Certain Underwriters at Lloyd's London v NL Indus., Inc.
2020 NY Slip Op 34331(U)
December 29, 2020
Supreme Court, New York County
Docket Number: 650103/2014
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, COMMERCIAL UNION INSURANCE COMPANY PLC, INDEMNITY MARINE ASSURANCE COMPANY LTD., NORTHERN ASSURANCE COMPANY LTD., OCEAN MARINE INSURANCE COMPANY LTD., WINTERTHUR SWISS INS. CO. LTD., WORLD AUXILIARY INSURANCE CORPORATION LTD., YASUDA FIRE & MARINE INS. CO. (UK) LTD., YASUDA, UK, YORKSHIRE INSURANCE COMPANY LTD., ATLANTA INTERNATIONAL INSURANCE COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, ONEBEACON AMERICA INSURANCE COMPANY, REPUBLIC INSURANCE COMPANY, and STONEWALL INSURANCE COMPANY,

Plaintiffs,

- v -

NL INDUSTRIES, INC., ACE AMERICAN INSURANCE COMPANY, ACE PROPERTY & CASUALTY INSURANCE COMPANY, AIG PROPERTY CASUALTY COMPANY, AIU INSURANCE COMPANY, ALLIANZ UNDERWRITERS INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, ARROWOOD INDEMNITY COMPANY, CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA, CENTURY INDEMNITY COMPANY, CONTINENTAL INSURANCE COMPANY, DAIRYLAND INSURANCE COMPANY, EMPLOYERS INSURANCE COMPANY OF WAUSAU, EMPLOYERS MUTUAL CASUALTY COMPANY, EVEREST REINSURANCE COMPANY, EXECUTIVE RISK INDEMNITY, INC., FEDERAL INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY, INSCO LTD., THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, LANDMARK INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, MT. MCKINLEY INSURANCE COMPANY, MUNICH REINSURANCE AMERICA, INC., NATIONAL CASUALTY COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, NEW ENGLAND INSURANCE COMPANY, NEW HAMPSHIRE INSURANCE COMPANY, OLD REPUBLIC INSURANCE COMPANY, PACIFIC EMPLOYERS INSURANCE COMPANY, RIUNIONE ADRIATICA DI SICURTA, TIG INSURANCE COMPANY, TRAVELERS CASUALTY & SURETY COMPANY, TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, TWIN CITY FIRE INSURANCE COMPANY, UTICA MUTUAL INSURANCE

INDEX NO. 650103/2014

MOTION DATE _____

MOTION SEQ. NO. 019

DECISION + ORDER ON MOTION

COMPANY, WESTCHESTER FIRE INSURANCE
COMPANY, ZURICH AMERICAN INSURANCE
COMPANY, and ZURICH SPECIALTIES LONDON LTD.,

Defendants,

and

CERTAIN LONDON MARKET INSURANCE COMPANIES,

Nominal Defendants.

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 019) 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 708, 709, 710, 711, 712, 713, 714, 715, 716

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The issue in this action is whether the insurers of the manufacturer of Dutch Boy paint will cover the paint manufacturer's liability arising from *People v ConAgra Grocery Products, LLC*, Index No.: 2001-CV-788637 (Cal. Super. Ct., Santa Clara County) (Underlying Action), an action for the abatement of lead paint used in California residences. At issue are 320 insurance policies dating back to 1949.[1] Plaintiffs[2],

[1] NL believes that it purchased policies from the insurer defendants as far back as 1946 but has not located these policies (NYSCEF Doc. No. 674, Powers aff ¶ 29).

[2] Plaintiffs are Certain Underwriters At Lloyd's, London, Commercial Union Insurance Company PLC, Indemnity Marine Assurance Company Ltd., Northern Assurance

insurer defendants[3], and nominal defendants Certain London Market Insurance Companies (collectively, Insurers), all move for summary judgment, pursuant to CPLR 3212, for a declaration that the Insurers have no coverage obligation to defendant NL Industries, Inc. (NL) in the Underlying Action.

The Insurers assert three grounds on which this court should issue a declaratory judgment. These grounds are premised on the language of NL's insurance policies and the determinations in the Underlying Action. The Insurers assert that these determinations are matters of public record; they define the claim for which NL was held liable and for which it seeks coverage; they are final (appeals to the California Supreme

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Company Ltd., Ocean Marine Insurance Company Ltd., Winterthur Swiss Ins. Co. Ltd., World Auxiliary Insurance Corporation Ltd., Yasuda Fire & Marine Ins. Co. (UK) Ltd., Yasuda, UK, Yorkshire Insurance Company Ltd., Atlanta International Insurance Company, Government Employees Insurance Company, One Beacon America Insurance Company, Republic Insurance Company, and Stonewall Insurance Company.

[3] The insurer defendants are Ace American Insurance Company, Ace Property & Casualty Insurance Company, AIG Property Casualty Company, AIU Insurance Company, Allianz Underwriters Insurance Company, Allstate Insurance Company, American Home Assurance Company, Arrowood Indemnity Company, Central National Insurance Company Of Omaha, Century Indemnity Company, Continental Insurance Company, Dairyland Insurance Company, Employers Insurance Company Of Wausau, Employers Mutual Casualty Company, Everest Reinsurance Company, Executive Risk Indemnity, Inc., Federal Insurance Company, First State Insurance Company, Granite State Insurance Company, Hartford Accident and Indemnity Company, Insco Ltd., The Insurance Company of the State of Pennsylvania, Landmark Insurance Company, Lexington Insurance Company, Mt. McKinley Insurance Company, Munich Reinsurance America, Inc., National Casualty Company, National Union Fire Insurance Company of Pittsburgh, PA, New England Insurance Company, New Hampshire Insurance Company, Old Republic Insurance Company, Pacific Employers Insurance Company, Riunione Adriatica di Sicurta, TIG Insurance Company, Travelers Casualty & Surety Company, Travelers Property Casualty Company of America, Twin City Fire Insurance Company, Utica Mutual Insurance Company, Westchester Fire Insurance Company, Zurich American Insurance Company, and Zurich Specialties London Ltd.

Court and U.S. Supreme Court have been exhausted); and they cannot be re-litigated or re-disputed here for the purpose of determining coverage.

First, the Insurers argue that NL is not entitled to coverage because it was held liable in the Underlying Action for intentionally and affirmatively promoting lead paint for interior residential use with actual knowledge of the public health hazard that it would create. Second, the policies at issue only cover "damages" or "damages and expenses," and the abatement remedy ordered in the Underlying Action is neither.

Third, even if the abatement remedy is deemed as covered "damages" or "expenses," there is still no coverage because the policies also require that liability was imposed "for," "because of" or "on account of" "property damage" or "bodily injury" and neither "property damage" nor "bodily injury" were elements of the claim for which NL was held liable.

BACKGROUND

I. The Underlying Action

In March 2000, Santa Clara County filed a class action against NL[4] and other manufacturers and promoters of lead-based paints (Lead Paint Defendants) (NYSCEF Doc. No. [NYSCEF] 372, Underlying Action Complaint). Santa Clara alleged claims for strict liability, negligence, fraud and concealment, unjust enrichment, indemnity, and unfair business practices (*id*). In September 2000, Santa Clara, joined by Santa Cruz,

[4] "NL manufactured white lead carbonate pigment from 1891 to 1978, and it had manufacturing facilities in San Francisco and Los Angeles that manufactured white lead carbonate pigments in California between 1900 and 1972. It sold those pigments to California paint manufacturers, used them in its own paint products sold in California, and advertised and promoted paint products containing those pigments for residential use within the 10 jurisdictions during that same period" (*People v ConAgra Grocery Prods. Co.*, 17 Cal App 5th 51, 71 [Cal. 2017])

Solano, and Alameda Counties, filed an amended complaint, omitting the claim for unfair business practices and adding claims for civil conspiracy and nuisance (NYSCEF 373, Underlying Action First Amended Complaint). On January 23, 2001, these plaintiff counties, joined by Kern County, the City and County of San Francisco, San Francisco Housing Authority, San Francisco Unified School District, City of Oakland, Oakland Housing Authority, Oakland Redevelopment Agency, and Oakland Unified School District, as class representatives and on behalf of the People of the State of California (Government Plaintiffs), filed a second amended complaint alleging claims for fraud and concealment, strict liability, and negligence, negligent breach of special duty, public nuisance, private nuisance, unfair business practices, and false advertising (NYSCEF 374, Underlying Action Second Amended Complaint). Two public nuisance claims were alleged — one on behalf of a class of California municipalities alleging special injury (class public nuisance claim) and one on behalf of the People of the State of California seeking abetment (representative public nuisance claim) (*id.*).

On June 21, 2001, the Government Plaintiffs filed a third amended complaint, alleging the same fraud and concealment, strict liability, negligence, negligent breach of special duty and unfair business practices claims as the previous complaint. The Government Plaintiffs, in the third amended complaint, also replaced the three public and private nuisance claims alleged in the second amended complaint with a single cause of action for public nuisance on behalf of the People, omitting the public nuisance claim on behalf of the class plaintiffs and the private nuisance claim in its entirety (NYSCEF 375, Underlying Action Third Amended Complaint). The Lead Paint Defendants filed a demurrer as to the public nuisance claim, which the Superior Court

sustained without leave to amend (*see County of Santa Clara v Atlantic Richfield Co.*, 137 Cal App 4th 292, 301 [2006] [Court of Appeal discussing demurrer filed in the Superior Court] [*Santa Clara I*][5]).

In February 2003, the Lead Paint Defendants filed a motion for summary judgment seeking dismissal of the strict liability, negligence, fraud, and unfair business practices claims on statute of limitations grounds, which the Superior Court granted (*see id.* at 301-303). The Government Plaintiffs appealed, asserting, *inter alia*, that the Superior Court erred in "sustaining the demurrers to the public nuisance causes of action" and "granting summary judgment on statute of limitations grounds" (*id.* at 298).

On appeal, the Court of Appeal of California, Sixth Appellate District, reviewed the trial court's order sustaining the Lead Paint Defendants' demurrer without leave to amend regarding the representative public nuisance claim in the third amended complaint (*id.* at 304-311). The Court of Appeal also reviewed the Superior Court's order sustaining the Lead Paint Defendants' demurrer with leave to amend regarding the class public nuisance claim in the second amended complaint, which the Government Plaintiffs did not replead in the third amended complaint (*id.* at 311-313).

Upon review, the Court of Appeal directed the lower court "to (1) vacate its order sustaining the demurrer to the representative public nuisance cause of action in the third amended complaint and enter a new order overruling the demurrer to that cause of action, and (2) vacate its order granting summary judgment and enter a new order granting summary adjudication on the [unfair business practices] cause of action and

[5] A copy of this decision is submitted under NYSCEF 376.

denying summary adjudication on the negligence, strict liability and fraud causes of action" (*id*. at 333).

The representative public nuisance claim brought by Santa Clara, San Francisco, and Oakland counties on behalf of the People alleged that lead is present in homes, buildings and other property throughout the State of California. As the remedy, the counties sought abatement on behalf of the People, not reimbursement for specific property damage, bodily injury or costs of remediation. The Court of Appeal held that the remedy, and the fact that it was brought on behalf of the People, distinguished this claim from the class public nuisance claim (*id*. at 309 ["Here, the representative cause of action is a public nuisance action brought on behalf of the People seeking abatement. Santa Clara, SF, and Oakland are not seeking damages for injury to their property or the cost of remediating their property"]).

The Court of Appeal distinguished a products liability claim from a representative public nuisance claim, which seeks "future abatement," by stating that a products liability claim "does not provide an avenue to prevent future harm from a hazardous condition" (*id.* at 310).

The elements of a public nuisance claim under the relevant California Code are:

> "'*Anything* which is injurious to health ... or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property ... is a nuisance' (Civ. Code, Sec. 3479). 'A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal' (Civ. Code, Sec. 3480). 'The remedies against a public nuisance are: [¶] 1. Indictment or information; [¶] 2. A civil action; or, [¶] 3. Abatement' (Civ. Code, Sec. 3491). 'A civil action may be brought in the name of the people of the State of California to abate a public nuisance . . .' (Code Civ. Proc., Sec. 731; Gov. Code, Sec. 26528)"

(*id*. at 305).

While the Court of Appeal sustained the representative public nuisance claim, it held that the Superior Court "did not err in sustaining the demurrer to the class plaintiffs' public nuisance cause of action" (*id.* at 313). Specifically, the Court of Appeal rejected the class public nuisance claim "because it [was] at its core, an action for *damages for injuries caused to plaintiffs' property by a product*" (*id.*). The Court of Appeal also held that the fraud, strict liability and negligence claims were not barred by the statute of limitations.

In March 2011, on remand from *Santa Clara I*, the Government Plaintiffs filed a Fourth Amended Complaint, alleging a single claim for representative public nuisance under Cal. Civ. Code § 731 on behalf of the People (NYSCEF 377, Fourth Amended Complaint). The Government Plaintiffs' representative public nuisance claim was tried in July and August 2013 (NYSCEF 378, Statement of Decision at 1). In January 2014, at the end of trial, the California Superior Court issued a decision finding in favor of the People and against defendants ConAgra, NL, and Sherwin-Williams on the claim of public nuisance (*id*. at 101-102).

On March 26, 2014, the Superior Court filed an amended statement of that decision, requiring NL, Sherwin-Williams, and ConAgra to pay $1.15 billion into an abatement fund (NYSCEF 380, Amended Statement of Decision at 109). The Superior Court wrote that the

> "[t]he People sought to prove that defendants assisted in the creation of this nuisance by concealing the dangers of lead, mounting a campaign against its regulation, and promoting lead paint for interior use. The People further claimed defendants did so despite their knowledge for nearly a century that such a use of lead paint was hazardous"

(*id.* at 8). Of the defendants' knowledge, the Superior Court stated "at the same time they were promoting lead paint for home use, each Defendant knew that high level

exposure to lead-paint, in particular, was fatal. Each Defendant also knew that lower level lead exposure harmed children" (*id.* at 25). Of NL's knowledge specifically, the Superior Court stated

> "NL had actual knowledge of the hazards of lead paint as described above. NL was the largest manufacturer, promoter, and seller of lead pigments for use in house paint as determined in the FTC proceedings in the 1950s, NL operated large plants in the jurisdiction and was an active participant in the campaigns organized by LIA. E.g., Forest products campaign Tr. 709, Ex 82 Tr, 639. Judgment shall be entered against NL"

(*id.* at 29).

The Superior Court found that

> "[f]rom 1900 to 1972, NL promoted its lead paints in the Jurisdictions. During that time, NL regularly advertised its lead paints for home use in local newspapers in the Jurisdictions and in national magazines that reached consumers in the Jurisdictions"

(*id.* at 40). The Superior Court also found that "lead paint inevitably deteriorates, leaving behind lead-contaminated chips, flakes, and dust" (*id.* at 18). With respect to the question of "hindsight," meaning how advanced scientific knowledge was concerning the dangers of low-level lead dust from deteriorated paint, in the early twentieth century, the Court stated that

> "[t]he related issue is whether the Defendants can be held retroactively liable when the state of knowledge was admittedly in its nascent stage. The Court takes judicial notice of the fact that drugs, facilities, foods, and products of all kinds that were at one time viewed as harmless are later shown to be anything but. Yes, the governmental agencies charged with public safety may have been late to their conclusions that lead was poisonous. But that is not a valid reason to turn a blind eye to the existing problem. All this says is medicine has advanced; shouldn't we take advantage of this more contemporary knowledge to protect thousands of lives?"

(*id.* at 96).

Of the harm to children, the Superior Court stated "[a]s long as lead paint remains on homes in the Jurisdictions, children living in those homes will be at

significant risk of lead poisoning" (*id.* at 87). The Court found that "the only remedy for a public nuisance claim on behalf of the People is abatement - i.e., injunctive relief" (*id.* at 86) and was "convinced there are thousands of California children in the Jurisdictions whose lives can be improved, if not saved through a lead abatement plan" (*id.* at 97).

According to that March 26, 2014 decision, the abatement plan includes:

> "Testing of interior surfaces in homes to identify both the presence of lead–based paint and the presence of lead-based paint hazards; Remediation of lead-based paint on friction surfaces . . . by either replacement of the building component or by encapsulation or enclosure of lead-paint . . . Dust removal, covering of bare contaminated soil, proper disposal of waste, post-hazard control cleanup and dust testing, and occupant and worker protection . . . Education of families and homeowners on lead poisoning prevention and paint-stabilization techniques to remediate lead based paint hazards on non-friction surfaces"

(*id.* at 103).

The administration of the abatement plan required NL and the other defendants to make "payments into the fund shall be deposited into an account established in the name of the People and disbursed by the State of California's Childhood Lead Poisoning Prevention Branch (CLPPB) on behalf of the People" (*id.*).

NL and the other defendants appealed this decision to the Court of Appeal, which reversed the judgment and remanded the matter back to the trial court to "(1) recalculate the amount of the abatement fund to limit it to the amount necessary to cover the cost of remediating pre-1951 homes, and (2) hold an evidentiary hearing regarding the appointment of a suitable receiver" (*People v ConAgra Grocery Prods. Co.,* 17 Cal App 5th 51, 169 [2017][6] [*Santa Clara II*]). The Court of Appeal addressed the evidence collected by the trial court concerning the sale of lead paint, its extensive

[6] A copy of this decision was submitted under NYSCEF 382.

use in homes in the 10 jurisdictions at issue in the lawsuit, and the health hazards posed by lead paint to the children in those homes. The Court of Appeal noted that in many of the represented counties, lead poisoning from lead paint is the number one environmental children's health issue (*id*. at 74-76).

The Court of Appeal noted the ongoing problem of children exposed to and harmed by the lead paint

> "[c]hildren in the 10 jurisdictions are continuing to be exposed to lead from the lead paint in their homes and to suffer deleterious effects from that lead. Although only a small percentage of the children in these jurisdictions are screened for lead, thousands of children are found to have BLLs [blood lead levels] of concern each year"

(*id*. at 74).

The Court of Appeal again affirmed, as it had in *Santa Clara I*, that "[c]onstructive" knowledge would not be sufficient to support plaintiff's public nuisance cause of action," and that the standard was "*actual* knowledge." (*id.* at 83). Thus, "[l]iability [wa]s premised on defendants' promotion of lead paint for interior use with knowledge of the hazard that such use would create" (*id*.).

The Court of Appeal acknowledged the Superior Court's findings that NL had "'actual knowledge of the hazards of lead paint—including childhood lead poisoning' when they produced, marketed, sold, and promoted lead paint for residential use" (*id.* at 84) and that NL "expressly found that defendants 'learned about the harms of lead exposure through association-sponsored conferences'"; that they "knew in the 1930s that 'the dangers of lead paint to children were not limited to their toys, equipment, and furniture'"; that they knew "both that 'high level exposure to lead—and in particular, lead paint—was fatal' and that 'lower level lead exposure harmed children'"; and that "by the 1920s, defendants knew that 'lead paint used on the interiors

of homes would deteriorate and that lead dust resulting from this deterioration would poison children and cause serious injury.'" (*id.* at 85, quoting the March 26, 2014 Superior Court decision). The Court of Appeal cited these findings of the Superior Court with respect to NL:

> "Substantial evidence supports the trial court's finding that NL affirmatively promoted lead paint for interior residential use with the requisite knowledge. NL extensively promoted its lead paint for interior residential use from 1915 through 1950. Because NL knew of the danger to children from lead paint on residential interiors no later than 1914, substantial evidence supports the trial court's finding that NL's subsequent promotions of lead paint for such use were done with the requisite knowledge"

(*id.* at 99).

Further, the Court of Appeal noted that the Superior Court had found that NL and the other liable defendants had actual knowledge, when they marketed lead paint for indoor residential use, that "(1) 'lower level lead exposure harmed children,' (2) 'lead paint used on the interiors of homes would deteriorate,' and (3) 'lead dust resulting from this deterioration would poison children and cause serious injury'" (*id.* at 85, quoting the March 26, 2014 Superior Court decision).

As for the remedy, the Court of Appeal noted that "[a]n abatement of a nuisance is accomplished by a court of equity by means of an injunction proper and suitable to the facts of each case" (*id.* at 132). The Court further stated

> "[w]hile damages may be available in both public and private nuisance actions, damages are not an available remedy in the type of public nuisance action that was brought by plaintiff in this case, a representative public nuisance action. [A]lthough California's general nuisance statute expressly permits the recovery of damages in a public nuisance action brought by a specially injured party, it does not grant a damage remedy in actions brought on behalf of the People to abate a public nuisance"

(*id.* at 122 [internal quotation marks and citation omitted]).

Additionally, the Court of Appeal rejected the defendants' argument that the abatement fund was "a thinly-disguised damages award" for unattributed past harm to private homes (*id*. at 132). Rather, the Court held that

> "[a]n abatement order is an equitable remedy, while damages are a legal remedy. An equitable remedy's sole purpose is to eliminate the hazard that is causing prospective harm to the plaintiff. An equitable remedy provides no compensation to a plaintiff for prior harm. Damages, on the other hand, are directed at compensating the plaintiff for prior accrued harm that has resulted from the defendant's wrongful conduct. The distinction between these two types of remedies frequently arises in nuisance actions. Generally, continuing nuisances are subject to abatement, and permanent nuisances are subject to actions for damages. As Code of Civil Procedure section 731 permits a public entity plaintiff to seek abatement of a public nuisance in a representative action, the trial court could properly order abatement as a remedy in this case"

(*id.* at 132-133 [citation omitted]).

The abatement order issued by the Superior Court complied with this standard because the Government Plaintiffs "did not seek to recover for any prior accrued harm nor did [they] seek compensation of any kind" (*id.* at 133). Rather, the defendants' deposit in the abatement fund "would be utilized not to recompense anyone for accrued harm but solely to pay for the prospective removal of the hazards defendants had created." (*id.*).

NL and the other defendants filed petitions for review of the Court of Appeal decision in *Santa Clara II* in the California Supreme Court and for certiorari in the U.S. Supreme Court. The California Supreme Court denied review and the U.S. Supreme Court denied certiorari (*People v ConAgra Grocery Prods. Co.*, 2018 Cal. LEXIS 1277 [2018]; 139 S Ct 377 [2018]).

On July 24, 2019, the Superior Court issued an Order and Judgment approving a $305 million settlement, of which NL's share is $101.6 million (NYSCEF 701, Order and Judgment). NL has already paid $25 million (NYSCEF 674, Powers aff at ¶¶ 181-187).

II. The Policies and Coverage

NL alleges that it is entitled to coverage for its liability in the Underlying Action pursuant to the policies issued or subscribed by plaintiffs, insurer defendants, and nominal defendants. The Insurers issued or subscribed to commercial general liability policies for NL during the period between 1949 and 2000. According to John Powers, NL's Vice President and General Counsel, "[b]etween 1949 and 1997, approximately $1.285 billion (43%) in coverage was bought while NL was headquartered in New York, while approximately $1.690 billion (57%) in coverage was negotiated and delivered to NL at its Texas headquarters" (NYSCEF 674, Powers aff ¶ 98).

The Insurers, in support of their motion, annex numerous insurance policies and a summary of excerpts from those policies (NYSCEF 390-666, Insurance Policies; NYSCEF 387, Summary of Policies). For the purposes of this motion, the court will consider only those provisions identified by parties.

The summary of policies submitted by the Insurers includes language indicating that some policies cover harms resulting from "accidents" or "occurrences." For example, certain policies define an "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured" (NYSCEF 387, Summary of Policies at 3 [definition of occurrence 1970-1971 primary policy (Employers Commercial Union Policy No. CLE-Y9004-663)]; *see also id.* at 4-5

[definition of occurrence 1978-1979 primary policy (INA Policy No. SCG1020)]). Another policy defines an "occurrence" as "(a) an accident, or (b) an event, or continuous or repeated exposure to conditions, which results during the policy period, in personal injury, property damage, or advertising liability (either alone or in combination) neither expected nor intended from the standpoint of the Insured" (*id*. at 9 [definition of occurrence 1970-1973 umbrella policy (Commercial Union Policy No. EY-9004-671)]). Other policies state that they cover "liability . . . for damages . . . by reason of Bodily Injury, Personal Injury, Property Damage, [or] Advertising Injury" "resulting from an Accident" (*id.* at 13 [1986-1987 excess policy (Lloyd's Policy 6KA36140)]) and expressly exclude coverage for injuries or damage "which the Insured intended or expected or reasonably could have expected" (*id.* at 15).

Some of the policies only cover awards of "damages" against NL. As to this issue, NL's insurance policies fall into two broad categories. The first includes policies limited to liability imposed as or for "damages." Many of these policies cover NL for "all sums which [NL] shall be obligated to pay by the reason of liability . . . for damages" (*id.* at 11 [1979-1982 umbrella policy (London Policy No. 881/ULL0304)]). The second group of policies provide coverage both for "damages" and certain "expenses." These policies cover sums NL becomes "obligated to pay by reason of the liability imposed upon [it] by law . . . for damages . . . and expenses," (*id.* at 8 [1970-1973 umbrella policy (Commercial Union Policy No. EY-9004-671)]) as more fully defined by the term "ultimate net loss," which in turn is defined as sums NL must pay (1) "by reason of . . . property damage . . . either through adjudication or compromise," and (2) as "expenses . . . for litigation, settlement, adjustment, and investigation of claims

and suits" (*id.*; *see also id.* at 11 [1979-1982 umbrella policy (London Policy No. 881/ULL0304)]).

DISCUSSION

I. Choice of Law

The Insurers argue that, under New York choice of law principles, New York law applies to the policies. Specifically, they argue that, prior to 1989, the policies were issued to NL at its headquarters in New York City, and the First Department has already acknowledged that New York law applies to the pre-1989 policies (*Certain Underwriters at Lloyds, London v Millennium Holdings, LLC,* 44 AD3d 536, 537 [1st Dept 2007] ["NL Industries' policies were issued, negotiated, brokered, executed or paid for in New York at a time when it was headquartered in New York, and New York law has been held to apply to these policies"]). As to the policies issued between July 1988 to 2000, when NL was headquartered in Texas, the Insurers assert that, because there is no substantive difference between New York and Texas law on the issues raised here, there is no need to conduct a choice-of-law analysis.

Insurers argued during oral argument that

> "if we just focus on the 'nonfortuity/expected/intended' issue, for example, Texas and California apply the same tests as New York, which is: 'You either desire the harm or you're substantially certain that it's going to result from what you did.' That's the test. This is the test in the 'Restatement Second of Torts [sic],' Section 8(a), which is cited by the New York courts and other states. And so, we don't see a conflict here"

(NYSCEF 715, tr. at 17:3-10).

NL argues that choice of law cannot be decided without the relevant discovery and takes no position on what law applies. NL asserts that determining whether New York, California or Texas law applies is too complex to decide on this pre-discovery

motion. NL argues that any underlying tort occurred in California, predicated on California advertising and paint sold by California merchants, which was applied to California homes, and allegedly caused a public nuisance in certain parts of California. Also, NL has been in Texas since 1987, and it purchased its insurance in Texas beginning that year (NYSCEF 674, Powers aff ¶¶ 13, 14, 97-99). Powers avers that the majority of NL's primary, excess, and umbrella coverage was purchased while headquartered in Texas, citing that, between 1949 and 1997, approximately $1.69 billion, or 57% of NL's coverage was negotiated and delivered to NL at its Texas headquarters (*id.* ¶¶ 97, 98). During that same time period, approximately $1.29 billion, or 43% of coverage, was purchased while NL was headquartered in New York (*id.* ¶ 98). Throughout its brief, NL cites to New York, California, and Texas law to support its position.

The parties do not sufficiently detail a choice-of-law analysis in their briefs. *Certain Underwriters at Lloyds, London v Millennium Holdings, LLC, supra.*, cited by the Insurers, really addresses selection of the proper forum, a different analysis than choice of law, and the First Department did not specifically state why New York law had been held to apply to the policies. While the Insurers also cite to four Texas cases in a footnote to support their proposition that there is no substantive difference between New York and Texas law applicable here, they fail to compare these Texas cases to any New York law to support this assertion. Also, as previously stated, NL takes no position on the choice of law question and cites cases from the three jurisdictions, Texas, New York and California, which do indicate a conflict between the jurisdictions.

On choice of law analysis, the First Department has ruled that

> "[d]efendant, who cites to both California and New York law in support of his defense, fails to show there is the required 'actual conflict' between the law of defamation in California and defamation law in New York. Absent a showing of a discernable difference in the laws of the two states, no choice of law analysis is necessary, and New York law is applicable"

(*Zervos v Trump*, 171 AD3d 110, 128 [1st Dept 2019] [citations omitted]). The court will not craft arguments for the parties and will apply New York law.

II. Collateral Estoppel

The Insurers assert that the doctrine of collateral estoppel is applicable to the factual findings and rulings in the Underlying Action. NL counters that findings of the California courts, relied on here by the Insurers, are not part of a final binding judgment; the July 24th Order and Judgment approving the settlement is the final judgment. NL argues that any liability is predicated on the settlement only and that the California Superior Court's findings in its judgment, later partially reversed in *Santa Clara II*, were not carried forward into the July 24th Order and Judgment.

"Collateral estoppel rests on considerations of fairness and efficiency. Where a pending issue was raised, necessarily decided and material in a prior action, and where the party to be estopped had a full and fair opportunity to litigate the issue in the earlier action, fairness and efficiency dictate that the party should not be permitted to try the issue again" (*Bansbach v Zinn*, 1 NY3d 1, 10 [2003] [citation omitted]). "[C]ollateral estoppel, bars the relitigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment. As a result, the determination of an essential issue is binding in a subsequent action, even if it recurs in the context of a different claim" (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72 [2018] [internal quotation marks and citations omitted]).

"The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action" (*Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 456 [1985] [citation omitted]).

This action was brought to determine whether NL is entitled to insurance coverage for its liability in the Underlying Action. The main issue before this court is the interpretation and application of various insurance policies. However, the findings of the California courts as to NL's liability are closely intertwined with the issue before this court, as whether coverage exists is contingent on certain findings by the California courts such as NL's intent and actual knowledge.

Further, the findings of the California Superior Court are final and binding even though there was a settlement, resulting in the dismissal of the public nuisance claim. In *Santa Clara II*, the Court of Appeal reversed the Superior Court but the reversal was based on the Court of Appeal's conclusion that they could not "uphold the trial court's judgment requiring defendants to remediate all the houses before 1981 because there [was] no evidence to support causation as to the homes built after 1950 (17 Cal App 5th at 89). However, the Court of Appeal upheld the Superior Court's actual knowledge findings. Specifically, the Court of Appeal found that substantial evidence in the record supported the Superior Court's findings that NL had actual knowledge that lead exposure harmed children, that lead paint used in residences would deteriorate, and that the dust resulting from the deterioration would poison children causing serious injury (*id.* at 85).

NL and the other defendants filed petitions for review of *Santa Clara II* in the California Supreme Court and for certiorari in the U.S. Supreme Court. The California Supreme Court denied review and the U.S. Supreme Court denied certiorari (*People v ConAgra Grocery Prods. Co.*, 2018 Cal. LEXIS 1277 [2018]; 139 S Ct 377 [2018]). The parties then chose to settle, and the public nuisance claim was dismissed as a result. Thus, the Superior Court's findings that were not reversed remain intact and are final (*see Canfield v Elmer E. Harris & Co.*, 252 NY 502, 505 [1930] [judgment by confession, stipulation, or consent "is a conclusive adjudication of all matters embraced in it and a bar to any subsequent action on the same claim"]).

III. Expected or Intended Harms

The Insurers argue that NL is not entitled to coverage because it was held liable in the Underlying Action for promoting lead paint with the actual knowledge that it would cause harm. The Insurers assert that under the language of the policies at issue and the fortuity doctrine, codified at New York Insurance Law § 1101 (a), coverage is not available for an expected or intended harm. In response, NL advances four main arguments: (1) most of the policies do not contain an expected or intended harm exclusion; (2) there is no evidence that NL intended or expected the resulting harm; (3) there was no finding of intent in the Underlying Action; and (4) the fortuity doctrine does not apply.

A. Policies

As stated above, this action involves 320 insurance policies spanning over 70 years. The Insurers submit the policies upon which they seek summary judgment and a summary of certain policies at issue.

The following policy language is a sample of clauses relevant to the discussion here:

> "[O]ccurrence" means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured"

(NYSCEF 487, 1970-1971 Primary Policy Employers Commercial Union Policy No. CLE- Y9004-663 at PLS-NL-003283).

> "Occurrence definition An Event, including injurious exposure to, Conditions, which
> results during the policy period in Bodily Injury or Property Damage Neither expected nor intended from the standpoint of the Insured"

(NYSCEF 495, 1978-1979 Primary Policy INA Policy No. SCG1020 at CHUBB 000028).

> "OCCURRENCE. The term 'one occurrence' shall be taken to mean a single event, or originating cause and shall include all resultant or concomitant loss or losses whether to one or more locations"

(NYSCEF 402, 1952-1955 Excess Policy Lloyd's Policy No. F31956 at PLS-NL 000336).

> "'OCCURRENCE" CLAUSE'
>
> IN CONSIDERATION of the premium provided for herein it is hereby agreed that with respect only to coverages which are written on as 'occurrence' basis in the policy/ies of the Primary Insurers:--
>
> The words 'caused by accident' in the Insuring Clause in this Policy and the definition of the word "accident" in this Policy shall be deemed to be deleted.
>
> The words 'accident' or 'accidents' wherever appearing elsewhere in this Policy shall be deemed to read 'occurrence' or 'occurrences' respectively.
>
> The words 'occurrence' or 'occurrences' shall be deemed to have the same meaning in this Policy as is attributed to them in the policy(ies) of the Primary Insurers but, notwithstanding the foregoing, for the purposes of this Policy all occurrences arising
> out of one event shall be treated as one occurrence"

(NYSCEF 417, 1967-1970 Excess Policy Lloyd's Policy No. F78314 at PLS-NL-000453).

> "The term 'occurrence' shall mean (a) an accident, or (b) an event, or continuous or repeated exposure to conditions, which results during the policy period, in personal injury, property damage, or advertising liability (either alone or in combination) neither expected nor intended from the standpoint of the Insured"

(NYSCEF 488, 1970-1973 Umbrella Policy Commercial Union Policy No. EY-9004-671 at PLS-NL-003351).

> "The term 'Occurrence' shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising injury during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence"

(NYSCEF 597, 1975-1976 Excess Policy Northbrook Insurance Company Policy No. 63-300-105 at NBK 000003; NYSCEF 425, 1979-1982 Umbrella Policy London Policy No. 881/ULL0304).

The Insurers argue that the policies' express terms provide coverage only for accidents or occurrences that result in harm that NL neither expected nor intended, but NL points out that most of the policies do not contain an intended or expected exclusion, nor do they require an "accident" for coverage. For example, the 1949 primary policy that NL purchased from Lloyd's provided NL with protection

> "[f]rom and against all loss, costs, damages, attorney fees and expenses of whatever kind and nature which the Assured may sustain or incur by reason of or in consequence of: (a) Any and all liability imposed by law against the Assured for damage to or destruction of property of others (including damage resulting from loss of use of property damage or destroyed and all other indirect and consequential damage for which legal liability exists in connection with such damage to or destruction of property of others) sustained or alleged to have been sustained, arising from any cause whatsoever out of the operations conducted by the Assured in the United States of America"

(NYSCEF Doc. No. 679, 1949 Lloyd's Policy at PLS-NL-000401).

According to NL, the 1949 to 1970 Lloyd's primary policies contain almost identical language and do not contain the words intended or expected. Specifically, NL argues that their relationship with the Insurers is governed by policy endorsements that strike the term "accident" from the policies. For example, NL points to an endorsement dated December 29, 1955 in Lloyd's excess policy, No. F42923, that reads

> "[i]t is understood and agreed that the words 'caused by accident' are deleted from the Insuring Agreement of this Policy, wherever the word 'accident' appears elsewhere in this Policy it shall be understood to mean 'occurrence'. It is further agreed that definition 1. ACCIDENT is also deleted from this Policy and is replaced by the following: 1. OCCURRENCE. The term 'one occurrence' shall be taken to mean a single event, or originating cause and shall include all resultant or concomitant loss or losses whether to one or more locations"

(NYSCEF 402, No. F42923 Endorsement at PLS-NL-000336). NL additionally argues that word accident was replaced with the word occurrence in the Lloyd's 1967-70 excess policy (NYSCEF 417, No. F78314 Endorsement at PLS-NL-00453). Thus, the intended or expected exclusion can only apply to policies where it is included.

NL is correct that not all policies contain an expected or intended harm exclusion. As to the policies that do contain the exclusion, "New York courts tended to read the 'expect or intend' provisions fairly narrowly", meaning the courts "generally read 'expect or intend' provisions to exclude only those losses or damages that are not accidental" (*City of Johnstown, N.Y. v Bankers Standard Ins. Co.*, 877 F2d 1146, 1150 [2d Cir 1989] [citations omitted]). "In general, what makes injuries or damages expected or intended rather than accidental are the knowledge and intent of the insured. It is not enough that an insured was warned that damages might ensue from its actions, or that, once warned, an insured decided to take a calculated risk and proceed as before" (*id.* [citations omitted]).

"[C]onduct engaged in with the intent to cause injury is not covered by insurance" (*Empire Ins. Co. v San Miguel*, 2013 NY Slip Op 30702[U], *12 [Sup Ct, NY County 2013], quoting *Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 445 [2002]). "However, it is a well-established insurance principle that there can be liability coverage for an insured's liability arising out of his own intentional act if the resulting injury or damage caused was not intended" (*id.*).

> "In attempting to define what events are 'accidental,' the New York courts have focused on the nexus between an intentional act and the resulting damage. As this court has observed, the distinction is drawn between 'damages which flow directly and immediately from an intended act, thereby precluding coverage, and damages which accidentally arise out of a chain of unintended though expected or foreseeable events that occurred after an intentional act. Ordinary negligence does not constitute an intention to cause damage; neither does a calculated risk amount to an expectation of damage...'"

(*City of Johnstown, N.Y.*, 877 F2d at 1150 [citations omitted]). "[I]t is not 'legally impossible to find accidental results flowing from intentional causes, i.e., that the resulting damage was unintended although the original act or acts leading to the damage were intentional" (*Atlantic Cement Co. Fidelity and Cas. Co. of N.Y.*, 91 AD2d 412, 417-418 [1st Dept 1983] [citation omitted]; *see also Slayko v Security Mut. Ins. Co.*, 98 NY2d 289, 293 [2002] [citation omitted] ["insurable 'accidental results' may flow from 'intentional causes'"]). "The general rule remains that "more than a causal connection between the intentional act and the resultant harm is required to prove that the harm was intended" (*Slayko,* 98 NY2d at 293 [internal quotation marks and citation omitted]).

In order to determine whether NL is seeking coverage for an occurrence or accident that unintentionally or unexpectedly resulted in injury, the court must look to what conduct of NL's supported a finding of liability in the Underlying Action. "The duty

to defend is measured against the allegations of pleadings but the duty to pay is determined by the actual basis for the insured's liability to a third person" (*Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 [1985].

In *Santa Clara II*, the Court of Appeal acknowledged the Superior Court's findings that NL "'learned about the harms of lead exposure through association-sponsored conferences'"; "knew in the 1930s that 'the dangers of lead paint to children were not limited to their toys, equipment, and furniture'"; knew "both that 'high level exposure to lead—and in particular, lead paint—was fatal' and that 'lower level lead exposure harmed children'"; and that "by the 1920s, defendants knew that 'lead paint used on the interiors of homes would deteriorate and that lead dust resulting from this deterioration would poison children and cause serious injury.'" (17 Cal App 5th at 85, quoting the March 26, 2014 Superior Court decision). The Superior Court found that NL obtained this knowledge through its review of scientific and medical literature, certain trade associations' communications and meetings, and its own experiences (NYSCEF 380, Trial Court's Amended Statement of Decision at 29). NL even "employed medical doctors who were well aware of the hazards of lead paint and tracked the medical literature on this subject" (*id.*). The Court of Appeal held that these findings supported the trial court's determination that NL must have known by the early 20th Century that lead paint posed a very serious risk (17 Cal App 5th at 85).

The Court of Appeal also acknowledged the Superior Court's finding that NL affirmatively promoted lead paint for interior use despite knowing of the dangers. The Court of Appeal upheld this finding stating

> "[s]ubstantial evidence supports the trial court's finding that NL affirmatively promoted lead paint for interior residential use with the requisite knowledge. NL

> extensively promoted its lead paint for interior residential use from 1915 through 1950. Because NL knew of the danger to children from lead paint on residential interiors no later than 1914, substantial evidence supports the trial court's finding that NL's subsequent promotions of lead paint for such use were done with the requisite knowledge"

(*id.* at 99). The California Courts did not specifically address whether NL intended the damage as result of its actions. In fact, in *Santa Clara II*, the Court of Appeal stated that NL must have known that lead paint posed a serious risk of harm.

As stated above, in New York, there is a distinction between knowledge of the risk of hazardous consequences of one's actions, and the intention to cause harm. For example, in *Union Carbide v Affiliated FM Ins. Co.*, 101 AD3d 434 (1st Dept 2012), the First Department held that the insured's sale of asbestos with knowledge of its risk of harm, was not equivalent to the insured's intention to cause harm. The First Department found that "[p]laintiff's 'calculated risk' in manufacturing and selling its products despite its awareness of possible injuries and claims does not amount to an expectation of damage" (*id.* at 435). In *Atlantic Cement Co. v Fidelity*, the First Department held that Atlantic was entitled to indemnification for the damages recovered against it in the underlying action, as those damages were "accidentally caused" (91 AD2d at 417). Of Atlantic's liability, the Court found that

> "[w]hile it cannot be gainsaid that Atlantic *intended* to operate its cement plant at Ravena, that does not mean that they thereby 'intended' to cause damage to the property of the surrounding landowners, nor on its record can it be said that it was substantially certain that such damage would result from the operation of this plant"

(*id.*). Thus, the Insurers have failed to meet their burden on this motion as they have failed to make a prima facie case that NL's conduct is uninsurable under policies containing the exclusion.

B. Public Policy (Fortuity Doctrine)

As to the policies that do not contain the exclusion, this is where the fortuity doctrine applies. The Insurers argue NL's intentional conduct is uninsurable under New York's codified a "fortuity" standard (*see* New York Insurance Law § 1101 [a] [1]).

"'"Broadly stated, the fortuity doctrine holds that 'insurance is not available for losses that the policyholder knows of, planned, intended, or is aware are substantially certain to occur'" (*Chase Manhattan Bank v New Hampshire Ins. Co.*, 193 Misc 2d 580, 587 [Sup Ct, NY County 2002], quoting Barry R. Ostrager & Thomas R. Newman, Handbook on Insurance Coverage Disputes § 8.02, at 248 [5th ed. 1991]). New York has codified a narrower version of the doctrine (*id.*; *see* New York Insurance Law § 1101 [a]).

> "Insurance policies generally require 'fortuity' and thus implicitly exclude coverage for intended or expected harms. Insurance Law § 1101(a)(1) itself defines 'insurance contract' as: 'any agreement ... whereby one party, the 'insurer', is obligated to confer benefit of pecuniary value upon another party, the 'insured', ... dependent upon the happening of a fortuitous event ....' A 'fortuitous event' is defined as: 'Any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party.' (§ 1101 [a] [2].) Thus, the requirement of a fortuitous loss is a necessary element of insurance policies based on either an 'accident' or 'occurrence'"

(*Consol. Edison Co. of NY v Allstate Ins. Co.*, 98 NY2d 208, 220 [2002]).

The parties agree that, under New York law, the intention to cause injury is the standard by which the fortuity doctrine applies. Again, there is no evidence demonstrating an intent to cause harm when NL promoted the lead paint as discussed above. The Insurers have not met their burden.

IV. Damages or Expenses

The Insurers argue that the policies provide coverage for "damages" caused by the insured, and the abatement fund, set forth under *Santa Clara I* and *Santa Clara II*, to which NL was ordered to contribute, cannot be construed as damages under the policies. The Insurers assert that the abatement fund ordered in the Underlying Action is not an award to compensate the government for its losses, but rather, it is a remedy to prevent future harm. The Insurers further assert that the abatement fund qualifies as a prophylactic remedy, which is not covered under the language of the policy.

In opposition, NL argues that many of the insurance policies at issue do not even contain "as damages" language, and that the Insurers fail to clearly state in which of the 320 policies such language appears. NL argues that the Lloyd's primary policies through 1970 do not have any "as damages" language, quoting the 1949 Lloyd's primary policy as an example, "[f]rom and against all loss, costs, damages, attorney fees and expenses of whatever kind and nature …" (NYSCEF 387, Summary of Policies at 2 [emphasis added]). Nevertheless, NL argues that the monies they paid to the abatement fund do qualify as damages, because the only requirement of any judgment in the Underlying Action was that NL pay money; there was no injunctive relief, fine, penalty, restitution, punitive damages or exemplary damages assessed against NL. Further, NL emphasizes the fact that the policies do not expressly exclude coverage for payment of abatement.

"The tests to be applied in construing an insurance policy are common speech and the reasonable expectation and purpose of the ordinary business[person]" (*Ace Wire Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983] [citations

omitted]). "If the policy is ambiguous in this respect, any doubt or uncertainty in its meaning should be resolved against the defendant [insurer]" (*Perth Amboy Drydock Co. v New Jersey Mfrs. Ins. Co.*, 26 AD2d 517, 518 [1st Dept 1966]). Construing "damages" against the Insurers would result in coverage for the abatement costs incurred by NL. Here, an ordinary businessperson reading the policies at issue would believe coverage exists for NL's liability, and NL's liability under the California public nuisance statute constitutes "damages" under the relevant policy language.

The Insurers raise the issue that "damages" here are equitable in nature, and that the California Superior Court and the Court of Appeal made clear that the plaintiffs who brought the representative public nuisance claim under Cal. Civ. Code § 731 were not seeking compensation either for bodily injury or property damage on behalf of any individual or for monies spent by the government prior to the action to remediate the ongoing lead paint hazards. However, courts determining coverage have included in the ordinary dictionary definition of "damages" equitable relief, encompassing the costs of government expenditures for environmental cleanup (*see Avondale Indus., Inc. v Travelers Indem. Co.*, 887 F2d 1200, 2008 [2d Cir 1989] ["Damages, as the district court said, may 'include funds necessary for restoration of third parties' properties"]; *American Motorists Ins. Co. v Levelor Lorentzen, Inc.*, 1988 WL 112142, 1988 U.S. Dist. LEXIS 11631, *10-11 [2d Cir 1988] [applying New York law]; *Sherwin-Williams Co. v Certain Underwriters at Lloyd's London*, 813 F Supp 576, 587 [ND OH 1993] [holding that abatement cost claims fell within the London Market Insurers' coverage for property damage because harm, caused by lead paint, had been

done to the New Orleans Housing Authority's buildings, requiring remedial steps to make them safely habitable]).

The presence of deteriorated lead paint in the homes in the affected jurisdictions was widespread for years prior to the court's direction to NL to contribute to the abatement fund. The resulting harm to children has been catastrophic and California has not had the resources to ameliorate the problem. The courts in the Underlying Action created the abatement fund so that the government would have additional resources to remediate lead paint from friction surfaces, remove lead dust and cover contaminated soil (NYSCEF 380, Amended Statement of Decision at 103). Thus, in this case, although the abatement fund is technically injunctive relief, the court finds that this injunctive relief serves substantially the same purpose as reimbursing the government's costs in responding to the lead paint hazard. Specifically, the Superior Court and the Court of Appeal describe the inability of the State to continue the work of abatement, since it lacks the necessary resources.

The Insurers also point out that courts determining coverage are not simply making a distinction between whether the damages in the underlying action are equitable or legal in nature to determine their status as "damages" under the relevant policies, but, instead, consider whether the remedy directed was prophylactic or compensation for harm incurred.

Based on a review of the *Santa Clara* decisions and the relevant case law on coverage, the abatement fund in the underlying action was not strictly prophylactic. The fund awarded in the Underlying Action was mitigative and remedial, since at the time of the action, and well before, the hazards of deteriorating

lead-based paint present in the residences of children in California were prevalent and ongoing. The Court of Appeal noted in *Santa Clara II* that lead-based poisoning is a catastrophic problem for children in the counties represented in the action. The Court stated, for example: "lead paint is a serious environmental health concern in Monterey County," "lead poisoning is the top pediatric environmental health problem in Los Angeles County," "lead poisoning from lead paint is the number one children's environmental health issue in Alameda County" and "lead-based paint hazards in Oakland are 'coming close to crisis mode'" (17 Cal. App. 5th at 74-75).

Further, the Court of Appeal in *Santa Clara* II noted that this problem of children exposed to and harmed by the lead paint continues:

> "Children in the 10 jurisdictions are continuing to be exposed to lead from the lead paint in their homes and to suffer deleterious effects from that lead. Although only a small percentage of the children in these jurisdictions are screened for lead, thousands of children are found to have [blood lead levels] of concern each year"

(*id*. at 74).

Again, while the Insurers are correct that, in *Santa Clara II*, the Court of Appeal stated, that the monies sought are not intended as compensation, and will not compensate anyone for the harm done or for work previously completed to combat this prevalent health problem, both the California Superior Court and the Court of Appeal recognized that the hazard created by NL's promotion of lead paint, for which the government was seeking an abatement, was ongoing and continuing to cause actual harm to children (NYSCEF 380, Amended Statement of Decision at 87). The Superior Court acknowledged the ongoing problems of the presence of deteriorated and deteriorating lead paint and or lead dust in the buildings, and the need to continue the government's remediation of this problem. The abatement

plan included the cleanup and "[r]emediation of lead-based paint on friction surfaces . . . by either replacement of the building component or by encapsulation or enclosure of lead-paint . . . ." and "[d]ust removal, covering of bare contaminated soil, proper disposal of waste, post-hazard control cleanup and dust testing, and occupant and worker protection . . . ." (*id.* at 103).

Both the Superior Court and the Court of Appeal considered the insufficient government resources to combat this ongoing problem:

> "Childhood Lead Poisoning Prevention Programs [CLPPP] operated by the Public Entities have largely reached their limits. The Public Entities lack the resources to remove lead paint from homes in their jurisdictions, Thus, the number of lead poisoned children may not increase. But that number is unlikely to decrease much more, if at all"

(*id.* at 87).

> "CLPPP's lack the ability to engage in primary prevention, which seeks to prevent lead exposure in the first place. Instead, the CLPPP's largely target children who have already been exposed to lead. Abatement would be primary prevention. Although it is not feasible to remove all lead from every home in the 10 jurisdictions, primary prevention could be substantially furthered by lead inspections, risk assessments, education, and remediation of identified lead hazards in homes in the 10 jurisdictions"

(17 Cal. App. 5th at 76-77).

As a result of these decisions, this court finds that the abatement fund was not strictly intended to prevent harm, but was monies paid to the government, depleted by its ongoing efforts to remediate the longstanding contamination of houses and buildings by lead paint in California. It, therefore, qualifies as damages under the applicable policies.

Although speaking of requirements under a federal statute not at issue here, the Supreme Court of California, in its decision in *AIU Ins. Co. v Superior Court,* 51 Cal 3d 807 (Cal 1990), described government expenditures to clean up

contamination from hazardous substances as constituting a "loss" or "detriment" for which "reimbursement by responsible parties is monetary 'compensation'" (*AIU Ins. Co.*, 51 Cal 3d at 829; *see also* Black's Law Dictionary [11th ed 2019]) ["Compensation" is defined as "[p]ayment of damages, or any other act that a court orders to be done by a person who has caused injury to another"]).

This court finds that this is applicable to the "loss" or "detriment" caused to the California government in cleaning up the contamination, or restoring the Peoples' properties, from NL's lead paint. Therefore, NL's payments into the fund are damages under the relevant policy language. As this court has found that NL's payments into the abatement fund constitutes "damages," it need not reach the question as to whether it constitutes "expenses" as set forth in the Employers Commercial Union Policy EY-9004-671.

V. Property Damage, Bodily Injury, Personal Injury or Advertising Injury

The Insurers argue that NL is not entitled to coverage since the certain policies require that coverage be for damages or liability that is imposed for, or because of, or on account of property damage, personal injury, bodily injury or advertising injury. According to the Insurers, NL must establish property damage or personal injury as a predicate for its liability, which were not elements of the underlying representative nuisance claim.

The Insurers rely on *Millennium Holdings LLC v Lumbermens Mut. Cas. Co.*, 2013 WL 12344184 (Ohio Ct Com Pl 2013), where one of the lead paint defendants in the underlying action settled, before trial, with the government plaintiffs and sought coverage in Ohio for the settlement of the same representative public

nuisance cause of action at issue here. The Ohio Court ruled that Millennium's insurers had no duty to provide coverage for its settlement of the Santa Clara Action based on the "simple fact" that "property damage was not an element" of the nuisance claim, which "eliminated the possibility for Millennium to be held liable for property damage" (*id*. at *4). The Ohio Court found that it was of no consequence whether there was property damage or not, since it was not an element of the public nuisance claim, there could be no coverage. The Insurers also rely on *Structural Bldg. Prods. Corp. v Business Ins. Agency, Inc.*, 281 AD2d 617 (2d Dept 2001), where the Appellate Division, Second Department held that an insurer did not have to indemnify an insured where the insured sought to recover for an economic loss rather than bodily injury and/or property damage that the policy covered.

As a preliminary matter, the court notes that the determinations made here will only apply to those policies that contain the "because of", "on account of" or "imposed for" language.

Assuming that the policy language at issue here is identical to the language of the policy at issue in *Millennium Holdings*, this court respectfully disagrees with the conclusion of the *Millennium* Court that there could be no coverage under the policy because property damage was not an element of the underlying representative public nuisance claim.

In the Underlying Action, the Superior Court set forth an abatement plan that continued the work of the government entities to remediate the existing and ongoing hazards in the buildings and houses caused by the presence of lead paint. The abatement plan included the cleanup and "[r]emediation of lead-based paint on friction

surfaces . . . by either replacement of the building component or by encapsulation or enclosure of lead-paint . . ." and called for "dust removal, covering of bare contaminated soil, proper disposal of waste, post-hazard control cleanup and dust testing, and occupant and worker protection . . . ." (NYSCEF 380, Amended Statement of Decision at 103). The Superior Court also acknowledged that the abatement plan would address the rampant injuries to children: "[t]he Court is convinced there are thousands of California children in the Jurisdictions whose lives can be improved, if not saved through a lead abatement plan" (*id.* at 97). The Court found the nuisance ongoing (*id*. at 83).

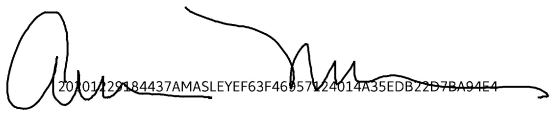
While this court agrees that property damage and bodily injury are not elements of the representative public nuisance claim, there is a connection between the lead poison injuries to the children residing in the buildings containing the lead paints promoted by NL and the property damage to those buildings as a result of NL's promotion of lead paint. "[T]here is a connection, however remote, between injuries to persons and liability for that injury of the insured" (*NAACP v Acusport Corp*., 253 F Supp 2d 459, 463 [EDNY 2003]; *see also Amerisure Ins. Co. v Acusport Corp*., 2004 US Dist. LEXIS 6901 [SD OH 2004]). Therefore, the Insurers' motion for summary judgment on this ground is denied.

This constitutes the decision of this court. All remaining arguments have been considered and do not yield an alternative result.

Accordingly, it is

ORDERED that the Insurers' motion for summary judgment is denied; and it is further

ORDERED that the parties are to submit a Preliminary Conference Order to SFC-Part48@nycourts.gov by January 22, 2021, 4 pm (no appearance). The Part 48 PC Order can be found under this Court's Practice Rules on the Commercial Division website.



12/29/2020
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE