ORDER PREPARED BY COURT

SYNGENTA CROP PROTECTION, INC. Plaintiff, v. INSURANCE COMPANY OF NORTH AMERICA, *et als.*, Defendants.	SUPERIOR COURT OF NEW JERSEY UNION COUNTY – CIVIL PART DOCKET NO. UNN-L-3230-08 ORDER September 2, 2015

FILED

SEP - 2 2015

KENNETH J. GRISPIN, P.J.Cv.

THIS MATTER being opened to the Court by the "Moving Insurers", as defined in the Statement Of Reasons attached, and the Court having read the moving and opposing papers and having heard oral argument on August 26, 2015 and for the reasons set forth in the Statement Of Reasons;

IT IS on this 2nd day of September, 2015,

ORDERED as follows:

1. The law of the State of New York shall apply at trial.

2. Moving Insurers' motion for Summary Judgment is **DENIED.**

KENNETH J. GRISPIN, P.J.Cv.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SYNGENTA CROP PROTECTION, INC. Plaintiff, v. INSURANCE COMPANY OF NORTH AMERICA, et als., Defendants.	SUPERIOR COURT OF NEW JERSEY UNION COUNTY – CIVIL PART DOCKET NO. UNN-L-3230-08 STATEMENT OF REASONS September 2, 2015

I. FACTUAL ALLEGATIONS

1. Introduction and Background

Before the Court is a Declaratory Judgment Action brought by Plaintiff Syngenta Crop Protection, Inc. ("Syngenta"), as alleged successor in interest to the U.S. agribusiness of Novartis Corporation ("Novartis") and its predecessors Ciba-Geigy Corporation ("Ciba-Geigy") and Geigy Chemical Corporation ("Geigy"). The complaint, filed on September 30, 2008, seeking coverage from over 100 general liability Insurers, whose policies span the years 1959-1986, for the product liability claims asserted against Syngenta and Syngenta AG—its parent company—in two underlying Illinois lawsuits which alleged damage to sanitary water supplies from contamination of those drinking water sources by Atrazine and/or Atrazine-containing products. See infra, Section I-2. In its Third Amended Complaint, Syngenta details the product liability claims pled against it in the underlying actions and relief sought for property damage allegedly arising out of the use of the purportedly defective product, Atrazine, and Atrazine-containing

herbicide products[1] manufactured and sold by Geigy, Ciba-Geigy, Novartis, and Syngenta. Syngenta asserts four causes of action, seeking declaratory judgment for the primary insurers' defense and indemnity obligations (First and Second Causes of Action) and the excess/umbrella insurers' indemnity obligations (Third Cause of Action) and asserting a claim for breach of contract against the primary insurers (Fourth Cause of Action).

All of the Defendants in this action issued and/or underwrote occurrence-based insurance policies that incept before 1986. Defendant Insurance Company of North America ("INA") was the only primary insurer named as a Defendant in this action. Based on the terms of a prior settlement release, the dispute between it and Syngenta was submitted to arbitration, and INA prevailed in that arbitration in or about late 2011. Thus, the remaining Defendant Insurers—or, here, "Moving Insurers"—wrote excess/umbrella, pre-1986 occurrence-based policies.

The "Moving Insurers" now move for Partial Summary Judgment on two different grounds: (1) asserting that the "pollution exclusion" [clause] appearing in policies issued between 1971-1985 and the "absolute pollution exclusion" [clause] appearing in policies issued between 1985-1986 are to be governed by New York substantive law, and (2) asserting that no coverage is owed to Syngenta under the policies containing the pollution exclusion or the absolute pollution exclusion in light of New York substantive law interpreting such exclusions and the lack of any disputed issues of material fact relevant to the applicability of the pollution exclusions. Collectively, the "Moving Insurers" are: Baloise Insurance Company, HDI-Gerling Industrie Versicherung AG, Haftpflicktverband der Deutschen Industrie V.a.G., Gerling-Konzern Allgemeine Versicherungs Atkiengesellschafts, Zurich American Insurance Company, Zurich International (Bermuda) Limited, Zurich Insurance Company, AXA Versicherung AG on

[1] The definition of Atrazine and its alleged byproducts and propensities are the subject of arguments by the parties, and are addressed by the Court infra, Section I-4.

itw own behalf and as successor of Colonia Versicherung Aktiengesellschaft, Swiss Reinsurance Company, Limited, European Reinsurance Company of Zurich, Limited f/k/a European General Reinsurance Company of Zurich, Westport Insurance Company f/k/a Puritan Insurance Company, for itself and as successor of Manhattan Fire and Marine Insurance Company, Switzerland General Insurance Company, Continental Casualty Company, The Continental Insurance Company as successor by merger to The Fidelity & Casualty Company of New York, The Continental Insurance Company as successor by merger to certain policies issued by Harbor Insurance Company a/k/a Greenwich Insurance Company, and One Beacon Insurance Company f/k/a Employers' Liability Assurance Corporation, Limited.

2. The Underlying Actions

Syngenta seeks a declaration of coverage for two underlying product liability lawsuits: (1) Holiday Shores Sanitary Dist. v. Syngenta Crop Protection, Inc. et ano., No. 04-L-710 (Ill. Cit. Ct., 3d Cir., Madison Cnty.) ("Holiday Shores"), and (2) City of Greenville v. Syngenta Crop Protection, Inc. et ano., No. 10-CV-00188 (S.D. Ill.) ("City of Greenville") (collectively, the "Underlying Actions").

In Holiday Shores, a putative class comprised of similarly situated sanitary water districts and water authorities in Illinois filed an action against Syngenta and Growmark, Inc. in Illinois State Court, Madison County. The litigation sought damages relating to the cost to remove Atrazine from the water supply through various methods, including granular activated carbon filtration systems. The plaintiffs alleged that Atrazine—manufactured and sold by Syngenta and or its alleged predecessors and distributed by Growmark, Inc.—once released into the environment, entered the water supply through run-off. The plaintiffs further alleged that ingestion of Atrazine and its degradant chemicals in any concentration could cause cancer and

reproductive problems in humans, necessitating its removal from the water supply. Further, the plaintiffs alleged that Syngenta knew that when Atrazine and Atrazine-containing products were "applied and used for their intended purpose, [Atrazine] would invade [p]laintiffs' property and contaminate their waters" causing "severe and permanent damage to their properties" and contamination of their water supply. The plaintiffs asserted various causes of action, including negligence, trespass, nuisance, and strict liability.

In City of Greenville, a putative class comprised of sanitary water districts across multiple states, including Illinois, Missouri, Kansas, Indiana, Ohio, and Iowa, with the plurality located in Illinois, filed an action in the United States District Court for the Southern District of Illinois against Syngenta and its parent, Syngenta AG. Similar to the plaintiffs in Holiday Shores, the plaintiffs in City of Greenville asserted causes of action that included negligence, trespass, nuisance, and strict liability, and sought recovery of costs incurred or to be incurred by class members to remove Atrazine from their drinking water supply. Further, the plaintiffs sought costs for additional testing and monitoring of the water supply.

The Underlying Actions were resolved by way of a nationwide class settlement agreement approved by the United States District Court for the Southern District of Illinois on October 23, 2012. Pursuant to the settlement agreement, Syngenta paid $105 million in settlement of the claims asserted against it in the Underlying Actions. The settlement class included every community water system in the United States that could submit acceptable proof of any detection of Atrazine as of a certain date. In return for payment, Syngenta received an irrevocable covenant not to sue, granting it release for all future property damage and economic loss claims arising out of any damage from Atrazine over the ten years following the settlement. Thus, every settling water district class member is subject to the release and covenant not to sue.

The settlement agreement also provided a release to the five other Atrazine manufacturer defendants in companion cases to the Holiday Shores action, specifically: Sipcam, Drexel, United Agri Products, Dow, and Makhteshim-Agan—none of which contributed to the $105 million settlement fund.

Following settlement, Syngenta recouped approximately $4.2 million from the other Atrazine manufacturing defendants, which it applied as a credit against the $105 million settlement, for a total indemnity demand of $100.08 million. Syngenta also recouped approximately $23 million from its post-1986 insurers that are not part of this Declaratory Judgment action. Syngenta also seeks approximately $73 million in defense costs allegedly incurred in connection with the defense of the Underlying Actions. In addition, the settlement agreement provides that the "U.S. District Court for the Southern District of Illinois shall have and retain jurisdiction over . . . any and all matters arising out of, or related to, the interpretation or implementation of this Agreement," and further provides that it was to "be governed by and construed in accordance with the laws of the State of Illinois."

After the settlement was approved, 1,085 community water systems submitted proofs of claim that were accepted by the court-appointed administrator and received payments under the settlement. Of the $105 million settlement amount paid by Syngenta, $64,227,136 was paid to the claimants, and the remaining funds were paid to the plaintiffs' class counsel, the settlement administrator, and for other court-approved expenses. Claimants were not required to utilize the settlement proceeds to treat, remove, and/or monitor their water supplies for Atrazine. Monies were paid out to claimant water districts in more than forty (40) states, with the top ten claimants receiving approximately sixty (60) percent of the settlement monies. The 143 Illinois claimants received the highest percentage—totaling $15,056,241, or 23.4% of all monies paid.

3. Prior Action Between the Parties and Related Decisions by the Court

Ciba-Geigy previously sued the Moving Insurers and/or their predecessors and other insurers in Union County, New Jersey, in a declaratory judgment action to enforce liability insurance coverage under the same policies at issue in this litigation, and others, for losses in connection with environmental liabilities, including liabilities under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq. (CERCLA). The liabilities arose out of alleged groundwater contamination from the disposal of allegedly hazardous industrial waste at over one hundred (100) sites in thirty (30) states.

In that litigation, Ciba-Geigy Corp. v. Liberty Mut. Ins. Co., et al., Docket No. L-97515-87 (N.J. Super. Ct. Law Div. 1987) ("Liberty Mutual"),[2] the late Honorable Lawrence Weiss, J.S.C. was required to determine the applicable law for interpretation of the pollution exclusions in the insurance policies. Judge Weiss held that "the law of the state where the site is located" would govern the interpretation of the pollution exclusions. Judge Weiss also denied reconsideration on the same issue. The trial decision held that the pollution exclusions were inapplicable to Ciba-Geigy's claims, and awarded judgment to Ciba-Geigy. The parties in Liberty Mutual thereafter settled their claims and executed settlement agreements..

In July 2011, certain Defendant Insurers moved for summary judgment, contending that the claims at issue in the Underlying Actions were released as part of the settlement in Liberty Mutual. Syngenta opposed those motions and cross-moved for partial summary judgment, arguing that the Underlying Actions involved product liability claims, not environmental claims and, therefore, fell within the "carve-out" in the Liberty Mutual settlement agreements.

[2] Consolidated for discovery with similar actions under the caption In re Envtl. Ins. Declaratory Judgment Actions, Docket No. UNN-L-573-89 (N.J. Super. Ct. Law Div. 1987).

Specifically, the settlement agreements had released coverage for "environmental claims," as defined therein, but preserved, by way of a "carve-out," coverage for product liability claims.

On April 20, 2012, this Court issued an Order and accompanying Statement of Reasons holding that the claims in the Underlying Actions were product liability claims and that the term "environmental claims" in the settlement releases was intended by the parties to the settlement agreements to be "limited to claims involving the disposal of hazardous waste." The Court found that the "carve[-]out for product liability claims would . . . be null if the release were meant to include any claim with an environment-related liability." While the Court found that the claims in the Underlying Actions are product liability claims, it recognized that claims relating to Atrazine are inherently environmental in nature. Specifically:

> [h]erbicide products such as Atrazine are inherently environmental in nature due to their function and use. The use of such a product affects the environment and becomes environmental. Accordingly, a court would be hard pressed to encounter cases where the circumstances surrounding the use of such a product were not considered "environmental."

On September 24, 2013, the Court issued another Order and accompanying Statement of Reasons pertaining to Syngenta's motion for summary judgment requesting that the remaining Defendants' affirmative defenses of prior release be struck. Except as to Defendants who were permitted to withdraw the affirmative defense, the Court granted Syngenta's motion. The Court again found that "[i]f all claims were intended to fall within the definition of Environmental Claims just because of its environmental nature, no carve[-] out provision would have been included in the Environmental Settlement Agreement, and it would be a nullity."

4. Atrazine and its Byproducts and Propensities

a. General Definitions and Background

Atrazine is a synthetic, triazine-selective herbicide developed, patented, and registered for use by Geigy in the United States in 1958. It is designed to inhibit pre- and post-emergence

broadleaf and grassy weeds, and is particularly effective at controlling weeds associated with corn and sorghum crops. When applied as intended and directed, Atrazine works to inhibit the growth of weeds, allowing the crop to go unabated. Syngenta, as the purported successor in interest to Geigy, manufactures and sells Atrazine and Atrazine-containing products in the United States. Upon expiration of Geigy's patent on Atrazine in 1976, other companies began manufacturing and selling Atrazine-containing products in the United States. For approximately the past forty (40) years, Syngenta has been only one of several companies selling Atrazine.

Herbicides and pesticides, including Atrazine and Atrazine-containing products, must undergo regulatory review in order for their registration, including the details of its label, to be permitted for distribution in the United States. The United States' regulatory standards governing Atrazine have changed over the years. In 1991, the United States Environmental Protection Agency (EPA) set a Maximum Contaminant Level for Atrazine in drinking water of 3 parts per billion ("ppb"). The EPA is currently reviewing Atrazine pursuant to FIFRA § 3(g), which requires the agency to review each registered pesticide every fifteen (15) years. The EPA has not, to date, recommended Atrazine's ban in the United States.

b. Disputes Over Atrazine and its Byproducts and Propensities

According to the Moving Insurers, both the EPA and Geigy have acknowledged Atrazine's "pollutant" and "contaminant" propensities. As to Geigy, the Moving Insurers assert that Geigy's own researchers focused on Atrazine degradation and groundwater protection, resulting in various research studies and reports that confirm these propensities. The Moving Insurers point to a November 17, 1971 study entitled "Metabolism of s-Triazine Herbicides," which explored degradation and run-off issues. This 1971 study purportedly addressed the "major concern about these herbicides, [including Atrazine,] in terms of the environment" by

studying the rate and pathways of their degradation in soils. The Moving Insurers also point to a January 1991 study entitled "Atrazine Update: A Briefing Paper on Atrazine Groundwater Protection and Toxicological Risk Evaluation," which allegedly explored steps needed to protect against Atrazine contamination.

The Moving Insurers aver that due to the environmental concerns addressed in these and similar studies, and with the oversight of the EPA, Ciba-Geigy in the early 1990s revised its labels and material safety data sheets for Atrazine and Atrazine-containing products. Specifically, according to the Moving Insurers, the labels were revised to include environmental hazard warnings and increased water protections from Atrazine run-off. In fact, according to the Moving Insurers, the labels were revised to state that the product is a "restricted use herbicide due to ground water surface concerns." The labels purportedly contain further disclaimers and use restrictions to "minimize the potential for Atrazine to reach ground and surface water" under the heading "Precautionary Statements, Environmental Hazards," which reads as follows:

> Atrazine can travel (seep or leach) through soil and can enter ground water which may be used as drinking water. Atrazine has been found in ground water. Users are advised not to apply Atrazine to sand and loamy sand soils where the water table (ground water) is close to the surface and where these soils are very permeable, i.e., well-drained . . . .
>
> This product may not be mixed or loaded within 50 ft. of intermittent streams or rivers, natural or impounded lakes and reservoirs . . . .
>
> Do not apply directly to water, to areas where surface water is present, or to intertidal areas below the mean high water mark. Do not apply when weather conditions favor drift from treated areas. Runoff and drift from treated areas may be hazardous to aquatic organisms in neighboring areas. Do not contaminate water when disposing of equipment wash waters.

The Moving Insurers also assert that while Atrazine remains in use in the United States, concerns about its residues in drinking water have led to more aggressive restrictions and bans internationally—specifically, a 2004 ban by the European Union allegedly due to "persistent concerns about groundwater contamination."

Syngenta, by contrast, avers that Atrazine has been regulated and approved by federal and state authorities in the United States since it was introduced into the market, and continues to be so to date. According to Syngenta, at the federal level, the United States Department of Agriculture regulated Atrazine until the early 1970s, at which point, the then-created EPA assumed responsibility for its regulation. Syngenta avers that Atrazine is regulated to date by the federal government and state governments for use on farmlands throughout the United States, and further, the EPA states on their website that "cumulative exposures to [Atrazine] through food and drinking water are safe" and that "the levels of [A]trazine . . . that Americans are exposed to in their food and drinking water, combined, are below the level that would potentially cause health effects." According to Syngenta, this finding by the EPA is contrary to the Moving Insurers' argument that the EPA considers Atrazine to have "pollutant" or "contaminant" propensities. Moreover, Syngenta disputes that the EPA is "reviewing [A]trazine because of potential harm to humans or the environment." Indeed, as noted above, the EPA's current review of Atrazine is pursuant to FIFRA § 3(g), which requires the EPA to review each registered pesticide every fifteen (15) years.

Syngenta also takes issue with the Moving Insurers' reference to the alleged 1971 and 1991 studies. For example, Syngenta disputes that it internally acknowledged any "pollutant" or "contaminant" propensities for Atrazine. Specifically as to the 1971 study set forth by the Moving Insurers, Syngenta asserts that the study states "runoff . . . will not be dealt with in this review," and goes on to argue that the Moving Insurers' references are taken out of context. As to the Moving Insurers' argument that the 1971 study addressed concerns about Atrazine "in terms of the environment," Syngenta avers that the full quotation provides:

> Since residual trazines or their breakdown products in soils do not represent a hazard to other soil life, animals or man, our major concern about these herbicides in terms of the environment has centered around the rate and pathways of their degradation in soils.

Syngenta likewise disputes the characterization of the 1991 study as exploring steps needed to "protect against [A]trazine contamination."

As to the revision of Ciba-Geigy's labels in the 1990s, Syngenta avers that it did indeed revise its labels and material data safety sheets for Atrazine and Atrazine-containing products, but disputes that any such revisions were due to "concerns" about Atrazine or that the EPA exercised any oversight of any such revisions. Syngenta reiterates that all pesticide and herbicide labeling is subject to agency review. See, e.g., 40 C.F.R. § 156.10(a)(6). As to the banning of Atrazine by the European Union (EU), Syngenta disputes that the EU "banned the use of [A]trazine because of persistent concerns about groundwater contamination." Instead, according to Syngenta, the action taken by the EU in 2004 was tied to a general groundwater limit of 0.1 ppb for all pesticides and herbicides, and was not taken "because of any specific toxicological reasons but because [the EU] was concerned that residues in groundwater might exceed its nominal limit of 0.1 ppb."

5. Disputes Regarding the Specific Policies at Issue in this Matter

The Moving Insurers assert that Syngenta has placed over $1.3 billion in excess policy limits at issue in the DJ Action. However, according to the Moving Insurers, Syngenta is not identified in any of the historic, pre-1986 liability policies at issue as a named insured because Syngenta did not come into existence until the year 2000, after the expiration date of the last policy at issue in the DJ Action. According to the Moving Insurers, Syngenta seeks coverage under the policies at issue based upon its alleged status as the successor in interest to Ciba-Geigy's Atrazine-related business.

The Moving Insurers aver that the pre-1986 insurance program at issue in the DJ Action is unique because it primarily consisted of insurance policies, tailor-made by Ciba-Geigy's insurance broker, Marsh & McLennan, Inc. ("Marsh"), to account for the specific liability risks of its client, Ciba-Geigy. The industry term for these types of policies is "manuscript" policies. The Moving Insurers aver that they were part of the manuscript policy-based program, and issued several different policies. The Moving Insurers assert that in each of the manuscript excess/umbrella policies issued to Ciba-Geigy by the Moving Insurers, the following form of "qualified" pollution exclusion was included:

> It is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release, or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape if sudden and accidental.

The Moving Insurers assert that as to the manuscript policies in effect from 1985-1986, the following form of "absolute" pollution exclusion was included:

> It is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.

The Moving Insurers aver that at the time the policies were issued, Ciba-Geigy and/or its predecessors were New York corporations headquartered in Ardsley, New York, and the policies were delivered to them in New York. Moreover, according to the Moving Insurers, Marsh served Ciba-Geigy through its New York office such that the policies were brokered, negotiated, and delivered in New York. They note that because of the unique nature of the manuscript policies, Marsh served an important role in brokering the policies from and in New York.[3]

[3] After April 1, 1986, Ciba-Geigy's manuscript program switched from an occurrence-based program to a claims-made program. The insurers that comprise the post-1986 claims-made program are not parties to the DJ Action.

Syngenta notes that the above exclusions differ, in that the "absolute" pollution exclusion does not include the so-called "sudden and accidental" exception: the phrase "but this exclusion does not apply if such discharge, release or escape is sudden and accidental."

Syngenta heavily disputes the extent to which the policies retain connections to New York, and the Moving Insurers' arguments in this regard. According to Syngenta, although the Moving Insurers point to New York as the place of contracting because Ciba-Geigy's headquarters and Marsh's headquarters were located in New York when the policies were issued, the policies were underwritten and negotiated in various jurisdictions, including but not limited to: Switzerland, Germany, Bermuda, Massachusetts, and New York. Syngenta asserts that the Moving Insurers themselves were located in and thus signed the policies in six different jurisdictions: Switzerland, Germany, California, Bermuda, Connecticut, and Massachusetts. It avers that none of the Moving Insurers were or are currently located in New York, and further avers that Marsh and other brokers used in connection with the policies were located in both Switzerland and New York. Syngenta notes that the fourteen (14) other insurers or insurer groups that have joined the Moving Insurers' motion (the "Joining Insurers") were located in a variety of jurisdictions at the time their policies were issued, and therefore, the underwriting and negotiations for these policies may well have taken place in any number of jurisdictions.

Syngenta also argues that there is substantial documentary evidence in this matter that Ciba-Geigy's insurers knew or should have known that the company they were insuring was a major chemical company that sold its products nationwide and had multiple operating locations around the country involved in the manufacture and sale of agrichemical products, including Atrazine—one of the company's biggest-selling products. Syngenta argues that the Moving Insurers knew or should have known that they were insuring risks in multiple states other than

New York. Syngenta notes that Ciba-Geigy's insurance applications and questionnaires, as well as other underwriting materials produced in this litigation, explained that Ciba-Geigy manufactured and sold agrichemical products, that the company's annual sales of agrichemical products totaled in the hundreds of millions of dollars, that Ciba-Geigy's agricultural division was based in North Carolina, and that the company's major operations were located in various sites, including Illinois.

Syngenta points to a report from Marsh, describing Ciba-Geigy's business operations as of 1978 as stating:

> The Agricultural Division's primary business is the development, production and sale of a wide range of pesticides and hybrid seeds for sale to commercial farmers. The Division's herbicidal (i.e., weed killing) products account for about 67% of the Division's sales. Of these, the most important is [A]trazine (sold mainly under the Company's trademark "AAtrexR"), principally for use on corn.

(emphasis supplied).

Syngenta takes further issue with various assertions by the Moving Insurers. For example, Syngenta does not dispute that the name "Syngenta Crop" does not appear in the pre-1986 policies, it asserts that it was previously known as Novartis Crop, which was incorporated in 1996. It also avers that it seeks coverage in the DJ Action for policies as the successor-in-interest to the rights of not only Ciba-Geigy, but also to Novartis and Geigy.

II. MOVING INSURERS' ARGUMENTS IN SUPPORT OF THEIR MOTION

1. Choice of Law

In support of their motion for summary judgment, the Moving Insurers first aver that as New Jersey is the forum of the present DJ Action, its choice of law principles govern what state's substantive law applies. Erny v. Estate of Merola, 171 N.J. 86, 94 (2002). In this instance, the Moving Insurers argue that New Jersey choice of law principles dictate that New York state

substantive law governs the dispute because, most significantly, New York was the place of contracting.

According to the Moving Insurers, if there is a conflict in the potentially applicable substantive law, and that conflict involves contract interpretation, New Jersey courts have traditionally relied on the law of the place of contracting because it comports with the reasonable expectations of the parties, unless another state has a more significant interest in the issue. State Farm Mut. Auto Ins. Co. v. Estate of Simmons, 84 N.J. 28, 37 (1980). This principle has been extended to actions seeking insurance coverage for a product liability claim. N.L. Indus., Inc. v. Comm. Union Ins. Co., 65 F.3d 314, 322 (3d Cir. 1995). The Moving Insurers aver that in determining which state has the more significant interest in a dispute, courts should consider the following factors: (1) the competing interests of the states, (2) the interests of commerce among the states, (3) the interests of the parties, and (4) the interests of judicial administration. Id. at 320. Further, although "domicile, residence, nationality, place of incorporation[,] place of business of the parties, and the places of contracting and performance" are relevant to which state's interests are paramount, the Moving Insurers assert that typically, the law of the location of the principal insured risk should govern unless another state's interests are more significant. Ibid.; see also Century Indem. Co. v. Mine Safety Appliances Co., 398 N.J. Super. 422, 437 (App. Div. 2008).

The Moving Insurers note that Syngenta has described the Underlying Actions as sounding in product liability; specifically, that the Underlying Actions involved allegations that Atrazine, Atrazine-containing products, and their degradant compounds caused damage to the drinking water of various community water districts in the Midwest. The degradant compounds were allegedly introduced into the environment after Atrazine and Atrazine-containing products

were sold to farmers and utilized for their intended purpose as herbicides. The Moving Insurers note that because the underlying claims for property damage are alleged to arise out of the intended use of Atrazine and Atrazine-containing products after these products were no longer in the possession of Syngenta, Syngenta has characterized these claims as product liability claims. As such, according to the Moving Insurers, the law of the place of contracting applies to this matter, as it is a product liability-based insurance coverage dispute. N.L. Indus., supra, 65 F.3d at 320-23; Diamond Shamrock Chems. Co. v. Aetna Cas. & Sur. Co., 258 N.J. Super. 167, 218 (App. Div 1992).

The Moving Insurers rely heavily upon N.L. Indus., supra, and aver that in that matter, claimants from various states alleged personal injuries as the result of the use of lead paint containing lead pigment manufactured by the defendant, N.L. Industries. 65 F.3d at 317. The claimants alleged that N.L. Industries knew about the harm posed by the lead paint and "affirmatively misrepresented the safety, sustainability and qualities of lead paint through [its] advertisements and promotional activities." Ibid. The district court was asked to determine the coverage obligations, if any, of N.L. Industries' insurers. Ibid. In conducting this analysis, the court held that New York substantive law applied to the coverage dispute because—despite having operations in multiple locations across the country—N.L. Industries' principal place of business was New York and the policies had been negotiated and delivered in New York, resulting in the conclusion that the parties' reasonable expectations must have been that New York substantive law would control. Ibid.

The Moving Insurers assert that N.L. Industries is similar to this matter, because the Underlying Actions involve allegations that Syngenta misrepresented and/or concealed the dangerous propensities of Atrazine and/or Atrazine-containing products which, when applied by

farmers, would run-off into the water supply and contaminate it. Therefore, the Moving Insurers argue that any conflict of laws analysis should be subject to the choice of law principles enunciated in Simmons, supra, and N.L. Industries, supra.

Next, the Moving Insurers argue that a conflict of law exists between the laws of the potentially applicable jurisdictions. To that end, the Moving Insurers note that before undertaking a choice of law analysis, the Court must determine whether there is a true conflict between the potentially applicable substantive laws of the states with an interest in the DJ Action. The Moving Insurers also note that the parties have different positions on this issue, with the Moving Insurers asserting that New York law applies and Syngenta asserting that Illinois law applies.

The Moving Insurers argue that New York and Illinois interpret differently the scope of the pollution exclusion language in the policies at issue here. For example, the Moving Insurers point out that with respect to the sudden and accidental exception to the pollution exclusion, New York courts apply a temporal component to the term "sudden," and deem it to mean abrupt, whereas Illinois courts interpret the term "sudden" to mean "unexpected or intended" and to not have a temporal component. Compare Northville Indus. Corp. v. Nat'l Union Fire Ins. Co., 89 N.Y.2d 621, 631 (1997) with Outboard Marine Corp. v. Liberty Mut. Ins. Co., 154 Ill.2d 90, 125 (1992) (emphasis supplied). Moreover, according to the Moving Insurers, in Space v. Farm Family Mut. Ins. Co., 235 A.D.2d 797 (N.Y. 3d Dep't 1997), New York's intermediate appellate court held that fertilizer—even when put to its intended use—is a "pollutant" within a pollution exclusion similar to the pollution exclusions at issue in this DJ Action. The Moving Insurers contrast Space, supra, with Am. States Ins. Co. v. Koloms, 687 N.E.2d 72 (Ill. 1997), where the Illinois Supreme Court purportedly sought to limit the scope of the absolute pollution exclusion

to traditional environmental contamination. The Moving Insurers thus argue that because a conflict exists between New York and Illinois substantive law as it relates to this dispute, a choice of law analysis is necessary to resolve which state's substantive law is to apply.

In support of the Moving Insurers' argument that New York law is to apply, they assert that New York is the place of contracting. According to the Moving Insurers, the place of contracting is determined based on where the policies were brokered, negotiated, delivered, and executed. N.L. Indus., supra, 65 F.3d at 320 n.4. The Moving Insurers assert that a review of the policies in this DJ Action issued from 1971-1985 makes clear that New York was the place of contracting. To that end, the Moving Insurers aver that the policies were brokered by Marsh through its offices in New York, Ciba-Geigy was a New York corporation at the time of the policies' issuance, and Ciba-Geigy's address was "444 Saw Mill River Road, Ardsley, [New York] 10502." Therefore, according to the Moving Insurers, the policies—referenced as the "10502" policies after the Ardsley zip code—were negotiated and delivered to Syngenta's alleged predecessors-in-interest at its corporate headquarters. The Moving Insurers argue that under these facts, New Jersey's choice of law principles compel a finding that New York law, as the place of contracting, governs this action unless another state's interests are paramount—which, of course, the Moving Insurers dispute.

As Syngenta's position is that to the extent there is a conflict of law, Illinois substantive law is to apply, as it retains the highest level of interest in this matter, the Moving Insurers aver that the Court should turn to the factors set forth in § 193 of the Restatement (Second) of Conflicts of Laws as enunciated in Pfizer, Inc. v. Employers Ins. of Wausau, 154 N.J. 187, 194-98 (1998) to determine if Illinois' interest overcomes the presumption in favor of application of New York law. The Moving Insurers reiterate that the applicable factors are (1) the competing

interests of the states, (2) the interests of commerce among the states, (3) the interests of the parties, and (4) the interests of judicial administration. Ibid.

As to the first factor, the Moving Insurers argue that New York's interests trump Illinois' interests. The Moving Insurers aver Illinois' interests relate to the fact that the community water districts at issue in Holiday Shores and some of the districts at issue in City of Greenville are located in Illinois. However, all of the claimants have been fully compensated. Therefore, according to the Moving Insurers, both the claimants and their states of residence, including Illinois, have been adequately protected and no longer retain an interest in this matter. See Moper Transp., Inc. v. Norbet Trucking Corp., 399 N.J. Super. 146, 157 (App. Div.), certif. denied, 196 N.J. 462-63 (2008). Addressing the second factor, the Moving Insurers assert that Illinois' claimants received less than 13% of the settlement monies. Thus, the Moving Insurers argue that as more than 85% of the allocated settlement funds were paid to water districts in states other than Illinois, it would frustrate the interests of interstate commerce if Illinois' interest was afforded greater importance.

By contrast, the Moving Insurers argue that New York, as the place of contracting, has significant interests in dispute. They aver that New York's public policy interests favor application of its laws to the interpretation of the policies, reiterating their assertion that the policies were brokered, issued, and delivered in New York, and also that former N.Y. Ins. Law § 46 dictated the inclusion of pollution exclusions in all policies in New York on or after September 1, 1971. The Moving Insurers argue that these facts demonstrate that New York has the preeminent interest in, and public policy against, insuring pollution, which should guide this Court's choice of law analysis. Technicon Elecs. Corp. v. Am. Home. Assur. Co., 74 N.Y.2d 66, 76 (1989). The Moving Insurers likewise argue that the interests of interstate commerce and

predictability, that the law of the place of contracting governs, are satisfied by application of New York law here.

As to the third factor, the Moving insurers argue that based on the place of contracting, both Syngenta, as the alleged successor-in-interest to New York corporations, and the Moving Insurers had a reasonable expectation that New York law would apply to the policies. The Moving Insurers assert that although the Underlying Actions were filed in Illinois, the mere selection by the underlying plaintiffs of Illinois as a forum does not overcome the fact that the proposed class in City of Greenville was national and the water districts that received monies under the settlement of the actions were located in more than forty (40) different states. In addition, according to the Moving Insurers, Syngenta has no significant connection to Illinois other than being sued there. Thus, the Moving Insurers argue that the third factor favors New York law.

Finally, as to the fourth factor, the Moving Insurers aver that as the connections between this coverage dispute and New Jersey consist simply of the forum, there is no difference in convenience or burden for the Court to apply Illinois or New York substantive law, and this factor does not weigh in favor of or against the application of the law of either state. In sum, then, the Moving Insurers argue that a plurality of the factors weighs in favor of New York law under New Jersey's choice of law principles, and the Court should so find.

2. Application of Choice of Law to the Pollution Exclusions Appearing in the Policies

Flowing from the Moving Insurers' argument that New York substantive law is to apply to this dispute, they next argue that under New York law, the pollution exclusions appearing in the policies apply to preclude coverage for the claims asserted against Syngenta in the Underlying Actions. They aver that in New York, "contracts of insurance, like other contracts,

are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous the terms are to be taken and understood in their plain, ordinary and proper sense." In re Estates of Covert, 97 N.Y. 2d 68, 76 (2001). An "insurer is entitled to have its contract of insurance enforced in accordance with its provisions and without a construction contrary to its express terms." Bretton v. Mut. Of Omaha Ins. Co., 110 A.D.2d 46, 49 (N.Y. 1st Dep't 1985). The Moving Insurers assert that although a court will typically construe the terms of an exclusion narrowly, a court must apply the plain and ordinary meaning of terms and "no matter how well intentioned, cannot create policy terms by implication ro rewrite an insurance contract." Id. at 49. Against these principles, the Moving Insurers address the interpretation of the pollution exclusion appearing in the 1971-1985 policies and the absolute pollution exclusion appearing in the 1985-1986 policies.

The excess/umbrella policies issued to Ciba-Geigy include the following form of pollution exclusion:

> It is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release, or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape if sudden and accidental.

In addition, the Moving Insurers reiterate that under former N.Y. Ins. Law § 46, all policies issued in New York between September 1, 1971 and 1982 were deemed to include the pollution exclusion. The Moving Insurers assert that a New York court considering whether this version of the pollution exclusion precludes coverage for a particular claim will undertake a two-step analysis: (1) does the exclusion apply, i.e.: does the alleged property damage arise out of the discharge of contaminants or pollutants, and (2) does the exception to the exclusion save coverage for the insured, i.e.: was the discharge sudden and accidental. See, Technicon, supra, 74

N.Y.2d at 71. Based on this analysis, the Moving Insurers argue that the pollution exclusion appearing in the 1971-1985 policies bars coverage for the claims asserted against Syngenta in the Underlying Actions.

The Moving Insurers cite Space, supra, and reiterate that in that matter, New York's intermediate appellate court held that a fertilizer applied to a farmland in accordance with its intended use is a "pollutant" such that it falls within the exclusionary language of a pollution exclusion similar to the one at issue here. 235 A.D. 2d at 798. The Moving Insurers list the facts of Space as follows

> [T]he insured operated a farm on which it applied liquid manure as fertilizer. The insured had secured a liability insurance policy for its operations that contained a pollution exclusion precluding coverage for liabilities arising out of the dispersal of contaminants or pollutants. The insured was sued by an adjoining landowner who complained that the fertilizer contaminated his well water. The insurer disclaimed coverage for the suit. The insured initiated a coverage action and contended that the fertilizer was purposefully and beneficially applied to its land and, as a result, should not be deemed a pollutant or contaminant as those terms are used in the pollution exclusion. The Appellate Division disagreed, holding that the fertilizer is properly classified as a pollutant or contaminant when "the substance has leached into the groundwater and contaminated a well on adjoining property." [Id.] at 798.

From this, the Moving Insurers argue that the court held that the pollution exclusion applied to preclude coverage for the insured because there was a "discharge, dispersal, release or escape" (leaching) of a "pollutant" (fertilizer) into the environment.

The Moving Insurers aver that other courts in New York have similarly held that the introduction of materials into the environment—even if the materials were intentionally deposited for a beneficial use—warrant classification of the materials as "pollutants" for purposes of the pollution exclusion. Specifically, they point to Cannon Const. Co., Inc. v. Liberty Mut. Ins. Co. 227 A.D.2d 364 (N.Y. 2d Dep't 1996). In Cannon, the New York Appellate Division, Second Department was asked to consider whether the insured was entitled to coverage

for cleanup costs incurred to cure damage to property and wildlife as a result of the application of liquid asphalt that subsequently dispersed into a nearby water body. The Cannon court held that "where the insured's oil-like asphalt sealant contaminated the waters and wildlife of the Manhasset Creek upon its discharge, the sealant constituted a pollutant within the definition of the terms in the policy." Id. at 365. See also Hudson River Fishermen's Ass'n v. City of New York, 751 F. Supp. 1088, 1101-02 (S.D.N.Y. 1990), aff'd, 940 F.2d 649 (2d Cir. 1991); Tri Cnty. Serv. Co. v. Nationwide Mut. Ins. Co., 873 S.W.2d 719, 721-22 (Tex. Ct. App. 4th Dist. 1993).

Next, the Moving Insurers argue that New York courts have further held that the pollution exclusion is applicable in the context of product liability claims when the product is "placed into the environment." Continental Cas. Co. v. Rapid-American Corp., 80 N.Y.2d 640, 654 (1993). The facts are asserted as follows:

> Rapid American involved personal injury claims by workers allegedly exposed to asbestos fibers during their work with asbestos products. Finding that asbestos is an "irritant, contaminant or pollutant," the Rapid-American court turned its attention to the additional terms of the pollution exclusion that, like the exclusions at issue herein, required the "discharge, dispersal, release or escape" of a pollutant "into or upon land, the atmosphere or any water course of body of water." [Id.] at 647, 653. Given the language of the exclusion, the Rapid-American court found that the exclusion is, by its plain terms, meant to preclude coverage for environmental pollution. Id. at 653-54.

As such, according to the Moving Insurers, the court held that whether claims fall within the purview of the pollution exclusion depended not on "whether the asbestos products were launched into the stream of commerce or remained under the control of the manufacturer, but rather whether asbestos was placed into the environment." Id. at 654.

Based on the cited case law and pollution exclusions in the policies, the Moving Insurers argue that the claims at issue in the Underlying Actions fall squarely within the exclusion. The Moving Insurers ask the Court to look at the claims pled in the Underlying Action and the terms

of the exclusion to determine whether the claims involve the discharge, dispersal, release or escape of a pollutant into or upon land, the atmosphere, or a body of water. They submit that such an analysis will result in a finding that the Underlying Actions allege a "discharge, dispersal release or escape," i.e.: run-off and/or leaching, of a "pollutant" or "contaminant," i.e. Atrazine, into or upon a body of water, resulting in property damage, and that therefore, the claims are precluded by the pollution exclusion.

The Moving Insurers likewise assert that the "sudden and accidental" exception to the exclusion does not save Syngenta's coverage claim from preclusion. The Moving Insurers argue that the interpretation of the sudden and accidental exception is well-settled under New York law. Northville Indus. Corp. v. Nat'l Union Fire Ins. Co., 89 N.Y.2d 621, 631 (N.Y. 1997). In Northville, the New York Court of Appeals held that the word "sudden" as used in the exclusion has a temporal component. Ibid. The Court reasoned that to interpret "sudden" to mean "accidental" would render the phrase redundant. Id. at 632. Further, the Court held that the term "accidental" means to preclude "any intentional discharge of a pollutant from qualifying for that exception." Id. at 631. Therefore, according to the Moving Insurers, if the dispersal of a pollutant or contaminant is not both sudden—meaning abrupt—and accidental—meaning unintentional—the pollution exclusion precludes coverage and the exception is inapplicable.

The Moving Insurers next argue that if, as here, an insurer demonstrates that a claim falls within the purview of a pollution exclusion, the burden of proof shifts to the insured to show that the discharge was sudden and accidental. Id. at 634. The Moving Insurers argue that Syngenta cannot meet this burden of proving that the run-off of Atrazine into the water supply was both sudden and accidental as interpreted by New York law. See Ogden Corp. v. Travelers Indemn. Co., 924 F.2d 39, 42 (2d Cir. 1991) (emphasis supplied). This is so, according to the Moving

Insurers, because Syngenta has not alleged—nor can it—that the contamination of the water supply was "sudden" so as to invoke the exception to the exclusion. Rather, the Moving Insurers aver that the decades-long timeframe over which Atrazine and Atrazine-containing products was applied and allegedly ran off into the water supplies of the underlying plaintiffs and Syngenta's knowledge of Atratine's propensity to contaminate the water supply demonstrate that the "sudden" exception to the exclusion does not apply. Moreover, the Moving Insurers argue that Atrazine's propensity to run off into the sanitary water supply was well-documented and understood by Syngenta long before the Underlying Actions were filed, which precludes a finding that the "discharge, dispersal, escape or release" was "accidental." Thus, the Moving Insurers argue that the Court must enter summary judgment in their favor as a matter of law.

Next, as to the absolute pollution exclusion appearing in the 1985-1986 policies, the language is as follows:

> It is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.

The Moving Insurers assert that the absolute pollution exclusion does not contain the "sudden and accidental" exception, and that New York courts have held that such exclusions are unambiguous, and broad in scope and application. See Bruckner Realty, LLC v. Cnty. Oil., Inc., 816 N.Y.S.2d 694 (Sup. Ct. 2006), aff'd sub nom. 40 A.D.3d 898 (N.Y. 2d Dep't 2007); Town of Harrison v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 89 N.Y.2d 308, 316 (1996). They aver that the absolute pollution exclusion precludes coverage for the underlying claims.

The Moving Insurers reiterate their aforementioned arguments, and likewise argue that as to the absolute pollution exclusion, the analysis turns on whether Atrazine and Atrazine-containing products qualify as an "irritant, contaminant or pollutant," and whether its application

constitutes a "discharge, dispersal, release or escape." They point to various cases in which the release of oil, petroleum, and an "oil-like asphalt sealant," though otherwise serving a beneficial use prior to its release, was found to qualify as a release of a "pollutant" under absolute pollution exclusions. Cannon, supra, 258 A.D.2d at 365; Tartan Oil Corp. v. Clark, 258 A.D.2d 457 (N.Y. 2d Dep't 1999); State v. Capital Mut. Ins. Co., 213 A.D.2d 888 (N.Y. 3d Dep't 1995). To that end, they argue that here, Atrazine and Atrazine-containing products were used as intended, and as a result, the products were placed into the environment—converting Atrazine and Atrazine-containing products from useful products to "pollutants" for purposes of the pollution exclusion. Rapid-American, supra, 80 N.Y.2d at 654.

The Moving Insurers accordingly cite Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) and its progeny, and argue that as no material facts are in dispute, the Court should find in their favor as a matter of law.

II. SYNGENTA'S ARGUMENTS IN OPPOSITION TO THE MOVING INSURERS' MOTION

1. Choice of Law

At the outset, while Syngenta agrees with the general proposition averred by the Moving Insurers as to when to apply choice of law principles, it argues that there is no true conflict of law with regard to the threshold issues of whether Atrazine is a "pollutant" within the meaning of the pollution exclusions and whether the exclusions apply to product liability claims. In the alternative, or to the extent that there is a conflict, Syngenta argues that Illinois substantive law applies to this dispute.

Syngenta avers that an actual conflict would exist only if the court were first to determine the threshold issues in favor of applicability, i.e., finding that the pollution exclusion clauses unambiguously encompass Atrazine as a "pollutant," and the product liability claims at issue. In

such a scenario, according to Syngenta, a conflict would exist as to the "sudden and accidental" exception to the qualified pollution exclusion because New York law is unfavorable to policyholders for coverage for liability arising from pollution or alleged pollution occurring gradually over the years, whereas Illinois law is more favorable to policyholders. Thus, to the extent that the Court determines there to be an actual conflict of law, Syngenta argues that the Court should apply Illinois law to the interpretation of the pollution exclusions.

Syngenta agrees with the Moving Insurers that New Jersey courts follow the Restatement (Second) of Conflict of Laws in regard to the choice of law applicable to the interpretation of an insurance agreement, Gilbert Spruance Co. v. Pa. Mfrs. Ins. Co., 134 N.J. 96, 102 (1993), which reads in pertinent part:

> The validity of a contract of fire, surety or casual 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 states in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Conflicts of Laws § 193. The Moving Insurers aver that where, as here, the insured's business is "predictably multistate," the choice of law analysis focuses on the state interest factors described in Section 6. N.L. Indus., Inc. v. Comm. Union Ins. Co., 154 F.3d 155, 157-58 (3d Cir. 1998) ("N.L. Indus. II"). Syngenta and the Moving Insurers agree that the factors in Pfizer, supra, are applicable to this matter. However, Syngenta argues further that "in environmental cases, the location of the site carries very substantial weight in the 'significant relationship' analysis, typically adequate to overcome the contacts of the place of contracting." N.L. Indus., 65 F.3d at 321.

Pivoting to its argument that Illinois law should govern under the Pfizer factors, Syngenta reiterates its position that Illinois carries the most significant relationship to the issue raised by

the Moving Insurers. As to the first factor, Syngenta argues that Illinois' contacts with this action are "qualitatively and economically predominant" in comparison to those of New York or any other state. Sensient Colors, Inc. v. Allstate Ins. Co., 388 N.J. Super. 374, 388 (App. Div. 2006), aff'd 193 N.J. 373 (2008). Syngenta argues that Illinois is the principal site of the alleged contamination and the state in which liability would have been imposed had the plaintiffs prevailed at trial, and thus, has a "paramount interest in the remediation" of the alleged contamination which "extends to assuring that casualty insurance companies fairly recognize the legal liabilities of their insureds." Johnson Matthey Inc. v. Pa. Mfrs.' Ass'n Inc. Co., 250 N.J. Super. 51, 57 (App. Div. 1991). Syngenta argues that this interest outweighs the interest of New York, the alleged place of contracting.

Syngenta next lists facts which it asserts shows Illinois' substantial interest in this matter:

- The Holiday Shores action was filed and litigated in Illinois Circuit Court in Madison County, Illinois.
- The City of Greenville action was filed and litigated in the United States District Court for the Southern District of Illinois.
- The Illinois federal court approved the settlement agreement resolving the underlying actions and retained jurisdiction over the agreement
- The settlement agreement expressly provides that it is to be governed by Illinois law.
- All of the allegedly contaminated plaintiff Community Water Systems in Holiday Shores were located in Illinois.
- A plurality of the allegedly contaminated plaintiff Community Water Systems in City of Greenville were located in Illinois.
- The 143 Illinois claimants received the largest percentage of the $64,227,136 paid to Community Water Systems under the settlement: $15,056,241, or 23.4 percent.[4]

[4] Syngenta argues that the Moving Insurers' claim that Illinois Community Water Systems received less than thirteen (13) percent of the settlement monies is due to their failure to account for approximately $41 million in attorneys' fees and administrative costs" taken off the top" before distribution to the class.

- Of the twenty-five (25) highest paid claimants, ten (10) were Illinois Community Water Systems.

Syngenta likewise argues that by submitting claims and receiving payments under a settlement agreement governed by Illinois law and over which the Illinois federal court retained jurisdiction, all of the class claimants—including the Community Water Systems located outside of Illinois—"purposefully availed [themselves] of the benefits and protections of [the] laws" of Illinois, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 482 (1985), expecting that any disputes regarding the availability of funds to compensate them for Atrazine detects would be governed by Illinois law. In sum, Syngenta argues that Illinois has a paramount interest in having its laws apply to determine who should bear the cost associated with the claimants' injury.

Syngenta disputes the Moving Insurers' argument that Illinois no longer has an interest in this dispute because "all of the claimants have been compensated" and therefore "both the claimants and their states of residence . . . have been adequately protected." Syngenta asserts that the Supreme Court of New Jersey rejected this line of reasoning, and explained that interest analysis is not locked in time to the date of compensation for an alleged injury because a state's public policy interest in addressing environmental contamination within its borders "remains equally strong regardless of who conducts and incurs the costs of remediation and when." Sensient Colors, supra, 388 N.J. Super. at 385; Unisys Corp. v. Ins. Co. of N. Am., 154 N.J. 217 (1998). Syngenta argues that in this matter, Illinois' interest in addressing the alleged harm within its borders "extends to assuring that indemnification agreements allocating financial responsibility are effectively enforced." Sensient Colors, supra, 388 N.J. Super. at 385. Therefore, according to Syngenta, the Moving Insurers cannot reasonably dispute Illinois' continuing compelling interest.

Syngenta next addresses New York's interest, which it argues is minimal. To that end, Syngenta avers that only two New York claimants received funds, totaling $10,534 or .0164 percent (i.e.: less than two hundredths of one percent) of the $64,227,136 paid to claimants. Syngenta avers that Illinois claimants received 1,429 times more money than New York claimants. Syngenta also takes issue with the Moving Insurers' argument with respect to N.Y. Ins. L. § 46, which Syngenta notes was repealed in 1982, and argues does not establish New York's present interest in determining whether "a non-New York company should recover from non-New York insurance companies for non-New York losses." In addition, according to Syngenta, the Supreme Court of New Jersey in Unisys, supra, rejected the argument that the inclusion of pollution exclusions in all policies in a state shows the state's public policy against insuring pollution; Syngenta argues that such an application would "frustrate Illinois' interests." 154 N.J. at 221.

As to factor two, Syngenta asserts that that factor likewise weighs in favor of Illinois and against New York. Syngenta argues that like the Pfizer court, which found that if New York law were applied to determine coverage with respect to a site in another state and that state's law was in conflict with the law of New York, the interests of that state would be "hindered" by the application of New York law's broader interpretation of the pollution exclusion, so too is the case here.

As to factor three, Syngenta reiterates that because its business was "predictably multistate," with nationwide business, all parties must have expected that liability could arise anywhere in the country and that the law applicable would be that of the place where liability was imposed—here, Illinois. Syngenta notes that per Pfizer, supra, "in absence of a choice-of-law provision in the contract, a policyholder would expect that it would be indemnified under the

law in effect at the place where liability is imposed." Id. at 203. As there are no choice of law provisions in the policies here, Syngenta asserts that neither Ciba-Geigy nor the Moving Insurers could have reasonably expected that all policy interpretations in all situations would be governed by the law of any one state. Rather, Syngenta argues that they must have understood that the language contained in the policies would "expand[] and contract[] to afford adequate coverage to [the] insured under the substantive law of each state." Johnson Matthey, Inc. v. Pa. Mfrs.' Ass'n Ins. Co., 250 N.J. Super. 51, 57 (App. Div. 1991). At the time the policies were issued, Ciba-Geigy's Atrazine products were being and had been sold throughout the country, predominantly in the Midwest. Syngenta notes significantly that per Pfizer, supra, "[p]redictability appears to be a minor virtue in view of the willingness of insurers to issue multi-site policies that will be subject to the unpredictable substantive law of many states fixing the liabilities of their insureds." 154 N.J. at 202-03. Thus, Syngenta asserts that the insurers subjected themselves to the substantive laws of the various states in which liabilities might arise.

As to factor four, Syngenta agrees with the Moving Insurers that this factor neither weighs for or against either side's position, but argues in sum that the plurality of the factors weigh in favor of applying Illinois law.

Syngenta next argues that applying the law of the place of contracting would be inappropriate, because under New Jersey law, courts refuse to apply the law of the state of contracting in insurance coverage actions when—as here—the alleged injury predominantly occurred outside the place of contracting. See, e.g., CSR Ltd. v. Cigna Corp., 95-CV-2947, 2005 WL 3132188, at *16 (D.N.J. Nov. 21, 2005); HM Holdings, Inc. v. Aetna Cas. & Sur. Co., 154 N.J. 208, 215 (1998). This is so, according to Syngenta, because the pollution exclusion is typically invoked in cases involving harms similar to the one here, though Syngenta admits that

such harms typically involve traditional environmental pollution and not product liability. Syngenta avers that the Moving Insurer's argument that the place of contracting should apply "unless another state has a more significant interest" actually compels the application of Illinois law per its aforementioned arguments. Further, according to Syngenta, cases such as this one, where there are allegations of environmental contamination, the location of the site carries substantial weight in the interest balancing analysis. N.L. Indus., supra, 65 F.3d at 321. Syngenta maintains this position even though cases like Pfizer and the previous action between the parties involves hazardous waste disposal and not products used in the stream of commerce because the alleged harms are "sufficiently similar" to compel this result. Syngenta argues that the Moving Insurers agreed with this exact position in the previous action, arguing there "that the entire purpose of the [City of Greenville case] is consistent with a traditional environmental claim."

Next, Syngenta argues that choosing the place of contracting would not yield a uniform choice of law and would be pointless, due to the various locations in which the Moving Insurers' policies were negotiated and/or countersigned. That is—the policies were located in and thus signed the policies in six different jurisdictions, and none of the Moving Insurers was or is located in New York. The brokers used in connection with the issuance of the policies were located in Switzerland and New York. The underwriting of and negotiations with respect to the policies took place in at least five jurisdictions. Syngenta avers that from this, the suggestion that New York was the exclusive place of contracting ignores these facts.

Moreover, according to Syngenta, it would be a "pointless exercise" to choose a uniform place of contracting here because it tells nothing "about the insurance transaction[s] involved." Johnson Matthey, supra, 250 N.J. Super. at 60. This is so, according to Syngenta, because at bottom, the Moving Insurers should have known at the time of contracting that Ciba-Geigy's

Atrazine products were sold and used nationwide, that the company had various locations across the country, and that they were therefore insuring risks throughout the United States.

2. Whether or Not the Pollution Exclusions are Applicable

Syngenta next argues that the Moving Insurers cannot satisfy the threshold burden of proving the exclusions apply to the dispute in this matter, which is theirs to bear under both New York and Illinois law. Ins. Corp. of Hanover v. Shelborne Assocs., 905 N.E.2d 976, 982 (Ill. Ct. App. 2009); Dean v. Tower Ins. Co. of N.Y., 979 N.E.2d 1143, 1145 (N.Y. 2012). Syngenta avers that both New York and Illinois courts narrowly construe exclusionary provisions in insurance policies in favor of the insured. Burton v. Gov't Emps. Ins. Co., 482 N.E.2d 233, 235 (Ill. Ct. App. 1985); Belt Painting Corp. v. TIG Ins. Co., 795 N.E.2d 14, 17 (N.Y. 2003). To that end, Syngenta asserts that the Moving Insurers cannot meet their burden because they cannot unambiguously show that Atrazine was a "pollutant" within the meaning of the exclusions.

Syngenta avers that the pollution exclusions "use a string of words enumerating things that could constitute pollutants . . . [b]ut just because a substance might literally be encompassed in one of these words does not make it a pollutant subject to the exclusion." Syngenta asserts that this overbroad definition led courts in Illinois and New York to find it ambiguous and unreasonable as written. See Koloms, supra, 795 N.E.2d at 79; Belt Painting Corp., supra, 795 N.E.2d at 20. For example, Syngenta points to Erie Ins. Exch. v. Imperial Marble Corp., 957 N.E.2d 1214 (Ill. Ct. App. 2011), appeal denied, 963 N.E.2d 245 (Ill. 2012), and states that in that case, the insured sought coverage for claims arising from air pollution allegedly caused by chemical emissions generated in the normal course of business. The insurer asserted that the claims were precluded by its policy's pollution exclusion, while the insured argued that its emissions did "not qualify as hazardous or pollutants when dispersed in amounts in compliance

with [its] permit" granted by the Illinois Environmental Protection Agency (IEPA). Finding that the pollution exclusion was ambiguous as to "whether the emission of hazardous materials in levels permitted by an IEPA permit" constituted pollution excluded by the policy, the court denied the insurer's motion for summary judgment. Id. at 221. Syngenta argues that Erie Ins. Exch. is on all fours with this case, where all the activities leading to the underlying claims were expressly permitted and approved by federal and state governmental authorities. See also, Belt Painting Corp., supra, 795 N.E.2d at 20; Netherlands Ins. Co. v. Pindar Vineyards, LLC, No. 21430/06, 2014 WL 4383039 (N.Y. Sup. Ct. Aug. 6, 2014).

Syngenta argues that the Moving Insurers' New York cases similarly do not support the argument that Atrazine is or was unambiguously a "pollutant" within the meaning of the pollution exclusions. Further, only one of the cited cases involved an agricultural substance, Space, supra, and in that matter, the substance at issue—liquefied cow manure—was by definition a "waste material" and the pollution exclusion was a customized provision pertaining to fertilizers. 235 A.D.2d at 797-99. Here, by contrast, Syngenta argues that Atrazine is not a waste product, it was not actively applied by the insured, and the exclusions in the policies do not express or indicate any intent to encompass Atrazine, other herbicides or other chemical products, despite their obvious significance to Ciba-Geigy's business. Therefore, Syngenta asserts that Space has no bearing on issues here.

Syngenta next addresses the Moving Insurer's reference to two regulatory actions to bolster their argument that Atrazine is a pollutant or contaminant. Syngenta argues that the actions—the 2004 "ban on Atrazine and the EPA's promulgation in 1991 of a "maximum contaminant level" applicable to Atrazine—are not given proper context. As to the first action, Syngenta avers that the 2004 action of the European Commission (the "EC") was neither a ban

nor a science-based decision concerning Atrazine, but rather was the result of an EC directive that applied to all plant protection products, not just Atrazine. Syngenta asserts that no country has ever discontinued the use of Atrazine based on health effects. Second, with respect to the setting of a maximum contaminant level, Syngenta avers that under the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f et seq., the EPA established such levels in drinking water since 1974, but did not set one for Atrazine until 1991. Syngenta asserts that this action, taken years after the policy periods at issue, does not support the Moving Insurers' arguments. Rather, Syngenta points out that the SDWA defines "contaminant" as "any physical, chemical, biological, or radiological substance or matter in water" without reference to a substance's potential toxicity, and the level for any substance reflects a level at which there are "no known or anticipated adverse effects on the health of persons." Id. at § 300f(6); 56 Fed. Reg. 3526 at 2530.

In addition, Syngenta asserts that the EPA has expressly "concluded that cumulative exposures to [Atrazine[through food and drinking water are safe," and that "the levels of Atrazine . . . that Americans are exposed to in their food and drinking water, combined, are below the level that would potentially cause health effects." Likewise, Syngenta disputes wholesale that Syngenta itself, or its predecessors, considered Atrazine a pollutant or contaminant.

Next, Syngenta argues that the Moving Insurers cannot establish that the pollution exclusions apply to the product liability claims at issue here, as the exclusions were intended to apply only to traditional environmental pollution not product liability claims. Syngenta notes that "by the insurance industry's own admissions, the pollution exclusions do not apply to liabilities arising from the policyholder's products: industry publications and statements repeatedly emphasize that product liability claims do not fall within the exclusions . . ." Syngenta points to

various cases throughout the country and publications by the insurance industry to that effect. Syngenta also notes that the Supreme Court of Illinois recognizes that the pollution exclusions only bar coverage for "traditional" pollution, citing Koloms, supra, 687 N.E.2d at 81 and its progeny.

Syngenta disputes the Moving Insurers' argument that New York courts have held the pollution exclusion is applicable in the context of product liability claims when the product is placed into the environment. Specifically, Syngenta disputes the case cited in support thereof, Continental Casualty Co., supra, 609 N.E.2d at 506, and argues that there, the court did not address the applicability of the pollution exclusions to products liability claims, but rather denied the insurer's motion for summary judgment on the basis that the exclusion was "ambiguous with regard to whether the [products] . . . were discharged into the 'atmosphere' as contemplated by the exclusion." Syngenta avers that this holding did not overrule the lower court's decision that the exclusion is inapplicable to product liability claims, nor did it contradict the Appellate Division's earlier holding that the exclusion was designed to apply only to an "actual corporate polluter." See Continental Cas. Co. v. Rapid-American Corp., 177 A.D.2d 61, 69 (N.Y. App. Div. 1992); Autotronix Sys. Inc. v. Aetna Life & Cas., 89 A.D.2d 401, 403-04 (N.Y. App. Div. 1982).

Syngenta next takes the position that applying the exclusions to the underlying claims would render Ciba-Geigy's product liability coverage illusory, defeating the very purpose of the insurance. Syngenta notes that Illinois and New York law hold that when interpreting policy exclusions, courts must consider the nature of the policy at issue so as not to frustrate the purpose of the coverage of the insured. See, e.g., Dora Twp. v. Indiana Ins. Co., 400 N.E.2d 921, 922 (Ill. 1980); Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co., 314 N.E.2d 37, 39 (N.Y. 1974). Syngenta

cites to numerous cases for examples of this principle, and asserts that here, Ciba-Geigy purchased comprehensive liability coverage from the Moving Insurers to protect itself from liability arising from its central business activities. It argues that the policies explicitly provide for coverage for product liability for Ciba-Geigy's chemical products, many of which were agrichemical products that were environmental in nature. Most significantly, Syngenta asserts that had the Moving Insurers intended their policies to exclude coverage for liabilities arising from the use of Atrazine, one of Ciba-Geigy's main products, they would and should have insisted on specific language to that effect, as they did with respect to "(1) Birth Control Drugs or Devices; (2) DES; (3) Swine Flu Vaccination; (4) Asbestos; and (5) Urea Formaldehyde." Syngenta argues that their failure to do so supports the conclusion that Ciba-Geigy reasonably expected coverage for such claims.

3. Application of Choice of Law to the Pollution Exclusions Appearing in the Policies

Next, in the alternative, Syngenta argues that if the Court does find the Moving Insurers have met their burden with respect to threshold applicability of the exclusions, the exclusions would still not bar coverage unless and until it could be determined that the "sudden and accidental" exception does not apply. Under Illinois law, Syngenta avers that this depends on the resolution of a question of material fact, to be determined at trial, and precludes summary judgment. See Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204 (Ill. 1992). Syngenta notes that the majority of policies here include this language, though it agrees with the Moving Insurers that the meaning of "sudden and accidental" has a different interpretation under New York law vis-à-vis Illinois law. Under Illinois law, Syngenta agrees the term "sudden" means unexpected and unintended by the insured, while New York follows a temporal approach. To this end, Syngenta argues that critically, courts in Illinois look to what the policyholder knew

or expected at the time of the policy and the conduct at issue, not at what the policyholder subsequently knows or expects with the benefit of hindsight. Id. at 1222. Therefore, Syngenta asserts that there has been no testimony or evidence that Syngenta or its predecessors expected or intended the release of a toxic pollutant, precluding summary judgment here.

Again, arguing alternatively, Syngenta asserts that the pollution exclusions do not apply to the "personal injury" claims of nuisance and trespass under Illinois law because the policies contain a "follow-form" or "broad-as-primary" endorsement, which has the effect of "obligat[ing] the excess or umbrella insurer to pay for any loss within the scope of the primary policy, despite applicable exclusions in the excess or umbrella policy." Ameron Int'l Corp. v. Ins. Co. of State of Pa., 60 Cal Rptr. 3d 55, 83 (Cal Ct. App. 2007). In other words, according to Syngenta, the excess insurers "agreed to be bound by the terms of the underlying primary policy, notwithstanding any more restrictive terms in the excess policy." McDonald's Corp. v. Am. Motorists Ins. Co., 748 N.E.2d 771, 774 (Ill. App. Ct. 2001).

Syngenta argues that the underlying claims qualify as "personal injury" claims because the plaintiffs in the Underlying Actions asserted claims for nuisance and trespass, both of which constitute claims for "personal injury" within the meaning of policies that define "personal injury" to include "wrongful entry or eviction, or other invasion of the right of private occupancy;" coverage for such claims is therefore not barred by exclusions that do not, on their face, apply to "personal injury." Syngenta cites to several example cases where courts applying Illinois law rejected application of an exclusion to nuisance and trespass claims, finding them to be considered "personal injury" claims, and argues that this matter can be no different. See, e.g., Millers Mut. Ins. Ass'n of Ill. v. Graham Oil Co., 668 N.E.2d 223 (Ill. App. Ct. 1996).

III. DISCUSSION

1. Summary Judgment Standard

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46–2(c).

When determining whether there is a genuine issue of material fact, the court must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

2. Choice of Law

In this matter, a choice of law analysis is appropriate because the parties' dispute centers around two different states—Illinois and New York—which differ in their interpretation of the scope of the pollution exclusion language in the governing policies. The Court must first determine whether an actual conflict exists by examining the substance of the potentially applicable laws with an eye towards whether a distinction exists between them. Grossman v. Club Med Sales, Inc., 273 N.J. Super. 42 (App. Div. 1994).

In this matter, an actual conflict exists. At its crux is the fact that with respect to the "sudden and accidental" exception to the pollution exclusion, New York courts apply a temporal component to the term "sudden," and deem it to mean abrupt, whereas Illinois courts interpret the term "sudden" to mean "unexpected or intended" and to not have a temporal component. Compare Northville Indus. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 679 N.E.2d 1044 (1997); Technicon Elecs. Corp. v. Am. Home Assur. Co., 542 N.E.2d 1048 (1989) (holding that

"discharges that are either nonsudden or nonaccidental block the exception from nullifying the pollution exclusion"); Borg-Warner Corp. v. Ins. Co. of N. Am., 174 A.D.2d 24 (App. Div. 3d Dep't 1992) ("Thus, for a release or discharge to be 'sudden' within the meaning of the pollution exclusion, it must occur abruptly or quickly or 'over a short period of time.'" (citations omitted)) with Tribune Co. v. Allstate Ins. Co., 2003 Ill. App. LEXIS 1669, *41 (Ill. App. Ct. 1st Dist. Aug. 11, 2003) (holding that under Illinois law, " 'sudden' mean[s] 'unexpected or unintended' . . . [t]hus . . . the term 'sudden' in the policy here adds nothing. For coverage, [a plaintiff] need show only that an unintended and unexpected happening caused the pollution.") (quoting Outboard Marine Corp. v. Liberty Mut. Ins. Co., 154 Ill.2d 90, 125 (1992)).

Thus, the Court must determine which state's substantive law to apply to the matter. In State Farm Mut. Auto. Ins. Co. v. Estate of Simmons, 84 N.J. 28, 36-37 (1980) ("Simmons"), the Supreme Court of New Jersey "rejected the mechanical and inflexible lex loci contractus [law of the place where the contract is made] rule in resolving conflict-of-law issues in liability insurance contracts," as it later explained in Gilbert Spruance Co. v. Pa. Mfrs. Ass'n Ins. Co., 134 N.J. 96 (1993) ("Gilbert"). Since Simmons, "[New Jersey] courts have adopted a more flexible approach that focuses on the state that has the most significant connections with the parties and the transaction." Gilbert, supra, 134 N.J. at 102 (citation omitted). Gilbert explained that approach, known as the "most significant relationship" test in the Restatement (Second) of Conflicts of Laws (1971) ("Restatement"), as follows:

> [In Simmons, w]e held that because the law of the place of contract "generally comport[s] with the reasonable expectations of the parties concerning the principal situs of the insured risk," . . . that forum's law should be applied "unless the dominant and significant relationship of another state to the parties and the underlying issue dictates that this basic rule should yield." . . . In making that determination, courts should rely on the factors and contacts set forth in Restatement sections 6 and 188.

Ibid. (citing Simmons, supra, 84 N.J. at 37).

Simmons emphasized the importance of considering the parties' expectations regarding the principal location of the insured risk as the rationale for looking to the place of contracting. However, it also recognized that "this choice-of-law rule should not be given controlling or dispositive effect." Simmons, supra, 84 N.J. at 37. That is, "[i]t should not be applied without a full comparison of the significant relationship of each state with the parties and the transaction." Ibid. Moreover, "[t]hat assessment should encompass an evaluation of important state contacts as well as a consideration of the state policies affected by, and governmental interest in, the outcome of the controversy." Ibid.

Though Simmons stopped short of adopting the Restatement expressly, Gilbert and a series of later Appellate Division cases made clear that "the 'most significant relationship' standard of the Restatement" provides the applicable choice-of-law framework in New Jersey courts. N.J. Mfrs. Ins. Co. v. MacVicar, 307 N.J. Super. 507, 512 (App. Div. 1998) (describing Gilbert as "emphasizing again that[,] with respect to insurance contracts, the law of the place understood by the parties to be the principal location of the risk controls unless some other state has a more significant relationship"). See also Canal Ins. v. F.W. Clukey Trucking, 295 N.J. Super. 131 (App. Div. 1996); Hertz Claim Mgmt. v. Marchetta, 281 N.J. Super. 190 (App. Div. 1995); Chalef v. Ryerson, 277 N.J. Super. 22 (App. Div. 1994); Pittston Co. v. Allianz Ins. Co., 795 F. Supp. 678, 683 (D.N.J. 1992) (collecting cases and explaining that "New Jersey Appellate Division decisions have made clear that the Restatement's 'most significant relationship' test is the law of New Jersey").

Under the Restatement approach, "the general rule in contract actions is that the law of the state with the most significant relationship to the parties and the transaction under the principles stated in Restatement section 6 governs." Gilbert, supra, 134 N.J. at 102 (citing

Restatement § 188). In determining which state has the most significant relationship, § 188 instructs courts to evaluate each state's contacts, "according to their relative importance," such as the place of contracting and performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties. Restatement § 188(2). Section 6 of the Restatement instructs courts to consider the following factors: "(a) the needs of the interstate and international systems, (b) the relevant polices of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the 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." Restatement § 6; see also Gilbert, supra, 134 N.J. at 103; Simmons, supra, 84 N.J. at 34. Put more succinctly, the relevant factors as enunciated by the Supreme Court, are "(1) the competing interests of the relevant states; (2) the interests of commerce among the states; (3) the interests of the parties; and (4) the interests of judicial administration." Pfizer, Inc. v. Emplrs. Ins. of Wausau, 154 N.J. 187, 189 (1998).[5]

The Court thus turns to applying the analysis to this matter. At the outset, it should be reiterated that the law of the place of contract should be applied "unless the dominant and

[5] In Sensient Colors, Inc. v. Allstate Ins. Co., 193 N.J. 373 (2008), the Court employed the choice-of-law analysis set forth in the later cases of Pfizer, supra, 154 N.J. at 205, HM Holdings, Inc. v. Aetna Cas. & Surety Co., 154 N.J. 208, 215 (1998), Unisys Corp. v. Ins. Co. of N. Am., 154 N.J. 217, 223 (1998), and Gilbert, supra, 134 N.J. 96, 97-98, which adopted a site-specific approach pursuant to the principles of Restatement § 193, to find New Jersey's interpretation of the standard pollution exclusion to be applicable to the coverage issue before it as the result of New Jersey's strong interest in achieving waste cleanup in this State and adequate funding for that enterprise. Sensient, supra, 193 N.J. at 396. However, that interest is inapplicable here, and as the Supreme Court has recognized, Restatement § 193 "may not be readily transferable from environmental-coverage cases to products-liability cases." Pfizer, supra, 154 N.J. at 195 n.3. Indeed, when the "subject matter of the insurance is an operation or activity" and when "that operation or activity is predictably multistate, the significance of the principal location of the insured risk diminishes . . . ." Lonza, Inc. v. The Hartford Acc. and Indem. Co., 359 N.J. Super. 333, 346 (App. Div. 2003) (citing Gilbert, supra, 254 N.J. Super. at 50). In such situations, the governing law is that of the state with the dominant significant relationship according to the principles set forth in Restatement § 6. Ibid.

significant relationship of another state to the parties and the underlying issue dictates that this basic rule should yield," Gilbert, supra, 134 N.J. at 102. Syngenta avers that it is unclear whether New York or some other jurisdiction is the true place of contracting for purposes of these clauses. According to Syngenta, the policies were underwritten and negotiated in various jurisdictions, including but not limited to: Switzerland, Germany, Bermuda, Massachusetts, and New York. Moreover, the Moving Insurers themselves were located in and thus signed the policies in six different jurisdictions: Switzerland, Germany, California, Bermuda, Connecticut, and Massachusetts. Likewise, none of the Moving Insurers were or are currently located in New York, and further avers that Marsh and other brokers used in connection with the policies were located in both Switzerland and New York. Finally, the Joining Insurers were located in a variety of jurisdictions at the time their policies were issued, and therefore, the underwriting and negotiations for these policies may well have taken place in any number of jurisdictions. In sum, Syngenta argues that New York cannot be the place of contracting.

However, Syngenta does concede that its predecessors were incorporated and had their headquarters in New York at the time the policies were issued. Syngenta likewise concedes that Marsh's headquarters were located in New York, and that Marsh serviced Syngenta's predecessors through its New York office, such that the policies were brokered and delivered in New York. Taken together, this is sufficient for the Court to conclude that New York is the place of contracting. NL Indus. v. Comm. Union Ins. Co., 65 F.3d 314, 320 (3d Cir. 1995) ("If a company from another state uses an insurance broker to negotiate and purchase its insurance policies, then the place of contracting is the place where **the broker** negotiated the policies.") (citing Diamond Shamrock Chems. Co. v. Aetna Cas. & Sur. Co., 258 N.J. Super. 167 (App. Div. 1992). See also Polar Int'l Brokerage Corp. v. Investors Ins. Co. of Am., 967 F. Supp. 135,

141 (D.N.J. 1997 (same). Thus, the Court will continue its analysis with the premise that barring a more significant interest from another state—i.e., Illinois—New York law will apply, as it is the place of contracting. Gilbert, supra, 134 N.J. at 102.

Under the Restatement, in determining which state has the most significant relationship, § 188 instructs courts to look to other factors, such as the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties. Restatement § 188(2). Under these factors, the Court finds that the "location of the subject matter of the contract" weighs neither in favor of the application of Illinois law nor New York law, as the insured here—Syngenta and its purported predecessors—had a national (in fact, internatonal) business with products being placed into the stream of commerce in numerous states. Likewise, while some of the places of incorporation and places of business of the parties are in New York, others are in various states and countries, which at best weighs in favor of New York and at worst weighs neither for nor against any one state.

Turning then to the Section 6, or Pfizer factors, the Court will address each in turn. As to the competing interests of the New York and Illinois, this factor requires the Court

> to consider whether application of a competing state's law under the circumstances of the case "will advance the policies that the law was intended to promote." The "law" can be either the decisional or statutory law of a state. The focus of this inquiry should be on "what [policies] the legislature or court intended to protect by having that law apply to wholly domestic concerns, and then, whether those concerns will be furthered by applying that law to the multi-state situation." This is another way of saying that "[i]f a state's contacts [with the transaction] are not related to the policies underlying its law, then that state does not possess an interest in having its law apply. Consequently, the qualitative, not the quantitative, nature of a state's contacts ultimately determines whether its law should apply." . . .

Pfizer, supra, 154 N.J. at 198. (internal citations omitted). Here, the interests Syngenta asserts weigh in favor of Illinois law applying to this dispute are clearly quantitative and not qualitative. (emphasis added). For example, Syngenta notes that the Illinois claimants in the underlying

action received the largest percentage paid to Community Water Systems under the settlement, and that of the 25 highest claimants, 10 were from Illinois. These facts, while showing some connection between Illinois and the current dispute, fail to adequately show that Illinois possesses an interest in having its law apply—at least as opposed to any of the myriad of other states in which the other claimants resided.

Syngenta likewise asserts that Illinois has a "paramount interest in the remediation" of the alleged contamination, citing Johnson Matthey, supra, 250 N.J. Super. at 57—but this is not compelling, because as the Moving Insurers point out, the Settlement Agreement for the Underlying Actions allows Syngenta to stay the course, and the Community Water Supplies are not mandated under the terms of the agreement to remediate any purported environmental contamination. Likewise, the Court gleans that at no time during the underlying suits did the federal or Illinois government seek to intervene in the matters, or file their own claims against Syngenta for its purported contamination. Thus, it seems clear that Illinois retains no superior interest in this matter, again, at least as compared to any of the (approximately 40) other states from where the underlying claimants hail. Syngenta has not argued that Illinois had some unique interest in whether there was insurance coverage in this matter, and therefore, no qualitative contacts for applying Illinois law are present. Pfizer, supra, 154 N.J. at 198.

By contrast, New York law has, at best, more qualitative contacts or, at worst, equivalent contacts to Illinois. The Court does agree that the Moving Insurer's reliance upon N.Y. Ins. L. § 46 is misplaced, as that statute has been repealed and thus has no bearing on the current dispute. However, New York does have a qualitative contact in that the policies were brokered and delivered in New York, and thus the state has an interest in the certainty, uniformity, and predictability of insurance contracts entered into within its borders. See Restatement §6(f).

Syngenta's argument that New York's contacts are minimal because only two (2) claimants received funds from the settlement, and, in turn, received a small percentage of the total fund amount, is unpersuasive. Again, that is a quantitative factor and weighs neither in favor of, nor against the application of New York law. Thus, as to factor one, New York contacts are either equivalent to, or more significant than Illinois' contacts.

3. Atrazine as a Pollutant or Contaminant Under the Policies' Language

Turning to factor two, the interests of commerce among the states, the Court is required to consider "whether application of a competing state's law would frustrate the policies of other states" or whether "the law of one state can be disregarded without offense to its purposes." Pfizer, supra, 154 N.J. at 198. Syngenta argues that as to this factor, the Court should find that applying New York law would hinder Illinois' interest in assuring "in cases involving environmental claims, that casualty insurance companies fairly recognize the legal liabilities of their insureds." Johnson Matthey, supra, 250 N.J. Super. at 57. However, as decided previously, this is a products liability case with no waste sites or the necessity for remediation. (emphasis added). This stands in contrast to the traditional environmental pollution found in Johnson Matthey where there were waste sites and remediation efforts, which clearly guided the court's choice of law. See generally, Id. at 53-57. Thus, the Court finds no merit to the argument that applying New York law would hinder Illinois' interests in this matter—which are not compelling. By contrast, New York again has at least a larger qualitative contact to this dispute with respect to commerce - as it is the place of contracting - and New York retains an interest in commercial transactions flowing through its state. This Court finds that like factor one, factor two mitigates in favor of New York or to neither state.

As to factor three, the interests of the parties, the court is required to focus on the parties' "justified expectations and their needs for predictability of result." Pfizer, supra, 154 N.J. at 199. Specifically,

> Restatement [S]ection 188 "contacts" with the states, the domicile or residence of the parties, and places of incorporation, business, contracting, and performance, come into play here in assessing what [the] parties might reasonably have expected to be predictable.

Ibid. Syngenta argues to this point that its business was "predictably multi-state" and that in the absence of a choice of law provision, a policy holder expects that it would be "indemnified under the law in effect at the place where liability is imposed." Id. at 203. However, this argument is premised upon, and utilizes case law, that references traditional environmental pollution where waste sites are located in a particular place where the liability is ultimately imposed. Here, where liability was imposed—Illinois—was more a fortuitous forum for Syngenta than it was a qualitative location where Syngenta could reasonably expect to have liability imposed. This is so because the cases below are products liability cases, as opposed to traditional environmental pollution cases, and indeed, many of the plaintiffs could have brought their actions in numerous jurisdictions other than Illinois. Moreover, as the Court has already found that the place of contracting was New York, such a contact for purposes of this factor weighs heavily under the language of the Restatement. Therefore, the Court finds that this factor, too, weighs in favor of applying New York law.

Finally, as to factor four, the interests of judicial administration, the Court is required to consider

> whether the fair, just and timely disposition of controversies within the available resources of the courts will be fostered by the competing law chosen. In other words, what choice of law works best to manage adjudication of the controversy before the court.

Pfizer, supra, 154 N.J. at 199. Here, the Court agrees with both Syngenta and the Moving Insurers that this factor weighs neither in favor of New York nor Illinois law applying, as the Court can easily dispose of the dispute within its available resources under the law of either competing state.

In view of the above, the Court finds that New York substantive law governs this dispute. However, this does not end the analysis. For purposes of summary judgment, the Court must next consider whether, in view of New York law, the Moving Insurers can unambiguously show that Atrazine is a pollutant under the policies at issue in this matter. The Court finds that they cannot, and therefore, summary judgment will be denied.

"[A]n insurer seeking to invoke a policy exclusion 'must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case' " Villanueva v Preferred Mut. Ins. Co., 851 N.Y.S.2d 742 (N.Y. App. Div. 2008) (quoting Continental Cas. Co. v Rapid-American Corp., 609 N.E.2d 506, 593 N.Y.S.2d 966 (N.Y. 1993)); accord Kramarik v Travelers, 808 N.Y.S.2d 807 (N.Y. App. Div. 2006). To determine whether a policy provision is ambiguous, courts are guided by "the reasonable expectations of the average insured upon reading the policy" Matter of Mostow v State Farm Ins. Cos., 668 N.E.2d 392, 645 N.Y.S.2d 421 (N.Y. 1996); accord Villanueva, supra, 851 N.Y.S.2d at 743. The meaning of any part of such a policy must be determined upon consideration of the policy as a whole. See Roebuck v State Farm Mut. Auto. Ins. Co., 915 N.Y.S.2d 738 (N.Y. App. Div. 2011). In addition, "[a]n insurance contract should not be read so that some provisions are rendered meaningless." Cnty. of Columbia v Continental Ins. Co., 634 N.E.2d 946, 612 N.Y.S.2d 345 (N.Y. 1994); see generally Vectron Intl., Inc. v Corning Oak Holding, Inc., 964 N.Y.S.2d 724 (N.Y. App. Div. 2013). Upon application of these rules of

construction, if "an insurance policy's meaning is not clear or is subject to different reasonable interpretations," such an ambiguity must be resolved in favor of the insured. Pepper v Allstate Ins. Co., 799 N.Y.S.2d 292 (N.Y. App. Div. 2005); accord White v Rhodes, 823 N.Y.S.2d 786 (N.Y. App. Div. 2006).

Here, the policies contain pollution exclusion clauses, which bar coverage for liabilities arising out of the dispersal of "pollutants." As noted, to negate the coverage of an insurance contract through an exclusion clause, the insurer must establish that the exclusion is "stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in this particular case." Cont'l Cas. Co., supra, 80 N.Y.2d at652. Thus, in accordance with the pollution exclusion clause in this case, summary judgment is appropriate only if it is unmistakably clear that Atrazine is a pollutant under New York law and may be decided as a matter of law.

Unfortunately, New York has not published a comprehensive and exhaustive list of all recognized pollutants. Instead, courts asking whether a substance should be defined as a pollutant have traditionally made the determination by examining a litany of state and federal sources. New York has never addressed the particular question at hand in this case—whether Atrazine may be considered a pollutant—and therefore this court is required to conduct its own analysis in a manner similar to that used by New York courts.

Under the New York approach, a substance may be a pollutant, no matter how useful or beneficial it was at an earlier time. Hudson River Fishermen's Ass'n v. New York, 751 F. Supp. 1088, 1101 (S.D.N.Y. 1990), aff'd 940 F.2d 649 (2d Cir. 1991); see also Space v. Farm Mut. Ins. Co., 235 A.D.2d 797, 798 (1997) (disregarding the original, beneficial use of liquid manure and finding that it later became a pollutant when it leached into a well on adjoining property). Thus,

although a substance is not a pollutant when originally utilized, it may later become a pollutant if it is leaked into groundwater or contaminates a body of water. Ibid. However, based upon the cases cited by the Moving Insurers, the mere fact that a substance has seeped into another's property or public water has never been enough, by itself, to classify a substance as a pollutant. Instead, the courts look towards various interpretations and definitions of the substance's use to determine whether it has been classified as a pollutant.

For instance, in Hudson River Fishermen's Association, supra, the Southern District of New York, interpreting New York law, was tasked with ascertaining whether chlorine, alum, and alum sludge (otherwise known as "floc") were considered "pollutants" when introduced into New York public water systems. 751 F. Supp. at 1101-02. First, in finding that chlorine residual is a pollutant when introduced to navigable waters, the court relied heavily on federal interpretations of the Clean Water Act and regulatory interpretations of the Environmental Protection Agency. The court noted that "the EPA, the agency charged with the administration and enforcement of the Federal Clean Water Act, in its published regulations and guidelines cites chlorine as an example of a 'pollutant.'" Ibid. (citing 49 Fed. Reg. 37998, 38028 (1984)). Next, after turning its focus towards alum and alum sludge, the court examines the way in which alum has traditionally been treated and labeled by water treatment facilities. Ibid. The court determined that alum and alum sludge are pollutants because such substances are commonly disposed of as waste products in water treatment facilities, and furthermore, that the EPA has also stated that such "'sludges and filter backwashes'" would be considered pollutants under EPA regulations. Id. at 1102 (quoting 49 Fed. Reg. at 38028).

Then, in Continental Cas. Co., supra, the New York Court of Appeals addressed a question similar to the one present in this case. The question in that case was whether a pollution

exclusion clause contained in an insurance policy would preclude coverage for claims arising from "exposure to asbestos in a confined space, or even outdoors." 80 N.Y.2d 640, 653 (1993). It was determined by the court that asbestos could "certainly be an irritant, contaminant or pollutant of the type encompassed by the [pollution exclusion] clause." Ibid. In so finding, the opinion cites to various United States statutes that list asbestos as a "toxic pollutant" as well as a New York labor law that defined the substance as a "carcinogenic agent." See ibid. (citing Labor L. § 900 [asbestos defined as "known carcinogenic agent"]; 42 U.S.C. § 7412; 40 C.F.R. 61.01; part 122, Appendix D, Table V [asbestos listed as "toxic pollutant"]; and 33 U.S.C. § 1317; 40 C.F.R. 401.15 [asbestos is "toxic pollutant"]).

New York courts dealt with an analogous situation in Space v. Farm Family Mut. Ins. Co., 235 A.D.2d 797 (N.Y. 3d Dep't 1997). In that case, liquid manure applied as fertilizer for crops, leached into the groundwater and infiltrated a well on adjoining property. The question before the court was whether the manure, originally applied in a beneficial and appropriate manner to the crop land, should be defined as a pollutant under the pollution exclusion clause of the farmer's general insurance policy. Ibid. The court determined that the manure was a pollutant under the policy. In its opinion, the court noted that intended use at the time of original discharge is irrelevant in determining whether a substance is a pollutant. The court went on to find that liquid manure seeping into ground water is a pollutant under the exclusion clause by citing to a case in which liquid manure was classified as a "pollutant" under the Clean Water Act. Id. 798-99 (citing Concerned Area Residents for Envt. v. Southview Farm, 34 F.3d 114 (2d Cir. 1994), cert. denied, 514 U.S. 1082 (1995) (liquid manure classified as "pollutant" under Clean Water Act)). Likewise, in Netherlands Inc. Co. v. Pindar Vineyards, LLC, a trial court in New York denied summary judgment on the basis of a pollution exclusion in a case involving alleged

environmental pollution stemming from the use of 2,4-D, a herbicide. No. 21430/06 2014 WL 4383039 (N.Y. Sup. Ct. Suffolk Cnty. Aug. 6, 2014) (Trial Order). The Court noted that there were conflicting cases from other jurisdictions "holding that pesticides approved for use by the [EPA] and used in the usual manner are not pollutants," but no New York cases directly on point. Id. at *8. The court ultimately denied summary judgment for a variety of reasons; significantly, one was because "there [were] . . . issues of fact whether 2,4-D is a pollutant as defined in the policy and whether [the insured] had a reasonable expectation that the policy covered its operations, including, among other things, whether [the insured's president's] belief that 2,4-D is not a pollutant was reasonable." Ibid.

Finally, the Moving Insurers cite in their briefs to Cannon Const. Co. v. Liberty Mut. Ins. Co., 227 A.D.2d 364 (N.Y. 2d Dep't 1996). In Cannon Constr., a construction company bought insurance to cover the cost of cleanup it suffered when liquid asphalt, used by the company to repair public roads, leaked into a nearby creek and contaminated the water. Id. at 364-65. The court decided, without discussion, that the asphalt sealant used by the company unambiguously constituted a pollutant under the policy agreement.

In the present case, the Moving Insurers move for summary judgment on the issue of whether the pollutant exclusion clauses found within Syngenta's coverage policies clearly, unambiguously, and without reasonable alternative explanations, include Atrazine within the definition of "pollutants." The Court finds that for purposes of summary judgment, a material question of fact exists as to whether the Moving Insurers can prove that Atrazine is a pollutant or contaminant. As exhibited by the cases above, the New York approach to defining "pollutant" in the context of a pollutant exclusion clause is loosely based on the definitions of pollutant found in the Clean Water Act, New York statutes, and other federal statutes, as well as, in at least one

instance, the common industrial understanding and treatment of certain substances. Unlike most of the substances addressed above, Atrazine is not defined as a pollutant by federal statute, EPA regulation or New York statute.

In Hudson River Fishermen's Association and Space, for example, both courts referenced the EPA's interpretation of "pollutant" within the Clean Water Act as unambiguous proof that chlorine, alum sludge, and liquid manure were contained within that definition. Additionally, the court in Continental Cas. Co. pointed to a variety of federal laws, as well as a New York law, all of which stated that asbestos is a pollutant or toxic. Atrazine, on the other hand, is not defined by federal or state law as a pollutant or toxin. Atrazine is an herbicide that is recognized and regulated by federal agencies, such as the EPA, but has not been defined as a pollutant by these authorities, especially when used in the recommended manner.

It is both noteworthy and curious that the court in Cannon Constr. Co. found the use of "pollutant" within the policy to unambiguously and clearly include liquid asphalt. This court, however, finds Cannon Constr. Co. to be unpersuasive because it provides no analysis or rationale for why it was decided that asphalt is a pollutant. As such, it is devoid of guidance and reasoning justifying its approach. Without that predicate, reliance upon that holding as an elucidation of New York law in this matter would be imprudent. Rather, this court relies upon the approach utilized in the aforementioned cases, in which New York courts only unequivocally found a substance to be a pollutant as a matter of law when the substance had been explicitly defined as such by the EPA, federal statute, or New York law itself.

The court cannot conclude, as a matter of law, whether Atrazine is a pollutant because Atrazine has never been defined as such by law or regulation. Even though a beneficially used substance may later become a pollutant under New York law, the court cannot rely simply on the

fact that the substance has interfered with another's property or a body of water as a basis for declaring it a pollutant. Instead, the New York courts require an applicable and reputable source from which it may be determined without a doubt that Atrazine is a pollutant. In addition, the recent Netherlands case, supra, lends credence to the principle that summary judgment is inappropriate when, as here, there is a question of fact as to whether Atrazine is a pollutant, as defined in the policies, and whether Syngenta had a reasonable expectation that the policies covered its operations.

Absent contrary authority, the Moving Insurers cannot show at this stage that Atrazine was unambiguously intended to be included within the exclusion's use of the term "pollutant", and no alternative reading is warranted. The court does not find that the policies clearly, unambiguously, and without a reasonable alternative explanation, include Atrazine as a pollutant. Therefore, based on the issue of whether the pollution exclusion clauses were intended to include Atrazine, the summary judgment motions are **DENIED**.

KENNETH J. GRISPIN, P.J.CV.