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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CERTAIN UNDERWRITERS AT LLOYDS, LONDON, *et al.*, Defendants Below/Appellants v. CHEMTURA CORPORATION, Plaintiff Below/Appellee	C.A. No. 371, 2016 On Appeal from the Superior Court of the State of Delaware C.A. No. N14C-12-210 MMJ [CCLD] **PUBLIC VERSION**

APPELLANTS' CORRECTED* OPENING BRIEF

Carmella P. Keener (#2810)
ROSENTHAL, MONHAIT & GODDESS, P.A.
919 N. Market Street, Suite 1401
Citizens Bank Center
P.O. Box 1070
Wilmington, DE 19899-1070
(302) 656-4433
ckeener@rmgglaw.com

Counsel for Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies appearing herein

OF COUNSEL:

Thomas J. Quinn
Stephen T. Roberts
Alexander Mueller
Mendes & Mount, LLP
750 7th Avenue
New York, NY 10019
(212) 261-8000

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

EXHIBITS

NATURE OF PROCEEDING

This action for declaratory judgment and breach of contract was commenced by plaintiff Chemtura Corporation ("Chemtura") to determine rights and responsibilities under Umbrella and Excess Liability policies severally subscribed in favor of Uniroyal, Inc., by defendants Certain Underwriters at Lloyd's, London ("Underwriters") and certain solvent London Market Companies ("Companies") (collectively "London Market Insurers" or "LMI") from 1952-1986. It involves Chemtura's liability at two environmental sites: one in Ohio and one in Arkansas.

On December 23, 2014, a day after this action was commenced, Chemtura filed a Motion for Determination of Applicable Law on Allocation ("Choice of Law Motion") seeking the application of Ohio law to the Ohio site and Arkansas law to the Arkansas site. After Companies commenced a competing action in New York, Chemtura amended its Complaint to add additional parties and policies and Underwriters contemporaneously commenced a companion action in New York. Motions to dismiss and/or stay the respective actions were filed in each of the litigations, and the New York action was held in abeyance pending decision by the Delaware Superior Court on whether to dismiss or stay this case.

After briefing, the Superior Court denied LMI' motion to dismiss or stay, and the New York actions were voluntarily discontinued.

The Superior Court set a briefing schedule for Chemtura's Choice of Law Motion and LMI' Cross-Motion for Choice of Law Determination ("Cross-Motion"). As noted above, Chemtura argued that the law of the state in which the environmental site was located controlled the construction of the policy for allocation purposes. LMI contended the law of New York applied to all coverage issues, based, *inter alia*, on choice of law rulings made in three prior coverage litigations between Uniroyal, Inc. and LMI, and based on the New York corporate headquarters of Uniroyal Inc. during the majority of the time periods of the policies at issue.

On April 27, 2016 the Superior Court issued an opinion granting Chemtura's motion and denying LMI's cross-motion, *Chemtura Corp. v. Certain Underwriters at Lloyd's, London*, 2016 WL 3884018 (Del. Super. Ct. Apr. 27, 2016) (Ex. A). LMI timely moved for reargument which the Superior Court denied. *Chemtura Corp. v. Certain Underwriters at Lloyd's, London*, 2016 WL 3884020 (Del. Super. Ct. June 20, 2016) (Ex. B).

Interlocutory review of the Superior Court's decision was granted by this Court on August 4, 2016. This appeal followed.

SUMMARY OF ARGUMENT

1. The Superior Court erred by departing from long-standing Delaware precedent applying Restatement (Second) of Conflict of Laws ("Restatement") §188 (1971) and its "most significant relationship test" to insurance policies that potentially embrace multistate risks. In such a context, the law of the jurisdiction that bears the most significant relationship to the insurance program as a whole is determined by where the assured was headquartered during a majority of the insurance policies at issue. *See, e.g., Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 87-90 (Del. Ch. 2009), *aff'd in relevant part*, _ A.3d _, 2016 WL 4771312 (Del. Sept. 12, 2016). Instead, the Superior Court followed a minority of Delaware trial court opinions that applied a "law of the site" test to ongoing environmental coverage disputes, holding that the states in which the sites were located had a paramount interest in the issue of insurance coverage. However, the sites here have already been remediated (although one site may require additional preventative measures), and the respective states accordingly have little to no interest in the coverage issues at bar.

2. By holding that the law of the state in which the environmental site is located controlled the construction of the insurance policies at issue, the Superior Court created a dichotomy between "nationwide bodily injury claims" and "environmental claims," a distinction unknown in Delaware's choice of law

jurisprudence. This ruling frustrates the goals of "certainty, predictability and uniformity of result" stated in the Restatement §6, particularly in light of the fact that three separate courts have previously applied New York law to products liability and third-party bodily injury and environmental property damage claims made by plaintiff's predecessor Uniroyal under the same policies at issue. Under the Superior Court's ruling, choice of law depends on the type of claim presented by the policyholder, so that the same contract could be subject to the laws of 50 states as well as foreign countries, depending on the characterization of the claim. Such a result is unsound on its face.

3. The Superior Court also erroneously adopted a temporal analysis of the relevant contacts that limited its focus to the present day, restricting the scope of the historical review required under the Restatement and such Delaware authority as *Liggett Group Inc. v. Affiliated FM Insurance Co.*, 788 A.2d 134, 137-139 (Del. Super. Ct. 2001). Such cases looked to the jurisdictional contacts at the time the policies were obtained, not the current configuration of parties. By focusing its analysis on the present day, the Court failed to properly weigh the significance of the New York contacts of Chemtura's predecessor Uniroyal and the insurance policies it obtained from both LMI and The Home Insurance Company ("Home"), which issued millions in limits under insurance policies to which certain London policies follow form. Because the London policies from 1965 to

1976 could not be interpreted without the Home policies, those contacts should have been considered.

4. The Superior Court also reached a finding, not requested by either party, that the allocation law of Arkansas was "all sums" based on an unreported trial court decision that is itself not precedential under Arkansas law. This conclusion was reached despite the fact that the issue of whether Arkansas allocation law is "all sums" is disputed. The Superior Court erred by not conducting a separate analysis to predict what the Arkansas Supreme Court would hold, as required by this Court's opinion in *Shook & Fletcher Asbestos Settlement Trust v. Safety National Casualty Corp.*, 909 A.2d 125 (Del. 2006).

STATEMENT OF FACTS

I. THE PARTIES

A. LMI

Defendants-Appellants LMI are described on page 1, *supra.*

B. Chemtura

Plaintiff-Appellee Chemtura, a multi-billion-dollar and multi-national conglomerate, A329-35, claims it is a Delaware corporation formed in 2005, with principal places of business in Pennsylvania and Connecticut and that it is a successor to Uniroyal Chemical, which was a New Jersey corporation.[1] Uniroyal Chemical claimed (as Chemtura now claims) to be the successor to certain assets and liabilities of Uniroyal, Inc., which until 1967 was named United States Rubber Company, a New Jersey Corporation. A271-76.[2] United States Rubber had its principal place of business in New York by 1950, *United States v. E. I. DuPont de Nemour & Co.*, 87 F. Supp. 962, 964 (N.D. Ill. 1950), and this continued after the

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[1] The facts stated in the First Amended Complaint ("FAC"), A337-51, unless admitted in the Answer, A459-86, were presumed for motion practice to be true. Attached to the Declaration of Erica L. Dominitz dated December 23, 2014 ("Dominitz Decl.") that accompanied Chemtura's Choice of Law motion were portions of various documents, including documents allegedly establishing corporate successorship to the rights under the policies at issues. The Dominitz Decl., Exs. 1(f), 2-14, and excerpts of Exs. 15 and 16 may be found at A1-4 and 5-336. LMI summarized Chemtura's corporate history to the best of their understanding at A497-98.

[2] The London polices for 1961-1986 forbid assignment of policies without LMI' consent. *E.g.*, A621. Chemtura can only claim rights to the policies if it is a successor by merger or is otherwise in privity with Uniroyal and Uniroyal Chemical. *See Playtex Family Prods. Inc. v. St. Paul Surplus Lines Ins. Co.*, 564 A.2d 681, 690-91 (Del. Super Ct. 1989).

name change to Uniroyal, *DeCicco v. Uniroyal, Inc.*, 293 F. Supp. 1190, 1192 (D. Or. 1968). Uniroyal admitted in prior litigation that its insurance and environmental responsibilities were centered in New York until 1971, and then in Connecticut from 1971 to 1986. A630. Uniroyal's insurance broker, Marsh & McLennan, was located in New York. A620-21.

II. THE POLICIES

A. The London Policies

The policies at issue span over 30 years from May 1, 1952 to April 8, 1986.[3] None of the policies list Chemtura as a Named Assured, A619, which is not surprising as Chemtura did not exist during the terms of the policies.[4] The policies throughout the Uniroyal program reflect a strong New York nexus and presence.[5] Every London policy shows some connection to New York, while none show any connection to Delaware, Ohio or Arkansas. A621.

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[3] The FAC states that only policy periods from May 1, 1952 to February 1, 1965 and September 8, 1975 to April 8, 1986 were placed at issue. A343. In fact, an additional 24 policies from 1965 – 1975 were added when the Complaint was amended. A340-42.

[4] The Affidavit of Stephen T. Roberts ("Roberts Aff.") submitted in support of LMI's Opposition to Chemtura's Choice of Law motion contains various policy excerpts. It and its exhibits may be found at A616-1462 (with Exhibit 1 policy excerpts corrected at 1463-973).

[5] A detailed breakdown of the New York connections to each policy is set forth at A586-88 and at A618-21).

B. The Home Policies

The Home Insurance Company was a major participant in the Uniroyal insurance program, providing at least $40 million in first layer umbrella limits from 1965 to 1976, and at least another $65 million in excess limits from 1965 to 1985. A621-24, 1412-62, 2107, 2109-288. Home was a New York corporation from 1853 to 1973, when it re-domiciled to New Hampshire. A684-88. It continued to maintain a New York address and to issue polices from New York. *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1372 (E.D.N.Y. 1988).

The London policies from 1965 to 1976 incorporated the terms and conditions of the first layer Home policies. A618.

III. PRIOR ACTIONS

There were at least four prior actions relating to the policies at issue:

A. *The Home Ins. Co. v. Uniroyal, Inc.*, No. CV-93-5227740 S., Connecticut Superior Court, Judicial District of Hartford/New Britain ("Connecticut Environmental Action")

This litigation resulted in a settlement agreement

concluded both this action and the New Jersey Environmental action described below.

The court held that New York law applied to the policies

at issue, in part because of the fact that Home was headquartered there. A627-31, 830-35.

B. *Uniroyal Chemical Co., Inc. v. Aetna Casualty & Surety Co.*, No. L-4472-93, New Jersey Superior Court, Middlesex County ("New Jersey Environmental Action")

The New Jersey Environmental Action was stayed in favor of the Connecticut Environmental Action; the New Jersey court deferred to the Connecticut court in part because the policies at issue were negotiated in New York and Connecticut. A626, 813-24 and A630, 1082, 1088-903.

C. *Uniroyal Inc. v. American Reinsurance Co., et al.* No. L-8172-94, New Jersey Superior Court, Middlesex County ("New Jersey Asbestos Action")

The New Jersey Asbestos Action resulted in a determination by the New Jersey Superior Court, affirmed on appeal, that the Uniroyal London and Home policies at issue were governed by New York law, rejecting Uniroyal's claim that New Jersey law applied.[6]

D. *Uniroyal Inc. v. The Home Ins. Co.*, No. CV-84-3999 (JBW) United States District Court for the Eastern District of New York ("Agent Orange Action")

The Agent Orange Action resulted in a declaration that New York law applied to the same first layer Home policies at issue in the New Jersey Asbestos

[6] *Uniroyal, Inc. v. Am. Re-Ins. Co.*, 1996 N.J. Super. Unpub. LEXIS 2, L-8172-94 (N.J. Super. Ct. Oct. 29, 1996) (applying Restatement §§ 188 and 193 factors), *aff'd in relevant part*, 2005 WL 4934215 (N.J. App. Div. Sept. 13, 2005), *cert. denied*, 186 N.J. 363 (2006).

Action.[7] This is significant as the New Jersey Appellate Division found that the London policies during the 1965 to 1976 years "followed form" to the Home policies, incorporating the underlying terms and conditions to the extent not inconsistent with specific excess provisions.[8]

IV. THE SITES

A. The Vertac Site

The Vertac site is a 93-acre site in Arkansas which was used by three entities to manufacture herbicides from 1958 to 1986. A344 and In 1978, Uniroyal supplied Vertac with chemicals in order to produce herbicides. A344-45 and The United States Environmental Protection Agency ("EPA") alleged that operations at the site created hazardous waste contamination; after Vertac went into receivership, the EPA spent over $100 million to remediate the site. A345 and 1218. The EPA sued various parties to recover this money, including Uniroyal and Hercules. A345 and

Hercules and Uniroyal engaged in protracted litigation involving their share

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[7] *Uniroyal, Inc. v. The Home Ins. Co.*, 707 F. Supp. at 1371-72. Although the parties stipulated to New York law, the federal court found that the stipulation was warranted:

> Here there are enough contacts with New York to warrant honoring the stipulation. The defendant apparently issued the policies from its main office in New York and no other single jurisdiction had more meaningful contacts. New York substantive law governs.

Id. at 1372.

[8] *See Uniroyal, Inc. v. Am. Re-Ins.*, No. L-8172-94, 2005 WL 4934215, slip op. at *5 (N.J. Super. Ct. Sept. 13, 2005).

of such liability, with the net result that Uniroyal's share of remediation costs at the site was fixed at 2.6%. A325 and 1219. Uniroyal was found to be an "arranger" under CERCLA; it was never an owner or operator at the site. A 325 and

See also United States v. Hercules, Inc., 247 F.3d 706, 721 (8th Cir. 2001).

The Vertac site was specifically carved out of the 1994 settlement agreement resolving the New Jersey and Connecticut Environmental Actions. A346,

The Vertac site has been described by the EPA as fully remediated. A1142-46. Arkansas marks September 1, 1998 as the official end of the site's clean-up. *Id.*

Chemtura claims no future costs at Vertac. A346.

B. The Dartron Site

The Dartron Site comprises Operable Unit 17 of the Diamond Shamrock site in Painesville, Ohio; a prior owner began manufacturing vinyl chloride and polyvinyl chloride there in 1946. A346-47. Uniroyal disposed of wastes at the Site beginning in 1947 and owned and operated the Site from 1949 to 1979, when the chemical plant was sold to Dartron Corporation. *Id.*[11] In May 1993, the US EPA proposed the site for inclusion on the National Priorities List, and the Ohio EPA, as lead agency, engaged in extensive litigation to determine the extent to which each party would contribute to remedial efforts. A347. The Diamond Shamrock Community Relations Team, a community-based organization working with the Ohio EPA, has met periodically over the years to monitor remediation of the Operable Unit. A634-35, 1169-206. The minutes of the meetings over the last several years indicate no further remediation has taken place, nor is any planned. Chemtura did submit a Feasibility Study Report, but the Ohio EPA cannot act upon it until another study for a different Operable Unit (for which Chemtura is not responsible) is submitted. A1206. There is no imminent threat to human health. A1189. Ohio thus appears to have little or no interest in this site, A2007-09.

C. Other Claims

In the recent past, Chemtura has tendered several different types of claims for LMI' consideration under the policies at issue. In addition to the Dartron and Vertac environmental sites, Chemtura faces potential liability at sites in South Carolina, Mississippi, Connecticut, Italy, and Mexico. [12]

. Chemtura has therefore recognized that the policies at issue potentially provide coverage for bodily injury and property damage claims arising in states other than Delaware, Ohio or Arkansas, and in fact outside the United States, A588-89, 1207-08.

[12] Some of those sites were submitted as part of a proof of claim to The Home Insurance Company's liquidator, 1231-37.

ARGUMENT

I. THE SUPERIOR COURT ERRED BY HOLDING THAT THE LAW OF THE SITE APPLIED INSTEAD OF THE LAW OF THE STATE WITH THE MOST SIGNIFICANT CONTACTS TO THE INSURANCE POLICIES

A. Question Presented

Did the Superior Court err by misapplying the "most significant relationship test" to the insurance contracts at issue, where the insured was headquartered in New York for a majority of the insurance program at issue and there were substantial contacts with that state, and where the states in which the environmental sites are located have little or no remaining interest in the sites? *See* A506-16, 597-615.

B. Scope of Review

This Court reviews *de novo* a trial court's grant of partial summary judgment. *Shook & Fletcher*, 909 A.2d at 128.

C. Merits of Argument

1. In Resolving Insurance Disputes, Delaware Courts Focus on the Location of the Headquarters of the Insured at the Time the Policies Were Obtained

In cases involving disputes over insurance for multi-state risks, Delaware follows the Restatement (Second) of Conflict of Laws §188 "most significant relationship" test, which identifies five main factors for deciding what law governs a contract that is silent on that issue:

(a) the place of contracting;
(b) the place of negotiation of the contract;
(c) the place of performance;
(d) the location of the subject matter of the contract; and
(e) the domicile, residence, nationality, place of incorporation, and place of business of the parties.

Liggett, 788 A.2d at 137-38 (quoting Restatement §188).

These contacts are evaluated in light of the individual facts and the general choice of law considerations enumerated in Restatement §6:

(a) the needs of the interstate and international systems;
(b) the relevant policies of the forum;
(c) the relevant policies of other interested states and the relative interests of those states in determination of the particular issue;
(d) the protection of justified expectations;
(e) the basic policies underlying the particular field of law;
(f) certainty, predictability, and uniformity of result; and
(g) ease in the determination and application of the law to be applied.

Liggett, 788 A.2d at 138, n. 8.

All of the Delaware cases over the last twenty years have consistently applied this most significant relationship test to insurance policies that potentially embrace multi-state risks, and in doing so have applied the law of the state where the insured was predominantly headquartered at the time the policies were issued. For example, in *Liggett* itself, the court found that applying the above factors, all policies issued to an insured over a twenty-eight year period should be interpreted under North Carolina law, where the insured and its broker were located for the majority of that period. *Liggett*, 788 A.2d at 145.

In *Shook & Fletcher*, where the insured's principal place of business was in Alabama and it was originally incorporated there before later becoming incorporated in Delaware, the Superior Court reasoned:

> In complex coverage cases such as this, the insured's corporate headquarters has most often been found to be the logical situs of the most significant insurance-related activities. When considering the multiple factors of the "most significant relationship" test, the Court finds that the Alabama-based employees of Shook & Fletcher, as the insured, would have had to have been actively involved in the negotiation (to the extent there was negotiation) and execution of all insurance policies. In contrast, neither the insured's nor the insurer's principal place of business is in Delaware; Delaware was not the location of negotiation or execution of any insurance contract; the place of contract performance is not in Delaware; and Shook & Fletcher's Insulation Co. had no facilities in Delaware.
>
> Therefore, balancing the relevant contacts, the Court finds that Alabama has the most significant relationships to the parties and the subject matter in this action.

2005 WL 2436193 (Del. Super. Ct. Sept. 29, 2005), Mem. Op. at *3-4, *aff'd*, 909 A.2d 125 (Del. 2006).

More recently, the Chancery Court in *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76 (Del. Ch. 2009) analyzed the facts surrounding an insurance coverage program similar to the one at bar, and determined that New York law governed the policies. Vice Chancellor (now Chief Justice) Strine reasoned:

> Delaware courts have applied the law of the jurisdiction that bears the most significant relationship to the insurance coverage as a whole. Here, that means New York law. Houdaille was headquartered in New York when it began the insurance program at issue here. As a result, the reasonable expectations of the parties to the Houdaille

> Policies would have been that New York law would apply to all of the Policies. Even when insurers issued policies after 1977 (*i.e.*, to a Houdaille that was headquartered in Florida), those insurers knew that Houdaille had originally been headquartered in New York and that they were agreeing to take part in a comprehensive insurance scheme that had been conceived in and already had a substantial relationship with New York....
> Accordingly, I find that New York has the most significant relationship to the Excess Policies and therefore that its law governs those policies.

Id. at *89 (footnotes omitted).[13]

Here, the London excess policies at issue were not issued or negotiated in Arkansas, Ohio, or Delaware. Rather, when the majority of the London (and Home) policies were issued and negotiated, United States Rubber/Uniroyal was headquartered in New York, later moving to Connecticut, *supra* at 6-7, and A 630. Accordingly, under the controlling Delaware case law identified above (and consistent with rulings in prior litigation between LMI and Uniroyal), the London policies should be interpreted under New York law.

The Superior Court, however, rather than applying the §188 factors to the "insurance coverage as a whole," focused on the statement in comment (e) that "[t]he state where the thing or the risk is located will have a natural interest in

[13] This Court recently affirmed the application of New York law by the Chancery Court on the basis that "the law of that jurisdiction had the most significant relationship to the insurance coverage as a whole." *Viking Pump*, _ A.3d _, 2016 WL 4771312 (Del. Sept. 12, 2016), Mem. Op. at *10. *See also Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 1994 WL 721651 (Del. Super. Ct. Mar. 28, 1994), Mem. Op. at *4-6. (New York contacts required New York law to be applied even though policyholder relocated to New Jersey late in the program).

transactions affecting it." *Chemtura*, 2016 WL 3884018, Mem. Op. at *2. The Court then looked to §193 and its provision that "the law of the state of the principal location of the insured risk applies, unless some other state has a more significant relationship." *Id* at *3.[14] The Court then concluded that, because the present dispute involved environmental contamination, the "principal location" of the risk is the state where the contaminated sites are located. *Id* at *6.

However, "Section 193 comment (b) recognizes that this section assumes less significance 'where the policy covers a group of risks that are scattered throughout two or more states,'" as is the case here. *Liggett*, 788 A.2d at 138. The "risk" insured against was Uniroyal's global operations, not individual pieces of property. Indeed, despite the policies covering risks "anywhere in the world," A588-89, the only specific piece of property listed in the policies was a building in Canada. A28. The Vertac site was not even owned or operated by Uniroyal; it was held liable at Vertac as an arranger of the disposal of waste, which could have been transported anywhere. A633-34. Thus, §193 has no application to the policies at issue and, consistent with Delaware precedent applying the "most

[14] Restatement (Second) of Conflicts §193:

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

significant relationship" test under §188 and with rulings in prior litigation between LMI and Uniroyal, the policies should be interpreted under New York law, where Uniroyal was headquartered for a majority of the relevant period.[15]

2. Neither Ohio Nor Arkansas Has Any Interest in This Contract Dispute

In holding that the "law of the site" applied, the Superior Court followed a minority of Delaware trial court decisions all involving ongoing underlying litigation to determine remediation responsibility.[16] The Superior Court reasoned that Arkansas and Ohio "have a vested interest in having their laws apply to these policies. Lawsuits have been filed and may continue to arise out of the sites' usage and clean-up." *Chemtura*, 2016 WL 3884018, Mem. Op. at *5.[17]

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[15] The recent New York Court of Appeals decision in *In re Viking Pump, Inc.*, 27 N.Y.3d 244 (N.Y. 2016) has not mooted the choice of law issue. The Court of Appeals explicitly did not overrule its prior decision in *Consolidated Edison Co. of N.Y., Inc. v. Allstate Insurance Co.*, 774 N.E.2d 687, 693-95 (N.Y. 2002): where policies do not contain the "prior insurance" language at issue in *Viking Pump*, pro-rata allocation continues to apply. *Id.* at *257-61. Significantly, none of the policies here that were issued prior to 1966 contain the "prior insurance" language interpreted in *Viking Pump. See, e.g.*, A5-28. Whether New York law should apply is still very much an issue, both for this reason and to interpret the pollution exclusions in many of the London policies. A407-08.

[16] *See Chemtura*, 2016 WL 3884018, Mem. Op. at *3-4, citing *Chesapeake Utils. Corp. v. Am. Home Assurance Co.*, 704 F. Supp. 551 (D. Del. 1989); *Burlington N. R.R. Co. v. Allianz Underwriters Ins. Co.*, 1994 WL 637011 (Del. Super. Ct. Aug. 25, 1994), *appeal refused*, 653 A.2d 304 (Del. 1994); and *Clark Equip. Co. v. Liberty Mut. Ins. Co.*, 1994 WL 466325 (Del. Super Ct. Aug. 1, 1994).

[17] Ironically, neither of Chemtura's so-called relevant jurisdictions, Ohio and Arkansas, employ the "law of the site" test; rather, both employ the "most significant relationship test" of §188: *Scottsdale Ins. Co. v. Morrow Land Valley Co.*, 411 S.W. 3d 184, 189–190 (Ark. 2012) (applying law where insured was headquartered and where policies were negotiated over law where site was located); *William Hammann, Inc. v. Cont'l Cas. Co.*, 1987 WL 18121 (Ohio Ct. App. Oct. 7, 1987) (applying §188 analysis to insurance coverage disputes).

Yet, while the Superior Court acknowledged that remediation ended at the Vertac site in 1998 and that the EPA is only monitoring groundwater there, *id.* at *6, it did not acknowledge that Chemtura claims no future costs, nor that Chemtura represented that any contingent liability at the site was discharged in bankruptcy.

Nor is the Superior Court's reference to remediation, monitoring, and possible future litigation at the Dartron Site, *id.*, particularly compelling, as the Court did not acknowledge that litigation at the site ended in 2005, A347-48,

, or that Ohio apparently has no issue with Chemtura's current financial ability to perform. A2006-09.

There is no issue here about whether remediation of the two sites will be accomplished. In a similar case, the Second Circuit observed:

> [T]he District Court did not err in applying New York law – rather than the laws of numerous states.... Significantly, this is not a dispute over Grace's liability for the pollution that occurred at the various waste sites, and the question of whether the victims of the pollution will be compensated is not involved. Rather, this is merely a dispute over who ... must bear the cost of defending Grace.... As the District Court aptly noted, "the interest [of a state in which a waste site is located] diminishes when the question is not whether someone will or can pay for the cleanup but rather who will pay."

Maryland Cas. Co. v. Cont'l Cas. Co., 332 F.3d 145, 155 (2d Cir. 2003) (quoting *Maryland Cas. Co. v. W. R. Grace & Co.*, 1992 WL 142038, at *3 (S.D.N.Y. June 8, 1992). Because neither Arkansas nor Ohio has any interest in this purely private dispute, neither state's law should have been considered.

II. THE SUPERIOR COURT ERRED BY CREATING A DICHOTOMY BETWEEN BODILY INJURY AND ENVIRONMENTAL CLAIMS WHICH IS NOT SUPPORTED BY DELAWARE CASES APPLYING RESTATEMENT §188 TO COVERAGE DISPUTES

A. Question Presented

Did the Superior Court err by failing to follow the majority of Delaware cases interpreting the Restatement's "most significant relationship test," by creating a dichotomy between "nationwide bodily injury cases" and environmental cases, and by requiring an "overwhelming corporate nexus" to overcome a "presumption" that the law of the site applied? A511-13, 601-10.

B. Scope of Review

This Court reviews *de novo* a trial court's grant of partial summary judgment. *Shook & Fletcher*, 909 A.2d at 128.

C. Merits of Argument

1. The Better Reasoned Delaware Authority Rejects the Law of the Site

The cases cited by the Superior Court in support of its "law of the site" ruling – *Clark, Burlington Northern, and Chesapeake Utilities* –, *Chemtura*, 2016 WL 3884018, Mem. Op. at *3-4, were a minority of those Delaware decisions interpreting and applying Restatement §§6, 188 and 193 in an insurance coverage context. A majority of the Delaware conflicts decisions involving environmental contamination or property damage reject the "law of the site." *E.I. duPont de*

Nemours & Co. v. Admiral Ins. Co., 1991 WL 236943 (Del. Super. Ct. Oct. 22, 1991), Mem. Op. at *2 ("most significant relationship" test applied); *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1991 WL 236936 (Del. Super. Ct. Oct. 29, 1991), Mem. Op. at *1-2 (same); *Sequa Corp. v. Aetna Cas. & Sur. Co.*, 1992 WL 147994 (Del. Super Ct. May 21, 1992), Mem. Op. at *1-3 (same); *Sequa Corp. v. Aetna Cas. & Sur. Co.*, 1992 WL 179386 (Del. Super. Ct. July 16, 1992), Mem. Op. at *1-2 (same); *N. Am. Philips Corp. v. Aetna Cas. & Sur. Co.*, 1994 WL 555399 (Del. Super. Ct. Sept. 2, 1994), Mem. Op. at *1-7, *reargument denied,* Del. Super., C.A. No. 88C-JA-155, Bifferato, J. (Feb. 28, 1995) (same); *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 1994 WL 721651 (Del. Super. Ct. March 28, 1994), Mem. Op. at *3-4, *as modified,* Del. Super., C.A. No. 89C-SE-35, Gebelein, J. (Apr. 11, 1994) (same); *Sequa Corp. v. Aetna Cas. & Sur. Co.*, 1995 WL 465192 (Del. Super. Ct. July 13, 1995), Mem. Op. at *2 (same). The more recent cases also follow the "most significant relationship test" and apply the law of the state where the insured was headquartered where a conflict exists, both where environmental sites are at issue, *see Motors Liquidation Co. v. Allianz Ins. Co.*, 2013 WL 7095859 (Del. Super. Ct. Dec. 31, 2013), Mem. Op. at *2, A609, 638, 1239-76, and *Tyson Foods, Inc. v. Allstate Ins. Co.*, 2011 WL 3926195 (Del. Super. Ct. Aug. 31, 2011), Mem. Op. at *1-2, 5, and where bodily injury claims arise in multiple states, *see Liggett,* 788 A.2d at 138-39. *See also Shook &*

Fletcher, 2005 WL 2436193, Mem. Op. at *3, *aff'd,* 909 A.2d 125 (Del. 2006); *TIG Ins. Co. v. Premier Parks, Inc.,* 2004 WL 728858 (Del. Super. Ct. Mar. 10, 2004), Mem. Op. at *4.

The Superior Court distinguished the above line of authority by characterizing cases such as *Liggett, Shook & Fletcher* and even *Hoechst* as involving "nationwide bodily injury claims resulting from placement of a product in the stream of commerce." *Chemtura*, 2016 WL 3884018, Mem. Op. at *4.

As to the Delaware cases cited by LMI which did involve environmental claims, the Superior Court found that, in those cases, unlike the situation at bar, there was an "overwhelming corporate nexus" sufficient to overcome a "presumption" that the law of the site applied.

While the evolution of Delaware environmental conflicts case law was explained at length below, A601-10, it is sufficient to note that the federal case of *Chesapeake Utilities* was criticized for selectively omitting certain qualifications from the comments to § 193 to justify its "law of the site" rationale, *E.I. duPont de Nemours,* 1991 WL 236943, Mem. Op. at *5. *Accord Cont'l Ins. Co. v. Beecham, Inc.* 836 F. Supp. 1027, 1036-37 (D. N.J. 1993). The last two Delaware cases to consider Restatement §§188 and 193 in an exclusively environmental context were *North American Philips*, 1994 WL 555399, Mem. Op. at *6-8 and *Sequa,* 1995 WL 465192, Mem. Op. at *3-4. Both rejected the "law of the site" approach.

None of the authority cited by Chemtura or the Superior Court discussed a "presumption" that the law of the site should apply or a requirement that an "overwhelming corporate nexus" to a particular state be established in order to overcome such a "presumption," especially where, as here, the policies contemplate risks in multiple states. Even if there were such a requirement, the predominance of contacts with New York in this case clearly points to that state having the "most significant contacts" and therefore supplying the rule of law.

The Superior Court also failed to consider the importance of The Home Insurance Company. Chemtura itself acknowledged the importance of the Home policies, A2107-288, because the London policies "followed form" to them from 1965 to 1976. Thus, the substantial contacts of Home to New York, A621-23, 630, 2289-305, 684-703, 802-03, 837-39 and 1088-103, should have been included in the Court's analysis to properly assess the Restatement's "most significant relationship" test as it pertained to the Uniroyal insurance program as a whole. When so considered, New York was clearly the fulcrum of Uniroyal's insurance program. By focusing only on the London policies, rather than the insurance program as a whole, the court erred.

2. The Court's Focus on Only the Sites at Issue Undermines the Goals of the Restatement Set Forth in § 6

By focusing only on the two sites Chemtura chose to include in this lawsuit and applying the law of the states in which those sites were located, the Superior Court's decision (if not reversed) would mean that New York law was appropriately applied to the thousands of asbestos, Agent Orange, and other bodily injury claims previously litigated, as well as to the dozens of other products liability and environmental property damage claims that were previously in dispute, but that different and separate laws will be applied here. To the extent that further claims arise in the future –

- it will be unclear which law should apply to interpret the same contracts. This result would upend the Restatement goals of uniformity and predictability set forth in §6.

For example, Restatement §6 provides that a proper choice of law selection should reflect the justified expectations of the parties and ensure a uniformity of results. Parties contracting in New York to provide insurance coverage for a disparate array of global risks could have no expectation that various other state's laws would apply to claims involving environmental contamination. Further, as noted above, both Ohio and Arkansas use the most significant relationship test under Restatement §188 to resolve conflict of law issues. There can be no

uniformity of result when the law to be applied under the same contracts will vary from jurisdiction to jurisdiction, and from claim type to claim type.

It would be a perversion of these principles were Chemtura's argument to prevail. Since Arkansas and Ohio (and New York)[18] all apply §188, Chemtura should not obtain a different result because it has elected to sue in Delaware.

[18] *Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp.*, 36 A.D.3d 17 (N.Y.A.D. 2006), *aff'd*, 9 N.Y.3d 928 (2007).

III. THE SUPERIOR COURT ERRED BY FOCUSING ON THE PRESENT CONFIGURATION OF INTERESTS RATHER THAN APPLYING THE LAW OF THE STATE WITH THE MOST SIGNIFICANT RELATIONSHIP TO THE HISTORIC INSURANCE COVERAGE

A. Question Presented

Did the Superior Court err by focusing on the present-day interests of the various jurisdictions, rather than by evaluating the Restatement factors in the context of the historic insurance program? A2020-24, 2070-71.

B. Scope of Review

This Court reviews *de novo* a trial court's grant of partial summary judgment. *Shook & Fletcher*, 909 A.2d at 128.

C. Merits of Argument

1. The Superior Court Improperly Considered Chemtura's Present Contacts

The Superior Court incorrectly considered Chemtura's present incarnation as a Delaware corporation with places of business in Connecticut and Pennsylvania as relevant to the choice of law analysis. *Chemtura*, 2016 WL 3884018, Mem. Op. at *6. These present contacts are not relevant. *See Viking Pump,* 2 A.3d at 89 (analyzing the §188 factors based on the time "when [the insured] began the insurance program at issue here"), *aff'd in relevant part*, _ A.3d _, 2016 WL 4771312 (Del. Sept. 12, 2016). Indeed, the last twenty years of Delaware authority have considered the relevant contacts for choice of law purposes to be limited to

those present during the time period in which the insurance coverage was issued, the most recent being *Tyson Foods*, 2011 WL 3926195, *supra*, at 22. A511-13. The Superior Court's reliance on the present configuration of claims and parties may have also contributed to its failure to consider the New York contacts of Home, as described above.

Since at the time the policies were issued New York was clearly the single state with the most contacts, New York law should have been applied.

2. The Dispute Before the Superior Court Concerned Contract Interpretation Not Environmental Contamination

The Superior Court framed the question on choice of law thusly: "The risk in question is the responsibility for the environmental remediation costs... This is an environmental dispute stemming from contamination at two locations." *Chemtura*, 2016 WL 3884020, Mem. Op. at *7 (quoting *Chemtura*, 2016 WL 3884018, Mem. Op. at *6).

Respectfully, the "risk" insured was the operations of Uniroyal during the policy periods, and the costs for which Chemtura seeks reimbursement were spent long ago. That Chemtura or its predecessors were responsible for these costs was litigated and established long ago. That is not in question. Whether, and to what extent, such costs are covered under the policies is the question. This is not an

"environmental dispute." It is, rather, a dispute involving the interpretation of historical contracts.

This mischaracterization of the nature of the dispute may have contributed to the Superior Court applying an incorrect analysis in weighing the various contacts. Rather than focusing on the contacts that New York had with the insurance policies at the time they were issued as required by Delaware precedent, the Superior Court focused on whether New York currently had an interest in properties in other states that had already been remediated.

The Superior Court's distinction between the past litigation between LMI and Uniroyal, the entity through which Chemtura claims coverage, is also based on a misapprehension. The Court characterizes these prior litigations as having involved "bodily injury claims." *Chemtura*, 2016 WL 3884020, Mem. Op. at *2. Yet the Connecticut and New Jersey Environmental Actions involved the same types of environmental property damage claims at issue here, and the Connecticut court found New York law applicable based on the contacts of that state with the Uniroyal insurance program. A814-24, 831-35, 2021. While the New Jersey Asbestos involved asbestos property damage and products liability bodily injury claims, the choice of law decision adopting New York law ultimately rested on a

consideration of the factors set forth in Restatement §§ 188 and 193. A628-29, 854-69, 888-89.[19]

The court's misapprehension of the nature of the present and past disputes between the parties contributed to an incorrect test being applied.

[19] *Uniroyal Inc. v. Am. Re-Ins. Co.*, 1996 N. J. Super. Unpub. LEXIS 2, L-8172-94 (N.J Super Ct. Oct. 29, 1996), *aff'd in relevant part*, 2005 WL 4934215 (N.J. App. Div. Sept. 13, 2005), *cert. denied*, 186 N.J. 363 (2006).

IV. THE SUPERIOR COURT ERRED BY FINDING ARKANSAS ALLOCATION LAW IS "ALL SUMS"

A. Question Presented

Did the Superior Court err by concluding that Arkansas allocation law is "all sums," a result neither party requested, without conducting the analysis required and set forth by this Court in *Shook & Fletcher*, 909 A.2d 125 (Del. 2006), and by relying on a single conclusory sentence in a twenty-year-old unreported Arkansas *nisi prius* decision that was itself not precedential under Arkansas law? A597, 2034-38, 2071-72.

B. Scope of Review

This Court reviews de novo a trial court's grant of partial summary judgment when the parties do not contest any issues of fact. *Shook & Fletcher*, 909 A.2d at 128.

C. Merits of the Argument

1. The Issue of Allocation Methodology Under Arkansas Law Was Not Briefed and Should Not Have Been Decided

In its choice of law briefing, LMI argued that New York law should apply to the present dispute, as the historic insurance program at issue has its "most significant relationship" with New York. A513-16. Chemtura argued that Delaware law should apply, or, in the alternative, that the law of the environmental sites at issue should apply. A601. The parties' papers focused on which state's

law should apply, not on what the law was. As such, after the Superior Court made its ruling on choice of law, it should have ordered briefing on any disputed issues of foreign law. Although there was no dispute that the Ohio Supreme Court had adopted an "all sums" allocation regime, the parties dispute Arkansas law. A2034-40.

Instead, the Superior Court found that Arkansas allocation law is "all sums" based on *Murphy Oil USA, Inc. v. U.S. Fidelity & Guaranty Co.*, 9 Mealey's Litig. Reports: Insurance, No. 19 (Ark. Cir. Ct. Feb. 21, 1995) (Ex. C), a lone twenty-year-old unpublished trial court decision which contains no reasoning[20] or any explanation of the manner in which an "all sums" allocation would work under Arkansas law. *See Chemtura*, 2016 WL 3884018, Mem. Op. at *2, 6; *Chemtura*, 2016 WL 3884020, Mem. Op. at *2; A2034-40. How an "all sums" allocation would apply in the case of the Vertac site therefore remains unsettled as there are nuances regarding the methodology between different states.

For example, under Delaware's "all sums" approach, the policyholder is limited to a single year of coverage, while under Ohio's "all sums" approach, the policyholder has a duty to cooperate with targeted insurers to obtain contribution

[20] *See Mine Safety Appliances Co. v. AIU Ins. Co.*, 2016 WL 498848 (Del. Super. Ct. Jan. 22, 2016, Mem. Op. at *10 n. 54 (A "ruling will be deemed controlling precedent on the issues controlled by [a state's law]" "[s]o long as [that state's] court issues a reasoned decision.").

from non-targeted insurers. *Compare Stonewall Ins. Co. v. E. I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1259-60 (Del. 2010) with *Pennsylvania Gen. Ins. Co. v. Park-Ohio Indus.*, 930 N.E. 2d 800, 803 (Ohio 2010). After *Viking Pump*, a conflicts analysis would be required to determine how "all sums" in New York (for those policies containing the "prior insurance" clause interpreted in that case) differs from the approaches in Arkansas, Delaware, and Ohio. *See In re Viking Pump, Inc.*, 27 N.Y.3d 244 (N.Y. 2016).

Therefore, the Superior Court should not have ruled that Arkansas allocation law is "all sums" without full briefing on both that question and questions of how it might be applied there.

2. *Murphy Oil* Was Not Precedential Under Arkansas Law

The Superior Court ruled that it was appropriate to rely on the *Murphy Oil* decision for the finding that Arkansas law is "all sums," stating that while "there is a spectrum of precedential value in legal determinations," it would not "simply disregard[] a[n] [Arkansas] ruling, regardless of the nature and stage of the proceedings," but rather would "follow the 'all sums' approach unless and until an Arkansas court decides otherwise." *Chemtura*, 2016 WL 3884020, Mem. Op. at *2. In fact, the 1995 *Murphy Oil* case is not on the spectrum of precedential value at all. It was not until July 1, 2009 that Arkansas even allowed unpublished Arkansas Supreme Court or Court of Appeals decisions (published after that date)

to be relied on as precedent. *See* A2037-40, 2071-72, 2078-105. *Murphy Oil*, an unpublished trial decision from 1995, was not and is not precedential under Arkansas law.

3. The Superior Court Did Not Predict How the Arkansas Supreme Court Would Rule on Allocation as Required by This Court in *Shook & Fletcher*

Under Delaware law, when a trial court is applying the law of a different state and that law is not yet settled by that state's highest court, the trial court must "rule as [the highest court of the state in question] would probably rule if presented with the issue." *Shook & Fletcher*, 909 A.2d at 128. *See also* A2034-40; *Motors Liquidation*, 2013 WL 7095859, Mem. Op. at *2-3 ("In order to apply Michigan law here, therefore, the court would have to predict how the Michigan Supreme Court would rule." *Id.* at *2.).

Here, the Superior Court undertook no analysis regarding how the Arkansas Supreme Court would rule on the issue of allocation, but instead took at face value an unpublished, non-precedential, twenty-year-old trial court decision. Indeed, the Superior Court, contrary to *Shook & Fletcher*, appeared to consider itself bound by the *Murphy Oil* decision even though an Arkansas court could freely disregard it. *See Chemtura*, 2016 WL 3884020, Mem. Op. at *2; A2037-39. This ruling should thus be reversed and the parties should be allowed to brief the allocation issue under Arkansas law.

CONCLUSION

The decision of the Superior Court should be reversed, such that Chemtura's Choice of Law Motion is denied and LMI's Cross-Motion for Choice of Law Determination is granted.

/s/ *Carmella P. Keener*
Carmella P. Keener (#2810)
ROSENTHAL, MONHAIT & GODDESS, P.A.
919 N. Market Street, Suite 1401
Citizens Bank Center
P.O. Box 1070
Wilmington, DE 19899-1070
(302) 656-4433
ckeener@rmgglaw.com

Counsel for Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies appearing herein

OF COUNSEL:

Thomas J. Quinn
Stephen T. Roberts
Alexander Mueller
Mendes & Mount, LLP
750 7th Avenue
New York, NY 10019
(212) 261-8000

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CERTIFICATE OF SERVICE

I, Carmella P. Keener, hereby certify that on November 10, 2016, I caused the foregoing document to be served via File&Serve*Xpress* upon the following counsel of record:

David J. Baldwin, Esq.
Potter Anderson & Corroon LLP
1313 North Market Street
P.O. Box 951
Wilmington, DE 19899-0951

ROSENTHAL, MONHAIT & GODDESS, P.A.

By: */s/ Carmella P. Keener*
Carmella P. Keener (#2810)
919 Market Street, Suite 1401
P.O. Box 1070
Wilmington, DE 19899-1070
(302)656-4433
Attorney for Appellants, Certain Underwriters at Lloyd's, London, et al.