A-694-89T1

Superior Court of New Jersey

APPELLATE DIVISION

DOCKET NO. A-694-89T1

DIAMOND SHAMROCK CHEMICALS COMPANY,

Plaintiff-Appellant/Cross-Respondent,

vs.

THE AETNA CASUALTY AND SURETY COMPANY, et al.,

Defendants-Respondents/Cross-Appellants.

CIVIL ACTION
DOCKET NO. C-3939-84
ON APPEAL FROM FINAL JUDGMENT OF
THE SUPERIOR COURT OF NEW JERSEY,
CHANCERY DIVISION, MORRIS COUNTY
SAT BELOW: REGINALD STANTON, A.J.S.C.
WITHOUT A JURY

BRIEF OF DEFENDANTS-RESPONDENTS/ CROSS-APPELLANTS

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PROCEDURAL STATEMENT

Diamond Shamrock Chemicals Company ("Diamond Shamrock" or "Diamond") filed suit in September of 1984, seeking insurance coverage for claims relating to 1) contamination of its former manufacturing site at Lister Avenue in Newark, New Jersey ("Newark dioxin claims"), and 2) the Agent Orange class settlement ("Agent Orange claims"). Pa 2356. This joint brief of defendants, like Diamond's brief, addresses the issues raised by these claims in two essentially independent parts. In addition to the issues raised by Diamond's challenge to the evidentiary rulings and the final decision and judgment of the trial court, certain defendants have cross-appealed from the court's rulings on pretrial motions.[1] These motions are described below.

Certain excess insurers moved for summary judgment declaring that the "batch clause" provision in the insurance contracts establishes 133 occurrences, *i.e.*, the number of lots of Agent Orange undisputedly sold to the government. Finding material fact issues, the trial court denied these motions by Order dated August 4, 1987. Da 685.

On October 2, 1987, the trial court held that New York law governed the application of the insurance policies to the Agent Orange claims because of the substantial nexus between the contracts and New York. Pa 501-02. The trial court nevertheless held that New Jersey law controlled the application of these same contracts to the Newark dioxin claims. Pa 497. The trial court also denied most defendants an opportunity to present evidence at trial on whether the Agent Orange claims were uncovered losses under language excluding damage or injury incident to war, granting plaintiff's summary judgment motion on this defense. Pa 527.

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[1] In accordance with the special civil appeals scheduling order entered in this case, Addendum A indicates the extent to which particular defendants join in one or more of the points argued in this joint brief.

Defendants later moved for summary judgment on the Agent Orange claims because Diamond concededly could not present proof of injury as required under the policies. Defendants also moved for summary judgment declaring that environmental response costs do not constitute "property damage" under the insurance contracts. The trial court denied these motions and granted Diamond's cross-motion by Order dated February 4, 1988. Da 1057-61.

PART I: NEWARK DIOXIN CLAIMS

PRELIMINARY STATEMENT

After a twenty day nonjury trial, the Superior Court, Stanton, A.J.S.C., concluded that for eighteen years Diamond Shamrock Chemicals Company had continuously and deliberately polluted the air, the land, and the water on and around the chemical plant on Lister Avenue in Newark. Diamond polluted, the court found, because releasing its waste into the environment cost less than modifying its processes or maintaining its equipment, Pa 16-19, and because Diamond thought it could get away scot-free. Pa 15-16, 40-41.

Diamond may not have acted out of any affirmative, malevolent desire to harm the environment. But Diamond knew it was polluting. As the trial court held,

> Diamond did know the nature of the chemicals it was handling, it did know that they were being continuously discharged into the environment, and it did know that they were doing at least some harm.

Pa 40. Diamond also knew that its pollution was illegal:

> Diamond unequivocally knew that at least some of this contaminating activity violated the then existing statutory prohibitions against discharges into the Passaic River. It also should have known that much of its activity violated common law rules against nuisance, although litigation to enforce common law nuisance rules did not prove to be an effective way to protect the environment.

Pa 40. The only thing Diamond did not know was that eventually society would hold it accountable. Pa 40.

These findings of fact are sufficient, in and of themselves, to support the judgment below. No general liability policy, whether

written on an "occurrence" or an "accident" basis, with or without a pollution exclusion, protects an insured against the legal consequences of property damage or bodily injury that the insured expected or intended to result from its intentional acts. Pa 41. Diamond itself does not dispute this fundamental conclusion of law.

To prevail on its appeal, therefore, Diamond must establish that the trial court's finding of fact that Diamond deliberately discharged into the environment material it knew to be harmful is "'so wholly insupportable as to result in a denial of justice . . . .'" *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474, 483-84 (1974) (quoting *Greenfield v. Dusseault*, 60 N.J. Super. 436, 444 (App. Div.), *aff'd*, 33 N.J. 78 (1960)). To satisfy that burden, which Diamond's brief never even acknowledges, Diamond would have to demonstrate that the trial court's conclusion could not "'reasonably have been reached on sufficient credible evidence present in the record,' considering 'the proofs as a whole,' with due regard to the opportunity of the one who heard the witnesses to judge of their credibility." *Close v. Kordulak Bros.*, 44 N.J. 589, 599 (1965) (quoting *State v. Johnson*, 42 N.J. 146, 162 (1964)). *See also Bonnco Petrol, Inc. v. Epstein*, 115 N.J. 599, 607 (1989). Diamond fails to bear its burden on appeal.

To the extent that Diamond attacks the basis for the court's finding of fact, it does so only by calling this Court's attention to snippets of self-serving testimony, not to "the proofs as a whole." *Close v. Kordulak Bros., supra*, 44 N.J. at 599.[2] Diamond also deliberately distorts both the record of the proceedings below and the opinion of the trial court.

Diamond's stratagems are transparently disingenuous. Diamond suggests, for example, that pique caused Judge Stanton

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[2] Diamond's Appendix contains excerpts of trial testimony totalling only 152 pages. The trial transcript consists of 3,944 pages. At most, Diamond's discussion of the evidence before the trial court establishes that there was a triable issue of fact.

erroneously to deny it coverage for damage caused by an explosion at the Lister Avenue plant, an incident for which Diamond claims coverage is unquestionable. Pb 4-5, 48-49. Diamond fails to inform this Court, however, that it argued below that the 1960 explosion did not cause damage and that all of the Newark dioxin claims were caused by a single occurrence, *i.e.*, the introduction and migration of dioxin in the soil, air, and water at or adjacent to 80 Lister Avenue. Da 715. Similarly, Diamond does not tell this Court that in support of that position, Diamond elicited and presented to the trial court deposition testimony from its former plant manager that the fire that accompanied the 1960 explosion instantaneously consumed any dioxin that might have escaped. Da 644-45.[3] Diamond simply failed to prove that the 1960 explosion caused any covered property damage.[4] Diamond's claim that the trial court's denial of coverage turned New Jersey law "on its head", Pb 48, more appropriately describes Diamond's argument, which tries to turn on its head the case Diamond presented to the trial court.

Faced with the failure of the record to support its attack on the decision below, Diamond seeks refuge in public policy. Diamond claims that if it cannot transfer to its insurers the costs that it previously transferred to society at large by appropriating the environment for its own profit-making purposes, municipalities and taxpayers throughout New Jersey will suffer.[5] Defendants believe that this claim has been thoroughly and adequately addressed in the brief of *amicus curiae*

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[3] The same employee presented similar testimony at trial. Da 1476.

[4] Diamond, like any insured, bears the burden of establishing the existence of covered damage caused by an accident or occurrence to support its claim under its policies. *Hartford Accident & Indemnity Co. v. Aetna Life & Casualty Ins. Co.*, 98 N.J. 18, 26 (1984); *Williams v. Bituminous Casualty Corp.*, 51 N.J. 146, 151 (1968).

[5] Diamond, of course, is not a municipality; it is a corporation that the trial court concluded deliberately harmed the environment because it could make more money if it did so. Public entities, presumably, display a greater sense of their obligation to act as stewards for the future.

Insurance Environmental Litigation Association ("IELA Br."). More importantly, defendants submit that Diamond's emotional arguments have no place in this appeal. *Broadwell Realty Services, Inc. v. The Fidelity & Casualty Ins. Co.*, 218 N.J. Super. 516, 523 (App. Div. 1987). As the Court said in *Broadwell, id.* at 523,

> Whatever the relative merits of the competing public policies identified and advanced by the parties, we perceive no legal principle that would permit us to circumvent what the contract says. . . . Our role is merely to interpret the language of the insurance contract.

"The language of the insurance contract" applied to the facts found by the trial court on the basis of "'credible evidence present in the record,' considering 'the proofs as a whole,'" *Close v. Kordulak Bros., supra*, 44 N.J. at 599, requires that the judgment below be affirmed.

STATEMENT OF THE FACTS

1. THE POLLUTION AT LISTER AVENUE

A. The Lister Avenue Site Is Contaminated By A Large Number Of Toxic Chemicals, The Presence Of Which Requires Remedial Action.

From the time that it acquired the Lister Avenue facility in 1951 until the plant ceased operations in 1969, Diamond manufactured a variety of herbicides, pesticides and miticides, including DDT, chloride, 2,4-D, 2,4,5-T, chlorophenol, chlorine, caustic soda, hydrochloric acid, sulfuric acid, dichlorophenol and methanol. Da 470-71, 1114-15, 1164. All of these substances were considered economically valuable because, applied properly, they kill targeted organisms -- their utility lies in their toxicity. Da 1116-20.

Diamond's deliberate discharge during the manufacture of these products caused the site to be contaminated by an extraordinary

range of highly toxic chemicals. Literally dozens of EPA "priority pollutants" have been found on the site at action levels.[6] The soil samples taken on the site disclosed contamination by toluene, xylenes, chlorobenzene, DDT, DDD, 2,4,5-T, 2,4-D, hexachlorobenezene and dioxin. Ground water samples produced similar results. See Pa 1116-18, Pa 1267-97. Deputy Commissioner Catania of the Department of Environmental Protection testified that even if there had been no dioxin on the site, the presence of the herbicides, pesticides, and PCBs would have required that the site be cleaned up. Da 1153-54, 1156-57, 1159-62. The Administrative Consent Order that Diamond signed requires cleanup of all of these substances. Da 1153.

B. Diamond Routinely And Deliberately Discharged A Large Variety Of Waste Chemicals Into The Lister Avenue Environment.

Diamond does not seriously contest the trial court's extensive findings that for the entire time it operated the Lister Avenue plant, Diamond intentionally discharged waste chemicals into the Passaic River with full knowledge that its actions were illegal.[7] Pa 15-17 Diamond does, however, challenge the trial court's conclusion that its attitude toward discharges into the air and ground at Lister Avenue was equally cavalier. Diamond's objections are frivolous.

The trial court found that

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[6] As the trial court explained, "An action level is a quantity large enough to make remediation efforts mandatory." Pa 17-18.

[7] Diamond attempts to minimize its discharges to the river by asserting that its use of an alarm system to allow illegal discharges to be stopped before state inspectors could observe them ceased in 1956. Pb 5 n.3. In fact, however, the evidence shows that the Diamond plant manager took steps in 1956 to make the alarm system even more effective, and that its use continued well after that time. Da 383, 1466-69. The evidence also shows that corporate management knew of the plant manager's use of an alarm system to protect illegal discharges to the river. Da 1469-70.

> [h]ousekeeping at the Newark plant ranged from inadequate to poor throughout the entire period of its operation by Diamond. The conduct of processing operations was frequently sloppy. Spills of liquid and solid chemical products and wastes were literally continuous during every day of the plant's operation. Some pipes were always leaking.
>
> [F]rom 1951 to 1969 Diamond had a mindset and a method of conducting manufacturing operations which were destructive of the land, air and water resources of the environment.

Pa 17-18. The only valid criticism of these conclusions that the record permits is that they are vastly understated. The record establishes that throughout Diamond's operation of the plant, the facility at Lister Avenue literally oozed or gushed contaminants from almost every possible point.

From Diamond's acquisition of Lister Avenue in 1951 to 1960, Diamond routinely vented TCP, 2,4-D, 2,4,5-T and ester directly to the atmosphere. Following the rebuilding in 1960, Diamond continued to vent portions of its TCP production process directly to the atmosphere. Da 471-72, 474-75, 1137-38, 1198-99, 1434-35, 1477. Diamond's manager of scientific services, James Worthington, conceded that pollutants including but not limited to dioxin entered the environment through this routine process of atmospheric venting. Da 556-57.

As the trial court observed, leaks and spills were a routine occurrence within the plant buildings. Dangerous chemicals leaked from pipes, sumps, storage tanks, filters, valves, taps, centrifuges and drums. Pa 2259-60; Da 1147-50, 1176, 1241-48, 1437-39, 1445, 1448-50, 1458-61, 1478-79. When a pipe developed a leak during the processing of a chemical batch, the pipe would be repaired with tape in order to maintain the process. When these repairs did not stop the leaking, Diamond merely roped the area off so no one would walk by it. Da 1253. Indeed, Diamond routinely issued rubber raincoats and rubbers to plant visitors to protect their clothing against the ever present

noxious chemicals on the floors and in the atmosphere inside the plant. 1077-78, 1081. Employees tracked acid from the working areas into their own locker rooms. Da 1439-40. The materials released into the plants were so corrosive and powerful that the cement floors had to be reconstructed each year. Pa 39-40.[8]

Diamond attempts to convince this Court that the soil contamination for which it is responsible at Lister Avenue resulted solely from leakage of minute amounts of dioxin to the soil "through cracks in the floors of the process buildings, concrete sumps and the industrial sewer. . . ." Pb 11.[9] Ironically, however, the report of its

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[8] Diamond objects to the following statement made by the trial court about replacement of the floors at Lister Avenue:

> Floors were replaced so that people could walk without falling and hand trucks could be wheeled where needed, but nothing was done to mitigate the polluting effect the spills and leaks had upon the physical environment.

Pa 40. Diamond contends that this statement, which it reads as saying "that the *only* purpose for the repair or replacement of floors was to permit ease of movement", is contradicted by record testimony that the regular replacement of corroded floors was "plainly . . . to preserve the ability of the floors to contain spills and leaks." Pb 40 n.27. The record, however, contains credible testimony that the chemicals routinely spilled onto the concrete surfaces so badly corroded those surfaces that movement over them became difficult or impossible. Da 534, 1437-38, 1454. Moreover, the appendix materials cited by Diamond in support of its contention simply establish that during one of the floor resurfacings, Diamond pitched the floor toward the center of the building and put in small open drainage trenches. The purpose of these modifications was to allow the toxic chemicals on the floor to be washed into drainage ditches that ran directly to the river. Pa 2325-26. Diamond apparently even now fails to understand that washing chemicals directly into the Passaic River was doing "nothing . . . to mitigate the polluting effect the spills and leaks had upon the physical environment." Pa 40.

[9] Diamond's effort to focus the Court's attention solely on dioxin contamination, as opposed to contamination by DDT and other pesticides as well as the wide range of additional priority pollutants found on the site, *see* pp. 6-7, *supra*, appears to be part of a strategy to obtain sympathy as an "innocent" enterprise that is being forced to pay an enormous cost because of public concern over the effects of the presence of dioxin in concentrations of one part in a billion, even though dioxin's harmfulness to humans is open to question. *See, e.g.*, Pb 9, 11.

(footnote continued)

expert to which Diamond refers in support of this claim states as follows:

> Most of the plant's process facilities were susceptible to accidental releases through various piping connections, valves, pump seals, cleanouts, sampling ports, and relief valves. The effect of these spills was to spread chemical components onto the floors of buildings, or onto the adjacent ground, and in drains, sumps, and sewers.

Pa 1530 (emphasis added). This statement alone would be sufficient to support the trial court's finding that

> During that entire period [1951 to 1969], there were also constant spills and leaks onto the factory floors and the outdoor ground surfaces of the Newark plant.

Pa 39 (emphasis added).

Although the "action level" for dioxin is one part per billion, the levels of dioxin found at Lister Avenue ranged as high as 19,500 parts per billion. Pa 1272. Diamond knew that its waste stream contained a toxic material even before it knew that material was dioxin, *see* pp. 13-15, *infra*. Diamond had the capacity to measure dioxin at that level of concentration at least by the early 1960s. Da 1187-89. It also had the knowledge to reduce the dioxin content of its product and its waste below that level but chose not to do so for economic reasons. Da 1, 3, 216-21. Other manufacturers, of which Diamond was aware, modified their processes to eliminate or greatly reduce dioxin contamination as early as the late 1950s. Da 1, 216-17.

Diamond's expert does not stand alone. The record is replete with testimony that Diamond continuously and knowingly discharged toxic chemicals of all sorts directly onto the ground.[10] Chemicals routinely spilled onto the ground during the manufacturing process, Da 1481-83, or were washed onto the ground when equipment was cleaned. Da 1204. Leaks from the west side of the process building and material released from pipes, sumps, catch basins and storage tanks went directly into the ground. Da 1194-96, 1450-1455. Chemical storage tanks and railroad cars used to ship products were periodically washed out, transferring the residues from their containers to the ground. Da 1141-43, 1172, 1439-46, 1475-76, 1478-79.[11]

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10 Hiding behind word games, Diamond seeks credit for the fact that "[t]he Superior Court did not find and there is no evidence that chemicals were intentionally disposed of on the plant site by Diamond." Pb 13. Diamond apparently means by this statement that there was no finding and no evidence that Diamond established a designated waste disposal area on site. *See* Pb 12. That statement is true. When Diamond accumulated waste chemicals in containers, it removed any identifying signs from the containers and sent the toxic wastes off to be disposed of as part of its ordinary garbage. Da 157-58, 1140, 1192, 1241-42, 1247-48, 1442-1444. In one particularly egregious incident, Diamond placed dioxin filters in unmarked drums and disposed of them with the plant's routine garbage despite a memorandum that referred to dioxin and related compounds as "obnoxious organics" and stated: "The entire filter operation will be handled as if radioactive and the residue burned in our stack." Da 157-58, 576, 1181-82.

11 Arthur Scureman, one of Diamond's former employees, testified as follows about routine and regular releases into the environment of molton hot TCB (a highly corrosive chemical) which Diamond received in railroad tank cars.

> They had the top of the railroad car open, and it used to snow out of the railroad car. And they used to put a tarp or something to keep it down from going all over the place because you have to vent it when it's under heat.
>
> Q. What would happen to you if you came in contact with that material?
>
> A. You'd be burnt.
>
> Q. Now, were there ever times when that material escaped this tarp that was over it?

(footnote continued)

Miscellaneous leaks, discharges of DDT to clear pipes, breaks, ruptures of drums, tracking of debris by employees were common and contributed to the contamination of the soil.[12] Da 1149-50, 1183, 1200-06, 1431, 1462. These sources of ground contamination were obvious, and there were always signs of materials on the ground about the plant. Da 1243. Senior plant personnel understood full well that the operations of the plant caused pollution of the soil. Da 1492.

In light of the record below, Diamond's claim now that it did not know at the time that its activities routinely fouled the land is literally incredible. The trial court properly refused to believe Diamond's story.

> A. It was all over, it was on top, on the railroad car, and we used to have to go there and shovel it up from the ground. When it would come down, so much would be on the ground. We used to shovel it up and take it into the new building where the autoclaves was. They had a storage tank, and we used to take it up on the third floor and dump it in the tank."

Da 1462.

12 Diamond's expert testified that one source of contamination of the soil by dioxin was river flooding. Da 1202-03; Pa 1530. This testimony demolishes Diamond's claim that

> [t]here is no showing that any of Diamond's discharges to the River had anything to do with the soil and ground water contamination for which Diamond seeks coverage in this suit.

Pb 5. Even if Diamond's inappropriately narrow view of the underlying environmental action were correct, its expert's own testimony would support the trial court's consideration of Diamond's deliberate and knowingly illegal pollution of the river in determining whether Diamond should be considered to have expected or intended the environmental harm at issue in the underlying claims.

C. Diamond Knew That The Substances That It Was Discharging To The Environment Were Harmful.

As defendants have previously explained, Diamond used the Lister Avenue plant to manufacture herbicides, pesticides and miticides.[13] Diamond's phenoxy herbicides, such as Agent Orange, were especially potent, a fact well-known to Diamond. Pa 1116-17, 1171. For that reason, their labels warned users that skin contact with the products should be avoided and that improper introduction of the products into the environment could have harmful consequences. Da 476-78. Diamond's senior plant personnel knew that the discharges were dangerous. Da 1463-64, 1484.

In the early 1950s, Diamond knew that something in the chemical residues it allowed to slosh around at Lister Avenue was a

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[13] Diamond points out that it stopped manufacturing DDT before the long term environmental consequences of use of that pesticide became generally known. Pb 12 & n. 5. Based on this fact, Diamond argues that it did not know and had no reason to know that its release of DDT into the water and ground at Lister Avenue would cause environmental damage. What is at stake here, however, is not Diamond's belief as to the safety of DDT as properly applied. The DDT discharges at issue here were uncontrolled and undiluted releases of DDT and related acids directly to the Passaic River and to the ground of the Lister Avenue plant. Da 1240, 1429-30, 1432. At times, so much DDT was released to the river that the DDT solidified into "mountains", described by one former employee as "like an ant hill, one of these huge ant hills you see in Africa." Da 1433. Diamond sent employees out at night to "chop [the DDT] out and put the chunks into old cardboard drums," *id.*, so the "mountains" would not rise above the surface at low tide, thus alerting passing boats to Diamond Shamrock's disposal practices. Da 1249-50, 1432-33. Similarly, the DDT steamed out of pipes on the plant grounds would occasionally solidify in quantities large enough to be shoveled up and placed into anonymous containers for disposal with routine plant garbage. If there were any doubt that Diamond understood that release of DDT to the environment in this manner was harmful, the trial court would have been fully justified in inferring that knowledge based solely on the evidence of Diamond's furtive disposal efforts.

potent chloracnegen.[14] Although the particular causative agent had not been identified, by the end of 1955 Diamond knew that an impurity in its TCP, a principal constituent of its chlorinated herbicides, was the chloracnegen.[15] Da 225-26. Diamond also knew, by trial and error experimentation, that it could reduce the amount of the chloracnegenic impurity by reducing the temperature in the reaction used to produce TCP. Diamond chose not to take that step because higher reaction temperatures yielded greater productivity and more profit. Da 401-03, 564-66, 571, 584.[16] Between 1957 and 1959, researchers had identified dioxin as the chloracnegen, Da 219, and a Diamond representative who visited a German manufacturer that had eliminated chloracne in the plant had reported back to his superiors that "dioxine is so active as to be a chemical warfare chemical." Da 1.

In its statement of facts and in portions of its argument, Diamond cites or quotes from findings in the trial court's opinion to the effect that Diamond did not know that dioxin was toxic. *E.g.*, Pb 8-9, 41.[17] Diamond uses these statements in support of its claim that it did

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14 Chloracne is an eruptive skin condition described by a doctor from Diamond's home office who visited Lister Avenue in 1955 as extremely disfiguring and a serious social disability. Da 561.

15 Diamond also knew that to reduce the incidence of chloracne, "[t]he causal factors must be reduced to a minimum; . . . spillage, leaks, fumes . . . ." Da 558. Diamond's industrial hygienist recommended that there was no point in consulting with a medical specialist unless the company was willing to make physical changes at the plant to reduce environmental contamination. Da 562. Diamond did not make any changes.

16 Throughout its manufacture of TCP at Lister Avenue, Diamond chose not to follow both internal recommendations and recommendations of other manufacturers as to ways of reducing the chloracnegenic impurities in its TCP. Da 1, 3. Diamond's decision to place profit ahead of safety affected both the workers and environment at Lister Avenue and its final product.

17 By an interpolation into a quotation from the trial court's opinion, Diamond suggests that dioxin was not identified and detected until 1965. Pb 9. As the evidence recited above makes clear, this suggestion, which is inserted into a quotation from the trial court's opinion without any justification in the language of the passage quoted or any other portion of the opinion, has no grounding in

(footnote continued)

not know and had no reason to know that its discharge of chemical wastes containing dioxin harmed the environment. All of the statements on which Diamond relies, however, refer to the state of knowledge about dioxin as that substance was encountered in herbicides which were dispensed "into the environment in controlled agricultural applications." Pa 8. In light of Diamond's awareness of the consequences of its uncontrolled discharge of dioxin-containing substances into the Lister Avenue environment, and in light of Diamond's obvious knowledge that the other chemicals it routinely released at Lister Avenue were, and were intended to be, toxic, the fact that Diamond believed that those substances could be safely used "in controlled agricultural applications" leaves unaffected the trial court's conclusion that "Diamond did know the nature of the chemicals it was handling, it did know that they were being continuously discharged into the environment, and it did know that they were doing at least some harm." Pa 40.

II. DIAMOND IS A SOPHISTICATED AND POWERFUL INSURED THAT PURCHASED INSURANCE POLICIES WITH A POLLUTION EXCLUSION WITH FULL UNDERSTANDING THAT THOSE POLICIES DO NOT COVER LIABILITY ARISING OUT OF GRADUAL POLLUTION

Based on Diamond's "financial resources, the skills of its risk management employees and the expertise and experience of its brokers, . . . " the trial court found that "Diamond was a highly knowledgeable purchaser of insurance with a substantial amount of bargaining power in the insurance markets." Pa 24. After considering the evidence "in

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the evidence. Moreover, even if Diamond had lagged so far behind the rest of the chemical industry that it did not know the name dioxin until 1965, that fact would be irrelevant. Diamond did know from the early 1950s on that an impurity introduced into its process and released into the Lister Avenue environment by its housekeeping practices caused severe chloracne. Diamond knew, therefore, that the substance it was discharging into the environment was harmful, regardless of whether it knew that substance's name.

its totality", the trial court also found "that in purchasing the policies in question Diamond understood and expected that the pollution exclusion barred coverage for the kinds of claims which have arisen out of the operation of the Newark plant." Pa 36. The trial court's findings of fact are amply supported by credible evidence in the record.

A. Diamond Was A Highly Knowledgeable Purchaser Of Insurance With A Substantial Amount Of Bargaining Power In The Insurance Market.

The trial court heard live testimony from Diamond's present risk manager and from insurance brokers and others who have worked with Diamond's insurance personnel. The trial court also received into evidence extensive deposition testimony from individuals familiar with Diamond's internal risk management capacity. All of these witnesses testified to the skill, knowledge and sophistication of Diamond's insurance program and personnel. Da 449, 1111-12, 1272.

In addition, Diamond retained the services of the largest and most sophisticated insurance brokers in the world. Its domestic broker, Alexander & Alexander, was an acknowledged expert in the insurance issues relevant to chemical companies as a result of its representation of other major chemical manufacturers. Da 465-67, 1090-91, 1094, 1105-06. In the London market, where Diamond placed much of its excess insurance, Diamond also retained Sedgwick Forbes, an equally substantial and accomplished broker. Da 1283-84, 1288, 1290-91.

These skilled personnel, both brokers and employees, produced complex, highly sophisticated insurance programs. Diamond's brokers and risk managers explored various markets and negotiated premiums, service, deductibles, loss responsive plans and other methods of insuring that Diamond received the best coverage available. Da 4-36, 146-47, 421-22, 465-66, 506-08, 1087-89, 1091-92, 1099-100, 1105. Both Alexander & Alexander and the Sedgwick firm solicited competitive bids from various carriers on Diamond's behalf. The resulting insurance program involved deductibles,

retrospective premiums and fronting policies, among other devices. Da 1418-19.

Diamond routinely met with Alexander & Alexander to prepare specifications for Diamond's insurance coverage. Da 182-86, 517-18, 1095-96. These specifications set forth all of the terms, conditions, extensions and exclusions that were to be included in Diamond's primary or excess coverage. Da 426-27, 506-09, 1097. On occasion, Diamond prepared complete policy language that its insurers accepted and adopted. Da 1087-89. Diamond also negotiated non-standard clauses regarding notice of claims, settlement of claims, the dispersal of herbicides for their intended purposes, and the inclusion of the "batch clause"[18] in its insurance policies. Da 459-61, 1086-89, 1097-100, 1225-27, 1490-91. When Diamond opted for standardized language, it did so because that language was established and well understood by both insureds and insurers. Da 1103-04.

Diamond itself went into the insurance business when it could not find a satisfactory market for its property insurance needs. Greenstone Insurance Limited, a captive insurer created by Diamond, engages in a broad range of insurance activities and either insures or reinsures certain aspects of Diamond's business. Diamond's present risk manager as well as his predecessor have served as Greenstone's president. Da 537-38, 1358, 1368-69, 1418.

B. Diamond Understood And Expected That The Pollution Exclusion Barred Coverage For The Kinds Of Claims Which Have Arisen Out Of The Operation Of The Newark Plant.

The trial court found that both Diamond's management and its brokers understood that the pollution exclusion contained in Diamond's policies eliminated any coverage for claims arising out of gradual

18 *See* pp. 80-82, *infra*.

pollution. Pa 34. The testimony before the court fully supports this conclusion. Pa 1755; Da 445-48, 511-16, 1387-88.[19]

After the pollution exclusion became part of its policies, Diamond and its brokers repeatedly considered obtaining environmental impairment liability ("EIL") coverage. The record before the court establishes that EIL insurance became available in 1974 to provide coverage for liability arising out of gradual pollution, the kind of coverage the pollution exclusion eliminated. Da 37-45, 1257, 1263-66, 1270. Alexander & Alexander recommended that Diamond purchase EIL coverage, a recommendation it would not have made if it viewed EIL coverage as duplicative of the coverage afforded by the policies at issue here. Da 37- 45, 462-64. Diamond's risk manager recommended to the audit committee of the board of directors that Diamond purchase EIL coverage. Pa 1762; Da 1389-92. Diamond, however, chose to remain self-insured, as it knew it had been for

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19 Diamond criticizes the trial court for relying on "a few non-probative statements by Mr. Purdy, Diamond's former risk manager, and by Mr. Greening, Diamond's former broker . . . ." Pb 34 n.25. Diamond does not explain why the clear testimony of these individuals is "non-probative", other than to indicate that Diamond wishes they had said something else. Mr. Purdy unambiguously testified to his understanding at the time that the pollution exclusion was first added to the Diamond Shamrock policies that it excluded gradual pollution claims. Pa 2030. Similarly, Mr. Greening, Diamond's broker, testified that at the time the pollution exclusion was introduced, he told Mr. Purdy "that he had coverage for sudden accidental pollution and not gradual pollution, simply stated." Pa 2023. *See* Pa 2022.

Diamond's attack on this testimony, *see* Pb 34 n.25, shows only that Mr. Purdy could not recall the specific factors that caused Diamond to consider obtaining environmental impairment liability insurance several years after the introduction of the pollution exclusion. *See* Pa 2031. Defendants note that the testimony on which Diamond relies occurs on pages 54 and 56, respectively, of the deposition of Mr. Purdy. *See* Pa 2030-31. Diamond omits page 55, in which the topic of the questioning shifted from Mr. Purdy's understanding of the pollution exclusion at the time it was introduced to his consideration of environmental impairment coverage when that coverage first became available. *See* Da 513. Similarly, the other Purdy statement on which Diamond relies, Pb 34 n.25, has to do with whether response costs are covered by general liability policies, not with the meaning of the pollution exclusion. *See* Pa 2032.

years. Da 439-41, 516, 1413-14. The trial court properly considered all of this evidence in support of its conclusion that Diamond knew from 1971 on that it had no general liability coverage for claims arising out of gradual pollution and that it deliberately decided not to purchase insurance that would provide that coverage. Pa 34-35.

Finally, the trial court found that contrary to its "unfailing practice from 1951 to date" of giving prompt notice to its insurers, Diamond did not give its insurers notice "when significant claims involving gradual pollution of the environment began to be made against Diamond with respect to various facilities in the mid-1970's and early 1980's . . . ." Pa 35-36. The record amply supports the court's conclusions both as to Diamond's standard operating procedure for possibly covered claims, Da 416-18, 519-23, 1079-80, 1110, 1382-83, 1385-86, and as to Diamond's failure to follow that practice with regard to claims arising out of gradual pollution. Da 227-382, 479-99, 539-45, 548-55, 1399-412. Based on this conduct, the court properly inferred that Diamond knew that it did not have coverage for claims arising out of gradual pollution.[20]

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[20] Contrary to Diamond's suggestion, the trial court did not find "that Diamond's conduct, which was at worst inconsistent, works a forfeiture of Diamond's insurance coverage for environmental damage at its former Newark plant . . . ." Pb 33. Rather, the trial court relied on the evidence of Diamond's conduct as one portion of the evidentiary facts from which it concluded that Diamond knew that it did not have coverage for any claims arising out of gradual pollution, including the Newark claims. The trial court did not decree that Diamond must forfeit coverage; it simply refused to grant coverage that Diamond had deliberately chosen not to buy.

ARGUMENT

III. DIAMOND HAS NO COVERAGE FOR THE NEWARK DIOXIN CLAIMS UNDER ANY OF THE INSURANCE POLICIES BECAUSE DIAMOND EXPECTED OR INTENDED THE HARM FOR WHICH IT IS NOW BEING HELD ACCOUNTABLE

> Diamond did know the nature of the chemicals it was handling, it did know that they were being continuously discharged into the environment, and it did know that they were doing at least some harm.

Pa 40. Based on this finding of fact, the trial court held that

> Diamond's knowing and routine discharge of contaminants over a period of 18 years makes it necessary to conclude that the resulting injury and damage was expected from the standpoint of the insured within the meaning of the occurrence basis policies which were in force from 1960 to 1970.[21]

Pa 41. Based on that same finding of fact, the trial court also held that there was no coverage under the pre-1960 policies, because

> [t]he knowingly polluting conduct which precludes coverage under the occurrence basis policies which were in force from 1960 to 1970 also precludes

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21 Occurrence basis policies with essentially the same language were in effect from 1960 through the end of Diamond's coverage. Accordingly, the court's ruling on the 1960-1970 policies applies equally to the policies in effect through 1983. Moreover, as the trial court also held, the court's conclusion that Diamond intentionally discharged contaminants at Lister Avenue bars coverage because of the pollution exclusion in effect after 1970 regardless of whether the much-disputed "sudden and accidental" language in that exclusion is given a temporal or a non-temporal meaning. *See* Pa 41-42.

> coverage on any accident basis policy or under any theory of accident.

Id.

Diamond Shamrock does not contest the trial court's conclusion that if damage was expected from the standpoint of the insured within the meaning of the occurrence policies, it was not "caused by accident" within the meaning of the accident policies. *See* Pb 38, 44-45 n.28. Rather, Diamond contends that the trial court's finding that it expected environmental damage at Lister Avenue "is simply wrong as a matter of law," Pb 41, and that the trial court erroneously failed to apply a so-called "subjective test" to determine whether Diamond expected or intended that damage would result from its deliberate conduct. Pb 42-47. Diamond's attack on the factual basis for the court's conclusion either distorts or ignores both the trial court's opinion and the record below, and its legal argument is both irrelevant and wrong.

Diamond's principal assault on the trial court's findings of fact consists of almost a full page of its brief devoted to quotations from the trial court's opinion. Pb 41. With one exception, [22] these quotations

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[22] Diamond also recites the trial court's statement that "there is a sense in which some of this migration [of pollutants from the Lister Avenue plant site to other properties] was accidental or fortuitous, at least as to the specific mechanisms by which it occurred." Pb 41. Diamond omits, however, to continue the quotation to present fairly the trial court's reasoning. The remainder of the paragraph quoted by Diamond reads as follows:

> Some of it was very discrete - for example, the transportation of scrap metal from the Newark plant to the Brady Iron Works in 1981 which resulted in the contamination of the Brady property. However, given the continuous and large-scale pollution of the Newark plant site by the knowing conduct of Diamond, substantial off-site migration was inevitable. In my judgment, all of the migration should be treated as non-accidental and as being expected from the standpoint of the insured.

(footnote continued)

recite the trial court's conclusion that Diamond had reason to believe that its herbicides, including Agent Orange, were safe for their intended uses, dispersal "into the environment in controlled agricultural applications." Pa 8. As explained above, that conclusion neither conflicts with nor undermines in any way the trial court's finding that Diamond knew that the substances it discharged into the environment in an uncontrolled manner were toxic and hazardous. *See* pp. 13-15 & n.13, *supra*.

In addition, Diamond argues that the trial court improperly based its conclusion that Diamond knowingly polluted solely on a finding that "Diamond's management accepted the spills and leaks as part of the normal routine of operating a chemical manufacturing plant . . . ." Pb 39, quoting Pa 39. Diamond contends that the only way to get from that finding to the court's conclusion is through a chain of unsupported inferences. Pb 40. This argument rests on Diamond's distorted description of the trial court's opinion combined with its unjustifiable refusal to acknowledge the record on which the trial court based its findings.

The trial court's opinion sets forth the facts that support the ultimate conclusion to which Diamond objects in the paragraphs immediately after the statement quoted in part by Diamond. *See* Pa 39-40. Those facts, in pertinent part, are that:

Pa 42. The trial court correctly concluded that Diamond's failure to anticipate the specific mechanism by which the contamination it knowingly introduced into the environs of Lister Avenue might spread to other areas does not make that spread "unexpected". Moreover, even if the spreading of the contamination could be considered unexpected, the law is clear that Diamond cannot transfer to its insurers the cost of responding to property damage it expected to occur as a result of its deliberate acts even if the extent of the property damage exceeds its expectation. *See, e.g., Lyons v. Hartford Insurance Group*, 125 N.J. Super. 239, 246 (App. Div. 1973), *certif. denied*, 64 N.J. 322 (1974); *City of Newton v. Krasnigor*, 404 Mass. 682, 536 N.E.2d 1078, 1080 (1989).

— "Trenches and sumps frequently backed up and overflowed onto ground surfaces."

— "Chemical stains and deposits on ground surfaces throughout the site were clearly visible to the naked eye."

— "Visitors to the plant had to wear overshoes and slickers to protect their clothing."

— "Floors were replaced so that people could walk without falling and hand trucks could be wheeled where needed, but nothing was done to mitigate the polluting effect the spills and leaks had upon the physical environment."

— "Diamond did know the nature of the chemicals it was handling, it did know that they were being continuously discharged into the environment, and it did know that they were doing at least some harm."

Pa 39-40.

Each of these findings of fact is amply supported by credible evidence in the record considered as a whole. *See* pp. 6-15, *supra*. Taken together, they more than fill the artificial gaps Diamond attempts to create in the trial court's reasoning.[23]

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[23] Contrary to Diamond's claims, Pb 39-40, the trial court had no need to infer that the toxic chemicals routinely discharged by Diamond would reach the ground or that Diamond knew that those chemicals were toxic. Rather, the court found those facts based on testimony that directly established them. *See* Pa 39-40; pp. 9-14 *supra*. Diamond's claim that the trial court's judgment rests on a further "inference that Diamond knew that the material [it released] would be resistant to degradation or neutralization so that it would be necessary to clean it up to prevent environmental damage from occurring," Pb 40, is simply another version of Diamond's plaint that its insurers should pay for the environmental harm it deliberately caused because Diamond did not expect that society would hold it

(footnote continued)

Thus, the trial court's findings that Diamond knowingly released material it knew to be toxic and that Diamond knew it was doing at least some harm, Pa 40, remain effectively unchallenged. These findings vitiate Diamond's legal arguments. Diamond complains that the court did not choose between competing understandings of the reach of the phrase "expected or intended" in the occurrence definition. Pb 39. But the trial court did not need to make that choice to decide this case. Under any understanding of that phrase, there is no coverage for intentional acts that the insured knows will cause or are substantially certain to cause harm[24] for which it later seeks coverage.[25]

All of the cases to which Diamond refers support affirmance of the judgment below when read in light of the trial court's findings of fact.[26] Diamond, for example correctly quotes from the opinion of the

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accountable. That claim has no basis in either law or policy. *See* Pa 40; n.22, *supra*, n.25, *infra*.

24 The insured's failure to anticipate the extent of the harm for which it may later be held accountable is irrelevant. *See* n. 22, *supra*.

25 Diamond argues that New Jersey law incorporates a "subjective test" for determining whether damage is expected or intended. Pb 45-47. According to Diamond, the subjective test requires that the insured be shown actually to have known or been substantially certain that its conduct would cause harm before that harm can be considered "expected or intended". It is not sufficient, Diamond claims, that the insured should have known its acts would result in harm. Although the facts and holding in this case make that claim moot, as explained above, defendants adopt as their response to Diamond's argument on this point the brief of *amicus curiae* IELA at 8-19. Defendants also note that if Diamond's view of the law is correct, then, as Diamond argues, insurers and insurance purchasers will bear the costs of "the insured's indifference to the consequences of an intentional act." Pb 45. Defendants can think of no reason why the courts of this State should strain to encourage industrial insureds to be indifferent to the consequences of "intentional act[s]" by insulating them from the financial costs of those acts.

26 Diamond attempts to distinguish the denials of coverage in *Morton Thiokol, Inc. v. General Accident Ins. Co. of America*, No. C-3956-85, slip op. (N.J.

(footnote continued)

District Court in *Township of Gloucester v. Maryland Casualty Co.*, 668 F. Supp. 394 (D.N.J. 1987), for the proposition that "[p]ollution by means of gradual permeation is no less an occurrence than that emitted by way of a sudden release." *Id.* at 401, *quoted in* Pb 42. Diamond fails, however, to reprint for the Court the very next sentence in the *Gloucester* opinion. That sentence, which states the law applicable to the facts of this case, reads as follows: "The 'occurrence' clause will act to prohibit coverage where it is shown that the insured polluter knew or should have known of the ongoing pollution." 668 F. Supp. at 401.

Since the trial court's findings that Diamond intentionally and knowingly polluted Lister Avenue are more than adequately supported by abundant evidence in the record, both "[t]he 'occurrence' clause" and the uncontested meaning of the "caused by accident" clause in defendants' insurance policies "act to prohibit coverage" in this case. The judgment below should therefore be affirmed.

Super. Ct. Ch. Div. Aug. 27, 1987), *reprinted in* 1 Mealey's Litigation Reports (Insurance) No. 63 at 4,949 (Sept. 8, 1987), and *Technicon Electronics Corp. v. American Home Assurance Co.*, 74 N.Y.2d 66, 542 N.E.2d 1048, 544 N.Y.S.2d 531 (1989), on the ground that the insureds in those cases intentionally discharged mercury, a substance they knew to be dangerous. Pb 46 n.30. Diamond, however, has been found to have known that the chemicals it intentionally discharged were dangerous and harmful when released into the environment in an uncontrolled manner. Pa 40. The holdings in *Morton Thiokol* and *Technicon*, therefore, directly support the judgment below.

IV. THE ADDITIONAL GROUNDS ON WHICH THE TRIAL COURT BASED ITS HOLDING THAT THERE IS NO COVERAGE UNDER THE ACCIDENT POLICIES IN EFFECT FROM 1951 TO 1960 OR THE OCCURRENCE POLICIES WITH A POLLUTION EXCLUSION IN EFFECT FROM 1971 TO 1983 ARE CORRECT AND THE JUDGMENT BELOW SHOULD BE AFFIRMED FOR THOSE REASONS AS WELL

In addition to holding that defendants' insurance policies do not cover the Newark dioxin claims because Diamond intentionally and knowingly polluted the Lister Avenue site, the trial court also held that there is no coverage under the 1951 -1960 accident basis policies because "no person was injured and no property was damaged by any accident." Pa 25, and that the pollution exclusion in effect from 1971[27] forward precludes coverage under those policies. Pa 26. Since the record below more than adequately supports the trial court's finding of fact that Diamond intentionally and knowingly polluted, and since the judgment below can be sustained in its entirety on the basis of that finding of fact, this Court need not reach the issues raised by Diamond in its attack on the trial court's additional holdings. If this Court does reach those issues, however, it should affirm the judgment below for the additional reasons set forth by the trial court.

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27 The London Market policies absolutely excluded coverage for pollution related losses in 1970. The "sudden and accidental" language at which Diamond tilts first appeared the following year in policies issued by domestic insurers. Unrefuted testimony at trial indicated that the language of one of the pollution exclusions was presented to Diamond's London insurers by Diamond's brokers, and not imposed upon Diamond in the fashion that Diamond now asserts. Da 1301. *See also* separate brief being filed concurrently on behalf of the London Market Insurers with respect to their pollution exclusions.

A. The Accident Policies In Effect From 1951 To 1960 Provide No Coverage For The Newark Claims Because The Harm Alleged In Those Claims Was Not Caused By Accident.

The 1951 through 1960 policies under which Diamond seeks coverage provided, in pertinent part, that the insurers would

> 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] caused by accident.

See Pa 19-20. The trial court held that an "accident" within the meaning of those policies is "a discrete fortuitous event which happens within a short time at a specific time and place." Pa 25. Accordingly, the court found that Diamond cannot claim coverage for the Newark claims under the accident policies because "no person was injured and no property was damaged by any accident. There never was an accident within the meaning of any of these policies." Pa 25. The trial court's definition of the term "accident" contains two elements: (1) the event must be both discrete, happening "within a short time at a specific time and place;" and (2) it must be "fortuitous". Pa 25. The trial court correctly identified both of these criteria as aspects of the definition of "accident" under the law of this State, and correctly concluded that none of the claimed injuries were caused by accident.

1. An accident is a fortuitous event.

In the Appellate Division's most recent consideration of the meaning of the word "accident", the court held that term "must be given its plain meaning: 'an unexpected happening without intention or design'". *John's Cocktail Lounge, Inc. v. North River Ins. Co.*, 235 N.J. Super. 536, 541-42 (App. Div. 1989) (quoting Black's Law Dictionary 14 (5th Ed. 1979)). An insured's claim that he "'intended his act but not the resulting harm'" does not transform an intentional wrongful act into an accident. *Id.* at 542 (quoting *Commercial Union Ins. Co. v. Superior Court*, 196 Cal. App. 3d 1205, 242 Cal. Rptr.

454 (1987)).[28] As the Supreme Court stated in *Riker v. John Hancock Mutual Life Insurance Co.*, 129 N.J.L. 508 (N.J. 1943):

> The means are "accidental" if, "in the act which precedes the injury, something unforeseen, unexpected, unusual occurs, which produces the injury." If the result "is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way," the means are not in this category.

Id. at 511 (emphasis added).[29]

Thus, even if Diamond had not known it was causing harm when it deliberately discharged a wide variety of toxic substances into the Lister Avenue environment,[30] its routine intentional conduct would not be an "accident". Since all of the claims for which Diamond seeks coverage arise out of Diamond's deliberate conduct,[31] the trial court correctly held that "no person was injured and no property was damaged by any accident." Pa 25.

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28 *See also, e.g., Royal Globe Ins. Co. v. Whitaker*, 181 Cal. App. 3d 532, 226 Cal. Rptr. 435 (1986) (unintended harm resulting from intended breach of contract not "caused by accident"); *Tennessee Corp. v. Hartford Acc. & Indem. Co.*, 326 F. Supp. 520 (N.D. Ga. 1971), *aff'd*, 463 F.2d 548 (5th Cir. 1972).

29 In its brief, Diamond quotes only the sentence immediately preceding the portion of the *Riker* opinion quoted above. Pb 18-19.

30 The trial court's finding of fact that at a minimum Diamond did know it was doing at least some harm is thoroughly supported by credible evidence on the record taken as a whole. *See* pp. 20-25, *supra*.

31 Diamond not only failed to prove what part of the damage at issue in the underlying claims resulted from the 1960 explosion at the plant site, *see* Pa 29; it affirmatively proved that the explosion did not produce the contamination of the site. *See* p. 5, *supra*.

2. An accident is a "discrete . . . event which happens within a short time at a specific time and place."

The trial court's opinion sets forth the case law of this State, which clearly defines an accident as a specific fortuitous event that takes place within a short time at a specific time and place. *See* Pa 25-26.[32] Diamond, therefore, seeks support for its position in the decision of the Appellate Division in *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516 (App. Div. 1987). In particular, Diamond points to the Appellate Division's observation that the standard form general liability policy changed from an accident to an occurrence basis in 1966 in part because a number of courts had construed the term "accident" to include long-duration processes. Similarly, Diamond criticizes the trial court for acknowledging that by 1971, when the pollution exclusion was written, the temporal aspect of the term "accidental" had been eroded by judicial decisions and yet refusing to give a non-temporal construction to Diamond's policies written from 1951 through 1959. Pb 21. In short, Diamond argues that because the language of the standard form policy changed in 1966 partially in response to the refusal of some courts to enforce the plain meaning of the accident basis policies written previously, this Court in 1990 should rewrite the contracts entered into by Diamond and defendants in the 1950s.

Diamond's argument sinks of its own illogic. Obviously, if accident basis policies provided the same breadth of coverage as occurrence basis policies, there would have been no need to change the standard policy language.[33] Diamond's own acute awareness of the

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[32] The authorities cited by the trial court are further elucidated in *Amicus* IELA Br. at 19-20. Defendants and their supporting *amici* have responded with citations to case law from other jurisdictions that have rejected this understanding of the term "accident". Defendants see no reason to add to this Court's burden by rephrasing arguments already made elsewhere.

[33] The significance of the 1966 change is acknowledged in Chesler, Rodburg & Smith, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 Rutgers L.J. 9, 31 (1986), a pro-policyholder brief described by Diamond as "a leading law review article." Pb 16. As the article

(footnote continued)

difference between an occurrence basis and an accident basis policy appears from the fact that Diamond sought and obtained an occurrence basis endorsement six years before the change in the standard policy language. *See* Pa 20.

By asking this Court to read its 1951 through 1959 policies in light of 30 years of subsequent judicial and non-judicial changes in the scope of insurance coverage, Diamond asks this Court to give it coverage from 1951 through 1959 that it only obtained and paid for beginning in 1960. No doctrine of contract construction, no principle of justice, no consideration of public policy, and certainly no aspect of Diamond's behavior warrant conferring such a boon on Diamond Shamrock.

B. The Trial Court Correctly Held That The Policies Containing A Pollution Exclusion Provide No Coverage For The Newark Dioxin Claims.

For three independent reasons, the trial court concluded that the pollution exclusion contained in Diamond's policies beginning in 1971 defeated Diamond's plea for coverage of the Newark claims. The court based its holding on two of these reasons: its finding that the discharges of pollutants to the air, land, and water by Diamond during its 18 years of operation of the Lister Avenue plant were knowing and intentional, Pa 41, and its finding that Diamond itself fully understood at the time it bought the policies that the word "sudden" in the exception to the exclusion has a temporal meaning. Pa 36. The holding below should be affirmed on both grounds. In addition, while fully recognizing the controlling authority of the Appellate Division, Pa 33-34, the trial court urged that Court to reconsider the construction it gave the pollution exclusion in *CPS Chemical Co. v. Continental Insurance Co.*, 222 N.J. Super. 175 (App. Div. 1988) and *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516 (App.

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observes, "the insurance industry altered its premium structure and policy language . . ." when it changed from an accident basis to an occurrence basis.

Div. 1987). Not surprisingly, defendants join Judge Stanton in urging correction of the reasoning in those cases.

1. The trial court correctly held that Diamond's "knowing polluting conduct . . . precludes coverage under the pollution exclusion, even when the 'sudden and accidental' exception is given a non-temporal meaning." Pa 41.

The pollution exclusion in Diamond's primary and most of its excess policies[34] declares the insurance coverage inapplicable "to bodily injury or property damage arising out of the discharge, dispersal, release or escape" of pollutants, unless "such discharge, disp[er]sal, release or escape is sudden and accidental." Pa 21-22. Since it found that Diamond's "discharge, disp[er]sal, [and] release" of virtually the entire range of "irritants, contaminants, or pollutants" specifically mentioned in the pollution exclusion, *see* Pa 21, was intentional and knowing, the trial court concluded that the pollution exclusion barred coverage of the Newark claims.

This holding is entirely consistent with all of the rulings of the Appellate Division. In *Broadwell, supra*, the Court held that the "sudden and accidental" exception to the exclusion applies "[w]here the insured has taken reasonable precautions against contaminating the environment and the dispersal of pollutants is both accidental and unforeseen . . . . " 218 N.J. Super. at 535. In light of the trial court's well supported finding of fact that instead of "tak[ing] reasonable precautions against contaminating the environment and the dispersal of pollutants," Diamond deliberately and surreptitiously polluted, the holding in *Broadwell* compels affirmance of the judgment below.[35]

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34 Some Diamond excess policies during some years contained absolute pollution exclusions with no exceptions, or stated the goal of excluding pollution-related liabilities in language that differed from the exclusion containing the 'sudden and accidental' exception. *See* Pa 37; Da 1071.

35 Even if Diamond had established that it did not know the toxicity of the chemicals it deliberately released into the environment, *but see, p. 13-15, supra*,

(footnote continued)

2. The trial court correctly gave the "sudden and accidental" exception to the pollution exclusion a temporal construction in this case because the parties to the contracts understood and intended that meaning.

The trial court found, as a fact, that Diamond knew that the pollution exclusion barred coverage of the Newark claims. In the trial court's words,

> Taken in its totality, the evidence in this case makes it clear that in purchasing the policies in question Diamond understood and expected that the pollution exclusion barred coverage for the kinds of claims that have arisen out of the operation of the Newark plant. Diamond's practice in the actual handling of claims and losses involving damage caused by gradual pollution - a practice in which it persisted for many years - manifests that understanding.

Pa 36. Based on that fact and on its additional finding of fact that Diamond was "a sophisticated and knowledgeable insured," *id.*, the trial court concluded that "the pollution exclusion bars recovery by Diamond under any of the policies containing the exclusion so far as claims arising out of the operation of the Newark plant are concerned." *Id.*

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the result under the pollution exclusion policies would be the same based on the trial court's finding that Diamond deliberately introduced those chemicals into the environment. Unlike the occurrence clause, the pollution exclusion plainly focuses not on whether the resulting damages are "expected or intended" but on the nature of the process by which the pollutants are "discharge[d], disperse[d], [or] release[d]."

Diamond responds that it is no more sophisticated than the average commercial insured. Pb 28. Defendants agree that Diamond may well be a typical Fortune 500 company. Diamond's insurance staff; its relationship with the world's more sophisticated insurance brokers, who considered Diamond an important client; its ability to form its own insurance company when it did not find the offerings of the insurance industry suited to its needs; and its status as a large and desirable customer for whose business insurance companies eagerly competed, *see* pp. 16-17, *supra*, are not unique. But the fact that Diamond is not the only sophisticated, knowledgeable, and powerful insured with whom defendants must deal does not undermine the trial court's conclusion that Diamond possesses all of those attributes.[36]

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[36] *Amici curiae* the American Petroleum Institute, et al. ("API") argue that bargaining power is irrelevant because "nobody - not General Motors, not Exxon, not Boeing - is big enough to buy a CGL policy that deviates from the standard language of the time." API Br. 43-44. That assertion is false. In addition to the many other endorsements Diamond sought and obtained on its policies, *see* Da 1223-24, Diamond successfully insisted that the "batch clause" be retained in its policies after that clause was eliminated from the standard form CGL policy in 1966. Da 443-44, 529, 1226-27; *see* pp. 80-82, *infra*. Diamond's primary insurer, Aetna Casualty & Surety Company ("Aetna"), also agreed to modify the pollution exclusion itself, Da 1233-34, although Aetna absolutely refused Diamond's efforts to obtain general liability coverage for gradual pollution. Diamond continued those efforts as late as the year before it filed this suit, when it asked Aetna to replace the "sudden and accidental" language in the pollution exclusion with the phrase "expected or intended." Da 1393-96. Aetna refused this request because it did not consider gradual pollution to be insurable at any price. Da 1231-32. Apparently, none of the other insurance companies from which Diamond routinely sought competitive quotations, *see* Da 466-68, 1084-85, 1092, would provide gradual pollution coverage and Diamond would not write insurance for itself on that basis through its captive carrier.

To the extent that Diamond and its *amici* argue that Diamond should be given the benefit of the doctrines associated with contracts of adhesion because no carrier would accede to its request to provide coverage for claims arising out of pollution that was not expected or intended to cause harm regardless of whether the pollution resulted from sudden and accidental events, their argument makes no sense. A contract does not become a contract of adhesion merely because one or the other party considers some terms of the contract to be non-negotiable. Diamond's reasoning would treat the most hotly disputed and best understood provisions of negotiated contracts as contracts of adhesion. *Cf. Meier v. New Jersey Life Ins. Co.*, 101 N.J. 597, 611 n.10 (1986) (contract of adhesion is a contract that must be accepted or rejected in total). *See also McNeilab, Inc. v.*

(footnote continued)

The trial court also found that as a sophisticated insured, Diamond knew of the introduction of the pollution exclusion as soon as that provision was added to its policy and that Diamond fully understood that the exclusion denied it coverage for claims arising out of recurrent or gradual pollution of the environment. Pa 34-36. The trial court, in turn, bases this finding on the testimony of Diamond's risk managers and brokers, Pa 34, the testimonial and documentary record of Diamond's repeated consideration of EIL insurance to provide coverage for gradual pollution liabilities and its repeated decision to self-insure rather than obtain EIL coverage, Pa 34-35, and Diamond's failure to give notice of pollution claims to its insurers despite Diamond's practice of giving prompt notice of claims when it thought it might have insurance coverage. Pa 35-36. The record fully supports these findings of fact. *See* pp.17-19, *supra*.[37]

North River Ins. Co., 645 F. Supp. 525, 543-44 (D.N.J. 1986), *aff'd*, 831 F.2d 287 (3d Cir. 1987).

The proper inference to be drawn from Diamond's inability to obtain or write for itself occurrence coverage for liability arising out of gradual pollution is that such liability is uninsurable. *See* Da 1231-32. The courts should not presume that their understanding of the limits of insurability exceeds the understanding of the market place. *See generally* Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 Va. L. Rev. 1151 (1982).

37 Diamond claims that the record shows only two instances prior to June 1, 1983 when Diamond's insurance department considered the existence of insurance coverage for environmental damage claims against Diamond. Pb 32. The record, however, clearly establishes that Diamond's insurance department knew of many such claims years before it notified its insurers of those claims. *See, e.g.*, Pa 2308-17. Moreover, the record also establishes that Diamond's environmental department would notify Diamond's insurance department as a matter of course about "any pollution possibilities, whether or not sudden or accidental." The insurance department would advise Alexander & Alexander of the claim for the purpose of providing notice to its insurers if the insurance department felt that there was any possibility of coverage. Da 416-17, 519-20. In-house counsel for Diamond or its subsidiaries followed a similar practice of transmitting lawsuits, including environmental matters, to the insurance department for a determination whether to notify the insurers. Da 500-01. These facts, combined with the clear understanding and practice of Diamond's insurance department that prompt notice

(footnote continued)

Diamond claims that the trial court improperly failed to admit into evidence some documents or to consider other documents that allegedly support a nontemporal construction of the pollution exclusion. Pb 35-37. The court in its discretion[38] excluded documents from a West Virginia proceeding that Diamond had never seen and that were not submitted by any party to this case, and that therefore could have no bearing on Diamond's understanding of its policies, which were entered into in New York.[39] *See* Pa 2348-49. For the same reason, the court also excluded Aetna inspection reports that Diamond had never seen. These evidentiary rulings are well within the trial court's discretion, *Purdy v. Nationwide Insurance Co.*, 184 N.J. Super. 123, 130 (App. Div. 1982); *Tsibikas v. Morrof*, 12 N.J. Super. 102, 108-09 (App. Div. 1951), as was its decision not to adopt Diamond's view of other contested evidence.[40]

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of possibly covered claims should be given to Diamond's insurers, Da 416-17, 1080, 1382-83, fully support the court's inference that Diamond did not provide notice of environmental claims because its insurance department understood that claims arising out of gradual pollution are excluded by the pollution exclusion.

38 Diamond sought to introduce these documents as part of a mass tender of exhibits after the close of testimony. The trial court carefully considered the admissibility of each document despite the irregular procedure followed by Diamond. *See* Da 1593-98.

39 *Amici* American Petroleum Institute, et al. urge this Court to consider the West Virginia documents despite the trial court's refusal to admit them, which *amici* do not challenge. API Br. 51-57. API's assertion that this Court can rely on unadmitted evidence as reported in articles written by some of the same lawyers or law firms who prepared the API brief, like its dismissal of the trial court's evidentiary ruling with the words "no matter", is as breathtaking for its arrogance as for its casual disregard of centuries of understanding of the basic elements of due process.

40 Citing five documents, Diamond claims that Aetna expressly told it that the pollution exclusion would cover only expected or intended pollution. Pb 16, 37. None of the documents Diamond cites says any such thing. Moreover, only the first two documents, Pa 1616 and Pa 1618, were communicated to Diamond or its broker. There is no evidence that the remaining documents, which are Aetna intra-office communications, were ever seen by Diamond before this litigation.

(footnote continued)

Since Diamond and Aetna shared a common understanding of the contracts into which they had entered, the trial court enforced their agreement. Accordingly, the trial court construed the "sudden and accidental" exception to the pollution exclusion, in accordance with the parties' common understanding, to have a temporal meaning. On the basis of that construction, the court ruled that policies containing the pollution exclusion provide no coverage for the Newark claims. Pa 36.

Diamond claims that the trial court committed legal error by construing the insurance contracts to mean what the court found the parties understood them to mean. Instead, Diamond argues, the court should have applied the doctrine of *contra proferentem* and followed *Broadwell* to the conclusion that the contracts meant something different from the mutual understanding of the parties. Pb 28-34. Diamond's argument transmutes doctrines of contract construction into substantive principles of law, a transformation that has no support in the case law of this State.

"[T]he terms of an insurance agreement are to be enforced as any other contract." *Rao v. Universal Underwriters Ins. Co.*, 228 N.J. Super. 396, 411 (App. Div. 1988). Therefore, as the court stated in *Kopp v. Newark Ins. Co.*, 204 N.J. Super. 415, 420 (App. Div. 1985):

> Our function in construing a policy of insurance, as with any other contract, is to search broadly for the probable common intent of the parties in an effort to find a reasonable meaning in keeping with the express general purposes thereof.

Even if these documents could be read as Diamond suggests, the trial court was fully entitled to credit the testimony of both Diamond's risk manager, Pa 1762; Da 511-16, 531-32, and its broker, Da 434, 445-48, 450-51, that they knew full well that the pollution exclusion applied to all claims arising from gradual pollution.

(Emphasis added). To find the probable intent of the parties, the court begins with the language of the contract and then examines extrinsic evidence that may "shed further light on the parties' intent . . . . " *Communications Workers of America, Local 1087 v. Monmouth County Board of Social Services*, 96 N.J. 442, 452 (1984); *Kook v. American Surety Co. of New York*, 88 N.J. Super 43, 53 (App. Div. 1965); *see Phillips Electronic & Pharmaceutical Industries Corp. v. Leavens*, 421 F.2d 39, 45 (3d Cir. 1970). Canons of construction, such as *contra proferentem*, come into play only if "the probable common intent of the parties" cannot be determined from the evidence available to the court. A. Corbin, *On Contracts*, § 559 (1951).

The Supreme Court's most recent decision construing an insurance policy, *Werner Industries, Inc. v. First State Ins. Co.*, 112 N.J. 30 (1988) (per curiam), provides a clear example of the proper application of these doctrines. In *Werner*, the Court first looked to the language of the policy. To resolve any doubt about the meaning of that language, the Court considered both the commercial circumstances when the policy was issued[41] and evidence of the insured's actual understanding of the policy.[42] Since these inquiries identified the mutual intent of the parties, the Supreme Court had no need to consider application of doctrines of construction. The trial court followed the

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41 The Supreme Court in *Werner* observed that the relatively small premium paid for the excess policy involved in that case suggested that neither the insurer nor the insured expected the excess policy to provide first-dollar coverage. *See* 112 N.J. at 33 n.1. Here, the record shows that Diamond Shamrock repeatedly attempted and failed to convince Aetna or other insurers to sell it the very coverage it now seeks from this Court. *See* n.36, *supra*.

42 In *Werner*, the Supreme Court inferred from changes in Werner's articulation of its claim that at the time it purchased the First State insurance, Werner did not have a commercially reasonable expectation that it was obtaining the coverage it ultimately claimed from First State. *See* 112 N.J. at 37-38. Here, the trial court properly considered and drew the same inference from Diamond Shamrock's failure to give any notice of environmental claims to its insurers, in contrast to Diamond's practice as to other claims that it believed might be covered by insurance.

same well-delineated path to its conclusion. Nothing in *Broadwell* or any other decision of the appellate courts of this State requires a different result.[43]

Finally, Diamond argues that the trial court should have ascertained the presumed intent of an average policy holder rather than Diamond's actual intent. Pb 28-29. Nothing in the case law of this State, with the exception of the solitary justice's dissent in *DiOrio v. New Jersey Manufacturer's Ins. Co.*, 79 N.J. 257, 273 (1979) (Pashman, J., dissenting), supports Diamond's argument. More importantly, the analysis adopted unanimously by the Supreme Court in *Werner* conclusively establishes that for insurance contracts, as any other contracts, the intent of the parties to the contract controls.[44] The trial court correctly construed the pollution exclusion in this case in accordance with the mutual understanding of the parties.

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[43] Diamond's contention that a court must ignore evidence of actual intent in favor of the construction adopted in *Broadwell* amounts to an argument that the public policy of New Jersey does not allow commercial parties to agree on a pollution exclusion with the meaning understood by Diamond and Aetna. Diamond has not put forth any justification for that claim. *Cf. Werner Industries, Inc. v. First State Ins. Co., supra*, 112 N.J. at 38 (refusing in a commercial insurance context involving sophisticated parties to deny enforcement of a policy term that might be denied enforcement as a matter of public policy in a personal insurance context). *See also Diamond Shamrock Chemicals Company v. Aetna Casualty & Surety Co.*, 231 N.J. Super. 1, 16 (App. Div. 1989).

[44] Diamond and *amici curiae* American Petroleum Institute, et al. argue that the pollution exclusion must be applied uniformly by the courts, in accordance with the most pro-coverage construction adopted anywhere, in order to protect the functioning of the insurance industry. Pb 22-23, API Br. 45-47. Defendants certainly appreciate this touching display of concern for the health of the insurance industry, but the argument it supports is nonsense. The record establishes that Diamond put its insurance coverage out to competitive bid, and that it did so after both its own personnel and its brokers devoted considerable attention to defining and analyzing Diamond's coverage needs and desires. *See* pp. 16-17, *supra*. None of this effort would have any value if insurance programs for Diamond, and other large insureds, were merely uniform products priced on a uniform and statistically determined basis.

3. *Broadwell* and its progeny are wrong and should be overruled.

The trial court urged the Appellate Division to reconsider and overrule its holding in *Broadwell*, that the "sudden and accidental" exception to the pollution exclusion merely restates the "occurrence" clause of the general liability policy. *Broadwell* is a mistake that has sent the law and courts of this State down the wrong path. This case, the first case involving the pollution exclusion to reach an appellate court in this State after a full trial,[45] presents an appropriate vehicle for overruling *Broadwell*.

The pollution exclusion that is contained in the Aetna policies from 1971 through 1983 reads as follows:

> This insurance does not apply . . . [t]o bodily injury or property damage arising out of discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids, or gases, waste materials or other irritants, contaminants, or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, disp[er]sal, release or escape is sudden and accidental.

Pa 21-22. The *Broadwell* court construed the word "sudden" in the last clause of the pollution exclusion to mean "unexpected and unintended." 218 N.J. Super. at 536. The *Broadwell* court also suggested, although it did not clearly hold, that the pollution exclusion does not apply if the bodily injury or property damage caused by pollution is unexpected and unintended. *Compare id.* at 535 (exception to the exclusion applies "where the insured has taken reasonable precautions against contaminating the environment and the dispersal of

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[45] In *Broadwell*, the court noted that it was dealing with a "meager record." 218 N.J. Super. at 536.

pollutants is both accidental and unforeseen"), *with Id.* at 534-35 (equating the sudden and accidental exception with the definition of "occurrence"). Neither of these aspects of the *Broadwell* opinion is correct.[46]

The record below shows that for eighteen years, Diamond advanced its economic interest by continuously fouling the air, the land and the water. The trial court recognized that whatever words are appropriate to describe Diamond's behavior, "sudden" is not among them. As Judge McCurn of the Northern District of New York has stated, "there is no use of the word 'sudden' which is consistent with events transpiring over a twenty year period." *New York v. Amro Realty Corp.*, 697 F. Supp. 99, 110 (N.D.N.Y. 1988). Judge McCurn is correct; no speaker of American English who had not been to law school would dream of calling Diamond's eighteen years of pollution of Lister Avenue "sudden". What the members of this Court know as speakers of English, they should not forget as judges.[47]

The trial court knew, as the Appellate Division opinions and Diamond's brief stress, *see, e.g., Broadwell Realty Services, supra*, 218 N.J. Super. at 530-31; Pb 25, A1-A4, that dictionary definitions of "sudden" include the sense of "unexpected and unintended." *See* Pa 31-32. But the court also recognized that the term "sudden" has an inescapably temporal connotation:

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46 To find that the pollution exclusion does not apply to Diamond, this Court must accept *Broadwell's* construction of "sudden", apply that construction to the resulting bodily injury or property damage rather than to the polluting events, and reverse the trial court's finding of fact that Diamond knew at the time of its polluting acts that it was releasing toxic materials into the environment and doing at least some harm. As defendants have already established, the record below fully supports the trial court's finding of fact. *See* pp. 13-15, *supra*.

47 "What we know as men and women, we must not forget as judges . . . ." *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979), *cert. denied*, 446 U.S. 909 (1980).

> To take the temporal element of instantaneous (or almost instantaneous) swiftness of happening out of "sudden" is to squeeze the life out of the word. It is an intellectually unacceptable distortion of the fair meaning of the word.

Pa 32. As the discussion of synonyms under the entry for "sudden" in the Random House Dictionary of the English Language (second ed. 1987), *reprinted in* Pb A4, makes clear, the senses of a word do not stand alone in a living language:[48]

> Syn. 1, 2. unforeseen, unanticipated. SUDDEN, UNEXPECTED, ABRUPT describe acts, events or conditions for which there has been no preparation or gradual approach. SUDDEN refers to the quickness of an occurrence, although the event may have been expected: a sudden change in the weather. UNEXPECTED emphasizes the lack of preparedness for what occurs or appears: an unexpected crisis. ABRUPT characterizes something involving a swift adjustment; the effect is often unpleasant, unfavorable, or the cause of dismay: He had an abrupt change in manner.

(Emphasis added).

Moreover, to construe the word "sudden" as used in the exception to the pollution exclusion to mean solely "unexpected and unintended" totally ignores the context in which the word occurs.[49] In

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48 To the extent that Diamond seeks comfort in the fact that many dictionaries list the "unexpected" sense of "sudden" first, Diamond's argument is founded on a false premise. Webster's dictionaries, and most others, list the senses of words in order of their historical appearance, not of their commonly accepted current use. *See, e.g.* Webster's Third New International Dictionary 17a at 12.5 (1986).

49 "The best sense is the one that most aptly fits the context of an actual genuine utterance." Webster's Third International Dictionary 17a at 12.4 (1986).

the pollution exclusion, the word "sudden" is paired conjunctively with the word "accidental". Since there is no dispute that "accidental" as used in the exclusion means "unexpected and unintended", construing "sudden" to mean only "unexpected and unintended" renders the word "sudden" entirely redundant.

The law of this State properly rejects proposed constructions that render some words of a contract meaningless. *See, e.g., Washington Construction Co. v. Spinella*, 8 N.J. 212, 217-18 (1951) (quoting *Williston on Contracts* ("all parts of the writing and every word of it will, if possible, be given effect")); *City of Newark v. Hartford Accident & Indemnity Co.*, 134 N.J. Super. 537, 544 (App. Div. 1975) (refusing to treat policy language as redundant); *Schultz v. Kneidl*, 59 N.J. Super. 382, 384 (App. Div. 1960) ("every word of a writing should be accorded significance if reasonably susceptible thereof"); Appleman, *Insurance Law & Practice* § 7383 (1976). Construing the entire pollution exclusion with the "sudden and accidental" exception to be a mere restatement of the "occurrence" definition commits the same mistake on a larger scale. If the pollution exclusion means nothing more than the occurrence definition, the exclusion has no significance in the insurance policy. The suggestion that insurers undertook the effort needed to draft the exclusion and to file it with appropriate state agencies, and incurred the displeasure of their largest insureds,[50] in order to do nothing more than restate the already existing occurrence clause makes no sense.[51]

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50 Diamond, for example, immediately asked Aetna to eliminate the pollution exclusion when it was introduced in 1971. Da 459-61.

51 Diamond, the American Petroleum Institute, et al., and the commentaries written by counsel for various polluters on which the *Broadwell* court relied, 218 N.J. Super. at 532-34, place great stress on some contemporaneous statements that the purpose of the exclusion was to clarify the result that would generally be reached under the occurrence definition and to assure that result without any consideration of the intent of the polluter. These statements establish only that the insurance industry thought that most damage resulting from pollution not caused by a "classic accident" would not be covered, and that the industry wanted to assure that result regardless of whether the polluter "expected or intended" to cause damage. The purpose of the exclusion, in other words, was to modify the approach of the occurrence definition for pollution-related damages by changing

(footnote continued)

Moreover, the claim that the pollution exclusion, like the occurrence definition, focuses on the insured's intent or expectation to cause damage simply cannot be squared with the language of the exclusion. Whatever definition is given to the word "sudden" in the exception clause, that definition must apply to the "discharge, disp[er]sal, release or escape" by which the pollutant reaches the environment. There is no grammatically possible alternative construction. Thus, if "sudden" means only "unexpected and unintended" and has no temporal meaning, the exception applies only if the "discharge, dispersal, release or escape" of pollutants is "unexpected and unintended". An insured like Diamond that knowingly discharged all manner of "smoke, vapors, . . . fumes, acids, alkalis, [and] toxic chemicals," into the air, land and water cannot avoid the pollution exclusion by claiming that it did not know that those substances would produce damage.

Diamond and its supporting *amici* slide from their argument that "sudden" means "unexpected and unintended" to their conclusion that the pollution exclusion applies only if the insured intended to harm the environment without ever attempting to square that conclusion with the exclusion's clear language. Instead, Diamond mixes citations to cases holding that "sudden" does not have a necessarily temporal meaning with citations to cases holding, in the context of the occurrence definition, that an intentional act that produces unintended results can be considered an accident. Pb 27-28 n.19. As the New York Court of Appeals has recently explained, Diamond's argument has no merit:

> That argument fails because the pollution exclusion clause, by its own terms, does not distinguish between intended or unintended consequences of intentional discharges; rather, it excludes from

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the focus from whether the insured expected or intended damage to whether the event that caused the pollution was "sudden and accidental."

> coverage liability based on all intentional discharges of waste whether consequential damages were intended or unintended. If the discharge was intentional, the disqualifying exclusion clause is operative and there is no coverage because the exception clause lacks its springboard.

Technicon Electronics v. American Home Assurance Co., 74 N.Y.2d 66, 544 N.Y.S.2d 531, 533-34 (1989). [52]

Thus, even if "sudden" is given a non-temporal construction, the pollution exclusion cannot mean what Diamond says it means. This Court should clarify the law of New Jersey by correcting *Broadwell's* definition of the word "sudden". But if it chooses not do so, it should at the least clarify that nothing in the holding of *Broadwell* compels or supports importing into the pollution exclusion a focus on the insured's expectation or intent to do damage. That focus cannot be found in any of the words of the pollution exclusion. Whichever course this Court follows, the pollution exclusion defeats Diamond's claim for coverage.

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52 In its brief, Diamond cites *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 488-89, 426 N.Y.S.2d 603, 605 (1980), for the proposition that if damage is unintended, an event occurring over a long period of time could constitute an accident "regardless of the initial intent or lack thereof as it relates to causation . . . ." Pb 27-28 n.19. In *Technicon*, the highest court of New York explicitly rejected the insured's argument based on *Klock* that the pollution exclusion did not apply if the damage was unintended. The Court of Appeals stated that the discussion in *Klock*, which concerned the occurrence definition, had no bearing on the pollution exclusion because "the pollution exclusion at issue here is directed at the polluting act itself - the discharge, dispersal or escape." *Technicon Electronics v. American Assurance Co., supra*, 544 N.Y.S.2d at 534.

V. IF THIS COURT FINDS ERROR IN THE JUDGMENT BELOW AS TO ANY OF THE INSURANCE POLICIES, IT SHOULD REVERSE THE TRIAL COURT'S DETERMINATION THAT NEW JERSEY RATHER THAN NEW YORK LAW APPLIES TO THE NEWARK DIOXIN CLAIMS AND REMAND FOR APPLICATION OF THE LAW OF NEW YORK.

In *Westinghouse Electric Corp. v. Liberty Mutual Insurance Co.*, 233 N.J. Super. 463, 478 (App. Div. 1989), this Court stated that "traditional choice of law principles should apply" to insurance coverage disputes. For this reason, the trial court's recognition that the "focus" and "center of gravity" for Diamond's insurance was New York is firmly grounded in the evidence before it and is legally sound. Accordingly, the court below correctly applied New York law to the Agent Orange issues; it erred in failing to find that New York law is equally applicable to the environmental coverage issues arising from the operation of Diamond's Newark plant.[53]

New Jersey's choice of law rules ensure that the choice of forum is not dispositive of the case. As a result, neither forum convenience nor local concerns relating to environmental claims or to devastating injuries allegedly traced to Agent Orange provided by themselves an adequate foundation for applying the law of this State or frustrating the parties' reasonable commercial expectations. *State Farm Mut. Auto. Ins. Co. v. Estate of Simmons*, 84 N.J. 28 (1980). Speaking to this concern, this Court stated in *Westinghouse*:

> In our view, the notion that the insured's rights under a single policy vary from state to state depending on the state in which the claim invoking coverage arose

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53 At the same time, because New York law sustains the trial court's conclusions with respect to the environmental claims, as to those claims, the analysis here is material principally in response to Diamond's effort to advance its view of New Jersey law.

> contradicts not only the reasonable expectation of the parties but also the common understanding of the commercial community. It also seems to us anomalous, in conflict-of-law terms, to suggest that more than one body of law will apply to a single contract. The theme running through the federal mega-coverage cases is the assumption not only that state law will determine whose insurance law will govern the coverage dispute but also that it will be a single state's law, chosen in accordance with the applicable conflict principles of the forum.[54]

Westinghouse, 233 N.J. Super. at 476.

As a result, *Westinghouse* instructs that a trial court should inquire into the facts of each case, such as the place where the policies were negotiated, issued and performed, the principal location of the parties and the intent of the parties. Because the trial court conducted precisely such an inquiry, the Appellate Court's task here is an assessment of specific factual findings made by the trial court.

Diamond ignores the trial court's pivotal finding -- that New York is the center of gravity of its insurance, Pa 502, and the sound evidentiary basis in the record for that result. Without a reference to the record, Diamond argues that "it is probable that few, if any, of the contracts were made in New York." Pb 60. Diamond then devotes three sentences to the location of offices maintained by a few insurers, and equal space to the manufacture and delivery of Agent Orange. In

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54 Diamond concurs. Its answers to the defendants' interrogatories state:

> It would not make sense to apply the laws of the dozens of other states and foreign jurisdictions in which policies were issued by the defendants to govern the policies issued by them since this would be unmanageable and would lead to a patchwork of governing rules for Diamond's several hundred policies.

Da 1064.

contrast, the evidence in the record leaves no doubt that the court's conclusion is "supported by adequate, substantial and credible evidence", *Rova Farms Resort, Inc. v. Investors Ins. Co., supra*, 65 N.J. at 474. In light of *Rova Farms*, the ample evidentiary support for the trial court's conclusion and Diamond's conclusory argument thwarts Diamond's attempt to reverse those factual findings.

There is no factual basis for Diamond's claim that New Jersey law governs. Plaintiff is a Delaware corporation which, prior to relocating to Texas in 1980, had its principal place of business in Cleveland, Ohio. Diamond's annual reports for the years 1965 and 1968 reveal plants located in 47 cities in 19 states and several countries. Da 908, 947. Diamond's second action in this State, in which it seeks coverage for environmental liabilities arising from more than fifty sites in numerous states, reflects the geographic spread of Diamond's activities. *Diamond Shamrock Chemicals Co. v. Aetna Casualty and Surety Ins. Co.*, et al., Docket No. L-015901-86.[55] Da 989. The argument that New Jersey law controls is unsupported by the facts.

Diamond's attempt to translate New Jersey's involvement as the place of manufacture and delivery of Agent Orange into the "principal location of the insured risk" is unavailing. Three reasons exist for this. First, the policies represent what *Westinghouse* termed "comprehensive nationwide coverage". The proposition that the Newark plant was that coverage's "principal risk" is unsubstantiated by this record. Second, Diamond asks this Court to find that the Newark plant was the principal location of the risk for all of its policies, even though Diamond purchased many of those policies after it sold the Newark facility in 1971. Finally, the notion that the principal location of the risk always travels with the alleged injury to third persons or in accordance with situs of the allegedly insured occurrence is precisely what *Westinghouse* criticized.

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55 Only a small minority of Diamond's plants and environmental sites are located in New Jersey.

The contacts with New York present a wholly different picture. Diamond's broker, Alexander & Alexander, continuously serviced Diamond's account from its New York office, through which Diamond and Alexander & Alexander negotiated the contract, received and transmitted policy specifications to both the defendant insurers and others from whom Alexander & Alexander solicited coverage on Diamond's behalf, transmitted premiums to the insurers on Diamond's behalf, and took delivery of the policies. Pa 501-02; Da 419-20, 430-32, 445-57, 461-64, 1073-75, 1358-67, 1416-19. *See also, generally*, Da 896-1407. Hence, the trial court's factual determination that the center of gravity of the policies at issue was in New York is amply supported by the record.

Diamond's result-oriented legal reasoning is equally deficient, largely because the trial court's analysis of the evidence regarding the Agent Orange claims accords with New Jersey's choice of law -- the reasonable commercial expectations of the parties and a consistent and predictable construction of their obligations. Both *Simmons* and *Buzzone v. Hartford Accident and Indemnity Co.*, 23 N.J. 447 (1957), support this conclusion. In each case, the Court concluded that the law of the place of contracting governed and noted New Jersey's emphasis upon uniformity and ease of selection and application. *Simmons*, in particular, rejected an argument by the injured parties that the paramount interest is universally the forum state's concern for its own residents.

Instead, *Simmons* focused upon the expectations of the parties and the material state contacts. Thus, except where New Jersey's interest is predominant, or where the applicable foreign law is repugnant to New Jersey's public policy, the place of contracting is dispositive. *See e.g., Nelson v. Ins. Co. of North America.*, 264 F. Supp. 501 (D.N.J. 1967). Indeed, *Westinghouse* instructs that *Simmons* is controlling, and that the paramount interests to be examined, in the first instance, include stability and predictability of contract interpretation and the conduct of the parties themselves.

The trial court correctly discerned the reach of the evidence before it of New York's interests here. Those interests, which arise by

virtue of the contacts between New York and the policies at issue, New York's regulatory interest in insurance contracts negotiated or issued within its borders, and New York's coherent, sophisticated body of law concerning insurance are, in the context of *Simmons* and *Buzzone*, predominant here. *Cf. Alaska Packers Assoc. v. Industrial Accident Comm'n*, 294 U.S. 532 (1935) (execution of a contract sufficient to permit California to exercise legislative control over its performance, and regulate compensation paid to a workman injured elsewhere).

In contrast, New Jersey's interests here are merely concurrent with those of other states in which an Agent Orange claimant resides or an environmental hazard allegedly attributed to Diamond exists. Consequently, as to these parties and policies, New Jersey's choice of law rules lead to application of New York law. Thus, the Agent Orange ruling is consonant with *Simmons* and should be affirmed.

In contrast, the contradictory result reached by the court regarding the environmental claims conflicts with the evidence. In ruling that the presence of contamination provided the predominant interest, the court below adopted a rule since questioned by *Westinghouse*. That ruling may no longer stand here.

In short, application of these principles leads to a remarkably simple result. Both the factual findings made by the trial court, which are not subject to review here, and New Jersey's choice of law rules lead to New York. For this reason, this Court should affirm the choice of law ruling made below concerning Agent Orange and, in the event that further proceedings are necessary, reverse the contradictory ruling relating to the environmental claims arising from the Newark site and direct that coverage of those claims be resolved in accordance with New York law.

VI. IF THIS COURT FINDS ERROR IN THE JUDGMENT BELOW AS TO ANY OF THE INSURANCE POLICIES, IT SHOULD HOLD THAT THE TRIAL COURT ALSO ERRED IN DETERMINING THAT ADMINISTRATIVE RESPONSE COSTS CONSTITUTE COVERED "DAMAGES"

The most significant items for which Diamond seeks recovery from the defendant insurers as a result of its contamination of the Lister Avenue site are Diamond's costs of complying with administrative consent orders that require Diamond to clean up or permanently contain the many pollutants it released onto the site. Pa 10-11, 997, 1012. On December 11, 1987, the trial court ruled that Diamond's costs of compliance are "damages" within the meaning of defendants' insurance policies and, therefore, denied defendants' motions for summary judgment that those costs are not covered. Pa 2166-67. That ruling is wrong and should be reversed.

The insurance policies issued to Diamond obligate the insurers to pay "all sums which the Insured shall become legally obligated to pay as damages because of Bodily Injury or Property Damage "[t]o which the insurance applies . . . . " Pa 21 (emphasis added). The obligation the defendants assumed through this language is obviously different from and more restricted than the obligation they would have assumed had the policies required them to pay "all sums which the insured shall become legally obligated to pay because of bodily injury or property damage." The trial court's holding, like the holding of the Appellate Division in *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co, supra*, 218 N.J. Super. at 527, improperly treats the agreement the insurers did make as the equivalent of the agreement Diamond wishes the insurers had made.

In insurance policies, as in other contracts, the courts must give effect to the entire contract. Constructions that treat language deliberately included in a contract as if it were redundant or non-existent should not be adopted. *See, e.g., City of Newark v. Hartford Accident & Indemnity Co., supra*, 134 N.J. Super. at 544; *Schultz v.*

Kneidl, supra, 59 N.J. Super. at 384. The Court's conclusion in *Broadwell* that expenses "incurred by virtue of the *in terrorem* and coercive effect" of a governmental decree or "to prevent what would have been an avoidable legal obligation to pay damages to a third party", 218 N.J. Super. at 527, completely ignore this basic principle of contract construction.[56]

"Damages" is defined as "the estimated money equivalent for detriment or injury sustained," Random House Dictionary of the English Language 504 (2d ed. 1987), or "the estimated reparation in money for detriment or injury sustained : compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right." Webster's Third New International Dictionary 571 (1986).[57] The payments Diamond must make to comply with the consent decrees are not "damages" under any of these definitions.

First, response costs are not "damages" because they are not payment for "injury sustained." As the court noted in *Troy Mills, Inc. v. Aetna Casualty & Surety Co.*, No. 86-E-054, (N.H. Super. Ct.

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56 The *Broadwell* court apparently assumed that if the DEP had carried out its threat to clean up the property itself and assess Broadwell an amount equal to triple the cost of the cleanup operation, the DEP assessment would be a claim for "damages". That assumption is unfounded. By undertaking the cleanup, the government agency would merely have stepped into the polluter's shoes, and the costs the government agency incurred should be treated as if they were the polluter's costs. Any amount assessed in addition to the cost of cleanup would be, as it is clearly intended to be, a penalty imposed because the polluter deliberately refused to comply with its obligation to clean up after being ordered to do so. That penalty would be imposed not "because of bodily injury or property damage to which this insurance applies," but because of the polluter's intentional defiance of the law. Both the plain language of the insurance contracts and the public policy interest in encouraging compliance with the law preclude any claim for coverage of such penal damages.

57 *See also* Black's Law Dictionary 351 (5th ed. 1979) ("a pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another. A sum of money awarded to a person injured by the tort of another.")

June 20, 1989), *reprinted in* 3 Mealey's Litigation Reports (Insurance) No. 16 at H-1 (June 27, 1989), ***summarily aff'd***, No. 89-311 (N.H. Feb. 13, 1990):

> The costs incurred by [the generator] in order to comply with these orders will result from contractual relations with other individuals who are experienced in performing the necessary work. Hence, [the generator] is seeking indemnification for its own expenses voluntarily incurred and paid to individuals who are not directly impacted by the hazardous waste disposal at the landfill.

Troy Mills, supra, at H-7. Second, the cost of cleaning up cannot be considered compensation or reparation for damage done because the cost of restoration bears no necessary relationship to the value of the injury caused by Diamond's acts. *See, e.g., Continental Ins. Cos. v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977, 986 (8th Cir.) (en banc), *cert. denied*, __ _____ U.S. _____, 109 S. Ct. 66 (1988).

Courts around the country have split on this issue. *Compare, e.g., Continental Ins. Cos. v. Northeastern Pharmaceutical & Chemical Co., supra; Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); *Verlan Ltd. v. John L. Armitage & Co.*, 695 F. Supp. 950 (N.D. Ill. 1988); *Maryland Casualty Co. v. Ormond*, F. Supp. No. 87-3038, *slip op.* (W.D. Ark. Jan. 6, 1989); *Hayes v. Maryland Casualty Co.*, 688 F. Supp. 1513 (N.D. Fla. 1988); and *Patrons Oxford Mutual Insurance Co. v. Marois*, No. Ken-89-284 slip op. (Me. Apr. 2, 1990). Da 1599, (all holding cleanup costs are not damages), *with, e.g., Avondale Industries, Inc. v. Travelers Indemnity Co.*, 697 F. Supp. 1314 (S.D.N.Y. 1988), *aff'd*, 887 F.2d 1200 (2d Cir. 1989); *Boeing Co. v. Aetna Casualty & Surety Co.*, No. 55700-4, *slip op.* (Wash. Jan. 4, 1990), *reprinted in* 4 Mealey's Litigation Reports (Insurance) No. 5 at B-1 (Jan. 6, 1990); *C.D. Spangler Construction Co. v. Industrial Crankshaft & Engineering Co.*, No. 128PA88, *slip op.* (N.C. Feb. 7, 1990) *reprinted in* 4 Mealey's Litigation Reports

(Insurance) No. 7 at A-1 (Feb. 13, 1990); *American Motorist Insurance Co. v. Levelor Lorentzen, Inc.*, Civ. No. 88-1994, *slip op.* (D.N.J. Oct. 14, 1988) (applying New York law) (all holding that response costs are "damages"). The cases that have found that response costs are covered by general liability policies, however, have uniformly treated the words "as damages" in the general liability policy as if those words did not exist. The well-established law of this State requires that those words be given meaning and that Diamond's claim for coverage of response costs be denied.

CONCLUSION

For the reasons stated above, the trial court's judgment that Diamond has no insurance coverage for claims arising out of its eighteen years of intentional and continuous pollution of the Lister Avenue site should be affirmed. If the judgment is not affirmed as to any of the insurance policies at issue, this Court should rule on defendants' cross-appeals that New York law, not New Jersey law, governs resolution of the coverage issues relating to the Lister Avenue pollution claims and that the costs of complying with the consent decrees requiring clean up of the Lister Avenue site do not constitute covered damages. In that event, the case should be remanded for further proceedings consistent with the Court's holdings and with the holding of the Appellate Division in *Diamond Shamrock Chemicals Co. v. Aetna Casualty & Surety Co.*, 231 N.J. Super. 1 (1989).[58]

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[58] In *Diamond Shamrock Chemicals Co. v. Aetna Casualty & Surety Co., supra*, the Appellate Division reversed the trial court's award of a summary judgment declaration that the "owned property" exclusion of the policies is inapplicable to any of the Newark claims. The trial below expressly left for another proceeding, if necessary, the question of the effect of the owned property exclusion on Diamond's claim for coverage. Similarly, in light of its holding, the trial court did not determine which insurance policies would be responsible for providing the coverage Diamond seeks. For these reasons as well as the reasons stated in text, Diamond's request that this Court direct the entry of judgment in its favor, Pb 74, cannot be granted.

PART II: AGENT ORANGE CLAIMS

STATEMENT OF THE FACTS

I. THE AGENT ORANGE CLASS ACTION

After the Vietnam War, servicemen and women, along with their spouses and children, filed numerous civil actions in federal and state courts against Diamond Shamrock and other manufacturers of Agent Orange. The Vietnam veterans alleged that dioxin, a by-product of the manufacture of all Agent Orange formulations, had caused bodily injury to them and, in some instances, to their families. These actions were consolidated and proceeded as a class action in the United States District Court for the Eastern District of New York before Judge Jack Weinstein. The class was defined as "those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2,4,5-trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure." *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 729 (E.D.N.Y. 1983), *cert. denied*, 100 F.R.D. 735, *mandamus denied*, 725 F.2d 858 (2d Cir. 1984).

On May 7, 1984, the plaintiff classes reached agreement with the seven defendant chemical company manufacturers of Agent Orange for a settlement of the class action claims in the total amount of $180 million. Diamond ultimately paid $23.4 million as its share of the settlement.

A. The Use Of Agent Orange In The Vietnam War.

"Agent Orange," a code name developed and used by the United States Government to identify a certain kind of phenoxy herbicide, was a "war-related product." *See In re "Agent Orange"*

Product Liability Litigation, 506 F. Supp. 762, 795 (E.D.N.Y. 1980). Agent Orange was only used as part of military operations in Vietnam; these military operations were commonly referred to as "Operation Ranch Hand." *Id.*[59] Diamond Shamrock itself described Agent Orange as "a novel weapon of war." Da 627.

Agent Orange was used solely to achieve military objectives. As the Court of Appeals for the Second Circuit noted:

> As the bombing in Cambodia was designed to protect United States military and civilian personnel from a 'grave risk of personal injury or death,' *Holtzman, supra*, 484 F.2d at 1311 n.1, so also was the President's decision to use Agent Orange to defoliate Vietnamese jungle trails, a decision in which the South Vietnamese military, to some extent at least, participated.

In re "Agent Orange" Product Liability Litigation, 818 F.2d 204, 206 (2d Cir. 1987).

> The use of Agent Orange in Vietnam was believed necessary to deny enemy forces the benefits of jungle concealment along transportation and power lines and near friendly base areas.

In re "Agent Orange" Product Liability Litigation, 818 F.2d 187, 193 (2d Cir. 1987), *cert. denied*, _____ U.S. _____, 108 S. Ct. 2898 (1988).

Use of Agent Orange in Vietnam was also designed to "destroy enemy crops to restrict [the] enemy's food supplies." 506 F. Supp. at 779.

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59 In its public position paper on Agent Orange, Diamond itself claimed that "Agent Orange was not a commercial product." Da 628.

Agent Orange was applied in a special way, and designed for wartime use. As Diamond Shamrock said in its public position paper on Agent Orange:

> In Vietnam the combination [Agent Orange] was sprayed full strength, under wartime conditions, quite different from domestic ones.

Da 628 (emphasis added).

The United States Government had requisitioned Agent Orange from the defendant chemical companies, including Diamond, under the Defense Production Act and applicable regulations. 506 F. Supp. at 795. Agent Orange had been formulated pursuant to government specifications established by and imposed upon the manufacturers by the United States military. 818 F.2d at 192.

United States veterans who sued Diamond Shamrock were exposed to Agent Orange and other phenoxy herbicides in Vietnam "as a consequence of efforts undertaken by the United States military forces to defoliate the jungle." 818 F.2d at 152 (emphasis added). The Second Circuit noted that, in a related action,[60] the District Court held that the soldiers' exposure to Agent Orange and their claims arising out of such exposure were "'incident to and arising out' of plaintiffs' military service." 818 F.2d at 159 (emphasis added).

B. The Absence Of Any Causal Connection Between Agent Orange And The Injuries Alleged.

After they had settled with the class, the defendant chemical companies, including Diamond, moved for summary judgment against the Agent Orange plaintiffs who had opted out of the class action. In support of that motion, Diamond and the other defendants argued that "the overwhelming weight of medical and scientific evidence

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[60] *Ryan v. Cleland*, 531 F. Supp. 724, 728 (E.D.N.Y. 1982).

demonstrates no causal connection between Agent Orange and the various adverse health effects alleged." Da 1519.

Judge Weinstein granted the summary judgment motion on the grounds that no opt-out plaintiff could prove that a particular ailment was caused by Agent Orange and that no plaintiff could prove which defendant had manufactured the Agent Orange that allegedly caused his or her injury. *In re "Agent Orange" Products Liability Litigation*, 611 F. Supp. 1223, 1260-63 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, _____ U.S. _____, 108 S.Ct. 2898 (1988). The court found that the opt-outs had offered no evidence that Vietnam veterans suffer from the maladies they alleged with any greater frequency than other persons. *Id.* at 1239. The court further found that each of the "sound" and "reliable" epidemiologic studies of Agent Orange-exposed veterans concluded that there is no evidence of a causal link between Agent Orange and illness or death:

> A number of sound epidemiological studies have been conducted on the health effects of exposure to Agent Orange. These are the only useful studies having any bearing on causation.
>
> All the other data supplied by the parties rests on surmise and inapposite extrapolations from animal studies and industrial accidents. It is hypothesized that, predicated on this experience, adverse effects of Agent Orange on plaintiffs might at some time in the future be shown to some degree of probability.
>
> The available relevant studies have addressed the direct effects of exposure on servicepersons and the indirect effect of exposure on spouses and children of servicepersons. No acceptable study to date of Vietnam veterans and their families concludes that there is a causal connection between exposure to Agent Orange and the serious adverse health effects claimed by plaintiffs.

611 F. Supp. at 1231.

II. DIAMOND'S DECLARATORY JUDGMENT ACTION AND ISSUES ON APPEAL

In September 1984, Diamond commenced the instant action seeking, among other things, a declaration that it was entitled to insurance coverage from some or all of the defendants for its contribution to the settlement of the Agent Orange claims. At the request of certain defendants, in late January 1985, the trial court ordered Diamond to supplement its complaint to add as defendants certain liability insurers which provided coverage for bodily injury that occurred in certain specified foreign countries (hereinafter referred to as the "foreign risk insurers").

In this Appeal, defendants challenge certain rulings of the trial court during the course of proceedings below that allowed recovery for Diamond for its contribution to the Agent Orange settlement. Specifically, the trial court improperly granted Diamond's motion to strike defendants' defense based on certain policy language excluding damage or injury incident to war, even though it is undisputed that the Agent Orange claims arose as a consequence of war. Da 1050. In addition, the trial court denied certain defendants' motion for summary judgment in their favor on the grounds that Diamond could not present proof of injury, as required under the policies, despite Judge Weinstein's rulings in the Agent Orange class action that it was "highly unlikely" that any plaintiff could prove any causal relationship between Agent Orange and any alleged injury. Da 1059. The trial court also improperly refused to apply Diamond's foreign liability insurance, which covers claims involving injuries which took place outside the United States, to the Agent Orange claims. Pa 56.

In its Opinion, the trial court reaffirmed its earlier ruling denying the applicability of a "batch clause" provision in the policies which established 133 occurrences -- the number of lots of Agent Orange undisputedly sold to the Government. Finally, the trial court's Opinion awarded Diamond prejudgment interest for the full amount of its Agent Orange settlement from the date on which payment was made. Defendants appeal each of these rulings.

In response to Diamond's appeal with respect to the trial court's Agent Orange rulings, assuming Diamond is entitled to any recovery, the trial court properly rejected joint and several liability.[61] Moreover, contrary to Diamond's assertion, the trial court applied a proper allocation formula based on the plain language of the subject policies. In addition, the trial court properly applied one per occurrence limit for each 3-year excess policy. Finally, the trial court correctly ruled that the one month extension to the 3-year policy of American Re-Insurance Company does not provide additional coverage in the amount of $3 million per occurrence.

ARGUMENT

III. THE TRIAL COURT ERRED IN STRIKING DEFENSES BASED UPON WAR RISK EXCLUSIONS

> Defendants [in *In re "Agent Orange" Product Liability Litigation*] manufactured certain herbicides for civilian use. They did not design "Agent Orange," nor were they in the business of designing herbicides for military use . . . . Defendants were directly ordered by the United States military to produce on a massive scale a novel weapon of war untested in battle and

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61 The trial court held that New York law applied to the Agent Orange claims based on the substantial evidence of the nexus of the insurance contracts to New York. The trial court also held that New Jersey law applied to the Newark claims, despite the nexus of the contracts to New York. Diamond apparently does not appeal those rulings, but complains that the trial court's conclusion that New York law should apply to the Agent Orange claims is "wrong both as a matter of fact and as a matter of law." Pb 59-60. Defendants discuss the propriety of the trial court's finding that New York law should apply to the Agent Orange Claims because New York is the center of gravity of Diamond's insurance program in Part I of this brief. *See* pp. 45-49, *supra*.

> designed by the government to achieve its war-related objectives.

Da 627 (emphasis added).

> Agent Orange was not a commercial product. It was a 50-50 mixture of . . . two herbicides (weed killers), that Diamond Shamrock produced at the time of the Vietnam War, between 1966 and 1969 . . . . Government authorities did not seek advice from Diamond Shamrock as to the use of Agent Orange, nor did they advise Diamond Shamrock how the product would be used.
>
> In commercial use, each of the [component] products is diluted before application, and then sprayed under controlled conditions. Both have been used by farmers, foresters and ranchers for nearly 40 years with no evidence of outbreaks of health problems ascribed to Agent Orange in the lawsuits . . . . In Vietnam the combination was sprayed full strength, under wartime conditions, quite different from domestic ones.

Da 628.

A. Background Facts.

This cross appeal addresses the propriety of the trial court's rejection on motion, without opportunity for trial of factual issues, of defenses raised by those defendants that issued insurance contracts excluding liabilities incident to war. The court ignored substantial evidence demonstrating the close nexus between Diamond's liability for the risks associated with the development and use of Agent Orange in the Vietnam war effort.

1. The war risk exclusion.

The insurance contracts issued by Diamond's excess insurers in the 1960s contained the following exclusion:

> This contract shall not apply --
>
> * * *
>
> except in respect of occurrences taking place in the United States of America . . . 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 or 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 purpose of such a clause is to eliminate an insurer's liability in circumstances in which it is impossible to evaluate the risks. The clause effectuates that purpose by excluding coverage for all claims even indirectly occasioned by war. Courts have long recognized and enforced war risk clauses. For example, in *Jorgenson v. Metropolitan Life Insurance Co.*, 136 N.J.L. 148, 152-3 (1947), the New Jersey Supreme Court acknowledged:

> Military or naval service in time of war, whether in training or combat, is admittedly hazardous, fraught with incalculable danger. It is difficult to determine the scope of risks assumed by members of the armed forces in view of the methods of warfare, keeping in mind the possible devastation of present and future developments. An insurance company has the right to limit its liability to particular risks.

Similarly, in *Shneiderman v. Metropolitan Casualty Co.*, 14 A.D. 2d 284, 288, 220 N.Y.S.2d 947, 951 (1961), a New York court explained:

Da 604.

> The provision for exclusion of liability from such a risk is necessitated by the inability to properly gauge premiums to cover such a risk and the need of protecting the company from financial disaster.

The war exclusion is typical of such clauses. It eliminates all coverage when Diamond's liability is "directly or indirectly occasioned by [or] happen[s] through or in consequence of war."

2. Use of Agent Orange in Vietnam.

The United States developed Agent Orange to combat unique difficulties encountered by soldiers in the Vietnam war. The thick vegetation created a number of difficulties for American soldiers engaged in guerilla war with the Viet Cong. It concealed the movement of enemy troops and permitted roadside ambushes upon unsuspecting servicemen. *In re "Agent Orange" Products Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984). The agrarian portions of the country also permitted the Viet Cong to raise crops. *Id.* at 775.

In late 1961, President Kennedy authorized the use of Agent Orange and other defoliants in Vietnam upon the recommendation of the Department of Defense and the Department of State. *Id.* Agent Orange was a "growth regulator" that defoliates by inducing a malfunction in the growth process. *Id.* at 776. The Department of Defense had previously funded a study by experts in the Department of Agriculture to evaluate the possible usefulness of Agent Orange to the war effort. Da 679-80. The study found Agent Orange to be more effective than any other herbicide which was tested. Da 681.

The spraying of Agent Orange began in 1962 under the code name "Operation Ranch Hand". Initially sprayed near Saigon to prevent ambushes on the roads, it was also applied to destroy field crops. *Id.* at 775. The spraying of Agent Orange increased with the escalation of United States involvement in the war. *Id.* at 776. An estimated 10% of the total acreage of South Vietnam was sprayed with Agent Orange.

Agent Orange was not a commercial product; it was never sold to commercial users. Rather, it was manufactured according to specifications developed by the United States government specifically for the war effort in Vietnam. Da 627-28. The government formulated its specifications to develop a "novel weapon of war" for its "war-related objectives" rather than using an existing commercial product. Da 627.

The safety considerations that come into play under peace time conditions simply do not apply to products designed for war. For example, the military specifications called for Agent Orange to be applied at full strength, whereas comparable commercial products are diluted. Da 628. Agent Orange was sprayed at the rate of 3 gallons per acre as compared to 1 gallon per acre for similar commercial herbicides. *Id.* at 776. It is, therefore, significant that Diamond had sold herbicides similar to Agent Orange for nearly 40 years without the adverse health consequences ascribed to Agent Orange. Da 628.

Moreover, the exigencies of war further compounded the increased dangers already inherent in the Agent Orange specifications. Higher concentrations often would be found because of double spraying, drifts, miscalculations and sudden jettisoning of payload incident to the confusion of war and the need for aircraft to avoid enemy fire. *Id.*

One of the scientists engaged to study the effectiveness of Agent Orange as a "weapon of war," who was later retained by Diamond as an expert in this litigation, succinctly described the inherent danger involved in products designed for and subject to the exigencies of war, as opposed to products designed for commercial use:

A. We knew that there were some adverse effects from the use of DDT but we felt, too, that with proper regulation and with proper usage, that the adverse effects could be minimized.

Q. Is that, roughly speaking, the same view you hold with respect to the use of Agent Orange?

A. No, it wouldn't be the same at all.

Q. Could you explain the difference?

A. The difference is that Agent Orange was used to achieve a military objective. DDT was not used to obtain a military objective, it was used agriculturally. Agent Orange has never been used agriculturally.

Da 582.

3. Judge Weinstein's rulings regarding the non-commercial use of Agent Orange.

The increased dangers inherent to the exigencies and vagaries of war were recognized at length in the underlying proceedings. In striking the indemnity and contribution claims against the United States, Judge Weinstein applied the judicial doctrine prohibiting claims that arise incident to military service for what would otherwise constitute an actionable wrong. *In re "Agent Orange" Products Liability Litigation*, 506 F. Supp. 762, 770 (E.D.N.Y. 1980). The court reasoned that the extreme conditions arising from military service made it improper for military decisions to be second guessed by the civilian justice system. *Id.* at 771. In particular, the claims of the class arose "solely from their military service" arising out of exposure to a herbicide "used for a military purpose." *Id.* at 776.

Likewise, as Judge Weinstein observed, the Agent Orange manufactured by Diamond was in full compliance with government

specifications. *See In re "Agent Orange" Product Liability Litigation*, 565 F. Supp. 1263, 1274 (E.D.N.Y. 1983). Damages caused by Agent Orange occurred in Vietnam due to its particular uses in the war effort, and hence were obviously occasioned by war.

Judge Weinstein also emphasized the particular war-related, non-commercial uses of Agent Orange in Vietnam that caused the plaintiffs' injuries:

> As compared to commercial use of herbicides, the government increased the health risks by (1) spraying in much greater concentrations than recommended by the manufacturers for civilian use, (2) failing to inform users to guard against direct contact with the herbicide, (3) failing to take precautions to warn those who might be exposed to the herbicide, (4) failing to warn those in the area where it was used to avoid contact with vegetation and drinking or bathing in contaminated water or eating contaminated food, and (5) failing to provide sanitary precautions such as showers and fresh clothing and medical attention to those who were exposed.
>
> Members of the armed services were exposed to Agent Orange in a number of different ways. Air Force personnel handled the Agent Orange in preparation for large scale spraying from the air. Hand and mechanical equipment was used locally to clear the perimeter of installations. Troops were exposed to the spraying when they walked and lived in areas with affected vegetation. Some drank water or ate food prepared from crops that had been contaminated with Agent Orange. The exigencies of battle sometimes resulted in fast dumping of large quantities of the herbicide on troops. It is not disputed that the amount sprayed per acre vastly exceeded what would have been used in commercial farming or plant clearing activities by civilians.

In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740, 819 (E.D.N.Y. 1984).

The decision of the Second Circuit affirming dismissal of the "opt out" claims articulated the problems inherent in applying legal standards governing civilian life to decisions regarding the military use of Agent Orange. It noted that the military contract defense for products manufactured according to government specifications "advances the separation of powers and safeguards the process of military procurement." *In re "Agent Orange" Products Liability Litigation*, 818 F.2d 187, 191 (2d Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2898 (1988). The court went on to note:

> The allocation of such decisions to other branches of government recognizes that military service, in peace as well as in war, is inherently more dangerous than civilian life. Civilian judges and juries are not competent to weigh the cost of injuries caused by a product against the cost of avoidance in lost military efficiency.
>
> * * *
>
> Moreover, military goods may utilize advanced technology that has not been fully tested. *See McKay [v. Rockwell Int'l Corp.]*, 704 F.2d 444, at 449-50 [(9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984)] ("in setting specifications for military equipment, the United States is required by the exigencies of our defense effort to push technology towards its limits and thereby to incur risks beyond those that would be acceptable for ordinary consumer goods.")

Id. (emphasis added).

It is illogical that many of Diamond's insurers, which received protection from liability attendant to war, ultimately turned out to be the only entities denied protection from the inherent and increased risks associated with the military decision to develop and apply Agent Orange as a weapon of war.

B. The Agent Orange Claims Arose As A Consequence Of War.

The basic premise of the trial court's ruling against applicability of the exclusions is that the dangers associated with Agent Orange were not enhanced by the existence of the war. Pa 529. However, the above facts amply demonstrate that the same vagaries and exigencies that typically increase war time risks permeated the use of Agent Orange in Vietnam. Indeed, the military use and purpose for Agent Orange extended from its initial development -- including the evaluation of safety risks and the specifications calling for use at full strength -- to its actual deployment in Vietnam under war conditions.

In denying the applicability of the exclusion, the trial court read into the language two artificial limitations: (1) that it applies only to instances where liability was linked to an act of intentionally striking out at another human being; and (2) that it could only apply if friendly forces were mistakenly injured in the process of attempting to strike out at hostile forces. Pa 530-33. Nothing in the language of the exclusions supports this limiting construction.

By their terms, the exclusions at issue are not limited solely to those situations involving the attempted-but-mistaken intentional striking out by one individual upon another -- who happens to be friend rather than foe -- during wartime. The exclusions apply broadly to injury or damage that is "directly or indirectly" "due to," "a consequence of," "happens through," or "occasioned by" war. They are not limited in any way to damage or injury directly caused by intentional acts of aggression. Moreover, such artificial limitations directly contradict prior case law addressing similar language.

The applicable standard was articulated by the United States Supreme Court in *Standard Oil Co. of N.J. v. United States*, 340 U.S. 54 (1950), which involved a collision between a steam tanker owned by the insured and a Navy minesweeper clearing the channel approaches to New York harbor. Both vessels were at fault for the collision in failing to comply with the applicable rules of good seamanship. The Court had to determine whether liability of the tanker for damage to the minesweeper was covered by a war risk policy insuring against "all consequences of hostilities or warlike operations" or under the tanker's marine perils policy. *Id.* at 55-56.

The Court began its analysis by recognizing that minesweeping operations constitute "warlike operations" within the meaning of the policies. *Id.* at 56. However, it further reasoned that "common sense dictates that there must be some causal relationship between the warlike operation and the collision." *Id.* at 57. Under the circumstances, the exclusion's applicability was for the trier of fact to determine:

> whether the loss was predominantly or proximately caused by usual navigational hazards (and therefore an ordinary marine insurance risk) or whether it was caused by extra-ordinary perils stemming from the mine sweeping (and therefore a war insurance risk).

Id. at 58.

Particularly on point is *International Dairy Engineering Co. of Asia, Inc. v. American Home Assurance Co.*, 352 F.Supp. 827 (N.D.Cal. 1970), *aff'd*, 474 F.2d 1242 (9th Cir. 1973), where the court held that the accidental burning of a civilian warehouse in South Vietnam in 1967 by a flare dropped by the United States Air Force to facilitate night operations against the Viet Cong was a "hostile act" and a consequence of "hostilities or war-like operations," as well as a consequence of "civil war, revolution, rebellion, insurrection, and civil strife arising therefrom." *Id.* at 830-31. In that case, the insured argued that the war risk exclusion should not apply because the flare had not been dropped on the warehouse as part of a hostile act, but rather the flare had been negligently dropped on the warehouse and

thus the hostile character of its use did not cause the fire. This argument was rejected by the district and appellate courts, since the flare had been dropped in connection with military operations -- which was enough to trigger application of the war risk exclusion. In upholding the application of the exclusion, the District Court stated:

> Although flares are not themselves weapons designed to destroy or harm, all of the purposes for which flares were being used in Vietnam . . . would be 'hostile acts' by a belligerent in the sense that all those purposes involved use of flares in conjunction with weapons capable of firepower and to expose enemy forces to that firepower.

352 F. Supp. at 829.

Just as parachute flares were dropped in order to expose enemy troops, Agent Orange likewise was applied to eliminate ambushes from hidden enemy guerrillas. Moreover, the use of Agent Orange to destroy enemy crops brings the application well within the notion of a "hostile act" against an adverse power. *International Dairy Engineering Co. of Asia, Inc. v. American Home Assurance Co.*, 474 F.2d 1242, 1243-44 (9th Cir. 1973). *See also Home Ins. Co. v. Davila*, 212 F.2d 731 (1st Cir. 1954).

The trial court distinguished *International Dairy* because it involved "human beings striking out at other human beings." Pa 530-31. However, the court's analysis was incorrect since the dropping of parachute flares in *International Dairy* was no greater a direct physical threat to the enemy than the spraying of Agent Orange. Both comprised an integral component to the overall war effort in Vietnam. The insurers therefore should have been afforded an opportunity to demonstrate at trial that the use of Agent Orange in time of war entailed greatly enhanced risks to innocent parties than otherwise exist in peace time conditions.

The illogic of the trial court's analysis is evidenced by Diamond's own concession with respect to the efficacy of the similar

war risk exclusion in the policy of the Insurance Company of the State of Pennsylvania ("ISOP"). Pa 503-07. That exclusion provided:

> No liability shall attach to the company under this policy for consequence, whether direct or indirect, of war . . .

Diamond conceded at oral argument that the ISOP exclusion precluded coverage. Pa 503-04. The trial court therefore not only denied Diamond's motion to strike ISOP's defense based on the exclusion, but also granted ISOP's cross-motion for summary judgment on that defense. Pa 527. In view of this concession, Diamond cannot seriously contend that the Agent Orange claims were not a consequence of the Vietnam War.

Diamond thus conceded that the ISOP exclusion was effective. Pa 503-04. The trial court at the same time was of the view that there were no material differences in the various wordings of the exclusions for damage or liability incident to war:

> The language of the various clauses is not identical,... and in my judgment the difference in language is not significant, because the critical factor is the functional analysis of what it is that all of these war risk clauses are meant legitimately to achieve.

Pa 527-28. A straightforward analysis of the wording of the various exclusions demonstrates that, just as the ISOP exclusion applies to preclude coverage for injuries or damage incident to war, admittedly similar exclusions in the insurance contracts of the other defendants also serve to preclude coverage.

For all of the above reasons, the trial court improperly granted plaintiff's motion to strike defenses based on exclusions incident to war and should, at a minimum, have permitted the defendants to present evidence at a full factual hearing on the applicability of the exclusions.

IV. THE TRIAL COURT IMPROPERLY ALLOWED RECOVERY WHEN THERE WAS NO EVIDENCE THAT BODILY INJURY RESULTED DURING ANY POLICY PERIOD

A. Background Facts.

1. The Agent Orange rulings.

In his decision approving the settlement of the Agent Orange class action, Judge Weinstein found that it was "highly unlikely that, except for those who have or who have had chloracne, any plaintiff could legally prove any causal relationship between Agent Orange and any other injury, including birth defects." *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 749 (E.D.N.Y. 1984). However, the court pointed out that no proof had been shown of any chloracne injury to the plaintiffs. 597 F. Supp. at 856. Indeed, Judge Weinstein cited a study by the Veterans' Administration which found no cases of chloracne traced to the use of Agent Orange in Vietnam. *Id.*

The Second Circuit's decision affirming the settlement also observed "substantial problems" for the class in proving causation. It noted that "[t]he weight of present scientific evidence thus does not establish that personnel serving in Vietnam were injured by Agent Orange." *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145, 172 (2d Cir. 1987).

2. Diamond's excess insurance.

The excess insurance policies issued to Diamond for the period 1957 to 1975 provided that the excess insurers would "indemnify" Diamond for any and all sums which Diamond shall become liable to pay for bodily injury arising out of an occurrence. Da 15. These policies further provided:

G. LOSS PAYABLE

Liability under this Policy with respect to any occurrence shall not attach unless and until the Assured, or the Assured's underlying Insurers, shall have paid or have been held liable to pay the amount of underlying limit on account of such occurrence. The Assured shall make a definite claim for any loss for which the Company may be liable under the Policy within Twelve (12) months after the Assured shall have paid an amount of Ultimate Net Loss in excess of the amount of the underlying limits or after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and the Company.

Da 24-25. Thus, the excess insurers' obligation to indemnify Diamond would only arise where a judgment in excess of underlying insurance was entered against Diamond or where the excess insurer agreed in writing to a settlement which was in excess of underlying insurance.

3. Diamond's failure to present a claim to its excess insurers.

By telex dated May 8, 1984, Diamond advised certain of its excess insurers that the seven Agent Orange defendants were going to settle the class action for a total sum of $180 million. Da 223-24, 1376-77. Mr. Stauffer, Diamond Shamrock's risk manager, conceded that this telex did not tell Diamond's insurance carriers how much Diamond would be paying out of this amount. Da 1378. Moreover, he acknowledged that Diamond had not communicated any theory of trigger of coverage to its excess insurers at that time. *Id.*

After Diamond entered into the Agent Orange settlement, it continued to fail to submit a claim to its excess insurers. Mr. Stauffer admitted at trial that he never made a specific dollar request for

indemnification to any excess insurer. *Id.* Thus, as the trial court pointed out during Mr. Stauffer's testimony:

> [U]nless an excess carrier is given some data about the amount of the settlement and about the possible years to which the settlement would be attributed, he wouldn't know whether his policy became engaged at all . . . . He just wouldn't even know if he were within the dollar range where he might have to respond.

Da 1380-81.

B. The Rulings Of The Trial Court.

By Order dated February 4, 1988, the trial court denied the motion of certain excess insurers seeking partial summary judgment on the grounds that Diamond cannot prove that any bodily injury resulted to the Agent Orange claimants. Da 1059. While acknowledging that the Agent Orange claimants were unable to prove injury, Da 1053, the court ruled as follows:

> I do not think it is 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.
>
> * * *
>
> I think it is beside the point and legally irrelevant whether any of the veterans in Vietnam were actually injured by Agent Orange.

Da 1053-55. The court concluded that there was coverage simply because there was a serious claim asserted against Diamond about which the excess insurers had been notified. Da 1056.

C. The Excess Policies Are Not Obligated To Indemnify Diamond For Its Settlement.

It is well established that a court has a duty to enforce clear and unambiguous provisions in an insurance policy as they are written. *See, e.g., Kampf v. Franklin Life Insurance Co.*, 33 N.J. 36, 42-43 (1960); *Steiker v. Philadelphia National Insurance Co.*, 7 N.J. 159, 166 (1951). As stated by the Supreme Court:

> Whatever may be the rules of construction when a policy of insurance is ambiguous, it has long been the law in this State that when the contract is clear the court is bound to enforce the contract as it finds it. "The law will not make a better contract for parties than they themselves have seen fit to enter into, or alter it for the benefit of one party and to the detriment of the other. The judicial function of a court of law is to enforce the contract as it is written."

James v. Federal Insurance Co., 5 N.J. 21, 24 (1950) (quoting *Kupfersmith v. Delaware Insurance Co.*, 84 N.J.L. 271, 275 (E. & A. 1912)).

In this case, the contract entered into between the parties is clear and unambiguous and should be enforced as written. As Diamond itself acknowledges, coverage is triggered by an occurrence, which requires the existence of bodily injury during the policy period. Pb 52-53. Indeed, this principle is well established under both New York and New Jersey law.

For example, in the leading case of *American Home Products Corp. v. Liberty Mutual Insurance Co.*, 565 F. Supp. 1485 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984), the district court held that insurance policies require "a showing of actual injury, sickness or disease occurring during the policy period, based upon the facts proved in each particular case." 565 F. Supp. at 1489. On appeal, the Second Circuit agreed with the district court that the policy

language at issue permitted only one reasonable interpretation, that of injury in fact, concluding:

> Where, as here, the contract's language admits of only one reasonable interpretation, the court need not look to extrinsic evidence of the parties' intent or to rules of construction to ascertain the contract's meaning.

748 F.2d at 765 (emphasis added).

In analyzing the coverage dispute before it, the Second Circuit agreed with the district court's ruling that:

> The plain language [of the policy] demands that the insured prove the cause of the occurrence (accident or exposure), the result (injury, sickness, or disease), and that the result occurred during the policy period.

748 F.2d at 763 (emphasis added).

The New Jersey Supreme Court likewise acknowledged the requirement of proof of bodily injury in *Hartford Accident & Indemnity Company v. Aetna Life & Casualty Insurance Co.*, 98 N.J. 18 (1984). In that case, the Court denied coverage, pointing to the relevant language of the policy, which provided coverage for an occurrence resulting in bodily injury during the policy period, and held that "the existence of coverage would require a showing that [a claimant] actually suffered bodily injury." 98 N.J. at 28 (emphasis added).

Judge Weinstein's ruling on causation in the underlying Agent Orange case is dispositive of the issue of whether there has been "bodily injury" and hence an "occurrence" under Diamond's insurance policies. In applying New York law, the Court in *American Home Products* emphasized the collateral estoppel effect of the underlying litigation on the issue of when an injury occurred. 565 F. Supp. 1485, 1509 (S.D.N.Y. 1983). The Court explained that the underlying

trial "will also often resul 'n a finding of when the compensable injury occurred," and will consequently resolve the issue of coverage. *Id.* at 1510.

Other courts have also emphasized that an insurer's duty to indemnify must be determined by the actual facts relating to the underlying claim. For example, in *Travelers Insurance Co. v. Waltham Industrial Laboratories Corp.*, 883 F.2d 1092, 1099 (1st Cir. 1989), the court pointed out that "an insurer's obligation to defend is measured by the allegations of the underlying complaint while the duty to indemnify is determined by the facts, which are usually established at trial." Similarly, as the court explained in *Yakima Cement Products Co. v. Great American Insurance Co.*, 14 Wash. App. 557, 544 P.2d 763, 767 (1975): "Coverage or an insurer's 'duty to pay' depends upon the actual determination of facts surrounding the claimed injury relative to the policy provisions."

The actual facts in the case demonstrate that there was no compensable injury in the underlying Agent Orange case. That finding collaterally estops Diamond from somehow trying now to create an injury for insurance coverage purposes.

When presented with the undisputed evidence of no injury, the trial court simply elected to absolve Diamond of its burden of proving injury for insurance coverage purposes. In fact, the court concluded that it was legally irrelevant whether any class member was injured. Pa 57. In reaching this conclusion, the court looked only to whether the allegations, if proven, involved a claim for injury. However, this standard is the wrong standard to apply to an insurer's duty to indemnify.

The New York Court of Appeals has made it clear that "even in cases of negotiated settlements, there can be no duty to indemnify unless there is first a covered loss." *Servidone Construction Corp. v. Security Insurance Co. of Hartford*, 64 N.Y.2d 419, 423, 488 N.Y.S.2d 139, 142, 477 N.E.2d 441, 444 (1985). The mere fact that Diamond chose to settle the underlying case does not create insurance coverage unless the loss was otherwise covered by the policy.

Moreover, the reasonableness and good faith of Diamond's settlement of the Agent Orange case is of no significance, and certainly cannot establish coverage that does not otherwise exist. Here, as conceded by Diamond and found by the court, there is no bodily injury and hence no obligation to indemnify.

The impropriety of relying on the fact of settlement to establish indemnity coverage is further evidenced by the unequivocal language of Diamond's excess policies. In the event of a settlement, the policies obligate the excess insurers to indemnify Diamond only where the excess insurer has agreed in writing to the settlement.

Diamond has not, and cannot, establish that written consent was given. To the contrary, Diamond never told its excess insurers the amount of its settlement payment. Da 1376-77. Further, Diamond has never submitted a specific dollar claim for indemnification from any excess insurer. Da 1378. Thus, Diamond has not complied with the clear policy language which requires consent by an excess insurer as a condition precedent to indemnification. The absence of written consent by Diamond's excess insurers is fatal to its claim for indemnification.

In sum, because Diamond has consistently taken the position (and the courts have found) that there was no bodily injury suffered by the plaintiffs in the Agent Orange litigation, there can be no coverage for Diamond's settlement payment under the applicable policies.

V. COVERAGE IS AFFORDED BY DIAMOND'S FOREIGN LIABILITY INSURANCE

The trial court misconstrued and improperly refused to apply Diamond's foreign liability insurance to the Agent Orange claims. Da 1520, 1541, 1564. It mischaracterized defendants' position as follows: "defendants argue that Diamond is limited to those foreign risk policies in seeking coverage . . . ." Pa 56. Thus, the court understood the excess insurers to be arguing that, if the foreign liability policies applied, there would be no coverage under the excess policies. Pa 56. No such argument was made by the excess insurers.

Diamond's foreign liability insurance applies to claims involving injuries which took place outside the United States. Da 1523, 1545, 1573. Such insurance was considered primary insurance for purposes of the excess insurance policies issued to Diamond. Da 424-25, 442. Thus, in a situation where the foreign liability insurance would apply, the excess policies would require payment of the full limits of these policies. In other words, the excess policies would have no obligation to pay until there was exhaustion of the limits of the coverage provided by both the foreign liability coverage and the Aetna coverage. The excess policies continue to apply, but they apply in excess of the foreign liability coverage.

In concluding that Diamond's foreign liability policies do not apply, the court erroneously held that the "product liability claims in this case are not foreign risks." Pa 56. However, the issue of whether the product liability claims involve "foreign risks" is irrelevant to the applicability of Diamond's foreign liability insurance. That insurance covers the Agent Orange or any other claims of Diamond if the alleged injury occurs in a foreign location, including in South Vietnam. Moreover, the fact that any lawsuit arising out of these claims is eventually filed in the United States is irrelevant to the applicability of this coverage, since it is the location of the injury, not the location of the lawsuit, that controls coverage.

The court found that injury to the Agent Orange claimants took place in South Vietnam. Pa 51. Based upon that finding, coverage under the foreign liability policies necessarily follows. Thus, this coverage must be exhausted before any excess policy is obligated to provide indemnification to Diamond.

The court also based its conclusion that Diamond's foreign liability insurance did not apply on the finding that the "insured occurrence took place in the United States when the product was delivered to the military." Pa 56. However, it is the place of the injury that controls whether the foreign liability insurance is applicable. Indeed, this is best demonstrated by Diamond's prior handling of foreign injury claims.

In the early 1960s, numerous claims were made against Diamond as a result of chloracne injuries in South America. These claims involved 2,4,5-T products manufactured by Diamond at its Newark plant, the same plant that manufactured Agent Orange. Diamond's foreign risk insurers were notified of these claims by Diamond and paid them, and coverage by the foreign carriers was not disputed. Da 154-56, 159.

The only potential differences between the Agent Orange claims and these South America claims is that they involve different foreign countries and different products. These differences are irrelevant insofar as coverage under these policies is concerned. These claims are identical for purposes of coverage since they both involve injuries occurring within a foreign country arising out of exposure to products manufactured at Diamond's Newark plant. While Diamond contends that the Agent Orange claims are different because the lawsuit was filed in the United States, that fact does not somehow negate the foreign coverage as long as the injury takes place in the foreign country.

In sum, Diamond's foreign coverage is triggered since the alleged bodily injury -- *i.e.*, exposure to Agent Orange -- indisputably took place in South Vietnam. The court's ruling that the foreign liability insurance does not apply should therefore be reversed.[62]

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62 The court dismissed all claims for coverage for the Agent Orange claims against the foreign liability insurers on the ground that Diamond was guilty of late notice under New York law. (Those insurers were first notified long after the Agent Orange claims had been settled by Diamond and after Diamond had commenced this action.) Recognizing the legal and factual correctness of this late notice ruling, Diamond did not appeal from this ruling. Therefore, if this Court holds that Diamond's foreign liability insurance coverage applies to the Agent Orange claims, Diamond should be responsible for the resulting "loss" in coverage due to its late notice of the Agent Orange claims to the foreign liability insurers.

VI. APPLICATION OF THE BATCH CLAUSE COMPELS A FINDING OF 133 OCCURRENCES

A. Statement Of The Facts.

1. The batch clause.

Prior to 1967, Aetna's policies set forth Aetna's agreement "[t]o pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident."[63] Da 662. Under a section entitled "Limits of Liability", the pre-1967 policies incorporated a batch clause.[64] The batch clause provided that:

> [A]ll such damages arising out of one lot of goods or products prepared or acquired by the named Insured or by another trading under his name shall be considered as arising out of one accident.

Da 665.

In 1967, Aetna changed to a new form of policy which provided coverage on a per occurrence basis rather than a per accident basis. At Diamond's request, a "batch clause" endorsement was added to the occurrence form of policy. Da 633-34. This endorsement provided that:

> All such damage arising out of one lot of goods or products prepared or acquired by the named Insured

---

[63] As of 1960, the policy language was amended by an endorsement that substituted "occurrence" for "accident." Pa 20.

[64] The terms lot and batch have the same meaning and are used interchangeably.

> or by another trading under his name shall be considered as arising out of one occurrence.

Da 666.

Diamond negotiated to have the batch clause incorporated by way of endorsement to add certainty to the number of deductibles it might be required to pay for multiple claims arising out of a common product defect. Da 530. It perceived the possibility that it would be required to pay a separate deductible for each claim. Therefore, it wanted to be responsible for only one deductible for the total amount of damage caused by a lot or batch of its product, and the batch clause accomplished that goal more definitively than the occurrence interpretation. Da 469.

At the same time, as reflected by the testimony of its broker, Diamond also understood that inclusion of the batch clause required that each batch give rise to a separate occurrence:

> Q. Now, with respect to the operation of the batch clause, is it true that if an accident resulted from a batch of Diamond product, that accident would constitute a single occurrence?
>
> A. Yes.
>
> Q. And if there was a second batch of the same product that caused a different accident, that would be a second occurrence, is that correct?
>
> A. Yes.
>
> Q. And if there were five batches that resulted in five separate accidents, that would be five occurrences under the policy, is that right?

A. Right.

Da 428-29.

2. Prior judicial construction of the batch clause.

The proper interpretation of the batch clause in Diamond's insurance contracts was previously addressed in other litigation to which Diamond was a party. In that case, the court found multiple occurrences arising from Diamond's sale of contaminated chicken feed because the claims arose out of multiple lots of the feed.

In *Home Insurance Co. v. Aetna Casualty & Surety Co.*, 1975 Fire and Casualty Cas. (CCH) 792 (S.D.N.Y. 1975), *rev'd*, 528 F.2d 1388 (2d Cir. 1976), *on remand*, 1977 Ins.L.Rep. (CCH) 9 (Sept. 29, 1977), Diamond incurred liability for property damage as a result of the manufacture of lots of defective vitamin resin:

> At its Harrison, New Jersey, plant, Diamond Shamrock produced two lots of superconcentrated vitamin D-3 resin which became "inactive" and thus defective at the Harrison plant. The two Harrison lots were shipped to Diamond Shamrock's Louisville, Kentucky, plant where the defective resin was sprayed on corn cob fractions to produce four lots of "Nopdex 200," a vitamin D-3 livestock food supplement. As a result, each of the four Louisville lots of Nopdex was also defective. Diamond Shamrock sold the four Louisville lots to Central Soya Corporation which used them in making chicken feed. Central Soya sold the chicken feed to numerous chicken farmers throughout the country, and the chicken fed with the defective chicken feed developed various afflictions, including rickets, abnormal growth, defective egg production and death. Central Soya has been settling the farmers' claims, and the parties have agreed that Diamond

> Shamrock is liable to Central Soya to the extent of those claims.

Da 800-801.

When Diamond sought indemnification, Aetna, its primary carrier, and Home Insurance Company, its excess carrier, disagreed over the number of occurrences under the batch clause. Home contended that there were four occurrences -- one for each of the four Louisville lots of Nopdex. Aetna and Diamond, on the other hand, took the position that there were only two occurrences, one for each of the two Harrison lots of super-concentrated vitamin D-3 resin. Significantly, no one took the position that only a single occurrence arose "from the manufacture and sale" of Nopdex.

In that earlier case, Diamond adopted the same position as do the excess carrier defendants here with respect to the number of occurrences. Thus, Diamond argued that each lot should constitute one occurrence:

> [I]t is submitted that an ordinary businessman would -- or at least could reasonably -- say that the damage to the chicken arose out of the defective Harrison lots and that each lot, therefore, constituted one "occurrence".

Da 193 (emphasis added).

Likewise, Diamond's 1975 Memorandum in Support of its Cross Motion for Summary Judgment in the *Home* case asserted that the relevant provisions in determining the number of occurrences were first, the definition of "occurrence," and second, the definition of the batch clause. Da 206-07. The term "occurrence" was defined as an accident which results in damages neither expected nor intended. *Id.* at 207. The batch clause required that all damages arising out of one lot or batch of goods or products prepared or acquired by the insured "shall be considered as arising out of one occurrence." Based on these two terms, Diamond argued that each batch constituted an occurrence.

Diamond also argued that the purpose and intent for inclusion of the "batch" clause was that there would be only one occurrence for each batch or lot with respect to which an accident occurred. Da 193, 195.

In its subsequent brief to the Second Circuit Court of Appeals, Diamond argued:

> Based upon its intent and understanding with respect to the meaning of occurrence as clarified by the "batch clause," Diamond has taken the position that there were two occurrences for purposes of its policies with Aetna and Home, i.e., one occurrence for each of the two defective lots produced at the Harrison plant from which property damage arose.
>
> * * *
>
> [T]he damage involved in this case clearly "arose" out of the two Harrison lots as the word "arise" is commonly understood .... In short, the damage to the chickens originated from the defective Harrison lots and thus they are two lots of goods or products out of which damage arose.

Da 190-91.

Following remand of the case, Paragraph 36 of Diamond's Proposed Findings of Fact asserted:

> When the "batch clause" is applied to the per occurrence coverage, the only reasonable effect it can be given is one that should be understood to mean that there is one occurrence for each bad lot that is the proximate cause of all resulting liability damage and claims.

Thus, at no time in that case did Diamond assert, as it did here, that the manufacture and sale of a defective product was the occurrence. Da 214-15.

Diamond's own analysis in *Home v. Aetna* is equally applicable here. Indeed, Diamond should be collaterally estopped from arguing in this action for one occurrence when it previously argued in a case involving these same policies that the number of occurrences is dependent on the number of batches.[65] Here, as Diamond correctly and consistently acknowledged in *Home v. Aetna*, each lot constitutes one occurrence. Accordingly, based upon the trial court's previous finding that Diamond prepared and shipped at least 133 lots of Agent Orange, Da 683-85, there must be at least 133 occurrences in this case.

The *Home v. Aetna* court concluded that the batch clause controlled the number of occurrences for products liability claims. Applying the clause to the facts, the court found that there were "four Louisville lots of Nopdex and that the damage in this case arose out four occurrences." *Id.* at 795 (emphasis in the original).

3. The trial court's pretrial rulings.

Prior to trial, certain excess insurers moved for partial summary judgment, seeking the following declarations: (1) the batch clause is unambiguous and applies to the Agent Orange claims to determine the number of occurrences; and (2) Diamond shipped a minimum of 133 lots of Agent Orange to the Government in the 1960s. Thus, it was asserted that the Agent Orange claims involved 133 occurrences.

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65 Under both New York and New Jersey law, the doctrine of collateral estoppel bars a party from relitigating an issue which was actually determined in a previous action involving that same party. *Schwartz v. Public Administrator of County of Bronx*, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969); *State v. Gonzalez*, 75 N.J. 181 (1977). Thus, based on its argument and the ultimate ruling in *Home v. Aetna*, Diamond is precluded from taking any position other than that each batch or lot constitutes a separate occurrence.

The court denied the motion, although it agreed that the undisputed evidence established that 133 lots of Agent Orange were sold to the United States Government. Da 683-84.[66] Following a motion to reconsider that denial, the court adhered to its prior ruling. Da 693-694.

Shortly after this ruling on the effect of the batch clause, the court further ruled that Diamond was not required to prove that its product caused the injuries sustained by the servicemen in order to obtain coverage for the Agent Orange settlement. The settlement was reached without regard to which manufacturer of Agent Orange had caused injuries to a particular veteran. Pa 533-34.

Thus, although no claimant could prove exposure to Agent Orange produced from a particular batch, Diamond nevertheless settled the case at least in part because of its concern over liability being based upon an enterprise liability theory. Da 1275-78. In other words, Diamond settled the case because it faced prospective liability arising out of every batch or lot of Agent Orange which it manufactured. Moreover, the amount of Agent Orange produced by Diamond was a factor affecting the dollar amount of the Agent Orange settlement allocated to Diamond. *Id.*

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66 During the course of discovery, Diamond prepared documents relating to its shipments of Agent Orange to the United States Government. Diamond's summary sheets detail shipment dates, the number of drums shipped, the lot numbers, and the routings for each contract it had with the Government. The summary sheets list a minimum of 129 different lots of Agent Orange sold to the Government. Da 667-77. A comparison of the shipments of Agent Orange per Diamond's summary sheets based on the shipping documents and a Verified Statement filed by Diamond in the class action suit demonstrates that, at a minimum, Diamond made four additional shipments not reflected in the summary sheets. Da 651-61. The court thus correctly determined that the undisputed evidence established that a minimum of 133 batches of Agent Orange were sold by Diamond to the United States Government. Da 691.

4. The trial court's decision.

In its April 12, 1989 decision, the court held that the Agent Orange claims all arose out of a single occurrence -- the entire series of deliveries of Agent Orange to the military. Pa 50. In rejecting the applicability of the batch clause, the court discussed the difference between design and manufacturing defects and ruled that the batch clause only applied to manufacturing defects. Since the Agent Orange claims arose out of a design defect, the batch clause did not apply. Pa 55. The court later denied a motion to reconsider this ruling. Pa 2512.

B. The Uncontroverted Evidence Demonstrates That A Separate Occurrence Exists For Each Separate Batch Of Agent Orange.

The batch clause unequivocally provides that all bodily injury and property damage attributable to one lot of goods "shall be considered as arising out of one occurrence." Da 665. The meaning of this language could not have been made any clearer -- there is a separate occurrence for each lot of goods which results in bodily injury.

Diamond cannot now avoid the application of the unambiguous interpretation placed on the batch clause. This clause was placed in the policies at Diamond's insistence. Moreover, this unambiguous interpretation coincides with the understanding of the policy language held by Diamond and its insurance brokers and with the consistent handling of prior product liability claims.

For example, when this language came into dispute in *Home v. Aetna*, Diamond advocated that the batch clause be applied in a manner consistent with the position taken by the insurers here. Specifically, Diamond claimed that all damages arose out of two batches of product, and therefore there were two occurrences. Significantly, Diamond never argued for the application of a single occurrence.

Here, as Diamond correctly and consistently argued in *Home v. Aetna*, each batch of product constitutes one occurrence. Thus, based upon the court's previous finding that Diamond prepared and

shipped at least 133 lots of Agent Orange, there must be at least 133 occurrences in this case.

Further, the evidence presented at trial in this case was undisputed that every prior claim which involved a Diamond product and multiple claims was handled by Diamond on a multiple occurrence basis. Specifically, Diamond treated the following product liability claims on a multiple occurrence basis.

1. Product liability claims were raised against Diamond involving a product used for cleaning swimming pools. These claims involved more than one swimming pool but a single Diamond product. These claims were handled as more than one occurrence.

2. Dacamine claims against Diamond involved a weed killer that was sprayed by airplane over vegetable fields. The spray drifted onto other farmers' fields and claims arose from those farmers. These claims were handled as more than one occurrence.

3. Dacthal was an industrial weed killer manufactured by Diamond. There were a series of claims in California, Washington and Oregon where Dacthal was alleged to have damaged potatoes. Aetna paid losses for these claims. These claims were handled as multiple occurrences. Application of the batch clause to the Dacthal claims resulted in one occurrence per batch.

4. In a lawsuit involving the batch clause in Diamond's policies, *Home Insurance Co. v. Aetna Casualty & Surety Co.*, 1975 Fire and Casualty Cas. (CCH) 792 (S.D.N.Y. 1975), *rev'd*, 528 F.2d 1388 (2d Cir. 1976), *on remand*, 1977 Ins. L. Rep. (CCH) 9 (Sept. 29, 1977), Diamond treated each claim arising from the manufacture of a defective vitamin resin as a separate occurrence.

Da 1101-02, 1508-13. In contrast, the evidence at trial did not disclose any prior product liability claim that was handled as a single occurrence.

Diamond's prior course of performance in handling multiple claimant product liability claims is conclusive evidence that the Agent Orange claims arise out of multiple occurrences. As set forth in the *Restatement (Second) of Contracts* § 202(4) (1981):

> Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.

Id. [67]

Diamond along with its insurers and broker has repeatedly treated multiple claims arising out of Diamond products as multiple occurrences. The court's finding of one occurrence is without any evidentiary support. Rather, as Diamond argued and the trial court ruled in *Home v. Aetna:*

> [T]he damage involved in this case clearly "arose" out of the [133 Newark] lots as the word "arise" is commonly understood .... In short, the damage to the [claimants] originated from the defective

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[67] This section, previously Section 235(e) of the Restatement of Contracts 1st, has been widely adopted by New York and New Jersey courts. *See, e.g., Herbert Rosenthal Jewelrey Corp. v. St. Paul F & M Insurance Co.*, 249 N.Y.S.2d 208, 215, *aff'd*, 17 N.Y.2d 857, 218 N.E.2d 327 (App. Div. 1964); *Burnham & Company v. Indian Head Mills, Inc.*, 18 Misc. 2d 976, 191 N.Y.S.2d 74, 75 (N.Y. Sup. Ct. 1959); *Balsham v. Koffler*, 8 N.J. Super. 48 (1950).

> [Newark] lots and thus they are [133] lots of goods or products out of which damage arose.

Da 191.

Consequently, there are 133 occurrences in this case.

C. The Batch Clause Applies Regardless Of Whether The Claims Involve A Design Defect Or A Manufacturing Defect.

The court's refusal to apply the batch clause was based principally upon its perceived distinction between a design defect, *i.e.*, "the failure . . . of intellectual conceptualization," as opposed to "manufacturing defects" occurring through some error in making the product. Pa 54-55. Notably, such a distinction does not exist in the language of the batch clause. Moreover, nothing in the trial record supports any distinction between "design defects" and "manufacturing defects."

During the trial, Diamond did not offer a single exhibit or elicit a word of testimony in support of a design-manufacturing defect distinction. Indeed, Diamond never argued that the application of the batch clause rested upon the distinction. The court thus imposed its own artificial limitation upon the scope of the application of this clause. In this regard, it is significant that the court acknowledged during argument upon the motion for reconsideration that its ruling could not be found within the language of the clause:

> Now, it's true that there is no language in the policy speaking of manufacturing defects or speaking of design defects or subtracting one kind of liability defect to the other; there is obviously no language like that. And as Mr. Cuyler pointed out today really until the 1960's when we began to develop modern product liability law there wouldn't really be any reason why people would think in terms of

> distinctions between design defects and manufacturing defects.

Pa 92 (emphasis added). Moreover, by its own terms the clause extends, and is limited, to coverage for "products liability for bodily injury or property damage coverage." Pa 54. Nevertheless, the court adhered to its prior analysis and ruling.

In this case, all of the evidence of the parties' intent underscores the fact that Diamond and its brokers never applied the design-manufacturing distinction in determining the applicability of the batch clause. For example, Mr. William Greening, Diamond's principal broker from 1966 to 1980,[68] testified that Diamond had negotiated for the inclusion of the batch clause partly in response to liability claims against Diamond relating to the use by potato farmers of a weed killer known as Dacthal. Significantly, Diamond never made a determination that these claims related to mismanufacture as opposed to design:

> Q. Diamond never determined, though, that the particular product involved with the claim situations had been mismanufactured?
>
> A. No.
>
> Q. It never determined that the lot or batch of the particular products giving rise to the claims had been erroneously mixed or manufactured in the plant?
>
> A. Not to my knowledge.

---

68 Following the issuance of the court's April 2, 1989 decision, Mr. Greening was deposed in Miami, Florida in *Diamond Shamrock v. Aetna Casualty And Surety Co.*, Case No. 842383 (Superior Court of San Francisco County, California). Mr. Greening's deposition testimony, as well as the deposition testimony of Donald Purdy in that same case, was presented without objection to the trial court in connection with the motion for reconsideration.

Da 736-37. Indeed, the damage was caused by the application of the product to potato fields under certain unfavorable weather conditions. This "defect" eventually led Diamond to employ a warning instructing purchasers not to use the weed killer under those circumstances. Da 736-37.

Likewise, Diamond's former risk manager, Donald Purdy, testified about certain product liability claims against Diamond that led to the incorporation of the batch clause in the post-1967 policies. Neither of these claims, which involved dacamine and dacthal products, related to a "mismanufacture" of particular batches of the products. In fact, these products involved problems in design:

> Q. You don't recall that it was allegedly a mismanufacture situation where particular batches of the product had been defectively put together in the plant?
>
> A. No, no.
>
> Q. That would be the same answer with respect to Dacamine?
>
> A. Yes.

Da 746.

Purdy also reviewed a copy of the batch clause. He testified that he could recall no distinction made between application of the batch clause to claims involving mismanufacture as opposed to design problems:

> Q. Now, at any time when you, through Mr. Greening, expressed a concern with the Dacamine or Dacthal situations and the desire to somehow avoid being charged separately for each claim in that situation, did you express a desire to limit the batch clause to a mismanufacture situation, as distinguished from a formulation or design situation?

A. I don't remember that, no.

* * *

Q. So, regardless of whether it was a design, formulation or a mismanufacture situation, you wanted a clause that would limit the number of occurrences to the number of batches or lots?

A. Yes, and at the same time, to limit the amount of deductibles that would apply.

Da 747-48.

Similarly, with respect to the chicken feed claims which were the subject of the *Home v. Aetna* litigation, Purdy did not recall ever making a distinction between design and formulation defects:

Q. Now, do you ever recall telling your broker or anyone from Aetna that the batch clause would not apply in a design or formulation situation?

A. I don't remember if I did.

Q. Do you ever recall anyone from Aetna or your broker telling you that the batch clause would not apply to design or formulation situations?

A. I don't recall that.

Da 749-50.

Finally, Purdy confirmed that no distinction was made between design and manufacturing defect claims in determining coverage for product liability claims:

Q. In the context of product liability claims, were you aware of claims that were referred to as design defect claims?

A. I don't remember that we were talking about such things back then. We could have been; I don't remember anything specific, though.

Q. Well, just so I am clear, then, do you have any recollection of discussing the distinction between design defect claims and manufacturing defect claims in the 1960s when you were considering adding the batch clause by way of endorsement to the policy?

A. I have no recollection.

Da 751-52.

All of the evidence of the contracting parties' intent thus showed that the batch clause applies equally to product liability claims arising from design defects and manufacturing defects. Consequently, the batch clause does apply to the Agent Orange claims and results in a finding of 133 occurrences.

The case law is well settled that a court should not strain to impose an artificial meaning to the language of an insurance contract for the mere purpose of constructing nonexistent ambiguities merely to reach an unjustified result. *Marini v. Ireland*, 56 N.J. 130, 143 (1970); *Hartford Fire Insurance Co. v. Riefolo Construction Co.*, 161 N.J. Super. 99, 114-15 (App. Div. 1978), *aff'd*, 81 N.J. 514 (1980). Rather, the court must enforce the contract as written.

Finally, to the extent there is an ambiguity in the batch clause, this Court is then required to ascertain the probable common intent of the parties. In this case, testimony from Diamond's own agents at the time the batch clause was negotiated into the post-1967 policies demonstrates that the application of the batch clause was never to rest upon the distinction between manufacturing and design defects.

This Court should therefore reverse the trial court's ruling of the inapplicability of the batch clause, and remand with instructions to modify the judgment accordingly.

VII. DIAMOND IS NOT ENTITLED TO AN AWARD OF PREJUDGMENT INTEREST FROM ANY OF THE EXCESS CARRIERS

A. Background Facts.

In awarding coverage to Diamond for the Agent Orange claims, the court also concluded that Diamond should receive prejudgment interest from its insurers. The court assessed prejudgment interest against the insurers on a pro rata basis, in proportion to each insurer's liability for the Agent Orange settlement. Pa 53.

That portion of the court's decision awarding prejudgment interest did not set forth any findings of facts or legal conclusions supporting the award. Accordingly, certain of the excess insurers moved for clarification of this ruling.

In urging the court to reconsider its award of prejudgment interest, the excess insurers argued the following undisputed facts: 1) the contractual obligation of the excess insurers to pay money does not arise until there is exhaustion of underlying insurance; 2) at no time did Diamond ever present a claim to the excess insurers, choosing instead to simply put them on notice of a potential claim; and 3) Diamond refused to take any position on which policy years were liable for the Agent Orange claim, thereby preventing any excess insurer from cutting off the running of interest by making a money payment. Da 758-87.

The court reaffirmed its prior ruling, reasoning only that Diamond was denied the use of its money and that the excess insurers had the benefit of the use of the money for which they were later held liable. Pa 969. The court did not address the arguments presented by the excess insurers.

B. The Terms Of The Excess Policies Preclude Any Award Of Prejudgment Interest.

The excess insurers acknowledge that the use of money is a valuable interest worthy of protection under equitable principles. However, prior to the court's entry of judgment, the absence of any claim submitted to the excess insurers precluded any obligation on their part to pay money. Therefore, their own continued use of money also constituted a valuable right that should be honored by the courts.

In this case, the contractual agreement between Diamond and the excess insurers expressly contemplated that their obligation to pay under the insurance contracts does not arise, and therefore the continued right to possession of money does not transfer, until a proper claim for payment has been presented to these insurers. Thus, the language of the excess policies should govern the entitlement of Diamond to any prejudgment interest.

Under this excess policy language, drafted by Diamond's brokers, the excess insurers do not pay under the policies until all underlying insurance has been exhausted. As of the end of trial, no exhaustion had yet occurred, and hence no claim had yet been presented to the excess insurers. Indeed, Diamond consciously chose not to exhaust its underlying insurance by declining to adopt a position as to which policies were triggered, and thus never objected that its excess insurers had not paid.

Coverage is not afforded under the excess policies unless and until all underlying insurance has been paid. Specifically, the excess policies provide:

> G. LOSS PAYABLE
>
> Liability under this Policy with respect to any occurrence shall not attach unless and until the Assured, or the Assured's underlying Insurers, shall have paid or have been held liable to pay the amount of underlying limit on account of such occurrence. . .

. Such losses shall be due and payable within Thirty (30) days after they are respectively claimed and proven in conformity with this Policy.

Da 24-25. Thus, liability attaches under the excess policies only after the applicable underlying insurance has been paid and only 30 days after Diamond has proven a claim in conformity with this excess policy. Until Diamond's excess insurers became contractually obligated to indemnify Diamond, they had no contractual or equitable obligation to pay interest.

Similarly, the Limit of Liability section of the excess policies provides that the excess insurers will be liable for Ultimate Net Loss in an amount up to the per occurrence limit of the policy. Ultimate Net Loss is defined in these policies as:

3. ULTIMATE NET LOSS

The term "ultimate Net Loss" shall mean:

(i) The total sum which the Assured, or any Company as his Insurer, become obligated to pay by reason of personal injury or injury to or destruction of property, including the loss of use thereof, either through adjudication or compromise, and

(ii) Shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement adjustment and investigation of claims and suits which are paid as a

> consequence of any occurrence covered hereunder, excluding only the salaries of the Named Assured's, or of any underlying Insurer's permanent employees.
>
> * * *
>
> The Company shall not be liable for expenses as aforesaid when such expenses are included in other valid and collectible insurance.

Da 20-21. As can be seen, "interest" is included in the definition of Ultimate Net Loss. Therefore, any liability of the excess insurers for Diamond's settlement or pre-judgment interest is subject to the policy limits. Thus, if an excess policy has exhausted its limits toward reimbursement of Diamond's settlement amount, no amount of pre-judgment interest can be payable under that policy.[69]

C. Diamond Has No Equitable Entitlement To Prejudgment Interest.

In this case, Diamond never exhausted the insurance underlying the excess policies or established coverage in conformity with the excess policies until the court's ruling of April 12, 1989. Indeed, Diamond never even suggested any allocation approach to the court until the middle of the trial.

Furthermore, Diamond's litigation strategy, as embodied in the testimony of Robert Stauffer, Diamond's risk manager, further demonstrates the inappropriateness of awarding prejudgment interest against the excess carriers. Mr. Stauffer's testimony confirms that

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69 The trial court rejected this argument, finding that even if the limit of liability in an excess policy is exhausted, interest on the entire amount should run from the date of entry of judgment. Pa 983-84.

Diamond avoided taking any position on any coverage issue, and thus could not present an actual claim to its excess insurers.

> Q. At the time of your deposition, roughly a year, a year and a half ago, can you tell the Court, please, what your company's position was as to the number of occurrences for Agent Orange as you understood it as risk manager?
>
> * * *
>
> A. As best I can recall, the company had not taken a position at that point in time.
>
> Q. With regard to number of occurrences. Correct?
>
> A That is correct.
>
> Q. And as risk manager, was it not also your understanding at that point in time that the company had taken no position on trigger of coverage with respect to Agent Orange? Would it help to read your deposition a little?
>
> A. I can't recall. I don't think we, the company had taken a position at that point in time.

Da 1370-71.

Rather than take a coverage position, Diamond engaged its broker, Alexander & Alexander, to study the possible effects of various theories of trigger and number of occurrences. This study came to be known as the "Agent Orange Study."

> Q. Okay. And I take it that even though you had this information [the Agent Orange study] in hand, the company never came to a position as to trigger or number of occurrences, at least that it ever had communicated to any of its insurance carriers?

A. I don't know that this summary produced any kind of conclusion from which we could make such a decision.

Da 1376.

By failing to take a position on these issues, Diamond understood that it would not be in a position to expect payment from its excess carriers, if at all, until after the conclusion of this declaratory judgment action.

Q. Now, sir, would you agree with me that before an excess carrier can be held liable in general, with general types of excess policies that we're involved with in this type of litigation here, before an excess carrier can be held liable, the primary must exhaust?

A. Yes, sir, generally.

* * *

Q. Now, are you aware of any of your primary coverages that have been exhausted as of this moment?

A. I don't believe any are.

Q. If I were to ask you whether the Agent Orange claim would exhaust any of your primary coverage, could you answer that without knowing the number of occurrences or the trigger of coverage to be applied?

A. Probably not.

Q. Well, probably not or in fact, wouldn't it be impossible? If I didn't tell you what trigger to apply, and I didn't tell you how many occurrences there were going to be, could you sit down, for example, and tell me that the '68 policy would exhaust?

A. No sir.

Q. You just couldn't, could you?

A. No, sir.

Da 1372-73.

In a letter to Diamond's broker, Mr. Stauffer acknowledged that Diamond's excess carriers could not be expected to respond to a claim that did not exhaust underlying coverage because Diamond refused to take a position on trigger or the number of occurrences.

Q. [I]n the first paragraph you say in reference to apparently a letter from one of my clients, General Reinsurance, "It would have been sufficient for them . . . to simply deny coverage based on the failure of [Diamond's] demand to penetrate their layer of coverage." Right, sir?

A. Yes, sir.

Da 1374-75.

Interestingly, the trial court commented on Diamond's failure to adopt a position on trigger or number of occurrences or to otherwise make a monetary demand upon the excess carriers:

> THE COURT: Well, I think the point Mr. Cuyler is trying to get at, there really are several points, I suppose, but for starters, and unless an excess carrier is given some data about the amount of the settlement and about the possible years to which the settlement would be attributed, he wouldn't know whether his policy became engaged at all.
>
> He wouldn't, therefore, even get more fundamental questions of whether there might be a non-coverage because of some clauses in the policy. He just

> wouldn't even know if he were within the dollar range where he might have to respond.
>
> Do you know why nothing was done to try to make the problem more precise so far as the excess carriers were concerned?
>
> THE WITNESS [Mr. Stauffer]: Your Honor, if you would look at the last paragraph, we have said: "Diamond Shamrock continues to assume that each of its excess liability insurers follow the position adopted by Aetna in respect to the settlement and that any other defense is not waived thereby." And --

Da 1380-81 (emphasis added).

In sum, Mr. Stauffer explained that he could not disagree with the refusal of the excess insurers to indemnify Diamond.

> Q. And you don't have any quarrel with them in not paying any money until such time as the primary insurance is paid. Is that right? You don't have any quarrel with that?
>
> A. That's correct.

Da 546.

D. The Obligation Of The Excess Insurers For Prejudgment Interest Cannot Commence Prior To April 12, 1989.

Under New Jersey law, prejudgment interest is not allowed as a matter of right, but only where its award is supported by the equities of the particular case. *Bak-A-Lum Corporation of America v. Alcoa Building Products, Inc.*, 69 N.J. 123 (1975). In cases involving policies of insurance, prejudgment interest runs, at the earliest, from the date of presentment of a claim for payment. Since Diamond Shamrock never made a claim against its excess insurers for payment

of any portion of the Agent Orange claim, prejudgment interest, even if allowable in the abstract, could not have commenced until that time.

For example, in ***Ellmex Construction Co., Inc. v. Republic Insurance Co.***, 202 N.J. Super. 195 (App. Div. 1985), *certif. denied*, 103 N.J. 453 (1986), the insured successfully brought suit on a builder's risk policy. While awarding prejudgment interest to the insured, the Court computed interest from the date of denial of the claim, some six months after a formal claim and demand for payment had been made by the insured.

Similarly, in *Meier v. New Jersey Life Ins. Co.*, 195 N.J. Super. 478 (App. Div. 1984), *aff'd*, 101 N.J. 597 (1986), suit was successfully maintained by a beneficiary under a life insurance policy. In awarding prejudgment interest, the Court observed:

> Pre-judgment interest is compensation for loss of the use of money due, not a penalty, and is payable from the date that a liquidated obligation becomes due.

195 N.J. Super. at 488 (emphasis added) (citation omitted).

Finally, in *Miller v. New Jersey Insurance Underwriting Ass'n.*, 177 N.J. Super. 584 (Law. Div. 1981), *aff'd in part, rev'd in part on other grounds*, 188 N.J. Super. 175 (App. Div. 1983), *certif. denied*, 94 N.J. 508 (1983), the trial court entered judgment in favor of an insured under a fire policy. Again, prejudgment interest was awarded "at the legal rate from 30 days after the demand for payment."

In sum, New Jersey courts consistently have held that prejudgment interest will begin to run only from the date that money becomes due and payable under the terms of the contract of insurance. At the earliest, this date is the date of presentation of a ripe claim and demand for payment of a sum certain. Applying this rule to the payment of prejudgment interest by the excess carriers in this case, no claim or demand for payment of a sum was made certain until, at the earliest, entry of the court's Opinion of April 12, 1989.

New York applies similar rules to the availability of prejudgment interest. In an equitable action, an award of prejudgment interest is not a matter of right but is "a matter of discretion." *Margo Properties, Inc. v. Nelson*, 99 A.D.2d 1029, 473 N.Y.S.2d 822 (1984); N.Y. Civ. Prac. L.O.R. § 5001(a) (McKinney 1989). Moreover, the right to such interest arises only upon the denial of a claim properly presented to an insurer. *See, e.g., Buttignol Construction Co. v. Allstate Insurance Co.*, 22 A.D.2d 689, 253 N.Y.S.2d 172 (1964), *aff'd*, 17 N.Y.2d 476, 266 N.Y.S.2d 982, 214 N.E.2d 162 (1965); *Michael Delivery of Buffalo v. Firemen's Fund Insurance Co.*, 115 Misc. 2d 834, 454 N.Y.S.2d 790 (1982). *See also In re Strandburg's Estate*, 138 Misc. 732, 247 N.Y.S. 194 (1930), *modified*, 138 Misc. 859, 248, N.Y.S. 164 (1931) (attorney compelled to return fee obtained from disputed funds in his possession was not liable for interest because obligation to restore fee payment did not mature until court entered judgment).

The question of whether it is appropriate to award prejudgment interest to an insured under a judgment remarkably similar to the final judgment entered in this case was squarely addressed in *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*, 829 F.2d 227 (1st Cir. 1987). In that case, the insurers had urged the Court to fix the timing of injury for individual asbestos claims on a case-by-case basis. The Court disagreed and accepted the insured's position of a rebuttable presumption that initial injury occurred six years prior to the date of diagnosis.

The *Eagle-Picher* Court applied Ohio law, which by statute required prejudgment interest "when money becomes due and payable upon . . . any instrument of writing." 829 F.2d at 248-49. Thus, the only issue before the Court was <u>when</u> the insured was entitled to payment, or "when did money become 'due and payable'" under the policy. 829 F.2d at 249.

The Court recognized that it would be improper to charge a particular insurer (AMICO) for prejudgment interest before a claim was presented. Since a claim was never presented to AMICO, the Court refused to permit an award of prejudgment interest during any period

prior to this decision. Instead, interest was awarded from the date of the decision:

> It is true that there is nothing uncertain about the amounts of Eagle-Picher's claims payments. The accuracy of the lengthy computerized lists of figures representing the company's resolution of individual lawsuits alleging asbestos-related disease is undisputed. What has not been settled until our decision today, however, is which of those claims properly belong within AMICO's policy coverage. It can not reasonably be argued that AMICO's obligation could be determined by "mere computation" or "reasonably certain calculations" until we ruled on how one is to determine when a disease is reasonably capable of medical diagnosis. Until now, it was unclear which claims would become AMICO's responsibility. The uncertainty that existed until today is underscored by our decision to modify the district court's approach.

829 F.2d at 249 (emphasis added).

Finally, in *Morton Thiokol Inc. v. General Accident Insurance Company of America*, No. C-3956-85, slip op. (N.J. Super. Ct., Bergen County March 20, 1989), the court refused to grant prejudgment interest to the insured in a declaratory judgment action. After noting that interest is allowed where supported by the equities, the court held:

> Here, it has never been possible for General Accident to know with any degree of accuracy the amount of its obligation to Morton Thiokol. Not only was the claim unliquidated, but, for the reasons set out above, the demand submitted by Morton Thiokol must be reduced by substantial amounts. Certainly there was no time at which General Accident could have paid the amount it owed and thus ended the running of

> interest. The amount was never fixed and indeed it will not be fixed until final entry of judgment following the present proceeding.

Da 823-24.

Here, as in *Eagle-Picher* and *Morton Thiokol*, it was never possible until the court's ruling -- in this case, April 12, 1989, at the earliest -- for the excess insurers to know whether any primary layer of underlying insurance coverage would be exhausted and for which year or years. Until that time, it was uncertain whether the excess carriers would be responsible for any of Diamond's Agent Orange settlement. Thus, under both New York and New Jersey law, the excess carriers cannot be held responsible for prejudgment interest prior to the time they had a contractual obligation to pay under their contract.

VIII. JOINT AND SEVERAL COVERAGE DOES NOT EXIST FOR THE AGENT ORANGE CLAIMS

Diamond contends that the trial court erred in rejecting a joint and several allocation of liability against its insurers. In arguing for joint and several liability, Diamond hopes to obtain coverage broader than that provided by its insurance contracts. However, in considering the possible liability of Diamond's insurers for the Agent Orange claims, this Court's first and only obligation is to enforce the terms and conditions of the insurance contracts. Enforcement of Diamond's insurance policies simply does not permit joint and several application of these policies.

In order to obtain coverage under a particular policy, an insured such as Diamond must specifically establish the existence of an occurrence which results in injury during the policy period. Pb 52-53. Thus, under the law of both New York and New Jersey, a particular insurance policy is triggered for a particular claimant's injury only when the insured proves that bodily injury took place during the policy period. *American Home Products Corp. v. Liberty Mutual Insurance Co.*, 565 F. Supp. 1485, 1497 (S.D.N.Y. 1983), *aff'd as modified*,

748 F.2d 760 (2d Cir. 1984); *Hartford Accident & Indemnity Co. v. Aetna Life & Casualty Co.*, 98 N.J. 18, 26 (1984).

In this case, the short answer to joint and several liability for the Agent Orange claims is that Diamond is not entitled to any recovery because it failed to prove the existence of bodily injury during any policy period. It was consistently recognized by the court and all litigants, including Diamond, that there was no way to establish that any serviceman actually sustained bodily injury. Therefore, in the normal course, this failure of proof would result in a finding of no coverage. *See* discussion, *supra*, pp. 71-77.

However, the court did not follow *Hartford v. Aetna*, and relied instead upon a theory of bodily injury that does not comport with the common understanding of that term. It reasoned that the exposure of a Vietnam veteran to Agent Orange in and of itself constituted "a wrong" such that "[s]imple exposure" qualifies as the "injury in fact." Pa 51.

Therefore, even under the theory of liability adopted by the court, there is simply no basis for holding all policies liable for all injuries. Not all servicemen were exposed to all Agent Orange at all times. Consequently, neither the language of the policies nor the applicable case law support or rationalize a ruling which would make a 1966 policy responsible for the claims of a serviceman first exposed to Agent Orange in 1969.

While it is conceivable that a claimant was injured in more than one policy period, the relevant inquiry under the law of New York and New Jersey still requires an apportionment of the injury actually sustained in each policy period. Thus, in *National Casualty Insurance Co. v. City of Mount Vernon*, 128 A.D.2d 332, 515 N.Y.S.2d 267 (1987), the court held that the insurer had a duty to indemnify the city against a false imprisonment claim only for that period of the claimant's incarceration which fell within the insurer's policy period. The fact that

the claimant suffered a continuous injury during a single period of incarceration did not expand the insurer's indemnification obligation.[70]

Similarly, in *National Grange Mutual Insurance v. Continental Casualty Insurance*, 650 F. Supp. 1404 (S.D.N.Y. 1986), the court reviewed numerous New York decisions relating to the issue of whether insurers were liable on a joint and several basis, as Diamond contends, or on a pro rata basis. The court rejected the joint and several contention asserted in this case by Diamond as contrary to New York law.

> [E]ach insurer is obligated to contribute, pro rata, in proportion to their respective undertaking toward legal fees and other expenses of litigation. This appears to be correct under New York law.

Id. at 1413.[71]

Joint and several liability is likewise not the law in New Jersey. For example, in *Sandoz, Inc. v. Employer's Liability Assurance Corp.*, 554 F. Supp. 257, 266 (D.N.J. 1983), the court expressly rejected joint and several liability among insurers and opted instead for a method of allocation which resulted in each insurer being liable only for the injury that occurred during its policy period.[72]

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70 In that case, the claimant's incarceration lasted for a one and one-half year period extending to January 7, 1983. National Casualty had insured the city commencing on January 1, 1983. The court held that National Casualty was not obligated to provide full indemnity for the claim, but rather its duty to indemnify only extended to the portion of the injury which took place in the period January 1-7, 1982.

71 Diamond also relies on the New York case of *McGroarty v. Great American Insurance Co.*, 43 A.D. 2d 368, 351 N.Y.S.2d 428 (1974), *aff'd*, 36 N.Y.2d 358, 368 N.Y.S.2d 485 (1975). Pb 61. That case, which involved property damage, is factually inapposite to the Agent Orange case.

72 In dicta, the court suggested that joint and several liability might be proper in unique situations where there was no way of identifying and quantifying the extent to which injury was sustained during a particular policy period. 554 F. Supp. at

(footnote continued)

The analysis in *Sandoz* was recently adopted by the Appellate Division in *Gottlieb v. Newark Insurance Co.*, No. A-2243-88T5, ___ N.J. Super. ___ (App. Div. 1990). In that case, coverage was sought for damage caused by the improper application of toxic chemicals by an exterminator. The evidence suggested that additional property damage resulted from the migration of the toxic chemicals after the initial application. The Court relied upon *Hartford v. Aetna* in reversing the trial court's finding of coverage only under the policy in effect at the time of application and initial damage. However, in addressing the task of allocating the loss among the triggered policies, the Court quoted *Sandoz* and held:

> [W]hile "a carrier would not normally be held liable for injuries sustained before its coverage commenced or after it terminated" each insurer would be liable to indemnify for the damages resulting from the injuries which occurred during its policy period.

Slip op. at 7.

Notably, even assuming that the cases cited by Diamond correctly applied joint and several liability to their facts involving a continuous and indivisible injury, such facts do not exist here. As previously noted, bodily injury *per se* was not established. Instead, exposure to Agent Orange was the only injury allegedly sustained by the claimants and compensated by the court. The court determined that the "injury" (*i.e.*, exposure) occurred approximately four months after Agent Orange was delivered to the United States military in this

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266. Such a result, however, would not comport with the letter or spirit of the parties' agreement, nor is it consistent with the requirement of proof of actual injury during the policy period. It makes little sense to reward a policyholder, and penalize the insurer, by expanding contractual indemnity through joint and several liability because of the insured's inability to sustain its burden of proving injury in a given policy period. In any event, under the facts of this case, this issue need not be addressed by this Court.

country, and therefore it was fair and sensible to allocate the losses to each insurer in proportion to the amount of Agent Orange shipped during each policy period. Pa 51-52.

In so ruling, the court relied on the related New York case of *Uniroyal, Inc. v. Home Insurance Co.*, 707 F. Supp. 1368 (E.D.N.Y. 1988). In that case, a manufacturer of Agent Orange brought an action against its insurers seeking indemnification for the same Agent Orange class action settlement. The court concluded that injury from Agent Orange occurred at the time or shortly after the product was sprayed. The court further determined that Agent Orange arrived in Vietnam approximately three months after shipment, and was sprayed within approximately one week of arrival. Thus, the court concluded that injury occurred approximately four months from the date Agent Orange was delivered to the United States military in this country. *Id.* at 1389. Having concluded that the facts permitted a "clean differentiation of injuries between policy periods," the court determined that joint and several liability was inapplicable. *Id.* at 1392.

While defendants do not agree that "exposure" can be deemed the equivalent of "bodily injury," the conclusions drawn by the court as to when exposure took place -- and thus the extent of liability under each triggered policy -- are rationally supported by the available record. Application of joint and several liability finds no support in the record.

IX. THE TRIAL COURT APPLIED A PROPER ALLOCATION FORMULA

Diamond fails to identify any material error of fact or pertinent error of law as a basis for its appeal of the trial court's allocation formula. Instead, Diamond complains only that it will not be 100% indemnified under the allocation formula, contrary to its "reasonable expectations." Not surprisingly, Diamond cites no authority for its complaint. Nevertheless, Diamond apparently believes that its "reasonable expectations" of "full indemnity" should override the plain language of its insurance policies -- even when less than full indemnity is a direct result of Diamond's conscious decisions in operating its insurance program and in conducting this litigation.

Diamond attacks the court's application of the allocation formula used by Judge Weinstein in *Uniroyal, Inc. v. Home Insurance Co.*, 707 F. Supp. 1368 (E.D.N.Y. 1988), *appeal pending*, No. 89-7555 (2d Cir. 1989), on three grounds. Pb 65. Each of Diamond's arguments is without merit.

A. Diamond Is Responsible For Any "Uninsured Loss" For Its Agent Orange Settlement.

In an egregious attempt to engender sympathy, Diamond falsely suggests that it had only $10 million in excess insurance available to it for the 1966-1969 period. Pb 56-58. This misrepresentation forms the basis for Diamond's assertion now that the court's adoption of Judge Weinstein's allocation formula created an "uninsured loss" of over $9 million. Pb 56.

In fact, Diamond had $20 million in excess insurance coverage for the 1966-1969 policy period, which would have been more than sufficient to cover its Agent Orange settlement payment under the court's allocation. *See* Da 631. Thus, any alleged "deprivation" of full indemnity has resulted entirely from Diamond's own inaction in failing to pursue all of its potentially available insurance.

At the first deposition taken in this case, William Greening,[73] Diamond's broker of 14 years, explained that Diamond had $20 million in excess insurance available to it for the period 1966-1969. Da 635-36. Indeed, in a letter from Greening to Donald Purdy[74] dated April 25, 1967, Greening identified all of Diamond's

[73] William Greening was Assistant Vice President and later Vice President of Alexander & Alexander from 1963 to 1980. From 1966 to 1980, he was the principal broker involved in the Diamond account. Da 419-420.

[74] Donald Purdy was Insurance Administrator for Diamond beginning in 1957 and later became Corporate Director of Risk Management. Purdy was the senior insurance executive at Diamond until he left Diamond in September of 1982. Da 502-04, 505.

excess insurers for this period and set forth the limits of their insurance coverage.[75] It is therefore undisputed that Diamond had $20 million in excess insurance for the 1966-1969 period -- not $10 million as it now claims.

Under the court's allocation formula, approximately $19.9 million was allocated to the 2/1/66-3/1/69 period. This amount was less than the full amount of excess insurance ($20 million) available to Diamond for this period. Thus, Diamond had full coverage and should have obtained full indemnity for its Agent Orange settlement payment. However, either by failing to timely notify some of its excess insurers or by failing to include certain insurers and their policies in its coverage litigation,[76] Diamond limited its recovery and therefore is alone responsible for its asserted "deprivation" of full insurance coverage. Diamond's "reasonable expectations" were satisfied until it voluntarily caused a shortfall in coverage.

B. The Trial Court Properly Applied The Allocation Formula Adopted In Uniroyal.

Diamond complains that the court improperly applied the formula used by Judge Weinstein in the *Uniroyal* case, which it claims

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75 This letter was marked as Exhibit 5 at Greening's deposition on January 8, 1987. It showed that, above the $10 million level, additional insurance coverage was provided to Diamond as follows: Continental Casualty Company -- $2 million; Fidelity & Casualty Company -- $2 million; Insurance Company of North America --$1 million; and Employers Liability Corporation -- $5 million. Curiously, Diamond acknowledged this INA policy, but not the others, in its summary trial exhibit of insurance coverage. Pa 391-426.

76 The court dismissed Diamond's Agent Orange coverage claims against defendant Insurance Company of North America ("INA") on the ground of late notice, under New York law, since Diamond first notified INA in the midst of this very coverage action (which was years after Diamond had been sued in and after Diamond had settled the underlying Agent Orange actions.) Diamond Shamrock has not appealed from this adverse ruling. Nor has Diamond Shamrock appealed from the late notice rulings in favor of the foreign liability insurers. See n.62, supra.

was based on "assumptions which are either entirely arbitrary and incapable of proof . . . or are known to be wrong. . . . ." Pb 66.[77] Diamond ignores the fact that Judge Weinstein presided over the underlying tort litigation in the Agent Orange class action for several years and, as the court noted, "had a magnificent grasp of the facts of the underlying tort litigation and of their interplay with the complicated issues of the resulting insurance coverage litigation." Pa 49-50. Accordingly, the court held that the "central product liability coverage facts and issues [in that case] are on all fours with our case." Pa 49.

Although Diamond acknowledges that "there may be some virtue in selecting an arbitrary allocation system to determine the liability of the insurers . . .," Diamond's only real grievance with the court's allocation formula is that it does not provide 100% indemnity. Pb 66. However, Diamond's proposed allocation -- joint and several liability for all possibly implicated insurers -- has no basis in fact or law and ignores the plain language of the policies at issue.

Diamond proposes the alternative allocation of holding all insurers from 1961 to 1972 jointly and severally liable. Pb 68.[78] However, this proposal is based on Diamond's incomplete definition of the Agent Orange class as including "persons in Vietnam during 1961 to 1972." Pb 68. This statement is simply wrong. Diamond itself admitted in its Statement of Factual Premises submitted prior to trial

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77 Diamond's complaints about Judge Weinstein's decision are especially disingenuous in light of Diamond's prior sponsorship of his decision to the trial court. In its January 5, 1989 letter transmitting Judge Weinstein's decision to the court, Diamond suggested that the court could proceed on the basis of the same stipulations of fact, expert's affidavit and concessions that Judge Weinstein used. Da 727. Indeed, Diamond's letter contained a table prepared by Diamond which set forth Diamond's view of how its Agent Orange settlement should be allocated using Judge Weinstein's approach. *Id.*

78 The impropriety of this alternative is apparent on its face. For example, a policy issued to Diamond to provide coverage for occurrences and resulting injuries in 1962 cannot under any stretch of Diamond's imagination be available to provide coverage for injuries sustained by servicemen who first arrived in Vietnam after 1962 and only then were first exposed to Agent Orange.

that the Agent Orange class involved alleged injuries to members of the plaintiff class (veterans as well as their spouses, parents and children) which took place "in each policy period from 1962 through February 1, 1981." Da 625 (emphasis added). In fact, as certified by Judge Weinstein, the Agent Orange class included all children born before January 1, 1984. Thus, the evidence presented by Diamond underscores the impropriety of its proposed alternative allocation.

In sum, Diamond has failed to meet its burden of showing that the court's allocation is either factually or legally incorrect. In fact, Diamond has shown nothing other than its disappointment with the result of the court's allocation. Such disappointment is insufficient to overturn the court's ruling.

C. The Trial Court's Allocation Formula Comports With The Language Of The Policies.

Diamond also challenges application of Judge Weinstein's allocation formula in this case on the grounds that "the formula adopted in *Uniroyal* resulted in full indemnity for the insured in that case." Pb 57, 65. To the contrary, Judge Weinstein's objective in opting for a proportional allocation formula, as opposed to joint and several liability, clearly was not to ensure "full indemnity" for the insured. Judge Weinstein sought and applied an option that he believed "comports with the language of the policies at issue here" and with the holding of *American Home Products Corp. v. Liberty Mutual Insurance Co.*, 748 F.2d 760 (2d Cir. 1984) -- *i.e.*, that injuries trigger coverage. 707 F. Supp. at 1392.

In holding that Uniroyal was entitled to $9.9 million of the $10 million in coverage, the court noted that it was "pure coincidence" that the figure grazed the limit of the aggregate cap of the policy at issue. *Id.* at 1394. Clearly, Judge Weinstein's objective was not to provide Uniroyal with "full indemnity." Likewise, in his discussion of the number of occurrences, Judge Weinstein emphasized that a court must adopt a standard "that reflects the policy's meaning and 'cannot be

result-oriented. It must rest on a principled analysis that is not predisposed to favor insureds or insurers.'" 707 F. Supp. at 1383.[79]

In sum, the court, like Judge Weinstein in *Uniroyal*, properly determined that its mission was *not* to ensure 100% indemnity to Diamond. This is particularly true when Diamond has only itself to blame for any "deprivation" of full indemnity. The court properly applied an allocation that comports with the language of the policies and the facts of this case and which rests on a principled analysis that is not predisposed to favor insureds or insurers.

X. THE EXCESS POLICIES PROVIDE COVERAGE IN THE AMOUNT OF A SINGLE OCCURRENCE LIMIT FOR THE THREE-YEAR POLICY PERIOD 1966 TO 1969

Diamond argues that the court erroneously applied one per occurrence limit for each three-year excess policy and should have applied the occurrence limits separately for each year as in Diamond's primary policies. Pb 69-71. However, the language of the excess policies, coupled with the uncontroverted testimony of Diamond's broker, fully supports the court's ruling.[80]

Today, most commercial general liability policies of insurance are written for a one-year period. However, prior to the mid-1970s,

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[79] In fact, the *Uniroyal* court never applied the "reasonable expectations" rule invoked by Diamond. Pb 57. It held that the best and most recent New York cases hold that "the policy should be viewed as if by a reasonably intelligent business person who is familiar with the agreement and with the industry in question." 707 F. Supp. at 1378.

[80] Again, Diamond makes the emotional pitch that it was somehow "deprived" of over $9 million in coverage by the court's ruling that the limits of the excess policies applied per three-year policy period rather than per year. As discussed in the preceding section, Diamond alone is responsible for any alleged shortfall in recovery by its failure to join or provide notice to other insurers whose policies would have provided up to $20 million in excess insurance to Diamond for the period 1966 to 1969.

commercial liability policies often were written for three-year periods. When a policy is written for one year, the limits expressed in the policy are limits for the one-year policy period. With three-year policies, however, the insurer and the insured are faced with a choice. The policy limits can be expressed as a single limit for the term of the policy, or the policy limits can be expressed as a yearly limit applicable separately to each of the years the policy is in effect. Diamond had both forms of policy in its overall insurance program during the 1960s and early 1970s.

For example, the Aetna primary policy in effect from 2/1/66 to 2/1/69 had a per occurrence limit which was subject to an aggregate limit. The aggregate limit was a yearly limit which was applicable separately in each year the policy was in effect. The Aetna policy specifically stated:

> *Three-Year Policy* - A policy period of three years is comprised of three consecutive annual periods. Aggregate limits of liability as stated in this policy shall apply separately to each annual period.

Pa 434. This language is considerably different from the language found in the excess policies issued to Diamond.

The coverage grant of Diamond's three-year excess policies, which are identical and based upon the specifications prepared by Diamond's broker, Alexander & Alexander,[81] provides:

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[81] Representatives of Diamond met regularly with its broker to discuss the type of excess insurance that Diamond desired and to discuss the provisions which Diamond wanted in its excess insurance policies. Policy language or "specifications" were then prepared by Alexander & Alexander and submitted to Diamond for review by its insurance department. These specifications set forth all the terms, conditions and exclusions which Diamond thought would be important to have in its policies. Da 421-22, 506-09, 1095-97. The excess insurance policies issued to Diamond in the period 1957 to 1975 were based upon these specifications, which contained the terms and conditions approved by Diamond. Da 4, 15, 601, 1086-89.

1. COVERAGE

> The Company hereby agrees with Diamond Shamrock Corporation et al., as further named in the declarations made a part hereof, (herein called the "Assured") subject to the terms, conditions and limitations hereinafter mentioned, to indemnify the Assured for any and all sums which the Assured shall by law (including liability assumed by the Assured under contract or agreement) become liable to pay and shall pay or by final judgment be adjudged to pay on account of Personal Injuries including death at any time resulting therefrom and/or Property Damage as hereinafter defined arising out of occurrences happening during the contract period.

Da 15 (emphasis added). The contract or policy period in each of the relevant excess policies is a three-year period. Thus, coverage is extended to all injuries during the policy period which arise out of an occurrence, subject of course to any policy limits for each occurrence.

Paragraph 2(a) of Diamond's excess policies provides the applicable policy limits:

> 2. LIMIT OF LIABILITY - UNDERLYING LIMITS
>
> a) The Company shall only be liable for the Ultimate Net Loss in excess of the amount recoverable under underlying insurances . . . and then only up to a further [specified amount] in all in respect of each occurrence.

Da 15 (emphasis added). Thus, the excess policies establish a single limit of liability for an occurrence without regard to whether the injuries attributable to the occurrence take place at the same time, in one year, or over three years. Moreover, the excess policies do not contain an aggregate limit. Diamond therefore has coverage under the excess

policies up to the per occurrence limits for an unlimited number of occurrences during the three-year policy period.[82]

Indeed, the definition of occurrence contained in the excess policies confirms that the per occurrence limit was only intended to be available once per policy period. This definition, applicable to certain hazards covered by the excess policies, provides:

> 2. (a) OCCURRENCE
>
> The term "Occurrence" wherever used herein shall mean one happening or series of happenings or one accident or a series of accidents arising out of or due to one event taking place during the [three year] policy period.

Da 20 (emphasis added). This definition obviously contemplates that a single occurrence can extend for more than one year and indeed can extend throughout the entire three-year policy period. Nowhere do the excess policies suggest that anything other than a single occurrence limit would apply to any single occurrence.

The court correctly pointed out the differences in the language of the primary and excess policies. The court observed that Diamond's primary policy had a three-year term that "specifically divided itself into periods of one year for the purpose of fixing aggregate limits on liability," whereas none of the excess policies contained a provision for annualization or included an aggregate limit on liability. Pa 971-72. Rather, the court noted that the limit of liability in the excess policies

---

82 Diamond cites both the heading and certain language of this paragraph without explaining how it supports its position. Pb 70-71. However, this language does nothing more than describe the amount of coverage provided by the excess policies and acknowledge that the excess policies provide indemnification for losses in excess of the primary limits. This language certainly does not somehow incorporate the underlying Aetna primary policy language into the excess policies, which are subject to their own terms, conditions and limitations.

was fixed per occurrence. Accordingly, the court held that there is a single per occurrence limit for the three-year excess policy period:

> [T]he total limit for that excess policy triggered is the dollar limit per occurrence set forth in the excess policy. . . . There is only one occurrence per excess policy period. The excess policy period is three years. And when that is made out, that is the end of the liability of the excess carrier for that three year period.

Pa 977.

This interpretation is wholly consistent with the uncontroverted testimony of William Greening, Diamond's principal broker at Alexander & Alexander. Greening reviewed a copy of the excess policy form which was drafted by Diamond and its broker and used by Diamond's excess insurers during the period 1957 to 1975. He testified as follows:

Q. With respect to the section of the Limits Of Liability, there is a reference here and, specifically with respect to this policy, that there is coverage up to an amount of $5 million per occurrence. Do you see that?

A. Yes.

Q. Just so I'm clear, does that mean with respect to any single occurrence that would fall within the coverage of this policy, that the maximum liability that would be the subject of this policy with respect to that occurrence would be $5 million?

* * *

A. Yeah. I believe the limit per occurrence is $5 million.

Q. In other words, if there was a single occurrence that resulted in injuries throughout the period of this policy, the maximum liability under this policy would be $5 million, correct?

* * *

A. Yes.

Da 792-94. Based on the excess policy language, it is apparent that, for any single occurrence, the excess policies are liable for no more than a single per occurrence limit.

Diamond argues that, because the excess policies "followed form" to the Aetna primary policies, the per occurrence limits of the excess policies apply separately for each year. Pb 53-54. Again, the court addressed and rejected this exact argument. The court acknowledged that the excess policies are often described as "following form" because they follow the "substantive" nature of the risks covered by the underlying insurance. Pa 972-73.[83] However, the court noted that the excess policies do set forth their own terms, conditions and limitations of coverage:

> However, when the excess policies came to speak in terms of the limits of liability, they did not refer to the [primary] policies. They referred to their own limits, and those limits were set in a dollar amount such as $2 million, $3 million, $5 million, $8 million per occurrence.
>
> It seems to me that in fixing the dollar limitations of liability, as opposed to the substantive coverage of limits of liability of the excess policies, that we

83 Greening confirmed that the language of the excess policies cited by Diamond, Pb 54, simply referred to the type of risks to be covered by the excess policies and does not somehow incorporate provisions of the Aetna policy into the excess policies. Da 797.

> should look to the terms of the excess policies themselves and not to the terms of the underlying policies.

Pa 973-74. Accordingly, the court held that the liability of the excess carriers was "to be fixed in terms of the number of occurrences occurring within the policy period of each excess policy, and in terms of the dollar limit amount." Pa 974 (emphasis added).

Once again, the court's ruling is wholly supported by the language of the excess policies and the undisputed testimony of Diamond's broker. The excess policies expressly provide on the first page that they are subject only "to the terms, conditions and limitations hereinafter mentioned" and not to some condition in some other policy. Greening confirmed that the only conditions applicable to the excess policies were those conditions specifically set forth in the excess policies. Da 795-96. Contrary to Diamond's contention, no annual limits condition is contained in or incorporated into the excess policies.

Illustrative of the application of a single occurrence limit to a single occurrence resulting in injury during a multi-year policy period is Judge Weinstein's opinion in *Uniroyal, Inc. v. The Home Insurance Co.*, 707 F. Supp. 1368 (E.D.N.Y. 1988), *appeal pending*, Dkt. No. 89-7555 (2d Cir. 1989). Home had issued to Uniroyal a three-year policy covering the period 5/1/67 to 5/1/70 which contained an aggregate limit per occurrence of $10,000,000, an aggregate limit per year of $10,000,000, and a deductible per occurrence of $100,000. This deductible was not subject to an annual or aggregate limit. 707 F. Supp. at 1371.

Application of Judge Weinstein's single occurrence trigger of coverage approach resulted in injuries taking place until July 1, 1968, or 14 months into the 5/1/67 to 5/1/70 policy period. *Id.* at 1393. Nevertheless, since there was only a single occurrence applicable to this three-year policy, Uniroyal was obligated to pay only one, not two, per occurrence deductibles. *Id.* at 1394. Judge Weinstein thus applied one per occurrence deductible per policy (not per year) and further applied one *per occurrence* limit per policy (again not per year).

Thus, consistent with *Uniroyal*, only a single per occurrence limit is available to Diamond for the three-year policy period.

Another case which supports the court's ruling is *UNR Industries v. Continental Insurance Co.*, No. 85 C 3532, slip op. (N.D. Ill. 1988). Da 1506. *UNR* involved a three-year policy issued by Continental for the period November 1, 1973 through November 1, 1976. As with the Aetna policy here, the Continental policy was divided into three "annual periods," with annual limits of $500,000.

On the first anniversary date of the policy, Continental issued an endorsement amending the policy period to extend from November 1 to December 31, and further providing that the policy would expire on December 31, 1976 rather than November 1, 1976. Based on this endorsement, UNR argued that the policy extension for two months created a new and additional "annual period" with its own $500,000 aggregate limit, giving the insured a total of $2 million of coverage for the four periods. UNR's argument was rejected by the court:

> The starting point for analysis must be the language of the endorsement itself, which by its terms, nowhere creates a new period.

Da 1494 (emphasis added). Likewise, the court further recognized that there was nothing that prevented a policy period from extending to fourteen months:

> As previously noted, an "annual period" need not be limited to a period of exactly 365 days . . . . [T]o regard the Continental policy as having four anniversary periods and therefore four aggregates would be contrary to its very terms.

Da 1495.

The court's analysis in *UNR* is equally applicable here. Nothing in the excess policies suggests an intent to divide them into three one-year "mini-policies" with separate annual policy limits.

Indeed, it would be improper to interpret the excess policies in such a way as to create out of whole cloth a dramatic broadening of coverage which finds no support in the contract language. The excess policies plainly speak in terms of a single policy period with a single three-year per occurrence limit.

In sum, the unambiguous excess policy language, coupled with the testimony of Diamond's broker of 14 years, establishes that the court properly held that the per occurrence limits of the excess policies apply only once to any occurrence during the policy period.

XI. NO ADDITIONAL COVERAGE IS PROVIDED BY THE ONE-MONTH EXTENSION OF AMERICAN RE'S POLICY

American Re-Insurance Company ("American Re") issued an excess insurance policy to Diamond for the period 2/1/66 to 2/1/69 which provided $3 million in coverage for each occurrence. Da 15.[84] This policy was later extended at the request of Diamond for one month until 3/1/69. Diamond claims that the one-month extension creates additional coverage in the amount of $3 million per occurrence for all injuries allocated to this one month. Pb 72-73. This argument is without merit.

As discussed in the preceding section, a single per occurrence limit is provided by the American Re policy, regardless of its duration. Thus, no separate or additional per occurrence limit can be established by the one-month extension. To the contrary, the result of this short extension of the existing three-year policy was simply to provide an additional 30-day period of coverage extending the same per occurrence limit for an additional month.

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84 Other excess insurers also issued three-year excess policies to Diamond for this period.

The "Coverage" provision of American Re's excess policy states that American Re will indemnify the insured for any sums which it shall become liable to pay arising out of occurrences happening during the contract period:

> The Company hereby agrees . . . to indemnify the Assured for any and all sums which the Assured shall . . . become liable to pay . . . arising out of occurrences happening during the contract period . . .

Da 15. The per occurrence limit of liability for this policy is $3 million. This language plainly and unambiguously establishes that the total liability of American Re for all damages because of bodily injury during the policy period arising out of any occurrence shall not exceed the $3 million per occurrence limit. This language is not dependent upon annual periods, policy periods, anniversary dates, expiration dates, or extensions of policy periods.

As an accommodation to Diamond, American Re agreed to a 30-day extension of its 2/1/66 to 2/1/69 policy. *See, e.g.*, Da 637-642. This extension is reflected in the Alexander & Alexander Binder describing the risk as "extend 30 days" American Re's 2/1/66 to 2/1/69 policy. Da 1507. This 30-day extension does not state that the per occurrence limit shall apply separately to the extension period. Instead, it simply extends the policy period.

The original expiration date of this policy was February 1, 1969. The Binder simply extended that date to March 1, 1969. It did not expressly or impliedly alter the per occurrence limit of liability section of the policy. Thus, there can be no change in the total per occurrence limit for the policy period.

Moreover, no new or additional policy was ever issued to Diamond by American Re for this 30-day extension. Diamond maintained the same policy. The American Re policy in question indicates that it was issued for a three-year term. That policy's inception date was February 1, 1966. No new policy was issued for this one month period in February of 1969. Thus, there was no new

policy in force for one month providing any new or additional per occurrence limit. Rather, the existing policy remained in effect for the additional period from February 1, 1969 to March 1, 1969.

This issue was fully briefed and argued before the court on June 6, 1989. The court flatly rejected Diamond's position, holding that the excess policy was simply extended for a period of one month "so that it now becomes a 37-month policy instead of a 36-month policy." Pa 978. Accordingly, the court held that "there is no increase in coverage with respect to the upper dollar amounts payable on an occurrence which had already started to happen during the first 36 months." *Id.*

Diamond cites out of context the comment by the court that "[t]here is no increase in coverage that results from that one month extension." Pb 72. In fact, the court ruled only that there was no increase in coverage for this particular occurrence resulting from the one month extension, explaining:

> The plaintiff has argued that it wasn't getting anything for its money if we make that interpretation.
>
> I think the short answer is it wasn't getting anything in terms of this lawsuit for its money. It didn't get helped by that extension.
>
> But we have to keep in mind that Diamond Shamrock was a big company doing lots of things and incurring all sorts of possible risks and liability, and all kinds of occurrences.
>
> New occurrences not related to the Agent Orange occurrence could have happened and some probably did during that month's period of extension and the extension scooped up in coverage for them. That's the coverage that Diamond Shamrock got. It was valuable coverage and the premium for it was fairly earned.

Pa 978-79. Thus, Diamond's "objectively reasonable expectations" were fully met because Diamond received complete coverage for an additional 30 days for an unlimited number of occurrences up to the occurrence limit of the policy. Diamond received exactly what it bargained for.

This issue was also addressed by the court in *UNR Industries, Inc. v. Continental Insurance Company*, No. 85 C 3532, slip op. (N.D. Ill., November 8, 1988). Da 1493. One issue in that case involved the effect of an endorsement to an insurance policy extending the policy period an additional two months. The applicable aggregate limit in the policy was $500,000 for "each consecutive annual period comprising the policy period."

The court rejected the insured's argument that coverage during the two-month extension would be illusory unless it created a new two-month annual period with a $500,000 aggregate. The court held that the 14-month policy worked the same way as a 12-month policy: "as claims are paid, the aggregate limit is reduced, and when the aggregate is exhausted by payment, the carrier's obligation for products claims ceases." *Id.* at 6. The court observed that the language of the endorsement simply changed the anniversary date from November 1 to December 31:

> The endorsement is an amendment of the anniversary date to extend an annual period rather than an amendment to create a new period with an additional implied $500,000 aggregate limit.

Id. at 7-8.

Diamond cites as its only authority for its position the trial court's decision in *Asbestos Insurance Coverage Cases*, No. 1072, Tentative Decision Concerning Phase IV Issues, slip op. at 6-8 (Cal. Super. Ct. Aug. 29, 1988) *reprinted in* 2 Mealey's Litigation Reports (Insurance) No. 22 at A-1 (September 14, 1988). Pb 72-73. While Diamond represents that the California trial court addressed the same

issue before the court, that statement is incorrect. It is clear from the three pages of the California decision cited by Diamond that the trial court there was addressing primary policy language which expressly described the availability of aggregate limits for annual periods. The court did not address or even consider language in excess policies which relates to per occurrence limits. In this case, unlike the *Asbestos* case, the excess policies plainly state that the occurrence limit applies per policy period. Thus, Diamond's reliance upon the California trial court decision is misplaced.

The plain language of the American Re excess policy dictates that no separate or additional per occurrence limit can be established by the one-month extension of the policy period. Rather, this short extension of the existing three-year policy simply provided an additional 30-day period of coverage extending the same per occurrence limits for an additional month.

In sum, the extension of the American Re policy for 30 days does not increase the per occurrence limits of coverage provided by the 1966 to 1669 policy. The American Re policy covering the period 2/1/66 to 3/1/69 provides a single limit of $3 million for each occurrence during the 37-month policy period.

CONCLUSION

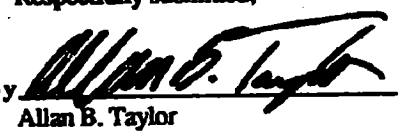
The trial court's judgment in Diamond's favor on the Agent Orange claims is flawed by errors of law and should be reversed. The trial court incorrectly granted Diamond's motion for summary judgment negating the war risk exclusions in several excess policies. This Court should direct the entry of judgment for defendants on the basis of the war risk exclusion or, at the least, remand for trial on that issue. Similarly, this Court should direct entry of judgment for defendants on the ground that Diamond did not and cannot satisfy its burden of establishing that any bodily injury occurred during defendants' policy periods.

The trial court erred in ruling that the foreign liability policies did not apply to the Agent Orange claims. Thus, if this Court should

find that Diamond is entitled to coverage for the Agent Orange claims, it should also hold that Diamond's foreign risk insurance policies provide coverage for those claims and that Diamond is liable for the loss of such foreign liability coverage due to its failure to notify the foreign liability insurers, which led to a finding of no coverage as to them. (Diamond has not appealed the judgment as to the foreign liability insurers.) The trial court also erred in concluding that the batch clause does not apply to the Agent Orange claims and in holding that Diamond is entitled to prejudgment interest. Correction of these errors requires further proceedings in the trial court.

Finally, Diamond's claims that its insurers are jointly and severally liable for the Agent Orange claims, that the trial court's allocation of responsibility among the insurers is incorrect, that the aggregate limits contained in the three-year excess policies are to be applied annually, and that by extending a three-year policy by one month American Re-Insurance became liable for an additional aggregate limit, are without merit. If this Court does not accept defendants' arguments on their cross-appeals, the judgment below should be affirmed.

Respectfully submitted,

By 

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ADDENDUM A

Set forth below are those sections of this brief in which the signatory defendants identified below do not join:

Aetna Casualty & Surety Company	Sections III-VI, X and XI of Part II: Agent Orange Claims[1]
General Reinsurance Company and North Star Reinsurance Company,	Section V of Part I: Newark Dioxin Claims; Section IV of Part II: Agent Orange Claims
Gibralter Casualty Insurance Company, Prudential Reinsurance Company, Ranger Insurance Company, Employers Mutual Insurance Company and American Centennial Insurance Company	Sections IV(A) and V of Part I: Newark Dioxin Claims; Sections III-VII, X and XI of Part II: Agent Orange Claims
Schedule A Defendants (*see* Addendum B)	Sections X and XI of Part II: Agent Orange Claims
Home Insurance Company	Sections IV-VI, X and XI of Part II: Agent Orange Claims

[1] Aetna joins Section VIII of Part II: Agent Orange Claims except insofar as Section VIII incorporates the argument of Section IV of Part II, in which Aetna does not join.

Insurance Company of North America, California Union Insurance Company and Pacific Employers Insurance Company	Sections V-VII, IX-XI of Part II: Agent Orange Claims
Commercial Union Insurance Company	Section IX (A) and X, n.80 of Part II: Agent Orange Claims
Fireman's Fund Insurance Company	Sections IV (A) and V of Part I: Newark Dioxin Claims; All of Part II: Agent Orange Claims
National Union Fire Insurance Company of Pittsburgh, PA, American International Underwriters, American Home Assurance Company, Lexington Insurance Company and Granite State Insurance Company	Sections IV-VI, X-XI of Part II: Agent Orange Claims

ADDENDUM B

Schedule A Defendants[1]

John Richard Ludbrooke Youell, a representative underwriter representing all underwriters at Lloyd's or their successors in interest who subscribe to policies of insurance issued to plaintiff; and

The following companies:

1. Accident and Casualty Company of Winterthur
2. Alba General Insurance Company Ltd.
3. Allianz International Insurance Company Ltd.
4. Andrew Weir Insurance Company Ltd.
5. Anglo-French Insurance Company Ltd.
6. Argonaut Northwest Insurance Company Ltd.
7. Assicurazioni Generali S.P.A. (U.K. Branch)
8. Aviation and General Insurance Company Ltd.
9. Bermuda Fire & Marine Insurance Company Ltd.
10. Bishopsgate Insurance Limited
11. British Aviation Insurance Company Ltd.
12. British National Insurance Ltd.
13. British National Insurance Company Ltd. as successor to North Atlantic Insurance Company Ltd.
14. Brittany Insurance Company Ltd.
15. Bryanston Insurance Company
16. Camomile Underwriting Agencies Ltd. on behalf of Compagnie D'Assurances Maritimes Ariennes Et Terrestres
17. City General Insurance Company Ltd.
18. CNA Reinsurance of London Ltd.
19. Compagnie Europeene D'Assurances Industrielles S.A.
20. Companhia de Seguros Imperio
21. Compania Agricola De Seguros, S.A.
22. Dart Insurance Company Ltd.
23. The Dominion Insurance Company Ltd.
24. Dominion Insurance Company Ltd. on behalf of the Anglo-Saxon Insurance Association Ltd.
25. Dominion Insurance Company Ltd. on behalf of the British Merchants Insurance Company Ltd.
26. Dominion Insurance Company Ltd., on behalf of London and Edinburgh Insurance Company Ltd.

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[1] Sometimes referred to herein as the London Market Insurers.

27. Dominion Insurance Co. Ltd. on behalf of the Royal Scottish Insurance Co.
28. Dominion Insurance Company Ltd. on behalf of the Trent Insurance Company Ltd.
29. Dominion Insurance Company Ltd. on behalf of the Vanguard Insurance Co. Ltd.
30. Dominion Insurance Company Ltd. on behalf of the World Marine and General Insurance Corporation
31. Drake Insurance Company Ltd.
32. Economic Insurance Company Ltd.
33. The Edinburgh Assurance Co. Number 2 Account
34. El Paso Insurance Company Ltd.
35. English and American Insurance Company Ltd.
36. Excess Insurance Company Ltd.
37. Fidelidade Grupo Segurador
38. Folksam International Insurance Company (UK) Ltd.
39. Heddington Insurance Company (UK) Ltd.
40. Helvetia Accident Swiss Insurance Company
41. Highlands Underwriting Agency on behalf of Highlands Insurance Co.
42. Highlands Underwriting Agency on behalf of American Home Assurance Co.
43. Highlands Underwriting Agency on behalf of London and Edinburgh Insurance Co.
44. INSCO Ltd.
45. La Royal Belge Group
46. Latino Americana de Reasugursos S.A.
47. Lexington Insurance Company Ltd.
48. London & Edinburgh General Insurance Company Ltd.
49. London and Overseas Company PLC ('A' Account)
50. London and Overseas Co. PLC ("A" Account) as successor to Hull Underwriters Association
51. Louisville Insurance Company Ltd.
52. Ludgate Insurance Company Ltd.
53. Minster Insurance Company Ltd.
54. Mutual Reinsurance Company Ltd.
55. National Casualty Company
56. National Casualty Company of America Ltd.
57. New India Insurance Company Ltd.
58. Orion Insurance Company Ltd.
59. Prudential Assurance Company Ltd.
60. River Thames Insurance Company Ltd.
61. Slater Walker Insurance Company Ltd.
62. Southern Insurance Company Ltd. (now known as the Box Hill Investment Ltd.)

63. Sovereign Marine and General Insurance Company Ltd.
64. Sphere Insurance Company Ltd.
65. Storebrand Insurance Company (UK) Ltd.
66. Stronghold Insurance Company Ltd.
67. Sumitomo Marine & Fire Insurance Company Ltd.
68. Sumitomo Marine & Fire Insurance Company (Europe) Ltd.
69. St. Katherine Insurance Company Ltd.
70. Swiss National Insurance Co. Ltd.
71. Swiss Union General Insurance Co.
72. The Taiso Marine & Fire Insurance Company (UK) Ltd.
73. Terra Nova Insurance Company Ltd.
74. Threadneedle Insurance Company Ltd.
75. The Tokio Marine & Fire Insurance Company (UK) Ltd.
76. Turegum Insurance Company Ltd.
77. United Standard Insurance Company Ltd.
78. Universal Reinsurance Corporation of New Jersey as successor to Bellefonte Insurance Company
79. Walbrook Insurance Company Ltd.
80. Winterthur Swiss Insurance Company
81. World Auxiliary Insurance Corporation Ltd.
82. Yasuda Fire & Marine Insurance Company (UK) Ltd.