Corrected 4-12-89

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| DIAMOND SHAMROCK CHEMICALS COMPANY | : SUPERIOR COURT OF NEW JERSEY |
| Plaintiff, | : CHANCERY DIVISION MORRIS COUNTY |
| -against- | : |
| THE AETNA CASUALTY AND SURETY COMPANY, ACCIDENT AND CASUALTY INSURANCE COMPANY OF WINTERTHUR (Successor to Accident and Casualty Company), AIU INSURANCE COMPANY, ALBA GENERAL INSURANCE COMPANY LIMITED, ALLIANZ INTERNATIONAL INSURANCE COMPANY LIMITED, AMERICAN CENTENNIAL INSURANCE COMPANY, AMERICAN EXCESS INSURANCXE COMPANY, AMERICAN HOME ASSURANCE COMPANY, AMERICAN RE-INSURANCE COMPANY, ANDREW WEIR INSURANCE COMPANY LIMITED, ANGLO FRENCH INSURANCE COMPANY LIMITED, ANGLO SAXON INSURANCE ASSOCIATION LTD., ARGONAUT - NORTHWEST INSURANCE COMPANY LTD., ARROW LIFE INSURANCE COMPANY (Successor to Slater, Walker Insurance Company), ASSICURAZIONI GENERAL S.p.A., ASSICURAZIONI GENERALI di TRIESTE e VENEZIA S.p.A., ATLANTA INTERNATIONAL INSURANCE COMPANY, AVIATION GENERAL INSURANCE COMPANY LIMITED, BELLEFONTE REINSURANCE COMPANY (Successor to Bellefonte Insurance Company), BELLEFONTE INSURANCE COMPANY (U.K. BRANCH), THE BERMUDA FIRE AND MARINE INSURANCE COMPANY LIMITED, BRITISH AVIATION INSURANCE COMPANY LTD. BRITISH MERCHANTS INSURANCE COMPANY LTD. | : DOCKET NO. C-3939-84 : Civil Action : OPINION |

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BRITISH NATIONAL INSURANCE LIMITED :
(Successor to British National
Life Insurance Society Limited), :
BRITISH & OVERSEAS INSURANCE
COMPANY LTD., :
BRITTANY INSURANCE COMPANY LTD.,
BRYANSTON INSURANCE COMPANY LTD., :
CALIFORNIA UNION INSURANCE COMPANY
CITY GENERAL INSURANCE COMPANY LTD., :
CNA RE INSURANCE OF LONDON LIMITED,
COMMERCIAL UNION INSURANCE COMPANY :
(Successor to Employers Liability
Assurance Corporation Ltd.), :
COMPANIA AGRICOLA de SEGUROS, S.A.
(Columbia), :
COMPAGNIE D'ASSURANCES MARITIMES
ARIENNES ET TERRESTRES, :
COMPAGNIE EUROPEENNE D'ASSURANCES
INDUSTRIELLES S.A., :
DART AND KRAFT INSURANCE COMPANY
LIMITED, :
DART INSURANCE COMPANY LTD.,
THE DOMINION INSURANCE COMPANY LTD., :
DRAKE INSURANCE COMPANY LTD.,
EL PASO INSURANCE COMPANY LTD., :
EMPLOYERS MUTUAL CASUALTY COMPANY,
ENGLISH & AMERICAN INSURANCE COMPANY, :
LTD.,
EVANSTON INSURANCE COMPANY, :
EXCESS INSURANCE COMPANY LIMITED,
FIREMAN'S FUND INSURANCE COMPANY :
FIRST STATE INSURANCE COMPANY,
FOLKSAM INTERNATIONAL INSURANCE :
COMPANY (U.K.) LTD.,
GENERAL REINSURANCE CORPORATION, :
GENERALI,
GIBRALTAR CASUALTY COMPANY :
GRANITE STATE INSURANCE COMPANY,
GREAT SOUTHWEST FIRE INSURANCE :
COMPANY
HAFEZ INSURANCE COMPANY :
(TEHERAN, IRAN),
HARTFORD ACCIDENT AND INDEMNITY :
COMPANY,
HELVETIA ACCIDENT SWISS INSURANCE :
COMPANY
HIGHLANDS INSURANCE COMPANY, :
THE HOME INSURANCE COMPANY,
IMPERIO COMPANHIA de SEGUROS, :
INSCO LIMITED

INSURANCE COMPANY OF NORTH AMERICA (Successor to Indemnity Insurance Company of North America) :
INTEGRITY INSURANCE COMPANY, :
LA ROYALE BELGE I.R. S.A. D'ASSURANCES :
LATINO AMERICANO de REASEGUROS, S.A. ("LARSA"), :
LEXINGTON INSURANCE COMPANY,
LONDON AND EDINBURGH GENERAL INSURANCE COMPANY LTD., :
LONDON GUARANTEE AND ACCIDENT COMPANY OF NEW YORK, :
LOUISVILLE INSURANCE COMPANY LTD. :
LUDGATE INSURANCE COMPANY LIMITED
MENTOR INSURANCE COMPANY (U.K.) LTD., :
MIDLAND INSURANCE COMPANY,
MUTUAL REINSURANCE COMPANY LTD., :
NATIONAL CASUALTY OF AMERICA LTD.,
NATIONAL CASUALTY COMPANY, :
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., :
NORTH ATLANTIC INSURANCE COMPANY LIMITED, :
NORTH STAR REINSURANCE CORPORATION,
ORION INSURANCE COMPANY LTD., :
PACIFIC AND GENERAL INSURANCE COMPANY LTD., :
PACIFIC EMPLOYERS INSURANCE COMPANY :
PRUDENTIAL ASSURANCE COMPANY LTD.
PRUDENTIAL REINSURANCE COMPANY, :
RANGER INSURANCE COMPANY
REPUBLIC INSURANCE COMPANY, :
RIVER THAMES INSURANCE COMPANY LTD., :
ROYAL INDEMNITY COMPANY,
ROYAL SCOTTISH INSURANCE COMPANY LTD., :
SECURITY INSURANCE COMPANY OF HARTFORD (Successor to New Amsterdam Casualty Company). :
SOUTHERN AMERICAN INSURANCE COMPANY, :
SOVEREIGN MARINE & GENERAL INSURANCE COMPANY LTD., :
SOVEREIGN MARINE & GENERAL INSURANCE COMPANY LTD. 'C' ACCOUNT, :

SOVEREIGN MARINE & GENERAL INSURANCE COMPANY LTD. H.D.N. ACCOUNT, :
SPHERE INSURANCE COMPANY LTD., :
ST. HELENS INSURANCE COMPANY LTD., :
ST. KATHERINE INSURANCE COMPANY PLC., :
ST. KATHERINE INSURANCE COMPANY PLC. (NO. 2 ACCOUNT), :
ST. KATHERINE INSURANCE COMPANY PLC. (X ACCOUNT) :
STOREBRAND INSURANCE COMPANY (U.K.) LTD., :
STRONGHOLD INSURANCE COMPANY LIMITED,
THE SUMITOMO MARINE & FIRE INSURANCE COMPANY LTD., :
SUMITOMO MARINE AND FIRE INSURANCE COMPANY (EUROPE) LTD. :
SUMITOMO MARINE AND FIRE INSURANCE COMPANY LTD. (TOKYO), :
SWISS NATIONAL INSURANCE COMPANY LIMITED (BASLE), :
SWISS UNION GENERAL INSURANCE COMPANY LTD., :
THE TAISHO MARINE AND FIRE INSURANCE COMPANY (U.K.) LIMITED,
TERRA NOVA INSURANCE COMPANY LTD., :
THREADNEEDLE INSURANCE COMPANY LTD., :
THE TOKIO MARINE AND FIRE INSURANCE COMPANY (U.K.) LTD., :
TRANSIT CASUALTY COMPANY,
TRENT INSURANCE COMPANY LIMITED, :
TUREGUM INSURANCE COMPANY, :
TUREGUM INSURANCE COMPANY LTD.,
TUREGUM INSURANCE COMPANY LTD. (NO. 5 ACCOUNT), :
TWIN CITY FIRE INSURANCE COMPANY, :
UNITED STANDARD INSURANCE COMPANY LTD., :
UNITED STATES FIRE INSURANCE COMPANY,
UNDERWRITERS AT LLOYD'S LONDON IN THE SYNDICATES LISTED ON EXHIBIT B HERETO, :
VANGUARD INSURANCE COMPANY LIMITED, :
WALBROOK INSURANCE COMPANY LTD.,
"WINTERTHUR" SWISS INSURANCE COMPANY :

WORLD AUXILIARY INSURANCE CORPORATION LTD., :
WORLD MARINE AND GENERAL INSURANCE COMPANY LTD., :
YASUDA FIRE & MARINE INSURANCE CO., (U.K.) LTD., and :
DOES 1-200, :

Defendants, :

and :

THE CONTINENTAL INSURANCE COMPANY, :
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK :
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA :
ST. PAUL MERCURY INSURANCE COMPANY, :

Added Defendants.

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Decided April 12, 1989.

James C. Pitney and Dennis R. La Fiura (Pitney, Hardin, Kipp & Szuch, attorneys) and William E. Hegarty, Raymond L. Falls, Jr., Leonard Spivak, Michael P. Tierney, Marshall Cox and Peter F. Laks (Cahill Gordon & Reindel, attorneys) for plaintiff.

Stephen D. Cuyler (Cuyler, Burk & Matthews, attorneys) and Peter I. Sheft and Leonard A. Sheft (Sheft, Wright & Sweeney, attorneys) for defendants General Reinsurance, North Star Reinsurance, Prudential Reinsurance, Gibraltar Casualty, Ranger Insurance, Republic Insurance, American Centennial and the London Market Insurers.

John B. La Vecchia (Connell, Foley & Geiser, attorneys) and Thomas J. Groark, Jr., Scott P. Moser, Joseph L. Hammer (Day, Berry & Howard, attorneys) for defendant Aetna Casualty & Surety Company.

Antonio D. Favetta (DeGonge, Garrity & Fitzpatrick, attorneys) for defendants the AIG Companies.

James W. Christie (Griffith & Burr, attorneys) for defendant Commercial Union Insurance Company,

Steven A. Kunzman (Kunzman, Coley, Yospin & Bernstein, attorneys) and Jean-Pierre D. van Lent (Bivona & Cohen, attorneys) for defendant Fireman's Fund Insurance Company.

Stefano Calogero (Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowski, attorneys) for defendant The Home Insurance Company.

Michael K. Mullen (Schenck, Price, Smith & King, attorneys) and Paul R. Koepff (Mudge, Rose, Guthrie, Alexander & Ferdon, attorneys) for defendants Insurance Company of North America and California Union Insurance Company.

Carl Greenberg (Budd Larner Gross Picillo Rosenbaum Greenberg & Sade, attorneys) and Robert J. Bates, Jr. (Phelan, Pope & John, attorneys) for defendants American Re-Insurance Company and American Excess Insurance Company.

Robert N. Golden (Golden, Lintner, Rothschild, Spagnola & DiFazio, attorneys) for defendant Royal Indemnity Co.

William S. Wachenfeld (Tompkins, McGuire & Wachenfeld, attorneys) for defendant Hartford Insurance Company.

George R. Hardin (Bumgardner, Hardin & Ellis, attorneys) for defendant London Guarantee & Accident Company of New York.

Frank P. Addas (James & Addas, attorneys) for defendant Great Southeast Fire Insurance Company.

Leon B. Piechta (O'Donnell, Kennedy, Vespole & Piechta, attorneys) for defendant Integrity Insurance Company.

Thomas F. Quinan (Wilson, Elser, Moskowitz, Edelman & Dicker, attorneys) for defendant Evanston Insurance Company.

Laurence M. McHeffey (Hanlon, McHeffey, Donington, Herzfeld & Ruben, attorneys) for defendant Midland Insurance Company.

Allan Maitlin (Feuerstein, Sachs, Maitlin, Rosenstein & Fleming, attorneys) for defendant Atlanta International Insurance Company.

Michael F. O'Neill (Purcell, Ries, Shannon & Mulcahay, attorneys) for defendant Hartford Accident Insurance Company.

John L. Slimm (Slimm, Dash & Goldberg, attorneys) for defendant Granite Insurance Company.

Stephen Jacobs (Siff, Newman, Rosen & Parker, attorneys) for defendant First State Insurance Company.

Thomas E. Lenney (Enright, Lenney & McGrath, attorneys) for defendant Colonial Penn Insurance Company.

Joseph L. Cook (Ravin, Sarasohn, Cook, Baumgarten, Fisch & Baime, attorneys) for defendant Security Insurance Company of Hartford.

Gerald M. Gorrin (Gorrin, Whitken & Crowley, attorneys) and John E. Peer (Long & Levit attorneys) for defendant Employers Insurance of Wausau.

Stanton, A.J.S.C.

## INTRODUCTION; GENERAL STATEMENT OF THE ISSUES

Plaintiff Diamond Shamrock Chemicals Company is a major chemical manufacturer. From 1951 until 1969, Diamond, or a corporate predecessor, produced chemicals for use in agriculture at its plant at 80 Lister Avenue, Newark, New Jersey ("Newark plant").

One of the chemicals produced at the Newark plant throughout the 1951-1969 period was trichlorophenol ("TCP"). TCP was an intermediate chemical which Diamond used to manufacture 2,4,5-T acid. 2,4,5-T products were phenoxy herbicides which were used widely throughout the United States for decades. The general view in the chemical industry and in the United States Department of Agriculture was that it was safe to dispense phenoxy herbicides into the environment in controlled agricultural applications.

Agent Orange is the name generally given to a line of phenoxy herbicides produced by Diamond and other manufacturers and purchased by the United States military for use in Vietnam as a defoliant. During the Vietnamese war from 1962 through 1970 enormous amounts of Agent Orange were sprayed on the countryside of Vietnam in order to defoliate forests and jungles used by hostile forces as cover.

In the process of manufacturing TCP at the Newark plant, quantities of dichloradibenzo-p-dioxin ("dioxin") were created as an unintended impurity. Dioxin was present as an impurity in all the 2,4,5-T phenoxy herbicides, including Agent Orange, manufactured by Diamond at the Newark plant.

For a number of years, Diamond did not even realize that it was creating dioxin. When dioxin was identified and detected, it was not perceived as being particularly toxic. In the early 1960's, dioxin was thought to be causally related to chloracne among workers at the plant. Chloracne is an irritating, disfiguring and persistent skin disorder. It is a significant nuisance to the workers afflicted by it, but it is not a dangerous condition.

Even to this day, chloracne among workers exposed to large amounts of dioxin is the only human health problem which is indisputably caused by dioxin. However, at about the time that Diamond stopped manufacturing 2,4,5-T phenoxy herbicides, and about the time the United States military stopped spraying Agent Orange in Vietnam, health and environmental scientists came to regard dioxin as a potentially dangerous substance. Although it has never been proven to be life-threatening to human beings, federal and State regulatory authorities have eventually come to treat dioxin as being extremely toxic to humans. The reason for this is that exposure in laboratories to very minute quantities of dioxin has

been quickly fatal to many species of animals - species which are generally reliable indicators of chemical risks to humans.

It may be that for reasons not presently understood we humans are simply not seriously vulnerable to dioxin, even though many other species of animals are. However, it may be that dioxin is indeed very dangerous to us, but that it works slowly in humans, so that its consequences will not become apparent until many years after a person has been exposed to it. In this context, one cannot help but think of the prescription drug DES, which was once widely administered to pregnant women to help prevent loss of an unborn child by spontaneous abortion. The drug does not seem to have hurt the women who took it, but large numbers of their offspring developed cancer many years later as they passed through puberty. Confronted with the devastating impact dioxin has on many species of animals, federal and State regulatory agencies have moved very aggressively against it. The regulatory agencies impose mandatory remedial measures if dioxin is found in a quantity as small as one part per billion.

Diamond closed the Newark plant for economic reasons in 1969. The plant was sold to another chemical manufacturer in 1971. No TCP was produced by anyone at the Newark plant after 1969. No dioxin has been created at the plant since 1969.

On June 2, 1983, the Governor of New Jersey issued an

Executive Order which found that the Newark plant may be contaminated with dioxin and that a "potential hazard exists to the public health because of the possibility of transportation of contaminated substances off the described premises into immediately surrounding areas." The Governor's Order directed the Commissioner of the Department of Environmental Protection to take whatever steps were necessary to abate the hazardous conditions. Although Diamond no longer owned the Newark plant, it was legally responsible to remedy the conditions at the site because it had produced the dioxin. In response to action taken by the New Jersey Department of Environmental Protection, Diamond has reacquired the Newark plant and an adjacent site in order to carry out remedial measures. It should be noted that if Diamond had not agreed to undertake remediation, the State itself could have performed the work and then collected three times the cost of the work from Diamond. See N.J.S.A. 58:10-23.11f. Diamond has entered a number of Administrative Consent Orders with the Department of Environmental Protection with respect to remedial work at the Newark plant. It is not yet fully known how much work Diamond will have to do at the plant and in the surrounding neighborhood. It could readily get to be $20,000,000. It could conceivably be much more.

In addition to remediation costs imposed by the Department of Environmental Protection, Diamond is confronted with claims for property damage and personal injury by hundreds of people who have

resided in the neighborhood of the Newark plant and with hundreds of personal injury claims asserted by people who have worked in the Newark plant or in other plants in its neighborhood.

From 1961 to 1969, Diamond made about 127 shipments of Agent Orange to the United States military under ten different contracts. All of the Agent Orange herbicides contained dioxin. Diamond does not know precisely what happened to its Agent Orange after delivery to the armed forces. In general, its shipments were mingled by the military with each other and with shipments of other manufacturers before being sprayed by the military on the Vietnamese countryside. Most of Diamond's Agent Orange was probably applied in Vietnam between 1962 and 1970. The government had considerable stocks of unused Agent Orange in at least two storage depots at the end of the war, and it may be that some of Diamond's Agent Orange was never used.

In 1980, the United States District Court for the Eastern District of New York certified as a class action a massive set of claims asserted against the United States and a number of manufacturers of Agent Orange. Diamond was one of the defendant manufacturers in that action. The plaintiffs were a class of approximately 2.5 million Vietnam veterans and their family members. The plaintiff veterans alleged that exposure to Agent Orange and the dioxin contained in it had seriously damaged their health and had also damaged some of their children. The health

problems alleged to have been caused included various cancers, genetic damage, birth defects, nervous disorders and skin diseases. On May 7, 1984, the court approved a settlement of the class action under which $180,000,000 was paid by the manufacturers collectively to the class. After approving the settlement between the manufacturers and the class plaintiffs, the court dismissed the claims of plaintiffs who had opted out of the class. The dismissal was based in part upon the inability of the plaintiffs to prove that their health problems had been caused by Agent Orange or dioxin. The approval of the class settlement and the dismissal of the claims of plaintiffs opting out of the class were eventually affirmed on appeal. See In re "Agent Orange" Product Liability Litigation, 689 F. Supp. 1250 (E.D.N.Y. 1988) for a history of that complicated litigation.

Diamond contributed $23,339,417.36 towards the settlement of the Agent Orange class action.

The defendants in this action are the Aetna Casualty and Surety Company and 125 other insurance companies. The defendants collectively issued approximately 660 insurance policies providing liability coverage to Diamond during the years 1951 to 1983. Aetna issued the primary liability policies for all the years in question. The other defendants have issued excess policies or reinsurance policies at various times from 1951 to 1983.

In this present action, Diamond asks the court to interpret its rights under the various policies and then to specifically enforce those rights against the defendants. Broadly speaking, Diamond seeks from the defendants collectively full indemnification for all the costs it has and will incur in remedying the contamination of the Newark plant, full indemnification for all pending and future property damage and personal injury claims asserted by residents, workers and property owners in the neighborhood of the Newark plant and full indemnification for the payment made by Diamond towards the Agent Orange class action settlement. Diamond also asks the court to require Aetna (and perhaps one or more of the other defendants) to supply a defense for Diamond in all pending and future actions arising out of Diamond's operation of the Newark plant. Diamond also sought to require Aetna to pay the full defense costs of the Agent Orange class action, but, prior to trial, I ruled that an agreement under which Diamond and Aetna split those costs on a 50-50 basis was valid and controlling on that issue.

This action was tried before me for 20 days.

## THE GENERAL DECISION

I have concluded that none of the defendants are liable in any amount on any of the policies with respect to Diamond's operation of the Newark plant. There is no coverage for the cost of

remedying the contamination at the Newark plant and in its neighborhood, and no coverage with respect to any pending or future claims for property damage or personal injury asserted by residents, property owners or workers in the neighborhood of the Newark plant under any of the policies in question.

I have concluded that there is coverage under some of the policies with respect to the Agent Orange class action.

CLAIMS ARISING OUT OF THE OPERATION OF THE NEWARK PLANT

The Newark plant abuts the Passaic River. At the point at which it flows past the plant, the Passaic River is a substantial body of water which can be navigated by commercial ships. Chemical pollution of the Passaic River in the Newark area has been severe for at least the past 50 years. At all times during its operation by Diamond, the Newark plant was a meaningful contributor to the pollution of the river, but there were so many other plants discharging chemical wastes into the Passaic River in the Newark area that it would have been severely contaminated even if the Newark plant had not existed.

From 1951 until 1956, Diamond intentionally discharged all of its waste chemical effluent into the Passaic River. Such discharges had been forbidden by specific statutory enactment since at least 1931. N.J.S.A. 58:14-7 and -8. The penalties for such

discharges were relatively light and enforcement was not vigorous by our current standards. However, in 1956, the Passaic Valley Sewerage District became insistent upon compliance with the no-discharge law, and Diamond purportedly tied its entire complex at the Newark plant into an industrial sewer constructed by the Passaic Valley Sewerage Commission.

Although Diamond purported to tie the whole Newark plant into the sewer in 1956, it actually tied only the 2,4-D building into the sewer. The chemical effluent from the main building continued to be discharged directly into the Passaic River. The discharges I have spoken about thus far were intentional, planned discharges from processing equipment through pipes or ditches. In addition, from 1951 through 1969, spills onto floors and ground surfaces drained mostly into the Passaic River. These spills were constant, and, collectively, they were substantial in volume. Diamond was conscious that its discharges into the river were illegal. It deliberately concealed them, and over a period of many years employed an alarm system to warn employees to stop the discharges when Passaic Valley inspectors were on the premises.

Over the years, discharges from the Newark plant into the Passaic River included 2,4,5-T acid (and dioxin), caustic soda, DDT, sulfuric acid, TCP (and dioxin), muriatic acid and monochlorobenzene. The conclusion is inescapable that the consistent policy of Diamond's management (both at the local plant

level and at corporate headquarters) was to discharge dangerous chemicals into the Passaic River in known violation of public law. This policy persisted from 1951 through 1969. The policy was consciously adopted by Diamond's management because the pollution of the public waters of the State was not perceived by them as a significant wrong, and because it would have been technically difficult and very costly to have avoided such discharges.

Housekeeping 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.

Much of the extensive testimony about the operation of the Newark plant focused on discharges, spills and drainage of chemicals into the Passaic River. However, the focus of the Department of Environmental Protection remediation efforts has not been on the river — it has been mostly on the presence of dioxin and other contaminants in the buildings and soils of the Newark plant, although the river is getting some attention. Extensive testing and sampling since 1983 has shown that there are action levels of dioxin and of many other chemicals which are regarded as priority pollutants at scores of locations throughout the Newark plant site. (An action level is a quantity large enough to make

remediation efforts mandatory.) While most of the attention of the Department of Environmental Protection and the litigants has been directed at dioxin, it is clear from the testimony of Deputy Commissioner Michael F. Catania that there are many other chemicals scattered around the site of the Newark plant which make a clean-up of the site necessary.

The fact that current remediation efforts are centering on the buildings and soils of the Newark plant rather than on the Passaic River does not mean that the extensive testimony about the abuse of the river was irrelevant. The testimony was highly relevant because it established that from 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.

It must, of course, be remembered that during the period from 1951 to 1969 our society was not nearly as knowledgeable, concerned and sensitive about the environment as it is now. Government regulation was much less pervasive and much more lax than it is today. By the standards of the 1950's and 1960's, Diamond's attitudes and conduct were not nearly as blatant and as outrageous as they would be by today's standards. However, even by the standards of the 1951-1969 period, Diamond's conduct in operating the Newark plant was unacceptably wrong and irresponsible. Diamond always put its narrowly perceived economic interest first. It

deliberately and persistently cheated on the limited environmental regulations which were in place.

There was no testing for pollution or contamination at the Newark site prior to 1983. Hence, we do not have any actual test data about conditions on the site from 1951 to 1969, or from 1969 until 1983. Nevertheless, the testimony concerning operations at the plant, coupled with current testing data, make it clear that there has been heavy dioxin and DDT contamination throughout the buildings, soils and waters of the Newark plant at all times from a few months after Diamond took over the plant in 1951 until today.

From January 28, 1951 until July 1, 1985, Aetna insured Diamond under a series of comprehensive general liability policies. These were the primary liability policies in force during that period. From January 28, 1951 until February 1, 1960, the policies provided coverage on an <u>accident</u> basis. From February 1, 1960 until July 1, 1985, the policies provided coverage on an <u>occurrence</u> basis.

The insuring agreement of the 1951 to 1960 accident basis policies reads as follows:

> "Coverage C - Bodily Injury Liability - Except Automobile"
>
> "To 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."

"Coverage D - Property Damage Liability - Except Automobile"

"To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident."

From 1960 through 1969, Aetna's policies retained accident basis language in their insuring agreement clauses, but they each contained an endorsement shifting the policies to an occurrence basis in the following language:

"It is agreed that such insurance as is afforded by the policy for bodily injury liability and for property damage liability under coverage applies subject to the following provisions:

"1. Whenever the word 'accident' appears, such word is amended to read 'occurrence'.

"2. 'Occurrence' means

(A) An accident, or

(B) Continuous or repeated exposure to conditions which results, during the policy period, in injury to persons or tangible property which is neither expected nor intended from the standpoint of the insured.

"3. For the purpose of determining the limit of the company's liability, all injury arising out of continuous or repeated exposure to substantially the same general conditions existing at or emanating from one location or source shall be considered as arising out of one occurrence."

From 1969 through 1985, the insuring agreement of Aetna's policies reads as follows:

> The Company will 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.
>
> To which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the Insured seeking damages on account of such bodily injury or property damage..."

Each of the policies from 1969 through 1985, defined "occurrence" as follows:

> "'Occurrence' means
>
> (A) An accident, or
>
> (B) Continuous or repeated exposure to conditions which results, during the policy period, in injury to persons or tangible property which is neither expected nor intended from the standpoint of the insured."

From 1971 to 1985, all of Aetna's policies contained an exclusion which has been referred to as the "Pollution Exclusion" in this trial. That exclusion reads as follows:

> "This insurance does not apply:
>
> To bodily injury or property damage arising out of the discharge, dispersal, release or escape of 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, disposal, release or escape is sudden and accidental."

In advance of trial, I ruled that New Jersey law would govern policy coverage for claims arising out of the operation of the Newark plant. There are a number of partially overlapping reasons why the policies do not afford coverage for claims related to the Newark plant. For ease of discussion, I will divide Aetna's primary policies into three distinct classes:

1. The 1951 to 1960 policies which provided coverage on an accident basis.
2. The 1971 to 1985 polices which provided coverage on an occurrence basis and which also contained the pollution exclusion.
3. The 1960 to 1970 policies which provided coverage on an occurrence basis and which did not contain any pollution exclusion.

Before discussing the classes of policies, however, something should be said about the approach which New Jersey courts take to the construction of insurance policies. The polestar of construction is that the reasonable expectations of the insured with respect to coverage are to be fulfilled. Because insurance policies are typically confusing and complicated, because the average insured has difficulty in understanding the intricacies of policy language, and because the insured's bargaining power is usually unequal to that of the insurer, the concept of fulfilling the reasonable expectations of the insured usually leads to

construing disputed policy language rather strictly against the insurer. See Zuckerman v. National Union Fire Ins. Co., 100 N.J. 304, 320-321 (1985).

However, the tendency to construe policies against insurers is not without limits. As the New Jersey Supreme Court has stated in Werner Industries, Inc. v. First State Ins. Co., 119 N.J. 30, 38-39 (1988), courts should always be sensible in their interpretations and should not read into an agreement or policy something which is not there. (I take this to mean also that courts should not read out of a policy a limitation which is clearly there.) The Supreme Court indicates in Werner Industries, that in construing insurance policies a distinction should sometimes be made between personal insurance coverage and the coverage provided under commercial policies to sophisticated insureds. A court should be less ready to construe a policy against the insurer where the policy is a commercial one purchased by a sophisticated insurer through a knowledgeable broker. 112 N.J. at 38.

At all relevant times, Diamond had a risk management office staffed by several full-time employees. Plaintiff's counsel have tended to minimize the skills of those employees, while defense counsel have tended to maximize them. None of the risk managers had advanced formal academic training in risk management, insurance underwriting or in insurance law. None of them came to Diamond

after having worked in the insurance industry. They were basically general purpose, middle level executives who were assigned to risk management by Diamond. They learned about risk management and its insurance component on the job. They were intelligent people who took their work seriously. I am satisfied that they rapidly became acceptably knowledgeable about the workings of insurance coverage.

For most of the time in question, Diamond used the firm of Alexander and Alexander as its insurance broker. Alexander and Alexander is of the largest and most sophisticated insurance brokers in the world. Since Diamond was a very major manufacturer with extensive insurance needs, its account was a valuable one and received careful attention from its broker. When Diamond went into the London Market to purchase excess insurance, it employed the Sedgwick firm as its broker there. Sedgwick is a large and experienced firm. It too gave Diamond careful attention. Diamond also formed a captive insurer to insure certain aspects of its operation. Considering its financial resources, the skills of its risk management employees and the expertise and experience of its brokers, the conclusion I reach is that Diamond was a highly knowledgeable purchaser of insurance with a substantial amount of bargaining power in the insurance markets.

I turn now to a discussion of the coverage provided by the various classes of Aetna policies.

The 1951 to 1960 policies which provided coverage on an accident basis. The simplest and most straightforward reason for denying coverage under these policies is that 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. It seems clear to me that any personal injury or property damage for which Diamond seeks coverage in this action was caused by the gradual and continuous dispersal of chemical contaminants into the environment by Diamond at its Newark plant. Injury or damage incurred in this way is not "caused by accident."

An "accident" within the meaning of the "caused by accident" language of the Aetna policies is a discrete fortuitous event which happens within a short time at a specific time and place. The New Jersey cases defining the essential character of an accident have tended to arise within the context of the Workers' Compensation Act litigation, where it is frequently necessary to distinguish accident from occupational illnesses caused by long-continued exposure to unhealthy work conditions (which were not covered under earlier versions of the Act), or to distinguish between accidents and health problems which arise out of the natural deterioration or malfunctioning of the human organism (which are not covered even under modern versions of the Act). See Dudley v. Victor Lynn Lines, Inc., 32 N.J. 479 (1960); Smith v. International High Speed Steel Co., 98 N.J.L. 574 (E. & A. 1922); U.S. Radium Corp. v. Globe Indemnity Co., 13 N.J. Misc. 316 (Sup. Ct.-Trial 1935), affirmed

116 N.J.L. 90 (E. & A. 1936); Liondale Bleach, Dye and Paint Works v. Riker, 85 N.J.L. 426 (Sup. Ct. 1914). However, the analysis of the concept of accident which is contained in these cases is not limited to Workers' Compensation law. It is an analysis capable of wide application, and it is, in my judgment, clearly applicable to the concept of accident in a comprehensive general liability policy. See 1 Long, The Law of Liability Insurance, Sec. 1.21 (1989).

In our case, no person was injured and no property was contaminated or otherwise damaged as the result of any specific act. There was a continuous process of discharging and spilling chemicals at the Newark plant which gradually produced action levels of a number of priority pollutants. This gradual degradation of the environment (along with possible injury to persons) is not attributable to any definite event. It is not "caused by accident".

The 1971 to 1985 policies which provided coverage on an occurrence basis and which also contained the pollution exclusion. The simplest and most straightforward reason for denying coverage under these policies is that the pollution exclusion is clearly applicable to any bodily injury or property damage which has occurred and it bars any recovery.

It is important to keep the language of the pollution

exclusion in mind. Accordingly, I repeat it:

"This insurance does not apply:

> To bodily injury or property damage arising out of the 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, dispersal, release or escape is sudden and accidental."

In shifting from an accident basis to an occurrence basis, the intention was to create broader coverage. The intent was to expand coverage to include health impairment or property loss arising out of the failure of the insured to maintain safe health and sanitary conditions. See 1 Long, The Law of Liability Insurance, Sec. 1.22 at 92 (1989). In order to prevent occurrence coverage from becoming too broad, the exclusion quoted above was created to bar coverage for injury or damage caused by gradual chemical or waste material pollution. However, the pollution exclusion was not intended to bar recovery where injury or damage caused by chemicals or waste materials would traditionally have been covered under an accident basis policy. Hence, the final provision of the pollution exclusion was that "this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental."

The troublesome contamination by dioxin and other toxic

chemicals in this case falls unambiguously within the reach of the exclusionary language of the pollution exclusion. The clear language of the pollution exclusion bars coverage where, as in this case, the damage happens gradually over a period of time. This view of the plain meaning of the language of the pollution exclusion is reinforced by noting the way in which insurance policy forms evolved from the late 1950's through the 1970's.

The interplay between the concepts of "accident" and "occurrence" and the way in which the pollution exclusion is intended to operate are readily illustrated by an actual event which took place at the Newark plant in 1960. In February of that year, a major explosion in the TCP unit destroyed the large five-story building housing that unit. Although no one worried about it at the time, we now know that the explosion must have spread dioxin contamination throughout the plant site and onto nearby properties. Under the accident basis policy which was in effect at that time, the damage to nearby properties caused by the dioxin deposited on them by dioxin would have been covered, because the explosion was an "accident" in the most straightforward sense of that word, and the dioxin contamination was caused by that accident. That same damage would also have been covered under an occurrence policy which did not contain a pollution exclusion, because the concept of "occurrence" includes an "accident" as well as gradual exposure to conditions. However, the exclusionary language of the pollution exclusion would have barred recovery, if

the words "but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental" did not appear at the end of the pollution exclusion provision. The effect of the "sudden and accidental" exception to the pollution exclusion would have been to extend coverage to the dioxin contamination resulting from the explosion. (Parenthetically, I note that there is, in fact, no coverage under the policies in force in 1960 for the dioxin contamination caused by the explosion, because it is now physically impossible to identify and quantify the contamination caused by the explosion. But that is a physical proof problem which does not detract from the validity of the conceptualization involved.)

Unfortunately, a number of reported decisions of the Appellate Division and of New Jersey trial courts have, in my opinion, flatly misread the plain language of the pollution exclusion and have fundamentally misunderstood the way in which the exclusion and its exception are designed to function. I refer to CPS Chemical Co. v. Continental Ins. Co., 222 N.J. Super, 175 (App. Div. 1988), and Broadwell Realty Services, Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516 (App. Div. 1987). Those cases approved and followed earlier trial court rulings on the pollution exclusion. CPS Chemical Co. v. Continental Ins. Co., 199 N.J. Super, 558 (Law Div. 1984), reversed on other grounds, 203 N.J. Super. 15 (App. Div. 1985); Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co., 188 N.J. Super. 156 (Law Div.

1982); Lansco Inc. v. Department of Environmental Protection, 138 N.J. Super. 275 (Ch. Div. 1975), affirmed 145 N.J. Super. 433 (App. Div. 1976), certification denied, 73 N.J. 57 (1977). My intention here, of course, is not to be inappropriately critical of the decisions of other courts, but to urge the correction of a mistake so that justice will be served.

Broadwell Reality Services, Inc. v. Fidelity & Casualty Co. most fully articulates the reasoning contained in the New Jersey cases construing the pollution exclusion. In interpreting the language "but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental" the court refused to give the word "sudden" a temporal meaning. Instead, the court approved decisions which had "construed the word 'sudden' in terms of an 'unexpected', 'unforeseen' or 'fortuitous' event" and stated that this definition was "consistent with the common meaning of the word in every day parlance". 218 N.J. Super. at 530-531. The court then went on to discuss and accept a view of the pollution exclusion which made it coextensive with the scope of the definition of occurrence, so that its function was limited to excluding coverage for pollution which was knowingly caused. 218 N.J. Super. at 532-535. The ultimate result of this reasoning was that the court ended up treating "the word 'sudden' as meaning unexpected and unintended." 218 N.J. Super. at 535.

The approach to the pollution exclusion taken in Broadwell and

the cases it followed is flawed in several ways. In the first place, it flatly misinterpreted the meaning of the word "sudden". The word "sudden" is not defined in any of the policies. Hence, it is to be given its ordinary meaning as used in everyday speech, to the extent, at least, that such ordinary meaning is consistent with the context within which the word is used in the policy. Although a "sudden" event is one which is unexpected and fortuitous, it is much more than that. It is something which happens swiftly. In common language, there is always this element of swiftness, as well as an element of unexpectedness. Thus, there is always a temporal element to the word "sudden".

I note the way in which the word is defined in Funk & Wagnalls, New Comprehensive International Dictionary of the English Language (Encyclopedia Edition 1978):

> "sudden - adj. 1. Happening quickly and without warning: sudden death. 2. Hurriedly or quickly contrived, used or done; hasty. 3. Come upon unexpectedly; causing surprise. 4. Quick-tempered; precipitate; rush. See synonyms under IMPETUOUS, SWIFT."

I also note the definition contained in Webster's New Collegiate Dictionary (1981):

> "sudden - adj. 1.a: happening or coming unexpectedly (a --- shower); b: changing angle or character all at once 2: marked by or manifesting abruptness or haste 3: Made or brought about in a short time: PROMPT syn

PRECIPITATE."

Of course, a person reading those definitions or comparable ones in other standard dictionaries can correctly conclude that a "sudden" event is one which is unexpected and unintended, but if that is all he gets from the definition, he is really missing the point. 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.

Furthermore, when the word "sudden" is put within the context within which it is used in the policies at issue in this case, its temporal character becomes even more clear. "Sudden" is used in conjunction with the word "accidental": "but this extension does not apply if such discharge, dispersal, release or escape is sudden and accidental." (My emphasis.) As noted earlier in this opinion, the most usual and traditional meaning of accident in insurance law is itself somewhat temporal in character. Thus, accidents have traditionally been treated as happening in a relatively short period of time. It was partly to avoid this temporal element of accident and to expand coverage that policies were shifted to an occurrence basis to allow recovery from exposure over time to conditions. If the word "accidental" were used by itself in the exception to the pollution exclusion, a precise, technical reading of it would probably bar recovery for unintended gradual pollution while allowing recovery for quickly happening pollution caused by

something like an explosive or a rupture. However, the reality is that the temporal aspect of the word had slipped somewhat in the course of everyday usage and of judicial construction. Hence, the unequivocally temporal word "sudden" was added to the word "accident" and the phrase "sudden and accidental" was used for the precise purpose of making the temporal aspect of the exception clear beyond any doubt.

If the word "sudden" is not given a temporal meaning, then there is no point to its being used in the exception to the pollution exclusion. Worse yet, if the word "sudden" is not given a temporal meaning, the same thinking will, a fortiori, read any temporal meaning out of "accident", and the exception to the pollution exclusion will become so broad that it will virtually swallow the exclusion and render it largely illusory. In my view, the approach of the Broadwell court has the effect of reading the pollution exclusion out of the policy. Such a result is unwarranted.

Broadwell was decided by the Appellate Division, which is our intermediate appellate court. Reported decisions of the Appellate Division are binding upon me as a trial judge. If I think that the Appellate Division made a mistake in deciding Broadwell (as I do), then I can (as I have) point out the mistake in the hope that it will hereafter be corrected by the Appellate Division or by the Supreme Court. In the meanwhile, Broadwell constitutes the

decisional law of New Jersey.

However, Broadwell and the other New Jersey decisions interpreting the pollution exclusion do not control my decision in our present case because of the particular facts which are present in our case. Unlike the insureds in the Broadwell line of cases, Diamond was a highly knowledgeable purchaser of insurance with a substantial amount of bargaining power in the insurance markets. Diamond's risk managers and brokers paid careful attention to the provisions in Diamond's liability policies and to what was going on in the insurance industry. Donald Purdy was the Diamond manager in charge of procuring and monitoring insurance from 1957 to 1982. William Greening was a vice president of the Alexander & Alexander brokerage firm who handled Diamond's account from 1966 to 1988. Both these men were immediately aware of the introduction of the pollution exclusion into Diamond's policies in 1971. Both were clearly of the view that the pollution exclusion barred recovery for claims arising out of gradual pollution, and they held that view from 1971 until they stopped handling Diamond's insurance. Mr. Purdy advised his supervisors on a number of occasions that Diamond's comprehensive general liability policies did not cover gradual pollution. When environmental impairment liability insurance first came onto the market in 1974, Mr. Purdy correctly understood that it did cover gradual pollution and he recommended its purchase. Indeed, as late as March 25, 1982, Mr. Purdy submitted a written report to the Audit Committee of Diamond's Board of Directors in which he specifically identified "non-sudden

and accidental" seepage and pollution as not being covered. In that report, he reminded the Board of Directors that he had recommended purchase of environmental impairment liability insurance.

Diamond's top management decided not to purchase environmental impairment liability insurance. Diamond made a conscious decision to be self-insured in the area of liability for gradual pollution. Its business judgment may, arguably, have been mistaken in this regard, but the decision was by no means a wild or irresponsible one. For one thing, the underwriting risks are so uncharted and so enormous that environmental impairment policies are expensive, sometimes very restrictively conditioned and not easily available. Furthermore, in the 1970's Diamond became much more sensitive to and concerned about pollution risks. Many millions of dollars were spent on pollution control throughout the company's operations, and Diamond thought that it had pollution risks under fairly good operational control. Diamond, of course, was not worried about the Newark plant after its sale in 1971.

At all times from 1951 until the present, Diamond's risk managers have always been aware that prompt notice of claims must be given to insurers. With respect to all claims other than those arising out of gradual pollution, Diamond's unfailing practice from 1951 to date has been to give prompt notice to its insurers. However, 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, Diamond usually did not give notice of the claims to its comprehensive liability insurers. The first carefully articulated notice of pollution claims appears to have been given in 1983 when the dioxin problems at the Newark plant site surfaced. The inference to be drawn is that Diamond did not give prompt notice of these claims to its comprehensive general liability insurers because it did not think it had liability coverage for them.

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 which 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. Given this, given Diamond's status as a sophisticated and knowledgeable insured, and given the rules laid down in Werner Industries, Inc. v. First State Insurance Co., 119 N.J. 30 (1988), and Zuckerman v. National Union Fire Ins. Co., 100 N.J. 304 (1985), the conclusion I reach is 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.

My discussion thus far of the basic insuring provisions and of the basic concepts of "accident", "occurrence" and the pollution exclusion has focused on the language of the Aetna policies which afforded primary comprehensive general liability insurance during all of the years in question. In addition to the Aetna policies, there were many hundreds of excess policies in force at various times which afforded comprehensive general liability coverage to Diamond over the limits of the Aetna policies. In general, those excess policies followed the form of the primary policies. Therefore, the coverage rulings which I make in this case with respect to the Aetna policies apply with equal force and for exactly the same reasons to the excess policies. I note, however, that some of the London market excess policies and a few American excess policies, for example, the Lexington policies, had pollution exclusion provisions which were even more restrictive of coverage than the language of Aetna's policies. Those more restrictive policies had, in essence, language excluding pollution coverage without any exception for sudden and accidental events. Diamond's argument that these facially more restrictive exclusions should be interpreted as applying only to oil and gas operations is not persuasive.

In Broadwell, the Appellate Division noted that there was a difference of opinion in out-of-state judicial decisions as to the meaning of "sudden" in the "sudden and accidental" exception to the pollution exclusion. The Appellate Division believed that the

position it adopted was the prevailing view in other jurisdictions. 218 N.J. Super. at 531-534. I am not certain whether the Appellate Division estimate of the prevailing view in other jurisdictions was correct as of the time when Broadwell was decided in 1987. However, I think that, as I write this opinion in 1989, the prevailing view is that "sudden" is to be given a specifically temporal meaning. See International Minerals and Chemical Corp. v. Liberty Mutual Insurance Co., 522 N.E. 2d 758, 768-769 (Ill. App. 1 Dist. 1988); Technicon Electronics Corp. v. American Home Assurance Co., 533 N.Y.S. 2d 91, 99 (A.D. 2 Dept. 1988).

The 1960 to 1970 policies which provided coverage on an occurrence basis and which did not contain any pollution exclusion. My basic view with respect to this group of policies is that they do not provide coverage because the injury to person and the damage to property arising out of the operation of the Newark plant was expected from the standpoint of the insured. Indeed, some of the injury and damage can fairly be treated as intended from the standpoint of the insured. In this connection, it is useful to repeat the relevant policy language:

> "It is agreed that such insurance as is afforded by the policy for bodily injury liability and for property damage liability under coverage applies subject to the following provisions:
>
> "1. Whenever the word 'accident' appears, such word is amended to read 'occurrence'.
>
> "2. 'Occurrence' means
>
> (A) An accident, or

(B) Continuous or repeated exposure to conditions which results, during the policy period, in injury to persons or tangible property which is neither expected nor intended from the standpoint of the insured." (My emphasis.)

As my previous discussion of the operations of the Newark plant made clear, Diamond intentionally and continuously discharged highly toxic chemical effluent into the Passaic River from 1951 to 1969. During that entire period, there were also constant spills and leaks onto the factory floors and the outdoor ground surfaces of the Newark plant. Considered one at a time and in isolation from each other, many of those spills and leaks might qualify as accidental. However, considered in their totality, as they must be in order to do justice to the realities of this situation, the spills and leaks establish a definite pattern of operation. Toleration of substantial and continuous spilling and leaking was the way of life at the Newark plant. I am satisfied that Diamond's management accepted the spills and leaks as part of the normal routine of operating a chemical manufacturing plant. Accordingly, its acts of pollution should be treated as conduct which was at least knowing. Some of the polluting conduct was fully intentional.

Factory floors at the Newark plant were so badly corroded by acid spills that they had to be replaced nearly every summer. 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.

I realize, of course, that Diamond did not anticipate back in the 1950's and 1960's that the New Jersey Legislature would pass the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, et seq., in 1976. Diamond did not know that the Department of Environmental Protection would come into being and that it would force Diamond to spend tens of millions of dollars to remedy pollution at the Newark plant. Diamond did not know that hundreds of neighbors would file suit against it for damages. But 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. 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. See Department of Environment Protection v. Ventron Corp., 94 N.J. 473

(1983).

I believe 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. I note that Judge Huot reached a similar conclusion in a broadly comparable case. See Morton Thiskol, Inc. v. General Accident Ins. Co. of America, Docket No. C-3956-85 (Ch. Div., Bergen County, August 27, 1987).

The knowingly polluting conduct which precludes coverage under the occurrence basis policies which were in force from 1960 to 1970 also precludes coverage on any accident basis policy or under any theory of accident. When someone acts the way Diamond did for 18 years, it is no accident that the environment was contaminated, that property was damaged, that neighbors may have been injured. See Harleysville Mutual Casualty Co. v. Harris & Brooks, Inc., 235 A. 2d 556 (Md. Ct. App. 1967); Clark v. London & Lancashire Indemnity Co. of America, 124 N.W. 2d 29 (Wi. Sup. Crt 1963); Morton Thiskol Ins. v. General Accident Ins. Co. of America, supra. The knowing polluting conduct also precludes coverage under the pollution exclusion, even when the "sudden and accidental" exception is given a non-temporal meaning. Broadwell Realty v. Fidelity & Casualty Co., supra, 218 N.J. Super. at 533.

Over the years, dioxin and other contaminants migrated off

the site. There is a sense in which some of this migration was accidental or fortuitous, at least as to the specific mechanisms by which it occurred. 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.

## THE AGENT ORANGE CLASS ACTION PRODUCT LIABILITY CLAIMS

In response to various motions made in advance of trial, I have previously made the following rulings with respect to the Agent Orange class action product liability claims:

1. New York law governs these claims.
2. The war risk exclusion clauses do not apply and do not bar coverage.
3. It was reasonable for Diamond to pay $23,339,417.36 towards the settlement of the Agent Orange class action.
4. Aetna and virtually all of the defendant excess insurers had adequate notice from Diamond of the

claims being asserted in the Agent Orange class action and had the opportunity to participate in the defense of the action and in its settlement.

The proofs and arguments presented during trial have confirmed the correctness of the pretrial rulings.

Diamond made a total of 127 Agent Orange shipments of varying sizes to the United States armed forces from 1961 to 1969. Diamond had no control over the Agent Orange once it was delivered. The armed forces appear to have mingled Diamond's shipments with each other and with shipments of other manufacturers. Diamond gave no instructions and no advice with respect to the application of the Agent Orange herbicide on the Vietnamese countryside. The military relied on its own judgment and expertise in devising and implementing the Agent Orange spraying program.

Up until the time at which it made its last shipment of Agent Orange to the military in 1969, Diamond thought that Agent Orange was an effective herbicide and that it was reasonably safe. Diamond was at least arguably justified in so thinking. Over the years, Diamond had come to know that the Agent Orange line of phenoxy herbicides contained dioxin and that dioxin was the impurity probably causing the chloracne among its plant workers. The plant workers were, of course, exposed to vastly greater

amounts of dioxin and to heavier concentrations of it than would be the case with expected users of the product.

In their civilian applications, the phenoxy herbicides were used in agriculture. The only persons expected to come in contact with these herbicides were agricultural field workers who would encounter it in a rather dilute form. There had been a few episodes of chloracne outbursts among South American agricultural workers, but this was thought to be caused by careless spraying of herbicides which persons applying the product had not diluted properly rather than by anything inherently very dangerous about the product. Diamond, of course, knew that the military was spraying Agent Orange extensively in Vietnam, but it did not know the particulars of its application. In short, Diamond did not know that it was delivering a defective product to the military when it shipped Agent Orange from 1961 to 1969.

Indeed, in 1989 we are still not certain that dioxin is seriously dangerous to humans. The fact that society is treating dioxin as highly toxic and the fact that the phenoxy herbicides (including Agent Orange) are now treated as defective products is a result of a series of political regulatory decisions. I do not use the word "political" here in any pejorative sense. If we are using a product which is not really necessary or for which there may be reasonable substitutes, and if we have some indication (as through the death of laboratory animals) that the product may be

highly dangerous to humans, it is probably a good idea to be cautious and to stop using the product. It may also be a good idea to take remedial action with respect to the presence of the product in the environment. In late 1969, reports of deaths of laboratory animals led civilian regulatory authorities to forbid the use of phenoxy herbicides in agriculture. Fairly shortly thereafter, the military authorities stopped using Agent Orange in Vietnam. The last spraying of Agent Orange in Vietnam appears to have taken place on April 15, 1970, although some spraying of other herbicides which did not contain dioxin went on for a while thereafter.

Given the stance of federal and state regulatory authorities, it is appropriate to treat Agent Orange as a defective product. Diamond distributed this product without knowing that it was defective. That lack of knowledge, of course, is not a defense in a product liability suit. The plaintiffs in the Agent Orange class action asserted product liability claims which fall clearly within the coverage of Aetna's comprehensive general liability policies and of the policies of the excess insurers. That is to say, in terms of the categories of coverage afforded by the basic insuring agreements of the various policies, there is coverage. However, there are difficult problems in allocating that coverage to particular policies.

All of the potentially implicated policies provide coverage

on an occurrence basis. In the various policies, "occurrence" is typically defined as including:

> "Continuous or repeated exposure to conditions which results, during the policy period, in injury to persons or tangible personal property which is neither expected nor intended from the standpoint of the insured."

As applied to the facts of the present case, occurrence is a somewhat elusive term. At one extreme, there was arguably an occurrence each time an individual soldier came into contact with Agent Orange. This could amount to over a million occurrences. Because each of the primary Aetna policies has a substantial deductible amount per occurrence, and because the various layers of excess coverage come into play only after the underlying Aetna policy is exhausted, spreading the $23,000,000 loss over a million occurrences would result in there being nothing collected by Diamond under any policy. I mention the million occurrence hypothesis for illustrative purposes only. No one in this case has argued for it.

However, many of the defendants, relying on the so-called "batch clause" in the various policies, have argued that there were 133 occurrences. That would result in 133 deductible amounts being applied against Diamond. It would also spread the recovery so broadly across the Aetna primary policies that there would be either no recovery or very negligible recovery against any of the

layers of excess coverage. That would result in some recovery against Aetna, but all or virtually all of the hundreds of excess policies would escape payment.

At the present, it is necessary to say something about the concept of elementary justice as it applies to any purchaser of insurance, even to a very sophisticated purchaser of insurance. The purchaser is supposed to get something for his premium money. He cannot be left with an illusory phantom. The fact is that Diamond spent substantial sums of money purchasing many hundreds of insurance policies which supposedly afforded it scores of millions of dollars of product liability coverage. Any interpretation of the concept of occurrence which would result in zero recovery on a $23,000,000 product liability loss simply is not acceptable, because it cheats the purchaser out of his reasonable expectation of coverage. Any interpretation of occurrence which would result in nominal or very minimal recovery is suspect on the same ground.

In terms of the numbers of occurrences involved, Diamond goes to the opposite extreme. It claims that there is only one occurrence. It argues, in effect, that the single occurrence is the whole, unbroken stream of producing, delivering and spraying the product. It then goes on to urge that there is joint and several liability under all of the policies issued in the years 1961 to 1980. Conceptually, a plausible argument can be made for

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

Related to but somewhat different from the problem of counting occurrences in a case like this is the problem of understanding the nature of the occurrence and the problem of relating an occurrence to a resulting injury. Under New York law, there must be not only an occurrence but also an injury in fact which results during the policy period. See Hartford Accident & Indemnity Co. v. Wesolowaki, 305 N.E. 2d 907 (Ct. App. 1973); Arthur A. Johnson Corp. v. Indemnity Insurance Co., 164 N.E. 2d 704 (Ct. App. 1959); American Home Products Corp. v. Liberty Mutual Ins. Co., 565 F. Supp. 1485 (S.D.N.Y. 1983), affirmed as modified, 748 F. 2d 760 (2d Cir. 1984). An occurrence by itself does not trigger coverage. Coverage is triggered by the injury which in fact results, and it is triggered as of the time the injury in fact resulted, even if the injury is not diagnosed until much later. The policy triggered is the policy in force at the time of the injury in fact. See American Home Products Corp. v. Liberty Mutual Ins. Co, supra, 748 F. 2d at 764.

In trying to resolve the complicated issues centering around the concept of occurrence and its relationship to resulting injuries triggering coverage, I am fortunate to have the benefit of a recent decision by Judge Weinstein in the United States District Court for the Eastern District of New York. Uniroyal, Inc. v. The Home Insurance Co., _____ F. Supp. _____ (E.D.N.Y. 1988). Uniroyal, the plaintiff in that case, had, like Diamond, been a defendant in the Agent Orange litigation. From 1966 to 1968, Uniroyal had made deliveries of Agent Orange to the United States military for use in Vietnam. Uniroyal had contributed approximately $9,000,000 to the Agent Orange class action settlement. The Home Insurance Company had issued five consecutive primary comprehensive general liability policies to Uniroyal covering the period from 1965 to 1976. When Home refused to indemnify Uniroyal for the $9,000,000 settlement contribution and for defense costs, Uniroyal sued to enforce its rights under the policies.

In some respects, the Uniroyal, Inc. v. The Home Insurance Co. case is less complicated than ours because it did not involve hundreds of excess policies, but its central product liability coverage facts and issues are on all fours with our case. In dealing with the coverage issues of Uniroyal, Inc. v. The Home Insurance Co., Judge Weinstein had the advantage of having presided over the underlying tort litigation, the Agent Orange class action. Hence, he 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.

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

The underlying Agent Orange litigation had established that Agent Orange was in short supply in Vietnam and that it was typically sprayed within a week after its arrival in that country. Even allowing for slow delivery by sea, Agent Orange probably arrived in Vietnam within three months after delivery by the manufacturer to the military. Exposure to Agent Orange by a serviceman happened either at the time of spraying or by contact with residue of the spraying during the first week or so after the spraying. Judge Weinstein concluded that it took about four months after a shipment had been delivered to the military for an individual serviceman to be exposed to the Agent Orange contained in the delivery. See ____ F. Supp. at ____. (Slip opinion at p. 68.) The facts about delivery, transportation time and spraying time were established by competent, publicly reported proofs in the

Agent Orange litigation. I think that it is appropriate for me to accept them as facts in the case before me.

In Uniroyal, Inc. v. The Home Insurance Co., the parties stipulated that any injury took place "at or shortly after a serviceman's exposure to Agent Orange spraying." This stipulation, plus an uncontroverted affidavit from a medical expert, led Judge Weinstein to conclude that injury in fact to servicemen took place within a week or so of spraying. See ____ F. Supp. at ____. (Slip opinion at p. 67.) We do not have such a stipulation in the present case. In my view we do not need such a stipulation to establish injury in fact. We do not need it because competent regulatory authorities have decided that dioxin is to be treated as highly toxic. Given that, the simple fact of exposure to dioxin is a wrong. Simple exposure to dioxin is injury in fact. Thus, with a somewhat modified basis for fixing injury in fact, I end up accepting as applicable to our case Judge Weinstein's holding that injury in fact to individual servicemen triggers coverage four months after delivery of a given shipment of Agent Orange to the military.

We do not know how many servicemen were actually exposed to Agent Orange in Vietnam. We do not, of course, know how many were exposed to Agent Orange manufactured by Diamond. Indeed, we are not even sure whether all of Diamond's Agent Orange was sprayed in Vietnam. However, documents which are available and are part of

the record in this case do show the dates on which shipments were made and the gallons of Agent Orange in each shipment. We do not know the number of people exposed to Diamond's Agent Orange, but we do know the number of gallons of Agent Orange shipped. For the purpose of allocating loss as among policies, it is fair and sensible to treat injuries received as being proportionate to gallons shipped. Thus, the allocation of loss method used in Uniroyal, Inc. v. The Home Insurance Co. case works effectively and properly in our case.

Within 15 days after receipt of this opinion, counsel for the various parties should gather the relevant shipment and policy records and should meet together out of my presence to make the following calculations:

1. The sum of $23,339,417.36 should be divided by the total number of gallons of Agent Orange delivered to the military by Diamond. This will give the monetary loss per gallon.

2. Using the records for each shipment starting with the first shipment in 1961, and taking it as given that each gallon shipped resulted in injury in fact on a date exactly four calendar months after the date of shipment, a date and dollar value can be fixed for every loss.

3. When a date and dollar value have been fixed for a loss, the loss should be paid by one or more of the policies in force on that date. If and when coverage under the primary policy in force on that date is exhausted, the loss should travel up the layers of excess policies in force on that date until it is fully paid.

4. Although there is only one occurrence, Aetna's policies clearly call for at least one deductible per policy. Hence, one deductible should be applied against the losses on each of Aetna's primary policies which is triggered.

5. The defendants shall be responsible for interest on the amount of $23,339,417.36 in proportion to their responsibility for the principal amount. Interest shall run from the date of payment of the Agent Orange settlement by Diamond until Diamond is paid by the defendants. Interest on any funds actually borrowed by Diamond to make the settlement payment shall be equal to the interest actually paid by Diamond. Interest on unborrowed funds used by Diamond in making the payment shall be at the prime rate in force from time to time between the settlement payment date and the date of payment by defendants at Diamond's principal bank in New York City.

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As noted above, some defendants have argued that there are 133 occurrences for product liability coverage purposes because of the batch clause in the policies. The batch clause reads as follows:

> "It is agreed that Item III limits of liability under CGL part are amended to include the following as respects products liability for bodily injury or property damage coverage:
>
> "All such damage 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 occurrence."

Diamond's manufacturing records divide its Agent Orange products which were shipped to the military into 133 lots. Thus, some defendants argue that there are 133 occurrences because of the quoted batch clause language.

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

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

By way of contrast, the product defect in the Home Insurance Co. v. Aetna Casualty & Surety Co. case in which Diamond was involved in 1975 was clearly a manufacturing defect, and the batch clause was properly applied to limit the number of occurrences to two. The livestock food supplement involved in that case was, in general, a perfectly safe product which was used without problems in animal feed. However, specifications for making the product were not followed for two particular lots. This mistake in the process of manufacture resulted in two contaminated lots of product which went into chicken feed which ended up injuring or killing thousands of chickens throughout the country.

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The defendants have argued that since any injuries caused by Agent Orange happened in Vietnam, there is no coverage under their policies which are generally limited to North American claims. Diamond had special foreign risk policies. The defendants argue that Diamond is limited to those foreign risk policies in seeking coverage for the Agent Orange class action product liability claims.

The product liability claims in this case are not foreign risks. The injuries in fact may have taken place in Vietnam, but the insured occurrence took place in the United States when the product was delivered to the military. Diamond had no control whatever after delivery, and there is a sense in which its "wrong" was completed upon delivery in the United States. Although the product was used in Vietnam, it was used there by the United States military pursuant to the orders of the United States government. With the exception of a few servicemen from allied nations, the plaintiffs in the Agent Orange case were United States citizens. All of the claims were asserted in United States courts and ended up being consolidated for trial in New York City.

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Some of the defendants have, on occasion, suggested that there .s no coverage under their policies because no one ever proved that .e had actually been injured by exposure to Agent Orange. These .efendants point to the dismissal of the claims of the plaintiffs who opted out of the Agent Orange class action settlement. The suggestion of lack of coverage on these grounds is not sound. The test for coverage in a tort action is whether the facts asserted in the complaint, if proven, would create a liability for which the defendant has purchased insurance coverage. Of course, every time a tort case is settled, it goes unproven. The vast majority of tort cases are settled, and insurance companies pay pursuant to settlements much more frequently than they pay pursuant to judgments. The fair settlement of cases benefits everyone, including insurers. Settlement does not preclude coverage.

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I will ask Mr. Cuyler to submit a form of judgment under the five-day rule. The judgment should state the dollar amounts payable by particular defendants under specified policies. If counsel are unable to agree upon the figures after going through the calculations set forth above, I will fix the form of the judgment on the motion of any party.

REGINALD STANTON
Judge of the Superior Court
Assignment Judge

RS:amg
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