insurer throughout the relevant period, Aetna, and a number of Diamond's excess insurers were members or subscribers of ISO and its predecessors.

uments confirm the liability insurance industry's doubts concerning the pertinence or utility of a war risk exclusion in their policies (*see*, *e.g.*, Pra 138, 140-43). Defendants proffered no evidence to the contrary.

II.

DIAMOND IS NOT REQUIRED TO PROVE THAT ITS AGENT ORANGE ACTUALLY CAUSED BODILY INJURY TO ANY PARTICULAR CLASS MEMBER (Db 71-77)

The only alleged basis for Diamond's potential liability to class members in the *Agent Orange Products Liability Litigation* was its manufacture and sale of Agent Orange to the Government. For the purpose of determining when there was an occurrence under Diamond's comprehensive general liability insurance policies the claimants' bodily injuries happened when they are alleged to have happened in the complaints filed on behalf of class members in the Agent Orange litigation. In determining how much each defendant would contribute to the Agent Orange settlement, no attempt was made to differentiate among the individual claimants in any way. Settlement on that basis satisfies the requirement of bodily injury in each of the periods of the policies issued to Diamond from 1962 through 1980.

Because defendants consented to the Superior Court's grant of Diamond's motion for summary judgment striking all defenses based on lack of notice and voluntary settlement without its insurers' permission (Pra 250-51), defendants may not contest the reasonableness of Diamond's settlement. Indeed, as Judge Stanton found, defendants were given an opportunity to object to the settlement but failed to do so, and, in any event, the settlement was reasonable (Pa 2164-65). Moreover, it is not open to defendants to attempt to show that Diamond was not liable, nor is Diamond required to show that it was liable in the underlying class action. *See, e.g., Luria Brothers & Co.* v. *Alliance Assurance Co.*, 780 F.2d 1082, 1091 (2d Cir. 1986) ("In order to recover the amount of the settlement from the insurer, the insured need not establish actual liability to the party with whom it has settled"); *Fireman's Fund Insurance Co.* v. *Security Insurance Company of Hartford*, 72 N.J. 63, 78, 367 A.2d 864,

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872-73 (1976); *cf. Vaughn* v. *Marine Transport Lines, Inc.*, 723 F. Supp. 1126 (D. Md. 1989) (indemnity claim).

Diamond's insurance policies expressly provide a defense for "groundless, false or fraudulent" claims and are triggered by the payment of both judgments and settlements (Pa 431). If defendants were to be permitted to escape their indemnity obligations where, as here, there is no question of lack of due notice or unauthorized settlement by the insured, the coverage Diamond purchased would be rendered illusory. *See Hoffman-La Roche, Inc.* v. *Hartford Group*, No. W-O15519-87, slip op. at 14-17 (N.J. Super. Ct. Law Div. Essex Co. Oct. 13, 1989), *reprinted in* 4 Mealey's Insurance Litigation Rep. B-1 (Nov. 28, 1989). Such a result would not comport with either the unambiguous language of Diamond's insurance or Diamond's objectively reasonable expectations of coverage.

Judge Stanton ruled prior to trial that it was not

> "necessary for Diamond Shamrock to be able to prove that any individual or any groups of individuals exposed to Agent Orange in Vietnam actually did experience any injury" (Pa 2162-63).

In making this ruling, Judge Stanton addressed all of the arguments that defendants now raise on their cross-appeal and effectively disposed of each one of them:

> "So far as the Agent Orange litigation in New York is concerned, the settlement is concerned, I think the critical issue is that there were serious issues raised by the veterans who had been exposed to Agent Orange, and by their families, that there was knowledge of the at least potentially devastating impact that Agent Orange might have on a human being, that there was a sense of human and social obligation to the plaintiffs involved, that there was an arguable risk that a jury and Court might end up finding that damages had been inflicted, causally relating them to the application of Agent

Orange, and then finding something at least broadly wrongful about the application of the Agent Orange.

So that there was a plausible, sensible grounds for settling the Agent Orange case on the grounds on which it was settled.

And, of course, it's important to note that that settlement was worked out by very sophisticated lawyers, it was accepted by very sophisticated business managers who ultimately were employing the lawyers, it was accepted, after there had been a good deal of expert, scientific input, and it was ratified both by the U. S. District Court and by the Circuit Court of Appeals, the settlement was.

So that it was not a frivolous settlement, it was not a settlement based on a purely illusory risk.

Now, it seems to me that Diamond Shamrock was entitled to enter into that settlement, that there is nothing inconsistent with Diamond Shamrock having entered into that settlement and also having participated in a successful defense of cases where there had been an opting out, and there is nothing inconsistent with Diamond Shamrock seeking protection with respect to the Agent Orange settlement even though it also thinks that, if push comes to shove, it might be possible to, and was possible, indeed was done, there was a prevailing on the merits of the question of whether people had actually been injured by Agent Orange.

But what happened was there was a serious claim, the primary insurer was actively cut in on the litigation, the secondary and excess insurers were at least notified of it and given some opportunity to have input in the litigation. The litigation went forward and was settled.

And I think it is beside the point and it is legally irrelevant whether any of the veterans in Vietnam were actually injured by Agent Orange.

> There may not have been. Let's hope there were not. But there was a real case. It did trigger prospective liability on the part of Diamond Shamrock and that, in turn, triggered insurance coverage from Aetna and the other carriers.
>
> So I'm satisfied that from the viewpoint of determining whether or not there is insurance coverage, we must regard injury as having been incurred." (Pa 2163-66).

This ruling was correct as a matter of fact and law and defendants offer no credible grounds for reversal.

III.

DIAMOND'S FOREIGN RISK INSURANCE DOES NOT APPLY TO THE AGENT ORANGE SETTLEMENT (Db 77-79)

The Superior Court made the following findings that are fully supported by the record (Pa 56):

—"the insured occurrence took place in the United States when the product was delivered to the military";

—Diamond's " 'wrong' was completed upon delivery in the United States"; and

—"[a]ll of the claims were asserted in United States courts and ended up being consolidated for trial in New York City."

Since defendants have failed to demonstrate that these findings are not supported by sufficient credible evidence, there is no basis for this Court to reverse the Superior Court's holding that Diamond's foreign risk policies do not apply to the Agent Orange claims. *Rova Farms Resort, Inc.* v. *Investors Insurance Company of America*, 65 N.J. 474, 484, 323 A.2d 495, 500 (1974).

By their express terms Diamond's foreign liability insurance policies do not apply to the United States and United States territories. For example, St. Paul Mercury Insurance Company policy no. SPL 5910, that covered Diamond for the period from January 1, 1966 to January 1, 1967 (and was twice renewed), contains the following Indemnifying Agreement IV, as amended by Endorsement No. 4 (Pra 153):

> "POLICY PERIOD, TERRITORY. This policy applies only to occurrences during the policy period within the countries designated in item 8 of the declarations; it shall not apply to occurrences within the United States of America, . . ." (Pra 151).

"Occurrence" is defined as

> "an unexpected event or happening or a continuous or repeated exposure to conditions which results during the policy period in Bodily Injury, Sickness, or Disease . . ." (Pra 154).

It is irrelevant *where* the resulting bodily injury occurred under Diamond's foreign risk policies. What is crucial is whether the unexpected event that *caused* the injury happened outside the United States. This was the contemporaneous understanding of Diamond's insurance department and its insurance brokers (Pra 158-61, 164-66, 169). Here, as the Superior Court found (Pa 56), the event that caused the injury was the manufacture and delivery to the United States government of an unintentionally defective product in the United States. Diamond's foreign risk insurance does not provide coverage.[31]

The only foreign claims about which testimony was offered—claims made in South America alleging bodily injury to agricultural workers caused by a herbicide sold by a Diamond distributor located in South America—were submitted to and paid by Diamond's foreign liability carrier (Pra 158-61). Diamond's risk manager at the time testified that Diamond's foreign liability carrier was notified of those claims "because the claims were brought overseas in Colombia, which would place it under our foreign liability coverage" (Pra 164). Diamond's insurance broker had a similar understanding of what claims are covered under Diamond's foreign liability insurances (Pra 169).

When defendants argue that there is no significant difference between the Columbia chloracne claims and the Agent

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31 In a similar coverage action brought by another Agent Orange manufacturer against its insurers, *Uniroyal, Inc.* v. *Home Insurance Co.*, *supra*, Judge Weinstein, who also presided over the underlying *Agent Orange Products Liability* class action, similarly held for purposes of coverage under comprehensive general liability insurance that the occurrence took place in the United States when the defective herbicide was delivered to the United States government (707 F. Supp. at 1390).

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Orange claims (Db 79), defendants ignore the following important differences:

— Agent Orange was sold by Diamond directly to the government in the United States while the agricultural herbicide was sold in Columbia by Diamond's local distributor to customers in South America; and

— the Agent Orange claims were brought in the United States while the Columbia claims were made in South America.

IV.

THE BATCH CLAUSE DOES NOT APPLY TO THE AGENT ORANGE SETTLEMENT (Db 80-95)

Defendants make two arguments in urging that the batch clause turns what the Superior Court held to be a single occurrence (Pa 53) into 133 occurrences.[32] Defendants argue that the batch clause establishes a *minimum* number of occurrences, with any doubt to be resolved against Diamond. In fact, the purpose of the batch clause was to establish a maximum number of occurrences, and any doubts are to be resolved in Diamond's favor. Defendants also argue, with respect to claims that were entirely dissimilar to the Agent Orange claims, that Diamond engaged in a course of conduct inconsistent with Diamond's position that the batch clause is inapplicable here, while at the same time they ignore the similar product liability claims where Diamond urged a single occurrence and defendants unsuccessfully urged the batch clause.

A. The Batch Clause Establishes A Maximum Not A Minimum Number Of Occurrences

The batch clause relates to "limits of liability . . . as respects product liability for bodily injury or property damage coverage" (Pa 54). For purposes of per occurrence and deductible limits of liability, "[a]ll such damage arising out of one lot of goods or products . . . shall be considered as one occurrence" (*id.*). There is nothing in the batch clause

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32 In fact, even under defendants' theory there can only be *at most* 122 occurrences, since they conceded at trial that eleven lots of Diamond's Agent Orange were never sprayed in Vietnam (Pa 911). Obviously, Diamond's liability could not arise from a shipment of Agent Orange that could not have caused any injury because it was never used. Further, since the evidence demonstrates that an additional unquantifiable amount of Diamond's Agent Orange may not have been used in Vietnam (Pa 12, 915), defendants have totally failed to demonstrate that any given number of lots gave rise to Diamond's liability. This is a further reason why defendants' batch clause argument does not provide grounds for reversal.

that states or even suggests that where a defectively-designed product is sold in multiple lots each lot must be treated as a separate occurrence, even though all of the injury from all of the lots resulted from a single design defect, rather than from separate causes peculiar to particular lots.

The purpose of the batch clause was to establish a maximum number of occurrences, not a minimum. This was the understanding of Aetna, as reflected in an Aetna internal memorandum, dated October 4, 1974. Aetna's memorandum records that Aetna, Diamond and Diamond's then insurance brokers:

> "all are in agreement as to what the intent of the 'lot' clause was, all agree that the intent was to minimize the occurrences rather than to maximize them" (Pra 196).

The Aetna memorandum went on to acknowledge that it was Diamond's intent

> "to minimize the number of occurrences so as to minimize the amount of deductibles that they would end up paying, and they say that they bought excess coverage so as to avoid having to pay multiple deductibles; therefore, they argue, it was their intent all along to restrict the number of occurrences chargeable to the Aetna policy" (*id.*).[33]

In rejecting defendants' argument that Diamond's liability for the Agent Orange settlement arises out of multiple occurrences, with the effect that Diamond would recover virtually nothing under its excess insurance, Judge Stanton referred to

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33 In agreeing to continue to include the batch clause endorsement in the policies it issued to Diamond, Aetna expressly confirmed *its* understanding

> "that the batch clause is added not in contravention of the definition of occurrence as it applies to a repeated exposure to conditions but to support the intent to limit the number of occurrences, based on injury or damage attributable to a batch or lot" (Pra 197).

It is significant that Aetna, Diamond's primary carrier throughout the relevant period and the author of the batch clause, does not join in this portion of defendants' brief (Db A1).

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Judge Weinstein's analysis in *Uniroyal* with respect to the number of occurrences:

> "I accept and follow the basic analysis of Judge Weinstein in Uniroyal. He held that the delivery of Agent Orange to the military was the occurrence within the meaning of the policies. He further held that the entire series of deliveries constituted a single continuous occurrence. This single occurrence resulted in numerous injuries of individual servicemen. The resulting injuries triggered coverage under the policies in force at the time of the respective injuries" (Pa 50).

The Superior Court properly distinguished between the occurrence that caused the injuries and the resulting injuries that trigger particular policies. The number of causes determines the number of occurrences. *Doria* v. *Insurance Company of North America*, 210 N.J. Super. 67, 72-73, 509 A.2d 220, 223 (App. Div. 1986); *Wilkinson & Son, Inc.* v. *Providence Washington Insurance Co.*, 124 N.J. Super. 466, 307 A.2d 639 (Law Div. 1973). The timing of injuries determines which policies provide coverage for an occurrence. *Gottlieb* v. *Newark Insurance Co.*, 238 N.J. Super. 531, 536, 570 A.2d 443, 444 (App. Div. 1990); *Lac d'Amiante du Quebec, Ltee.* v. *American Home Assurance Corp.*, 613 F. Supp. 1549, 1562-63 (D.N.J. 1985), *vacated & remanded on other grounds*, 864 F.2d 1033 (3d Cir. 1988).

In ruling that the batch clause was inapplicable, Judge Stanton made an analysis of the nature of Diamond's liability in the Agent Orange litigation that refutes defendants' multiple occurrence position:

> "To understand the applicability of the batch clause, we have to understand the difference between a design defect and a manufacturing defect. A *design* defect exists in a product when there is something wrong with the *plan* for making the product. A *manufacturing* defect exists when, through some error in the course of

making a product, the product *fails to conform to the plan* for making the product.

"The batch clause is meant to limit liability with respect to manufacturing defects. We readily understand the difference between design defect and a manufacturing defect with respect to a product such as an automobile. We do not usually think of a product such as Agent Orange as being designed. Yet, there is a sense in which it is designed. The presence of dioxin in TCP and in phenoxy herbicides should be regarded as a design defect. At first, Diamond did not fully understand the nature of the product it was creating, and then, when it did realize that dioxin was present, it was unable to devise an effective plan for eliminating it. Diamond also never recognized the toxic risks that dioxin posed. Hence, the failure is primarily one of intellectual conceptualization—of design. The batch clause is not applicable" (Pa 54-55).

In refusing on reconsideration to reverse its ruling on the batch clause, the Superior Court confirmed that the batch clause was irrelevant because the Agent Orange situation involved only a single occurrence:

"I think it must be kept in mind that fundamentally the batch clause is a clause which is designed to limit the liability of the insurance carrier. That is really what its basic function is . . . . [I]t's essentially a clause of limitation . . . . [I]ts basic function is to limit liability and its basic function is to limit liability under circumstances where there would otherwise be a considerable number of multiple occurrences.

"Now, it seems to me that we don't even have to consider whether the batch clause should be applied or not in this case because we have only one occurrence. And there simply is not any problem of trying to limit multiple occurrences so that liability stays within fair and plausible and manageable grounds" (Pa 90-91).

B. Product Liability Claims Similar To The Agent Orange Claims Have Been Treated By Diamond As A Single Occurrence

The logical distinction which the Superior Court drew between a design defect and a manufacturing mistake recognizes the singular nature of a design defect as opposed to defects that arise out of separate and distinct manufacturing errors. Defendants' response is the unsupported and erroneous assertion that Diamond and its brokers have consistently testified that neither Diamond nor its brokers has ever applied a distinction between design defect and production errors in determining the applicability of the batch clause (Db 91-94). However, they cite to nothing in the trial record of this action that they even claim supports this assertion.[34] They also argue incorrectly that Diamond treated similar products liability claims as multiple occurrences.

Defendants' argument ignores product liability claims strikingly similar to the Agent Orange claims—the claims arising from Diamond's manufacture of an allegedly defective polyester resin for use in manufacturing fiberglas boats. Coverage for these claims was the subject of a declaratory judgment action brought by Diamond in the California Superior Court in San Francisco that was settled in December 1989. As defendants well know (because most of them were also parties to the San Francisco action), Diamond's position with respect to the boat resin claims since their inception in 1981 has always been that they involved one occurrence under Diamond's comprehensive general liability insurance (Pra 202). Defendants argued in the California action that the existence of the batch clause required a finding of a minimum of one

34 Defendants rely, as they did below in their motion for reconsideration, upon inadmissible excerpts from depositions taken in another coverage action. Their assertion that this misleading and inadmissible testimony "was presented without objection to the trial court" is totally false (Pra 238-49). Moreover, they ignore contrary evidence in that other coverage action, including the deposition testimony of Diamond's casualty insurance manager that made precisely the distinction between design defects and manufacturing errors (Pra 192-95).

occurrence per batch of resin. Faced with the same arguments that defendants urged before Judge Stanton and repeat here, the California Superior Court also declined to hold the batch clause applicable to the product liability claims there at issue (Pra 476). Not only have defendants failed to mention this adverse ruling on the precise issue, but they have ignored entirely Diamond's consistent treatment of the boat resin claims as a single occurrence.

Defendants refer instead to four other instances of product liability claims they assert are similar to Agent Orange (Db 88-89). However, as to three of the instances—claims arising from the use of a swimming pool cleanser, claims arising from aerial spraying of a weedkiller and claims arising from application of another weedkiller—there is simply no evidence in the record to support defendants' suggestion that these claims are similar to the Agent Orange claims. Defendants point to no pertinent documentary evidence. They rely only upon the hazy recollections of witnesses who were unable to recall the precise nature of the claims. Indeed, there is evidence to suggest that these claims may not have involved a defective product at all.[35] Therefore, the alleged treatment of these claims as involving multiple occurrences is not probative of anything with respect to the applicability of the batch clause to the Agent Orange settlement.

Defendants' fourth example of allegedly similar claims—the series of claims made by poultry farmers arising out of two production errors happening during the manufacture of discrete batches of vitamin supplement for poultry feed—is totally distinguishable from the Agent Orange claims. The number of occurrences involved in the poultry vitamin claims was the subject of a coverage action brought by one of Diamond's excess insurers against Diamond and Aetna. *Home Insurance Co.* v. *Aetna Casualty & Surety Co.*, 1977-79 Fire & Casualty Cas. (CCH) 9 (S.D.N.Y. 1977). As Judge Stanton held, the situation in *Home* v. *Aetna* is irrelevant to the circumstances of the Agent Orange claims (Pa 55).

35 *See* Pra 158-69, 172-73, 179-90.

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The *Home* v. *Aetna* litigation arose because on two separate occasions four days apart a piece of process equipment used to manufacture batches of a vitamin at Diamond's Harrison, N.J. plant was not adequately cleaned before it was used again in the manufacturing process, and the batches of vitamin manufactured after each error were rendered inert (Pra 175-77). Each of the two specifically identifiable defective batches was then combined with corn cob fractions at Diamond's Louisville, Ky. plant to make a poultry feed supplement. Four shipments were made to the customer. The resulting damage could be traced to the two specifically identified Harrison batches (Pra 204-05). Other batches and shipments of Diamond's vitamin product were not affected.

Diamond and Aetna stipulated that the batch clause applied in that case. Two separate instances of failure to adequately clean the equipment gave rise to defects in four specifically identifiable lots of Diamond's product in that case. There was nothing inherently defective in the formulation of Diamond's vitamin product or in any but the specific lots involved in the litigation. In the Agent Orange situation dioxin was created as an unintended impurity due to a defect in the formula pursuant to which all of the herbicide was manufactured and was common to the entire output of the herbicide. The dispute in *Home* v. *Aetna* was whether two lots or four lots were involved and depended on the point in the production process where a "lot" was properly denominated as such.[36] The federal court's holding that four occur-

36 The batch clause was eliminated from the 1966 revision of the standard form comprehensive general liability insurance policy precisely because it

> "created many problems and difficulties for claim people in their attempt to determine what constituted one lot of goods or products to such an extent that the clause often becomes unworkable" (Henry G. Mildrum, *Implications of Coverage for Gradual Injury or Damage*, Nov. 11, 1965, at 10 (Pra 486).

It was described by one of the principal drafters of the 1966 policy as "unintelligible" (George Katz, *Why The New Liability Policy?*, reprint at 5) (Pra 492).

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rences were involved depended upon its analysis as to the acts that caused the resulting injury. *Home* v. *Aetna*, *supra*, 1977-79 Fire & Casualty Cas. (CCH) at 12. Here, as the Superior Court found, the cause of Diamond's Agent Orange liability was the single formula design defect that led to the creation of dioxin in every gallon of Diamond's Agent Orange (Pa 55).

Since defendants are relying on the batch clause to limit their indemnity responsibility, they bear the heavy burden of proof and risk of uncertainty that the law of insurance applies to exclusions and limitations on coverage. *See, e.g., Kopp* v. *Newark Insurance Co.*, 204 N.J. Super. 415, 499 A.2d 235 (App. Div. 1985); *Aetna Insurance Co.* v. *Weiss*, 174 N.J. Super. 292, 416 A.2d 426 (App. Div.), *certif. denied*, 85 N.J. 127, 425 A.2d 284 (1980).

V.

DIAMOND IS ENTITLED TO PREJUDGMENT INTEREST IN ADDITION TO THE LIMITS OF THE EXCESS POLICIES (Db 95-106)

Diamond is entitled to be compensated by its insurers for the loss of the use of money that Diamond had to pay in settlement of the Agent Orange claims that the Superior Court held Diamond's insurers should have paid. *Meshinsky* v. *Nichols Yacht Sales, Inc.*, 110 N.J. 464, 478, 541 A.2d 1063, 1070 (1988); *Fireman's Fund Insurance Co.* v. *Security Insurance Company of Hartford*, 72 N.J. 63, 68, 367 A.2d 864, 866 (1976); *Rova Farms Resort, Inc.* v. *Investors Insurance Company of America*, 65 N.J. 474, 504-05, 323 A.2d 495, 511-13 (1974); *Ellmex Construction Co.* v. *Republic Insurance Co.*, 202 N.J. Super. 195, 208-13, 494 A.2d 339, 347-49 (App. Div. 1985), *certif. denied*, 103 N.J. 453, 511 A.2d 639 (1986).

The purpose of such an award of interest was concisely stated by the Appellate Division in *Ellmex Construction Co.* v. *Republic Insurance Co.*, *supra*, 202 N.J. Super. at 212-13, 494 A.2d at 349:

> "Here, the defendant's view was that the exclusion controlled the question of coverage and plaintiff thus had no use of the monies actually due while that issue was litigated. The Court in *Busik* observed that 'interest is payable on a liquidated claim when liability is denied, even in good faith.' 63 N.J. at 358, 307 A.2d 571. The equitable purpose of an award of prejudgment interest is compensatory, 'to indemnify the claimant for the loss of what the moneys due him would presumably have earned if the payment had not been delayed.' *Ibid.* . . . 'The fact remains that . . . the defendant has had the use, and the plaintiff has not, of moneys which the judgment finds was the damage plaintiff suffered.' *Id.* at 359, 307 A.2d 571. In the circumstances here presented, the equities favor plaintiff and prejudgment interest should be awarded."

The same result is appropriate under New York law. *Aetna Casualty & Surety Co.* v. *Lumbermens Mutual Casualty Co.*, 152 A.D.2d 1003, 543 N.Y.S.2d 806 (4th Dep't 1989); *Entron, Inc.* v. *Affiliated FM Insurance Co.*, 749 F.2d 127, 131 (2d Cir. 1984); *Samovar of Russia Jewelry Antique Corp.* v. *Generali*, 102 A.D.2d 279, 281, 476 N.Y.S.2d 869, 871 (1st Dep't 1984); *Pope* v. *New York Property Insurance Underwriting Ass'n*, 112 A.D.2d 984, 985, 492 N.Y.S.2d 796, 797 (2d Dep't), *aff'd in part*, 66 N.Y.2d 857, 489 N.E.2d 247, 498 N.Y.S.2d 360 (1985); N.Y.C.P.L.R. § 5001(a) (McKinney 1963).

Defendants' reliance upon the discredited argument that prejudgment interest may not be awarded on an unliquidated contract claim (Db 102-06) is squarely answered by the Supreme Court's recent decision in *Meshinky* v. *Nichols Yacht Sales, Inc.*, *supra*, where the Court affirmed the Appellate Division's reversal of the Superior Court's denial of prejudgment interest:

> "We also agree with the Appellate Division ruling granting prejudgment interest. Ordinarily, the trial court has the discretion to grant or deny prejudgment interest. *Fasolo* v. *Board of Trustees, Div. of Pensions*, 190 N.J. Super. 573, 585 (App. Div. 1983). It is settled that prejudgment interest may be awarded on contract claims. *Bak-A-Lum Corp.* v. *Alcoa Bldg. Prods.*, 69 N.J. 123, 131 (1976). Moreover, the rule that limited prejudgment interest awards to cases where damages were liquidated or clearly ascertainable in advance has been significantly eroded. *Ellmex Constr. Co., Inc.* v. *Republic Ins. Co.*, 202 N.J. Super. 195, 210 (App. Div. 1985), *certif. denied*, 103 N.J. 453 (1986). As the Appellate Division noted, '[o]nce the trial judge concluded that plaintiffs rescission of the contract * * * was proper * * *, the damages awarded were "capable of ascertainment by mere computation" ' (quoting *Rivers* v. *General Accident Group*, 192 N.J. Super. 355, 359 (App. Div. 1983)). We are in accord with the Appellate Division's conclusion that under the circumstances the denial of

prejudgment interest was an abuse of discretion" (110 N.J. at 478, 541 A.2d at 1070).

Judge Stanton rightly rejected defendants' argument that the presence of the word "interest" in the definition of Ultimate Net Loss in their excess policies precludes recovery of pre-judgment interest against them in addition to the amount of the occurrence limits of their policies (Pa 983-84). It is plain from the context of the provision in question that the interest cost referred to is that incurred in the underlying action for which coverage is provided. Thus, the definition of Ultimate Net Loss provides the interest involved must be "paid as a consequence of any occurrence covered hereunder" (Db 97-98). The pre-judgment interest awarded by Judge Stanton was a consequence, not of the underlying covered occurrence, but of defendants' failure to pay the sum for which Diamond was liable and which Diamond paid in January 1985.

The dollar amount of Diamond's liability was fixed on May 7, 1984, when Diamond entered into the *Agent Orange* settlement with the full knowledge and approval of its insurers. That dollar amount, plus interest, was paid by Diamond on January 14, 1985, and Diamond has been denied the use of that money since that day. Correspondingly, Diamond's insurers, who should have paid the settlement on January 14, 1985, have had—and continue to have—the use of their respective portions of the settlement amount. *Kraynick* v. *Nationwide Insurance Co.*, 80 N.J. Super. 296, 302, 193 A.2d 419, 422 (Law Div. 1963) ("[c]ertainly defendant cannot profit from its original mistake of disclaiming [coverage] or from its continued litigation of this action"). Judge Stanton was correct in holding that Diamond is entitled to prejudgment interest from its insurers in proportion to their respective indemnity obligations. Any other ruling would give insurers an incentive to litigate coverage claims simply to delay payment.

VI.

JOINT AND SEVERAL LIABILITY IS MANDATED SINCE THERE IS NO WAY TO REASONABLY IDENTIFY OR QUANTIFY THE AMOUNT OF DIAMOND'S AGENT ORANGE SETTLEMENT ATTRIBUTABLE TO A PARTICULAR CLASS MEMBER'S BODILY INJURY IN A PARTICULAR POLICY YEAR (Db 106-15)

Defendants' arguments (1) ignore the cases in Diamond's main brief (Pb 61-64) supporting joint and several liability where a single continuing occurrence triggers successive policies, (2) effectively concede the correctness of the cases Diamond cited (Pb 66-68) that hold that joint and several liability is mandated where the effects of a continuous and indivisible injury cannot be reasonably allocated to particular policy years (Db 109), and (3) assert that because Judge Weinstein made a factual finding as to when injury happened in *Uniroyal, Inc.* v. *Home Insurance Co.*, *supra*, 707 F. Supp. at 1389, Judge Stanton was entitled to adopt that finding as the basis for rejecting joint and several liability of defendants here (Db 110). As Diamond pointed out to Judge Stanton in seeking reconsideration of the Superior Court's ruling (Pa 85-86), the record facts and stipulations of the parties on which Judge Weinstein relied in *Uniroyal* were not part of the record in this action and, therefore, the Superior Court lacked any evidentiary basis for its allocation scheme (Pb 65-66).[37]

Defendants' series of irrelevant arguments (Db 110-15) cannot paper over the fact that, as Judge Stanton candidly admitted (Pa 98), his allocation scheme was based upon a "fiction." Moreover, defendants do not even address the evidence in the trial record before Judge Stanton (Pb 65-66)

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37 Defendants' suggestion that Diamond urged the Superior Court to rely upon the record facts and stipulations of the parties before Judge Weinstein in *Uniroyal* (Db 113 n. 77) is false. The letter from counsel referred to (Da 727) makes clear the absence of these evidentiary supports for adoption of Judge Weinstein's findings (Da 730).

which demonstrates that the Superior Court's uncritical adoption of Judge Weinstein's allocation scheme cannot be justified in this case.

Finally, after trumpeting that the Superior Court's allocation scheme "Comports With The Language Of The Policies" (Db 114), defendants fail to quote a single sentence in Diamond's policies that supports Judge Stanton's adoption of Judge Weinstein's allocation formula in order to defeat coverage. This is not surprising. There is nothing in any of Diamond's policies that permits an insurer to reduce its indemnity responsibility by urging adoption of an arbitrary allocation scheme based upon the record in a case to which the insured was not a party. Rather, Diamond's policies promised, and Diamond reasonably expected, that it had purchased coverage for "all sums" which Diamond was "legally obligated to pay as damages" because of its settlement of the *Agent Orange* class action. The Superior Court erred in defeating Diamond's objectively reasonable expectation.

VII.

THERE IS NO EVIDENCE IN THE TRIAL RECORD TO SUPPORT DEFENDANTS' POSITION THAT THREE-YEAR EXCESS POLICIES PAY ONLY ONE PER OCCURRENCE LIMIT (Db 115-23)

Without identifying the source, defendants quote from a deposition taken in another action in support of their argument that their three-year excess policies apply their occurrence limits per policy, rather than per year as did Diamond's Aetna primary policies (Db 119-20). This deposition was not part of the trial record in this action and cannot properly be relied upon to support Judge Stanton's ruling. Moreover, to the extent that this Court chooses to consider the extraneous deposition testimony proffered by defendants, it should be placed in its proper context.

At a deposition taken by Diamond in the same coverage action, an executive in the claims department of one of Diamond's excess insurers during the relevant time period testified that, under the identical policy wording relied upon by defendants, the per occurrence limit applied once per year and not once per three-year policy (Pra 207). Contemporaneous claim documents prepared by the same executive or at his request to record the Agent Orange claims against Diamond fully support the executive's testimony (Pra 235-37). There is no support in the trial record for Judge Stanton's contrary ruling.

VIII.

THE ONE-MONTH EXTENSION OF AMERICAN RE'S POLICY CONSTITUTED A NEW EXCESS POLICY WITH NEW LIMITS (Db 123-27)

Defendants' argument with respect to the one-month extension of Diamond's excess insurance policies in February 1969 is a series of unsupported assertions as to the effect of the extension. No testimony or conclusive documentary evidence is offered by defendants to support their assertions. Their reliance upon the decision of the federal district court in *UNR Industries, Inc.* v. *Continental Insurance Co.*, No. 85 C 3532 (N.D. Ill. Nov. 8, 1988) (Da 1493), begs the question. Whatever may have been in the record before the court in *UNR*, *supra*, there is no evidence to support defendants' interpretation in the trial record below.

Moreover, a decision by another federal district court that was supplied to this Court recently by counsel for one of the defendants reaches the opposite conclusion. *See Independent Petrochemical Corp.* v. *Aetna Casualty & Surety Co.*, Civ. Action No. 83-3337 (D.D.C. Sept. 7, 1988), *reprinted in* 2 Mealey's Insurance Litigation Rep., F-1 (Sept. 14, 1989). There the court held, applying Missouri law, that the renewal or extension of an insurance policy constitutes a new policy that provides new limits of coverage unless the express language of the endorsement clearly and unambiguously establishes a contrary intention (slip op. at 125-27). Where, as here, the extension endorsement does not contain any reference to coverage limits, but charges an additional premium based on a further period of coverage, the presumption is that new limits are provided for the additional period (*id.*, at 127). Judge Stanton erred in failing to so hold here.

CONCLUSION

For all of the reasons set forth above and in Diamond's main brief, Diamond respectfully submits that (a) the judgment of the Superior Court with respect to coverage for environmental damage should be reversed, (b) the judgment 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, (c) defendants' cross-appeals should be denied, and (d) Diamond should recover from defendants the costs of this appeal.

Dated: May 11, 1990

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