EFiled: Oct 27 2016 11:33PM EDT
Filing ID 59750780
Case Number 371,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, et al., Defendants Below, Appellants, v. CHEMTURA CORPORATION, Plaintiff Below, Appellee.	No. 371,2016 On Appeal From the Superior Court of the State of Delaware C.A. No. N14C-12-210 MMJ [CCLD]

APPELLEE CHEMTURA CORPORATION'S ANSWERING BRIEF

OF COUNSEL:
Helen K. Michael (*Pro Hac Vice*)
Erica J. Dominitz
Virginia R. Duke
KILPATRICK TOWNSEND & STOCKTON LLP
607 14th Street NW, Suite 900
Washington, D.C. 20005-2018
Telephone: (202) 508-5800
Facsimile: (202) 508-5858
hmichael@kilpatricktownsend.com
edominitz@kilpatricktownsend.com

David J. Baldwin (No. 1010)
Ryan C. Cicoski (No. 5466)
POTTER ANDERSON & CORROON LLP
Hercules Plaza - Sixth Floor
1313 North Market Street
Wilmington, DE 19801
Telephone: (302) 984-6000
Facsimile: (302) 658-1192
dbaldwin@potteranderson.com
rcicoski@potteranderson.com

Dated: October 27, 2016

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

Rules

NATURE OF THE PROCEEDINGS

This is an appeal brought by defendants (collectively, the "Insurers") from the Delaware Superior Court's choice-of-law rulings in an insurance coverage action brought by plaintiff Chemtura Corporation. Chemtura seeks coverage from the Insurers under excess general liability insurance policies covering policy periods from 1952 to 1986 (the "Policies"). The present and future losses for which Chemtura seeks coverage arise from environmental contamination at two sites, one in Arkansas (the "Arkansas Site") and one in Ohio (the "Ohio Site"), allegedly caused by the business operations of certain insured entities including Chemtura's predecessor, Uniroyal Chemical Company, Inc. ("Uniroyal Chemical").

The parties filed cross-motions below seeking a choice-of-law determination. Chemtura argued that Arkansas and Ohio have the greatest interest in having their law govern the allocation of Chemtura's losses for environmental contamination alleged at the sites in those states. Chemtura also argued that the Superior Court could apply the law of the forum because Delaware law does not conflict with that of Arkansas and Ohio, both of which support the application of an "all-sums" allocation approach. Disregarding that New York has no connection to the parties or their coverage dispute, and that at least four other states and two foreign countries have contacts with the Policies or the parties, the Insurers argued

that New York's historical connections with placement of certain policies, including those of The Home Insurance Company ("Home"), which are not at issue, warranted application of that state's law.

In the April 27, 2016 decision, from which the Insurers appeal, the Superior Court granted Chemtura's choice-of-law motion and denied the Insurers' cross-motion, concluding that Arkansas and Ohio have the greatest interest in resolving the coverage dispute regarding the sites located in each of those states. *Chemtura Corp. v. Certain Underwriters at Lloyd's*, 2016 WL 3884018 (Del. Super. Apr. 27, 2016) (Exhibit A to Insurers' Opening Brief or "O.B."). The Superior Court held that the "law of the site" presumption established by §193 of the *Restatement (Second) of Conflict of Laws* (1971) (the "*Restatement*") and the "most significant relationship" test established by *Restatement* §188 both required application of Arkansas and Ohio law. *Id.* at *7.

Before conducting extensive proceedings on the parties' two choice-of-law motions (including hearing nearly two hours of argument on these motions (A1974-2065)), the Superior Court had already carefully considered and thoroughly evaluated the relative significance of various states' contacts with this dispute, including those of New York, in deciding the Insurers' motion to dismiss Chemtura's first-filed Delaware action in favor of their two competing and

subsequently filed New York actions.[1] In denying that motion, following a lengthy hearing of an hour and a half (A388-458), the court considered the same historical contacts that the Insurers later invoked in cross-moving for a choice-of-law determination, and concluded that these contacts gave New York nothing "more than [a] tenuous relationship to the disputes at issue" (B47).

The court considered this issue yet a fourth time in deciding the Insurers' motion for reargument of its choice-of-law decision, following yet further briefing. In denying that motion, the court made clear that it had evaluated all of New York's historical contacts in rejecting the Insurers' contention that this state "had the most significant relationship to th[is] dispute." *Chemtura Corp. v. Certain Underwriters at Lloyd's*, 2016 WL 3884020, at *1 (Del. Super. June 20, 2016) (Exhibit B to O.B.).

[1] Altogether, the briefing on these three motions comprised 1,081 pages, including exhibits, but excluding captions and tables of contents and authorities. (B102-103).

SUMMARY OF ARGUMENTS

The Insurers charge that the Superior Court misapplied the "most significant relationship" test prescribed by §188 of the *Restatement* by applying the "law of the site" presumption established by *Restatement* §193, and finding that the laws of Arkansas and Ohio, rather than of New York, govern the issue of allocation of damages arising from Chemtura's liability for environmental property damage at the Arkansas and Ohio Sites. (O.B.14-20).[2] Contrary to those contentions, §193's presumption is a component of §188's interest-based "most significant relationship test," which applies specifically to insurance contracts, and the Superior Court's correct determination that §§188 and 193 both require application of Arkansas and Ohio law is supported by ample Delaware case law.

1. **The Insurers' Point I Is Denied.** The Superior Court followed longstanding Delaware precedent applying the "law of the site" presumption to claims seeking coverage for environmental property damage. *See Burlington N. R.R. Co. v. Allianz Underwriters Ins. Co.* (*"Burlington Northern"*), 1994 WL

[2] Consistent with their improper practice in the Superior Court, the Insurers filed their Opening Brief under seal notwithstanding that it contains no confidential information. This Court accordingly should require the Insurers to publicly file their brief. *E.g., Hurd v. Espinoza*, 34 A.3d 1084 (Del. 2011) (recognizing public's right to access court records and affirming lower court's refusal to keep documents under seal where good cause did not exist for sealing it).

637011 (Del. Super. Aug. 25, 1994); *Clark Equip. Co. v. Liberty Mut. Ins. Co.*, 1994 WL 466325 (Del. Super. Aug. 1, 1994); *Nat'l Union Ins. Co. v. Rhone-Poulenc, Inc.*, 1992 Del. Super. LEXIS 571 (Del. Super. Aug. 17, 1992); *Chesapeake Utils. Corp. v. Am. Home Assurance Co.*, 704 F. Supp. 551, 556 (D. Del. 1989). The Superior Court also carefully considered all New York contacts relied on by the Insurers, and correctly concluded that Arkansas and Ohio, where the sites are located, have the most significant relationships based on §188.

2. The Insurers' Point II Is Denied. The Superior Court's ruling that §193 applies to Chemtura's environmental property-damage coverage claims is well supported by and grounded in Delaware jurisprudence applying the interest-based analysis required by *Restatement* §§188 and 193. The Superior Court did not, as the Insurers contend, create an erroneous dichotomy between Delaware choice-of-law cases involving nationwide bodily-injury claims and those involving environmental property-damage claims. The court correctly recognized that the cases considering bodily-injury coverage disputes involving claimants residing throughout the country have implicated different interests than have those considering environmental property-damage coverage disputes in which contamination of real property located in particular states was involved. The Superior Court then correctly applied §193's presumption in concluding that Arkansas and Ohio have the paramount interest in the coverage dispute regarding

losses Chemtura has incurred as a result of environmental contamination within those states' borders. Consistent with the Insurers' decision not to include any choice-of-law provision in their Policies and instead to include "service of suit" provisions obligating them to honor the insured's choice of forum and abide by that jurisdiction's choice-of-law rules, the Superior Court also soundly rejected the contentions of the Insurers that considerations of "uniformity and predictability" ostensibly required application of New York law to this dispute. As the court correctly concluded in denying the Insurers' estoppel arguments, which the Insurers have not appealed, the choice-of-law determinations made in prior cases involving the Insurers' Policies but different parties and different types of claims likewise do not support applying New York law here.

3. **The Insurers' Point III Is Denied.** The Superior Court correctly considered all contacts – historical and present – among the states having a nexus with the Policies or the parties and their coverage dispute. The court soundly rejected the Insurers' myopic focus on New York's historical contacts to the placement of certain Policies, and also considered the contacts of multiple other states and at least two foreign countries in concluding that Arkansas and Ohio have the greatest interest in resolving this coverage dispute. The Superior Court properly declined to consider the contacts of Home, whose policies are not at issue and which has never been a party to this action.

4. The Insurers' Point IV Is Denied. The Superior Court correctly considered Arkansas allocation law in making its choice-of-law determination. Delaware choice-of-law rules required consideration of Arkansas's allocation law, as well as that of Ohio and New York, as was a prerequisite for determining whether a conflict necessitating a choice-of-law analysis was even needed. The Superior Court also correctly concluded that Arkansas law supports the "all-sums" allocation methodology, based on the analysis and holding in *Murphy Oil USA, Inc. v. U.S. Fid. & Guar. Co.*, 9 Mealey's Litig. Reports: Insurance, No. 19 (Ark. Cir. Ct. Feb. 21, 1995) (Ex. 1 hereto). The Insurers have not cited a single Arkansas case conflicting with *Murphy Oil*.

STATEMENT OF FACTS

I. THE PARTIES

A. Chemtura

Chemtura, a global specialty chemicals company incorporated in Delaware, is a successor-in-interest to Uniroyal Chemical, a New Jersey corporation, which came to be formed and to be an insured as a result of the corporate transactions summarized below:

- In 1941, the predecessor to Uniroyal Inc., United States Rubber Company, was incorporated in New Jersey, with its principal place of business in New York.
- In 1967, US Rubber changed its name to Uniroyal, Inc.
- By 1972, Uniroyal, Inc. had moved its principal place of business to Connecticut.
- In 1985, Uniroyal, Inc. transferred all of assets and property pertaining to the operations within its Chemical, Rubber, and Plastic Segment to Uniroyal Chemical, which also was incorporated in New Jersey, with its principal place of business in Connecticut.
- In 1988, Uniroyal Chemical Company ("UCC") was incorporated in Delaware for the sole purpose of acquiring Uniroyal Chemical in 1989. Uniroyal Chemical (a New Jersey corporation with its principal place of business in Connecticut) became a wholly-owned subsidiary of UCC.
- In 1998, UCC, a Delaware corporation, merged down and into Uniroyal Chemical, with, Chemtura's predecessor, Uniroyal Chemical, continuing as the surviving entity.
- In 2005, Uniroyal Chemical merged into Chemtura USA Corporation, a New Jersey corporation having its principal place of business in Connecticut.

- In 2006, Chemtura USA Corporation merged into Chemtura, which is plaintiff below, and is a Delaware corporation, having principal places of business in Connecticut and Pennsylvania, and global headquarters in Pennsylvania.

(*See* Trans. ID 56514109 (Exs. 6, 7-11, 13-16)).

As this corporate history shows, at least five states — (1) Connecticut, (2) Delaware, (3) New Jersey, (4) New York, and (5) Pennsylvania — have contacts with Chemtura's predecessor, Uniroyal Chemical,[3] or other entities insured by Defendants.

B. The Insurers

The Insurers consist of Certain Underwriters at Lloyd's, London ("Underwriters") and various London Market Companies (the "Companies"). Underwriters' and the Companies' business operations are, and always have been, centered in England. Participating Lloyd's syndicate members reside and do business in numerous jurisdictions worldwide.[4]

---

[3] The Insurers endeavor to blur the distinction between these companies by referring to both Uniroyal, Inc. and Uniroyal Chemical collectively as "Uniroyal" (*e.g.*, O.B.6-7), but Uniroyal Chemical was a distinct business and Chemtura is not a successor to Uniroyal, Inc.

[4] *E.g., Ind. Gas Co. v. Home Ins. Co.*, 141 F.3d 314, 316 (7th Cir. 1998) (observing that syndicate members can be "located throughout the world"); *Northland Ins. Co. v. Arthur Hill & Assocs.*, 126 F. Supp. 2d 1066, 1072 (E.D. Mich. 2001) (eight of eleven syndicate members were Ohio residents); *Genstar Container Corp. v. Certain Underwriters at Lloyd's Subscribing to that Ins. Policy Numbered C70408*, 2000 WL 1897299, at *3 (N.D. Cal. Dec. 22, 2000) (syndicate members included residents of California and Delaware).

Having no current or historical presence in New York themselves, the Insurers focus (O.B.8) on certain historical contacts between New York and Home, which provided primary insurance coverage to some of the entities also covered by the Insurers' Policies. The Insurers' Policies are excess to, and incorporate terms and conditions of, Home's policies. Home's policies are not at issue, and Home has never been a party to this action. Home was a New York corporation and at one time had operations in New York, but now is insolvent and in liquidation in New Hampshire.

II. THE INSURERS' POLICIES

The Insurers' excess general liability Policies[5] span the 1952-86 timeframe, and contain standardized terms providing broad occurrence-based coverage. This broad insurance covers, among others, long-tail claims happening "anywhere in the world" (A14, A1808), which arise from "continuous or repeated exposure to conditions" (A8, A1810) resulting in damage or injury whenever such claims are asserted against the insured.

The Insurers' Policies cover Chemtura, as Uniroyal Chemical's successor,[6]

---

[5] See A617-618 for a complete list of these Policies.

[6] Citing *Playtex Family Prods., Inc. v. St. Paul Surplus Lines Ins. Co.*, 564 A.2d 681 (Del. Super. 1989), the Insurers contend in passing (O.B.6 n.2) that their 1961-1986 Policies prohibit assignments without their consent. *Playtex* nonetheless does not support their position. *Playtex* ruled only that a Kansas court's prior determination that the claimant was "a successor ... entitled to the benefits to

for, among other things, losses incurred as a result of claims alleging liability for third-party property damage (A6, A8, A1810), including those asserted regarding the Arkansas and Ohio Sites.

As the Superior Court emphasized, (2016 WL 3884018, at *5-6), multiple states and foreign countries in addition to New York have contacts relating to placement of the Insurers' Policies. These Policies were procured through brokers located in both London and New York, and premiums were to be paid to, among others, George Foster & Co. Ltd. in Montreal, Canada (A10). In addition and as

---

which [the insured] would be entitled under the policy" barred the insurer from "relitigating" the question. *Id.* at 690-91.

Also contrary to the Insurers' contention, courts applying Delaware law, like those applying Arkansas, Ohio, and New York law, hold that an anti-assignment clause does not preclude post-loss assignments of rights given without the carriers' consent, such as those at issue here. *E.g.*, *CNH Amer., LLC v. Am. Cas. Co. of Reading, Pennsylvania*, 2014 WL 626030, at *8 (Del. Super. Jan. 6, 2014) (anti-assignment provision "does not preclude an assignment if the assignment takes place after the loss has occurred"); *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121, 128-29 (Ohio 2006) (holding that "the chose in action as to the duty to indemnify is unaffected by the anti-assignment provision when the covered loss has already occurred"); *Nat'l Mut. Cas. Co. v. Cypret*, 179 S.W.2d 161, 164 (Ark. 1944) (anti-assignment provision inapplicable to assignment of liability that already has accrued under the policy); *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 103 (Del. Ch. 2009) (applying New York law) ("New York law generally does not permit anti-assignment clauses to be erected as a barrier to the transfer of 'post-loss claims'").

set forth in Fact Section I.A. above, New Jersey, Connecticut and Delaware have contacts with insureds Uniroyal, Inc. and Chemtura's predecessor, Uniroyal Chemical.

The Insurers included no choice-of-law provision in their Policies mandating application of New York (or any other jurisdiction's) law. What they instead chose to include were "service of suit" provisions. These provisions obligate the Insurers to submit to the jurisdiction of any "Court of competent jurisdiction within the United States" selected by the insured, and further prescribe that "all matters" in controversy "shall be determined in accordance with the law and practice of such Court," including its choice-of-law rules (A17).

III. THE UNDERLYING ENVIRONMENTAL CLAIMS

Chemtura seeks coverage in this action only for losses resulting from the environmental property damage alleged at the Arkansas and Ohio Sites. The Insurers assert (O.B.13) that Chemtura faces potential liability for environmental sites elsewhere, but fail to apprise this Court that the parties filed two stipulations below[7] (1) withdrawing *all* environmental coverage claims of which notice previously has been given, except for the Arkansas and Ohio Sites, and (2)

[7] The Insurers cite a page of a lengthy affidavit included in their Appendix as support for their representation that Chemtura has withdrawn "certain" claims. Because they failed to include copies of the actual stipulations in their Appendix, these stipulations are included in Chemtura's Appendix (*see* B50-55).

confirming that Chemtura will not seek coverage for any other known environmental claims not yet reported.[8]

A. The Arkansas Site

The Arkansas Site consists of a ninety-three acre property located in Jacksonville, Arkansas that was used from 1958 to 1986 by various entities to manufacture herbicides (A344). The Arkansas Site's cleanup has cost more than $100 million, and the Environmental Protection Agency ("EPA") engaged in extensive litigation in Arkansas courts to cover clean-up costs and remedy the contamination to soil, groundwater, and buildings at or near the property (A345). As Uniroyal Chemical's successor and one of the entities held responsible for the alleged environmental contamination, Chemtura has incurred approximately $2.5 million in litigation costs and $4.2 million in clean-up costs with respect to the Arkansas Site (A346). Sampling and monitoring at the Arkansas Site continue to this day. 2016 WL 3884018, at *6.[9]

---

[8] While the bodily-injury claims referred to by the Insurers have no relevance to this action because Chemtura is not seeking coverage for these claims here, the Insurers acknowledge that Chemtura withdrew its coverage requests for the claims put at issue in the competing New York actions they filed in an effort to avoid litigation in Chemtura's chosen forum (O.B.13).

[9] The Insurers note (O.B.11) Chemtura's statement that its potential future obligations with respect to this Site have been discharged in bankruptcy, but overlook that bankruptcy discharges are not self-executing and must be asserted as a defense in response to a demand for payment of the particular claim. In fact,

B. The Ohio Site

The Ohio Site consists of a parcel of land in Painesville Township, Ohio, where a plant used to manufacture various chlorides was located (A346). In 1993, the EPA designated the site as a national priority for environmental cleanup because of the threat posed to the surrounding environmentally sensitive areas (A347).

Protracted litigation in which Uniroyal Chemical was named as a party ensued in Ohio courts (A347). As a result of that litigation, Chemtura, as Uniroyal Chemical's successor, already has incurred approximately $2.7M in litigation costs and $2M in remedial investigation costs (A347).

Contrary to the Insurer's assertion (O.B.12), no remediation has yet occurred at the Ohio Site. While Chemtura has submitted a Feasibility Study Report evaluating the options for environmental remediation at this Site, the Ohio EPA has deferred selecting a remediation plan until a remediation plan is implemented for another, nearby site (B100). Cost estimates for performing the remediation at the Ohio Site range as high as $4.6M, with the average being in the range of $3M (A347).

---

other claimants recently have challenged whether Chemtura's bankruptcy discharge immunizes it from further liability with respect to various bodily-injury claims, and Chemtura has been forced to reopen its bankruptcy proceedings to respond to these claims.

IV. THE PRIOR ACTIONS BETWEEN DIFFERENT PARTIES AND ADDRESSING DIFFERENT ISSUES

As the Superior Court correctly recognized in rejecting the Insurers' contention that Chemtura should be "estopped from opposing the application of New York law" in the instant coverage dispute, 2016 WL 3884018, at *7; 2016 WL 3884020, at *2, the four prior coverage actions invoked by the Insurers involved different parties, different risks, and different issues than those involved here. The Insurers do not challenge this determination on appeal, and, as the Superior Court correctly ruled, "the issues" in these actions presented "were neither identical nor fully adjudicated on the merits." 2016 WL 3884018, at *7.

A. *Uniroyal, Inc. v. The Home Ins. Co.* (E.D.N.Y.)

The only parties to this action were Uniroyal, Inc., which for a time had maintained its principal place of business in New York, and Home, which then was a New York corporation that maintained its principal place of business in New York. *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368 (E.D.N.Y. 1988). Uniroyal Inc. sought coverage for nationwide bodily-injury claims involving exposure to Agent Orange, not for environmental property-damage claims, and the parties stipulated that New York law applied. *Id.* Choice of law was neither disputed nor adjudicated.

B. *Uniroyal, Inc. v. American Reinsurance Co.* (N.J. Super.)

In this action, Uniroyal, Inc. sought coverage for nationwide bodily-injury

claims, not for environmental property-damage claims. *Uniroyal, Inc. v. Am. Re-Ins. Co.,* 1996 N.J. Super. Unpub. LEXIS 2 (N.J. Super. Ct. Oct. 29, 1996). As with the New York coverage action involving Agent Orange claims, the primary policies of the Home were at issue, and the Home was a party. *Id.* Applying New Jersey's "most significant relationship" choice-of-law test, the court found that New York law applied. *Id.* No party argued that, and the court did not address whether, *Restatement* §193 applied.

C. *Uniroyal Chemical Co., Inc. v. Aetna Cas. & Sur. Co.* (N.J. Super.)

No choice of law ruling was made in this action, which was brought by Uniroyal Chemical and sought coverage for 33 environmental sites located in 15 different states and for two sites located in Canada (A631-32, 813-24). At the insurers' request, the court stayed this case in favor of the Connecticut Environmental Action discussed below (A813-24).

D. *The Home Ins. Co. v. Uniroyal, Inc.* (Conn. Super. Ct.)

As in the New Jersey environmental action discussed immediately above, the insureds sought coverage for 33 environmental sites located in 15 different states and for two sites located in Canada (A631-32, 831-35). Unlike the instant case, Home and Uniroyal, Inc. again were parties (A831-35). The court ruled that New York law applied based on Connecticut's *lex loci contractus* test (A831-35).

No party argued that, and the court did not address whether, *Restatement* §193 applied.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY APPLIED THE "LAW OF THE SITE" PRESUMPTION AND THE "MOST SIGNIFICANT RELATIONSHIP" TEST.

A. Question Presented

Did the Superior Court correctly apply the principles set forth in *Restatement* §§188 and 193 in determining that both the "law of the site" presumption and the "most significant relationship" test dictate that Arkansas and Ohio have the greatest interest in resolution of the coverage disputes regarding Chemtura's liability for environmental property damage at the one site located within each of their borders?

B. Scope of Review

This Court reviews *de novo* a trial court's grant of partial summary judgment. *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, 909 A.2d 125, 128 (Del. 2006).

C. Merits of the Argument

1. The Superior Court Correctly Applied the "Law of the Site" Presumption, Which Is a Specialized Formulation of the "Most Significant Relationship" Test Applicable to Environmental Property-Damage Coverage Cases.

The Superior Court correctly applied §193's "law of the site" presumption to

this environmental property-damage coverage dispute.[10] The Insurers mischaracterize this presumption as being inconsistent with §188's "most significant relationship" test. However, the inquiry called for by this test requires identifying what state has the greatest interest in having its law govern resolution of the particular "issue in contract" to be determined,[11] and §188[12] specifically requires that §193 be considered in undertaking this interest-based analysis in contract disputes involving casualty policies, such as the Insurers' Policies. *See Chesapeake Utils. Corp. v. Am. Home Assurance Co.*, 704 F. Supp. 551, 556 (D. Del. 1989) (while "§188 announces choice of law principles in contract disputes generally, §193 specifically dictates choice of law in insurance disputes").

There is also no merit to the Insurers' contention (O.B.18) that §193 does

---

[10] Section 193 prescribes that disputes involving the validity of a casualty insurance policy, such as the Policies at issue here, are to be 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."

[11] Section 188 prescribes that "[t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, *with respect to that issue*, has the most significant relationship to the transaction." *See Restatement* §188(1) (emphasis added).

[12] Section 188(3) provides that, "[i]f place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§***189-199*** and 203." (Emphasis added). As stated above, negotiations and performance were *not* in the same state, and §193 "otherwise provides" with respect to the environmental coverage claims at issue here.

not apply to insurance policies covering multistate risks. As the Superior Court correctly concluded, the relevant *Restatement* comments make clear the required interest-based inquiry focuses on the location of the risks at issue in the particular coverage dispute, and not whether the policies in question themselves may cover multistate risks. 2016 WL 3884018, at *2. As the Superior Court summarized with respect to §188:

> [C]omment e states the location of the contract's subject matter is an important factor when the contract deals with a specific physical thing, such as land or a chattel, or affords protection against a localized risk. "The state where the thing or risk is located will have a natural interest in transactions affecting it."

Id.

As the Superior Court also recognized (*id.* at *3), the comments to §193, which applies specifically to insurance contracts, underscore that the focus is on the location of the insured risk, and this consideration is of paramount importance where the liability stems from a risk in that particular location. In this regard, §193, comment b provides:

> An insured risk, namely the object or activity which is the subject matter of the insurance, has its principal location, in the sense here used, in the state where it will be during at least the major portion of the insurance period. . . . This will obviously be so when the insurance covers an immovable object. . . .
>
> . . . .
>
> *It enjoys greatest significance when an immovable is involved,* such as when the risk insured against is damage by fire to a particular

> building. . . . Provided . . . *that the risk will be in a particular state for the major portion of the insurance period, the risk's principal location is the most important contact to be considered in the choice of the applicable law*, at least as to most issues.

§193, cmt. b. (emphasis added). Section 193 comment f, in turn, specifically addresses situations, such as the one presented here with respect to the Arkansas and Ohio Sites, in which the insurance policies at issue cover property damage to real property located in multiple states. *See* 2016 WL 3884018, at *3. Comment f prescribes that, for choice-of-law purposes, it is appropriate, "at least with respect to most issues," to treat the coverage dispute "as if it involved" multiple "policies, each insuring an individual risk." §193, cmt. f.

It is telling that the Insurers studiously avoid discussing the Delaware cases applying the "law of the site presumption" in environmental coverage disputes involving sites located in multiple states. These cases, which are grounded in settled principles of Delaware law and faithfully applied the interest-based analysis called for by the *Restatement*, support the Superior Court's application of §193's law of the site presumption on the facts presented here.

In *Chesapeake Utilities,* the first decision to consider the issue, Judge Lachum concluded that §193 required application of the law of Maryland and Delaware, respectively, to coverage disputes arising from property damage at the sites located in those two states. 704 F. Supp. at 556-57. Consistent with §193's

comments, the court reasoned that the location of the site was "*the crucial factor*" for determining the governing law in a case involving coverage for environmental property damage. *Id.* at 556. As prescribed by comment b, the court emphasized that the "*location of the insured risk will be given greater weight than any other single contact* in determining the state of the applicable law provided that the risk can be located, at least principally, in a single state." *Id.* at 556-57 (quoting §193, comment b) (emphasis in original). As prescribed by comment f, the court further reasoned that the "fact that the policies now in question insure against risks located in more than one state is of no consequence" because it was appropriate for choice-of-law purposes to '"treat'" these policies as if they were separate contracts '"each insuring an individual risk."'" *Id.* at 557 n.13 (quoting *Restatement* §193, comment f). The court also stressed that the location of the insured risk '"enjoys the greatest significance'" where, like here, '"immovable'" property is involved. *Id.* at 557 (quoting §193, comment b).

In the second case, *Rhone-Poulenc,* Vice Chancellor Chandler concluded that the fact that the policies at issue covered multistate risks did not preclude application of the "law of the site presumption," or eliminate "the substantial interest of the states where the risks are located in seeing their law applied to contracts of insurance that will cover losses or liabilities in their jurisdiction." 1992 Del. Super. LEXIS 571, at *11-12. Based on §193's comments, the court

concluded that the laws of such states applied unless, on the particular facts, another state could be shown to have a "more significant relationship... to the transaction and the parties." *Id.* at *10. The Court applied Delaware law, where the sites at issue were located, because no other state had such a relationship.

In *Clark Equipment*, the court followed *Chesapeake Utilities* in concluding that §193 applied to the coverage dispute regarding the policyholder's liability arising from property damage at environmental sites located in four different states. 1994 WL 466325, at *6-7, 13, 17-18. Citing §193, comment f, the court further explained that where a policy insures against multi-state risks, courts can '"treat"' the policy "as if it involved [several] policies, each insuring an individual risk." *Id.* at *7. The court accordingly held that the law of the four states in which the environmental sites were located applied.

In *Burlington Northern*, the court considered these same principles in concluding that the laws of the eighteen states in which eighty different environmental sites were located applied to disputes regarding the carriers' coverage obligations with respect to liabilities incurred at those sites. 1994 WL 637011, at *1, 8, 23. While acknowledging that the location of a risk could be argued to have "less significance where an insurance policy covers a group of risks scattered through several states," the court held that "the nature of the risk here –

environmental damage – restores the location to pre-eminence." *Id.* at *7 (citing *Rhone-Poulenc,* 1992 Del. Super. LEXIS 571).

None of the Delaware choice-of-law cases on which the Insurers rely (O.B.22-23) undermine or otherwise cast doubt on the Delaware cases applying the "law of the site" presumption on which the Superior Court relied. Contrary to the Insurers' contentions that these other cases reject this presumption and establish that the cases discussed above represent a "minority" view (O.B.21), the Superior Court correctly concluded that none of these other cases justified discounting Arkansas' and Ohio's interests in resolution of this coverage dispute and applying New York law instead. As discussed further in Section II below, almost all of the choice-of-law cases relied on by the Insurers involved nationwide bodily-injury claims, which implicate different interests than those implicated here, and the few cases involving environmental coverage disputes presented circumstances, unlike those presented here, in which the relevant contacts were overwhelmingly concentrated in a single state.

2. The Superior Court Correctly Rejected the Insurers' Attempt to Discount Arkansas' and Ohio's Interests.

The Superior Court soundly rejected the Insurers' attempt to discount Arkansas' and Ohio's in resolution of the coverage disputes regarding the sites located in those states. 2016 WL 3884018, at *5-6. The Insurers misleadingly

assert (O.B.12) that "no further remediation has taken place" or "is planned" at the Ohio Site. The documents the Insurers cite, however, make clear that the Ohio EPA has deferred selecting a remediation plan for the Ohio Site (referred to as the Dartron site) until completion of the feasibility study needed to evaluate the remedial options for a nearby site (A1189, A1198, A1206). The Insurers also fail to apprise this Court of the cost estimates for performing the remediation at the Ohio Site, which range as high as $4.6M, with an average of $3M (A347).

There also is no merit to the Insurers' contention (O.B.20) that Arkansas lacks an interest in Chemtura's dispute with the Insurers' coverage dispute regarding the liabilities incurred with respect to the Arkansas Site. As the Superior Court observed regarding Arkansas's "vested interest," costs to remediate the environmental contamination at this Site have exceeded $150 million, and the "EPA will monitor the site's groundwater for contamination indefinitely." 2016 WL 3884018, at *5, 6. *Cf. Chesapeake Utils.*, 704 F. Supp. at 557, 558-59 (recognizing Maryland's interest paramount in coverage dispute regarding site located in that state where insured already had incurred "costs, at the state's behest, in cleaning up the site").[13]

---

[13] It is irrelevant whether, as the Insurers claim (O.B.13, 23), Chemtura faces potential liability from sites located in other states and countries that are not at issue here, or whether additional environmental claims might be asserted against Chemtura in the future. As the Insurers acknowledge (O.B.13), Chemtura has

3. New York Does Not Have Any Meaningful Interest in Chemtura's Environmental Coverage Claims, Let Alone a More Significant Interest than Ohio or Arkansas.

In concluding that New York did not have interests in this coverage dispute sufficient to override those of Arkansas and Ohio, the Superior Court considered all of the contacts, historical and present, which are scattered across at least five states – (1) Connecticut; (2) Delaware; (3) New Jersey; (4) New York; and (5) Pennsylvania – and two foreign countries – (1) Canada; and (2) England. 2016 WL 3884018, at *6. Given this "diversity of contacts," the court correctly concluded that none of these other states or countries has a sufficient nexus to this dispute to overcome §193's "law of the site" presumption. *Id.*, at *6.

In so ruling, the Superior Court observed that New York has no "current contacts" with this dispute and correctly rejected the Insurers' erroneous legal theory that the only relevant contacts to consider are New York's historical connection to placement of certain Policies. *Id.* at *2, 6. This historical connection does not give New York any meaningful interest in the instant coverage dispute between Chemtura, a Delaware corporation with Connecticut and Pennsylvania headquarters, and the London-based Insurers, and that connection

---

stipulated that it is not seeking coverage under their policies for any other known environmental claims, and they cite no support for their assertion that an insured's prior claims or possible future claims under a policy are relevant to a choice-of-law analysis for the claims at issue in the current dispute.

certainly is not sufficient to overcome Arkansas' and Ohio's paramount interests in resolution of this coverage dispute.

The insurers' invocation (O.B.27-28) of a historical connection between New York and the Home – an insolvent insurer (now in liquidation in New Hampshire) – fails to establish that New York has any interest in resolution of this dispute. Home is not a party to this action, and its policies are not at issue. The Insurers' Policies "follow form to" (or incorporate) the terms and conditions of Home's policies to the extent the Insurers' Policies do not otherwise provide, but this coverage dispute concerns the terms and conditions of the Insurers' Policies, and the follow-form provisions in their Policies create no contractual relationship between the Insurers and Home.[14] Home's historical contacts with New York are,

---

[14] *See, e.g.,* 15 *Couch on Insurance* §220:32 n.31 ("The language of a follow form clause in an excess liability insurance policy allows an insured to have coverage for the same set of potential losses and with the same set of exceptions in each layer of the insurance program; the language does not, however, bind the various insurers to a form of joint liability should coverage at a prior layer fail."); 2 Insurance Claims and Disputes §6:2 (6th ed.) ("An excess carrier's intent to incorporate the same words used in a separate agreement between the primary insurer and the insured does not imply an intent by the excess carrier to accept decisions made by the primary carrier. Similarly, the fact that a court has held that a primary policy affords coverage does not bind the following form excess insurer.") (internal quotations omitted); 1 Insurance Claims and Disputes §3:9 (6th ed.) ("The fact that a primary insurer agrees to a settlement does not obligate an excess insurer to agree, even if the excess policy follows form to the primary policy.").

therefore, irrelevant to the choice-of-law analysis. As the court held in *Nationwide Mut. Ins. Co. v. Wooters*, 1996 WL 280778, at *3 (Del. Super. Jan. 31, 1996), a choice-of-law case addressing a tort claim that is instructive on this issue, the location of an insurer that is not a party to the suit is "irrelevant ... as to this choice-of-law determination."

Indeed, in focusing exclusively on New York's contacts at the time certain Policies were placed, the Insurers effectively argue for application of the *lex loci contractus* choice-of-law test, which calls for applying the law of the state where the disputed contract was formed. Delaware has abandoned that test in favor of the *Restatement's* more "modern and flexible" approach. *Rhone-Poulenc*, 1992 Del. Super. LEXIS 571, at *4; *Chesapeake Utils.*, 704 F. Supp. at 555. As discussed in further detail in Section III below, Delaware courts applying the *Restatement's* interest-based analysis have correctly rejected carriers' contentions that one state's historical connections with policy placement suffice to overcome §193's presumption that it is the state where the environmental site is located that has the most significant relationship to the coverage dispute.

4. The Superior Court Correctly Held that *Restatement* §188 Also Requires Application of Arkansas and Ohio Law.

In contending that the Superior Court misapplied the "most significant relationship" test, the Insurers also disregard that the court considered the §188

factors relied on by the Insurers, and concluded that "Arkansas and Ohio, the states with the environmental contamination sites, have the most significant relationships" based on these factors as well. 2016 WL 3884018, at *6. For the reasons discussed above and in Argument Sections II and III, this correct determination provides an additional basis for affirming the Superior Court's choice-of-law ruling.

II. THE SUPERIOR COURT CORRECTLY DISTINGUISHED THE DELAWARE CHOICE-OF-LAW CASES CONSIDERING NATIONWIDE BODILY-INJURY AND OTHER CLAIMS.

A. Question Presented

Did the Superior Court correctly distinguish the Delaware choice-of-law cases applying the "most significant relationship" in coverage disputes involving nationwide bodily-injury claims from those involving environmental property-damage claims owing to the different nature of the insured risks and the interests implicated by those risks?

B. Standard 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 the Argument

1. The Superior Court's Ruling is Fully Supported by Delaware Choice-of-Law Jurisprudence.

The Insurers' cases belie their contention (O.B.21) that the Superior Court erroneously created a "dichotomy" between Delaware choice-of-law cases considering bodily-injury coverage disputes and those considering environmental property-damage coverage disputes. As the Superior Court correctly recognized, the Insurers' cases considering nationwide bodily-injury claims implicate different interests because, unlike environmental bodily-injury cases involving immovable

risks, they do not involve a risk located in any particular state that could give that state the greatest interest in resolution of the dispute.

The Superior Court correctly determined that *Liggett Grp, Inc. v. Affiliated FM Ins. Co.*, 788 A.2d 134, 137-38 (Del. Super. 2001), on which the Insurers rely (O.B.15), is inapposite because the coverage dispute involved "more than one-thousand tobacco health-related lawsuits filed against plaintiffs" involving claimants in "49 states and the District of Columbia" (2016 WL 3884018, at *4 n.36), and because, as *Liggett* emphasized, there is no "principal location" of the "risks" bringing the §193 presumption into play when "nationwide product liability claims are involved." 788 A.2d at 138.[15]

The Superior Court also correctly distinguished its own choice-of-law decision in *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, 2005 WL 2436193 (Del. Super. 2005), *aff'd,* 909 A.2d 125, 128-31 (Del. 2006). As the Superior Court recognized, this case involved a coverage dispute about "nationwide asbestos bodily injury claims" resulting from "placement of a product in a stream of commerce," and not claims for "environmental contamination and

[15] The Superior Court also correctly distinguished *Liggett* because the "tobacco manufacturing – the underlying lawsuits' cause – was solely in North Carolina, regardless of [the insured's] corporate headquarters' location." 2016 WL 3884018, at *4.

remediation" of real property located in a particular state. 2016 WL 3884018, at *4.

The Insurers' reliance (O.B.16-17) on then Vice Chancellor (now Chief Justice) Strine's decision in *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 88 n.27 (Del. Ch. 2009), is equally misplaced. The coverage dispute in that case also involved asbestos bodily-injury claims asserted by plaintiffs residing throughout the country, and, in making its choice-of-law determination, the court emphasized that, "where the insured-against injuries are spread among various states, the location of the subject matter of the contract cannot be ascribed to any single state."[16]

The few environmental coverage cases on which the Insurers rely (O.B.21-23) also provide no support for their claims of errors. The four cases cited by the Insurers that actually made a choice-of-law determination all were decided in the

---

[16] The Insurers' remaining products liability cases, which all involved risks scattered throughout the country, likewise do not support their contention that the Superior Court erred in applying the "law of the site" presumption here. *See Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 1994 WL 721651 (Del. Super. Mar. 28, 1994) (addressing coverage for lawsuits resulting from chemical compound that allegedly failed in residential plumbing systems; no party requested application of §193); *Motors Liquidation Co., Dip Lenders Trust v. Allianz Ins. Co.*, 2013 WL 7095859 (Del. Super. Dec. 31, 2013) (addressing coverage under products liability insurance for nationwide asbestos bodily-injury claims); *TIG Ins. Co. v. Premier Park, Inc.*, 2004 WL 728858 (Del. Super. Mar. 10, 2004) (addressing coverage for personal injury lawsuit).

1990's, like those relied upon by the Superior Court. As that court correctly recognized, all of the Insurers' 1990's cases involved facts not present here, which were sufficient to rebut the "law of the site" presumption.[17]

The Superior Court correctly concluded that *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 1991 WL 236943 (Del. Super. Oct. 22, 1991), was inapposite because, wholly unlike New York here, Delaware had the overwhelming majority of the relevant contacts with the coverage dispute. 2016 WL 3884018, at *5. In that case, the insured, DuPont, and a number of the insurers were incorporated in Delaware; the insured's principal place of business was in Delaware; the insured's business operations were concentrated in Delaware; and all of the policies were negotiated and procured in Delaware. 1991 WL 236943, at *1-5. Also unlike the instant case, the underlying claims involved fourteen different sites located in eight different states. *Id.*

---

[17] The remaining two cases relied on by the Insurers involving environmental claims also do not support their position because the courts in those cases were not required to make substantive choice-of-law rulings. *See Royal Indem. Co. v. Gen. Motors Corp.*, 2005 WL 1952933, at *8 (Del. Super. July 26, 2005) (finding in the context of a forum dispute that a full choice-of-law determination was not needed because both parties agreed that Delaware law would not apply); *Tyson Foods, Inc. v. Allstate Ins. Co.*, 2011 WL 3926195, at *5 (Del. Super. Aug. 31, 2011) (parties agreed that Arkansas law applied to environmental claims from sites located in Arkansas and Oklahoma under policies that were negotiated, procured and delivered exclusively in Arkansas).

The Superior Court likewise correctly distinguished *Sequa Corp. v. Aetna Cas. & Sur. Co.*, 1995 WL 465192 (Del. Super. July 13, 1995). *Sequa* recognized that *Restatement* §193 governed the choice-of-law analysis, but concluded that New York's extensive contacts created interests sufficient to overcome the "law of the site" presumption. *Id.* at *3-6. In stark contrast to the facts presented here, the insured had been located in New York since 1963, the insured's insurance department was located in New York during most of the relevant time period, and the policies were negotiated exclusively by New York brokers; while the environmental sites at issue were scattered among the eight states. *Id.* at *3-6.

The Superior Court correctly determined that *North Amer. Philips Corp. v. Aetna Cas. & Sur. Co.*, 1994 WL 555399 (Del. Super. Sept. 2, 1994), and *Monsanto v. Aetna Cas. & Sur. Co.*, 1991 WL 236936 (Del. Super. Oct. 29, 1991), were inapposite for the same reasons. Both of these cases involved environmental sites located in numerous states nationwide, whereas the insureds were headquartered and ran their insurance departments from a single location in New York and Missouri, respectively. 1994 WL 555399, at *7; 1991 WL 236936, at *1-4.

As the Superior Court concluded, the Insurers' 1990's cases do not reject application of the "law of the site" presumption: they simply recognize that this presumption may be rebutted by a showing, which the Insurers did not and cannot

make here, that another state has a greater interest in resolution of the particular coverage dispute than the states where the environmental sites are located.

2. The Superior Court's Application of the "Law of the Site" Presumption Does Not Undermine Restatement §6 Considerations of Uniformity and Predictability.

There is no merit to the Insurers' contentions (O.B.4, 25-26) that the Superior Court's application of the "law of the site" presumption undermines the *Restatement* 6's "goals" of "uniformity and predictability." As one court observed, "certainty, or uniform application of law" are not "a paramount goal with respect to [insurance] contracts entered into between ... sophisticated" business entities having the ability to contractually dictate the applicable law. *Rhone-Poulenc,* 1992 Del. Super. LEXIS 571, at *16. Because the Insurers elected not to include a choice-of-law provision in their Policies, the Restatement §6's considerations of uniformity and predictability are not implicated by the Superior Court's correct determination that New York does not have the most significant interest in having its law govern the instant coverage dispute. *See id.*; *Burlington Northern*, 1994 WL 637011, at *7 (had consistent application of New York law been of real importance to the insurers, "a specific choice-of-law [clause] could have been negotiated").

The Insurers' protestations about the supposed importance of "uniformity and predictability" also are belied by the service-of-suit provisions they did elect to

include in their Policies. As stated above in Fact Section II, these provisions prescribe that the Insurers will consent to jurisdiction of any "Court of competent jurisdiction within the United States" selected by the insured, and that "all matters" in controversy "shall be determined in accordance with the law and practice of such Court," including its choice-of-law rules. (A17). As the Superior Court recognized in denying the Insurers' motion to dismiss Chemtura's first-filed Delaware action, these provisions "entitle[] the insured to select the forum for coverage litigation" (B48). Because these provisions further prescribe that "all disputes" are to "be determined in accordance with the law and practice of" the forum chosen by the insured, they also require application of Delaware's choice-of-law rules in this action. *Chesapeake Utils.*, 704 F. Supp. at 557.

The choice-of-law rules employed by U.S. courts, of course, vary among jurisdictions, just as do the rules of substantive law. Having contracted to allow their insureds to choose the forum for coverage litigation and agreed to the application of that forum's choice-of-law rules, the Insurers cannot legitimately complain that the Superior Court declined to apply New York law based on its correct application of Delaware choice-of-law jurisprudence construing Restatement §§193 and 188. On the contrary, the Insurers chose to include service-of-suit provisions in their Policies consenting to jurisdiction of U.S. courts and application of domestic law for the purpose of inducing U.S. companies, leery

of being forced to litigate any coverage dispute in a foreign country under foreign law, to place coverage with the London market. *See Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1990 WL 9496, at *4 (Del. Super. Jan. 19, 1990) (noting the commercial "significance and value" of service-of-suit clauses to address "American insureds[']" reluctance to insure with the London market because of the risk of being "forced to litigate [any coverage dispute] in a foreign country"); *Appalachian Ins. Co. v. Superior Court*, 162 Cal. App. 3d 427, 432 (1984) (same). (*Accord* Peter J. Kalis, Thomas M. Reiter, James R. Segerdahl, *Policyholder's Guide to the Law of Insurance Coverage*, §23.03[A], at 23-19 (2016 Supplement) (Ex. 2 hereto) (the London insurance market recognized that including service-of-suit provisions was a "practical business necessity" for "penetrating the overwhelmingly powerful U.S. market in the postwar world").

The choice-of-law decisions in prior coverage actions relied on by the Insurers (O.B.8-10, 25), which were filed in other jurisdictions and decided based on those jurisdictions' choice-of-law rules, provide no support for the Insurers' position for the same reasons. Moreover, and as the Superior Court correctly recognized in rejecting the Insurers' contention that Chemtura should be "estopped from opposing the application of New York law" in the instant coverage dispute, the prior coverage actions involved different parties, different risks, and different issues, which "were neither identical nor fully adjudicated on the merits." 2016

WL 3884018, at *7. Because the Insurers do not challenge that correct ruling on appeal, there is plainly no basis for revisiting the Superior Court's resolution of the issue.

III. THE SUPERIOR COURT PROPERLY CONSIDERED THE PRESENT CONFIGURATION OF INTERESTS IN ADDITION TO HISTORICAL CONTACTS.

A. Question Presented

Did the Superior Court correctly consider the present-day contacts of the various potentially interested jurisdictions, as well as their historical contacts?

B. Standard 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 the Argument

The Insurers' contention (O.B. 27) that the Superior Court should not even have "considered" the present-day contacts of the various jurisdictions with the instant coverage dispute contravenes the plain terms of §188, and the interest-based analysis it requires. Section 188 prescribes that the contacts to be considered in applying the "most significant relationship" test include "the domicil, residence, nationality, place of incorporation, and *place of business of the parties*." *Restatement* §188(e) (emphasis added). It was thus plainly appropriate for the Superior Court to consider the fact that Chemtura, the plaintiff below, is a Delaware corporation with principal places of business in Connecticut and Philadelphia in evaluating the Insurers' contention that New York supposedly had the most significant relationship to this coverage dispute.

As the Superior Court recognized, §188 further prescribes that the court must determine what state has "the most significant relationship" as to the particular "issue in contract" and the particular disputed "transaction." 2016 WL 3884018, at *2. This issue- and transaction-specific determination necessarily requires consideration of present circumstances, as well as historical connections.

Consistent with the *Restatement*'s express terms, Delaware courts have soundly rejected the argument that historical contacts are determinative. *Rhone-Poulenc* is instructive. In *Rhone-Poulenc*, the insured and its predecessor were Delaware corporations that maintained their principal places of business in New York at the time some of the policies at issue were placed, and in Connecticut during the time of placement of the remaining policies. The insurers were incorporated and conducted business in various jurisdictions, and their policies covered risks located in a number of domestic and foreign jurisdictions. 1992 Del. Super. LEXIS 571, at *7. The court rejected the insurer's argument that New York's historical connections to the parties and the policies gave that state a more significant relationship to the dispute than Delaware, the location of the insured environmental risk. The court observed that other states, including California, where the insured's predecessor was located when policies covering prior policy periods had been placed, also had historical connections. *Id.* at *7. Focusing on

the present facts and circumstances underpinning the coverage dispute, as the "most significant relationship" test requires, the court concluded:

> [I]t seems to make little sense to declare that New York has the most significant relationship to a contract of insurance between a Delaware corporation headquartered in Connecticut and insurers located in a variety of jurisdictions, covering risks likewise in a variety of jurisdictions and involving a loss in Delaware based on the insureds' manufacturing activity, in Delaware. In fact, New York's interest in such a situation must approach zero.

Id. at *12-13.[18]

The Superior Court would have erred if, in undertaking the interest-based analysis the Restatement requires, it had not weighed both the historical and current contacts of the potentially interested states in making its choice-of-law determination. In denying the Insurers' reargument motion, the court reconfirmed that it had considered all of the New York and other contacts, including:

> (1) Uniroyal, Inc.'s contacts with New York from 1952-1975; (2) Uniroyal, Inc.'s contacts with Connecticut from 1975-1986; (3) the incorporation of Uniroyal, Inc. affiliates in New Jersey; (4) Uniroyal, Inc.'s payment of certain premiums in Canada; (5) the location of several brokers in Canada; and the fact the Insurers are headquartered in London, England.

---

[18] *Accord Sensient Colors Inc. v. Allstate Ins. Co.*, 908 A.2d 826, 834-35 (N.J. App. Div. 2006), *aff'd*, 939 A.2d 767 (N.J. 2008) (New York's historical contacts with the policies and the parties did not establish the most significant relationship; "[a]lthough plaintiff's predecessor was incorporated in New York and the Zurich policies were negotiated and purchased from a New York broker, plaintiff's principal place of business is in Missouri and its headquarters are now located in New Jersey").

2016 WL 3884020, at *1-2. Based on this "diversity" of contacts, the Superior Court reaffirmed its ruling that Arkansas and Ohio has the paramount interest in resolution of the instant dispute, and this correct ruling should be affirmed. *Id.* at *2.

IV. THE SUPERIOR COURT PROPERLY CONSIDERED ARKANSAS ALLOCATION LAW AND CORRECTLY HELD THAT ARKANSAS FOLLOWS THE "ALL-SUMS" ALLOCATION METHOD.

A. Questions Presented

Did the Superior Court correctly determine that Arkansas would employ the "all-sums" allocation method in making its choice-of-law determination?

B. Standard and Scope of Review

A trial court's determination of the law from another jurisdiction is reviewed *de novo*. *Shook & Fletcher*, 909 A.2d at 128.

C. Merits of the Argument

1. The Superior Court Properly Considered Arkansas Allocation Law.

The Superior Court correctly considered Arkansas allocation law in making its choice-of-law determination. The Insurers acknowledge (O.B.31-32) that the ruling sought by the parties was "which state's law should apply." Their assertion that the Superior Court should not have addressed "what" Arkansas "law was" (O.B.31-34) ignores that a predicate for this ruling was a determination of whether there is any conflict between the law of the forum (Delaware) and those of other potentially interested states that could apply to the parties' allocation dispute. The Superior Court could make this threshold determination only by considering

Arkansas allocation law, as well as that of Delaware, Ohio, and New York, to determine whether a conflict existed.

2. The Superior Court Correctly Held that Arkansas Applies the "All Sums" Method of Allocation.

The Superior Court correctly held that the Arkansas Circuit Court's decision in *Murphy Oil USA, Inc. v. U.S. Fid. & Guar. Co.*, 9 Mealey's Litig. Reports: Insurance, No. 19 (Ark. Cir. Ct. Feb. 21,1995) (Ex. 1) represents a valid pronouncement of Arkansas law supporting the conclusion that Arkansas would employ the "all-sums" allocation methodology. The *Murphy Oil* court held that (1) any "triggered insurance policy must respond fully to that limit of liability" up to the policy's limits, and (2) "in the event that the facts establish that multiple insurance policies are triggered for [the underlying lawsuit, the insured] has the right, since there are no insurance policy provisions to the contrary, to select the policy or policies pursuant to which it should be indemnified." *Id.* at I-2. The court expressly based its conclusion on the policy language at issue – *i.e.*, the contractual promise to pay "all-sums" – as well as the absence of any policy provisions requiring a contrary result. *Id.* There accordingly is no merit to the Insurers' assertions that *Murphy Oil* "contains no reasoning" and fails to explain how an "all-sums" allocation would apply under Arkansas law.

Nor is the fact that *Murphy Oil* is a trial court decision a basis for ignoring it, as the Insurers would have this Court do. The Insurers have failed to adduce *any* Arkansas case law – let alone an Arkansas appellate court opinion – to the contrary. Nor have they provided any other basis for their insinuation that the Arkansas Supreme Court would ignore an unambiguous contractual promise to pay "all sums" and instead adopt a different allocation methodology.

The Insurers charge (O.B.34) that the Superior Court supposedly "consider[ed] itself bound" by *Murphy Oil*. But the Superior Court made clear in denying the Insurers' reargument motion that "there is a spectrum of precedential value in legal determinations," and that, in the absence of any contrary Arkansas precedent, it would have been improper to ignore or second-guess *Murphy Oil* "unless and until an Arkansas court decides otherwise." 2016 WL 3884020, at *2.[19] Numerous other Delaware decisions support this correct conclusion. *E.g.*, *Shook & Fletcher*, 2005 WL 2436193, at *7 (considering Alabama trial court opinion on trigger of coverage in predicting that an exposure trigger would apply under Arkansas law); *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2016 WL

[19] The Superior Court also aptly observed that ignoring *Murphy Oil* would raise comity concerns, reasoning that "no Delaware judge would take kindly to an Arkansas judge simply disregarding a Delaware ruling, regardless of the nature and stage of the proceedings." *Chemtura*, 2016 WL 3884020, at *2.

498848, at *2 (Del. Super. Jan. 22, 2016) (relying on Pennsylvania Court of Common Pleas decision that at the time was on appeal as representing "present state of the law in Pennsylvania" regarding trigger of coverage).[20]

The Superior Court also soundly rejected the Insurers' contention that it should have ordered additional briefing regarding Arkansas allocation law before issuing its choice-of-law opinion. 2016 WL 3884018, at *1-2. The Insurers unquestionably were aware that Chemtura sought a ruling regarding Arkansas (and Delaware and Ohio) allocation law, and had ample opportunity to, and in fact did, respond to Chemtura's arguments quite extensively, in three briefs and at oral argument (*see* A2034-2040 (61:21-67:5); A597 n.64; A510 n.51). Although the Insurers repeatedly contended that *Murphy Oil* was not a sufficient pronouncement of Arkansas law, it proffered no authority – from Arkansas or elsewhere – holding, or even suggesting, that Arkansas courts would rule differently the next time they

---

[20] The Insurers' contention (O.B.33-34) that the Superior Court erred in considering *Murphy Oil* because it was an unpublished decision also misses the mark. The Insurers rely on a previous version of Arkansas Supreme Court Rule 5-2, which had imposed certain restrictions regarding the publication of Arkansas *appellate* court – but not *trial* court – decisions. *See* A2078-82; Ark. Sup. Ct. R. 5-2. That rule, which no longer is in effect, has no bearing on whether Delaware courts may consider an unpublished Arkansas Circuit Court decision when attempting to determine how the Arkansas Supreme Court would rule on an issue, particularly where, as here, there are no other Arkansas decisions addressing allocation.

are asked to adjudicate Arkansas allocation law.[21]

[21] The Insurers' assertion that there could be nuances regarding the application of an "all-sums" allocation is irrelevant to whether Arkansas is an "all-sums" jurisdiction. In due course, the parties will have an opportunity to address precisely how Arkansas' "all-sums" methodology will apply to the particular losses at issue here.

CONCLUSION

For the foregoing above, Chemtura respectfully requests that the Court affirm the Superior Court's Order granting Plaintiff's Motion to Determine Applicable Law Regarding Allocation and denying Defendants' Cross-Motion for Choice-of-Law Determination.

OF COUNSEL:

Helen K. Michael (*Pro Hac Vice*)
Erica J. Dominitz
Virginia R. Duke
KILPATRICK TOWNSEND & STOCKTON LLP
607 14th Street NW, Suite 900
Washington, D.C. 20005-2018
Telephone: (202) 508-5800
Facsimile: (202) 508-5858
hmichael@kilpatricktownsend.com
edominitz@kilpatricktownsend.com

POTTER ANDERSON & CORROON LLP

/s/ David J. Baldwin
David J. Baldwin (No. 1010)
Ryan C. Cicoski (No. 5466)
Hercules Plaza - Sixth Floor
1313 North Market Street
Wilmington, DE 19801
Telephone: (302) 984-6000
Facsimile: (302) 658-1192
dbaldwin@potteranderson.com
rcicoski@potteranderson.com

Dated: October 27, 2016