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| SYNGENTA CROP PROTECTION, INC.,<br><br>Plaintiff,<br><br>v.<br><br>INSURANCE COMPANY OF NORTH AMERICA et als.,<br><br>Defendant, | SUPERIOR COURT OF NEW JERSEY<br>UNION COUNTY – CIVIL PART<br>DOCKET NO. UNN-L-3230-08<br><br>STATEMENT OF REASONS<br>Opinion II<br><br>March 6, 2017 |

## Introduction

In this insurance coverage action, Syngenta seeks insurance coverage from Allstate for the claims brought against it in the underlying Actions pursuant to the excess liability insurance policies issued or subscribed by Northbrook to Ciba-Geigy Corporation under Policy Number 10502B. Allstate has moved for partial summary judgment on the grounds that Syngenta has failed to prove property damage during the policy period. Defendants Baloise Insurance Ltd., et al. (collectively "Certain Insurers")[1], Excess Insurance Company Limited (solely on behalf of policies underwritten by Capacity Managers, Inc.) & Stronghold Insurance Co., Federal Insurance Company, INSCO Limited, and Travelers Casualty and Surety Company and St. Paul Fire and Marine Insurance Co. (collectively, "Moving Insurers") have joined in Allstate's motion in regard to their own respective policies.

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## Factual Background

Plaintiff, Syngenta has brought claims for insurance coverage under legacy insurance policies issued to its predecessor in interest Ciba Geigy-Corporation and/or Ciba-Geigy

[1] Since this motion was argued on January 19, 2017, Baloise Insurance Ltd. settled with the Plaintiff. The remainder of "Certain Insurers" and the Defendants which joined in on the motion are still active Defendants.

Corporation's predecessor, Geigy Chemical Corporation. The subject insurance claims brought by Syngenta arise from two product liability actions in Illinois titled Holiday Shores Sanitary District v. Syngenta Crop Protection, Inc. & Growmark, Inc., No. 04-L-710 (Ill. Cir. Ct. 3d Cir. Madison Co.) (hereinafter "Holiday Shores"), and City of Greenville v. Syngenta Crop Protection, Inc., No. 10-188-JPG (S.D. Ill.) (hereinafter "City of Greenville") (collectively, the "Underlying Actions"). The plaintiffs in these two Illinois actions sued Syngenta for damages, contending that Atrazine, a broadleaf weed suppressant, led to contamination of water systems in Illinois and six other Midwest states.

The parties to the Underlying Actions reached a Settlement in early 2012. The Settlement provided for a payment by Syngenta of $105 Million. The Settlement provided release to Syngenta but was also completely funded by Syngenta. In order to effectuate the Settlement, Syngenta presented a Joint Motion for Preliminary Approval of the Settlement of the Underlying Actions to the United States' District Court for the Southern District of Illinois requesting the court certify a class of community water districts ("CDWs"). Acting on the Joint Motion, the court conditionally certified a class, which it described as "All Community Water Systems in the United States of American for Which Any Qualifying Test Result Shows Any Measurable Concentration of Atrazine."

In order to receive funding under the Settlement, the CWDs had to provide proof of the origin of the Atrazine found in each class members' water. The court approved the Settlements on October 23, 2012. Following the Settlement, Syngenta received approximately $4.2 million from other Atrazine manufacturers, which it applied as credit against the $105 million settlement.

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**Moving Insurers Motion for Partial Summary Judgment as to Syngenta's Failure to Prove Property Damage**

Moving Insurers assert that based on the terms of the policies, Syngenta must prove that payment under the Settlement was for property damage that took place during the relevant policy period, i.e. prior to 1986, in order to obtain indemnification of the $105 million Underlying Settlement from the Excess Insurers. Moving Insurers contend that Syngenta has failed to provide evidence of property damage during the policy period of any policy at issue, and therefore the motion for partial summary judgment should be granted.

Moving Insurers cite several cases that analyze the policy language that limits coverage to conditions, which result in bodily injury during the policy period, not coverage to incidents of exposure. Moving Insurers aver that similarly, the wording in the excess policies in this case trigger the policies when an "injury-in-fact" that is, an actual injury, takes place during the policy period.

Moving Insurers allege that the only argument Syngenta can provide is to contend that a molecule of old Atrazine, applied in 1960, in water samples from 2012 satisfies the proof of damage or constitutes injury-in-fact during the policy period. Moving Insurers insist that this position does not satisfy New York's injury-in-fact standard. They cite to Employers Ins. of Wausau v. Duplan Corp., 1999 U.S. Dist. LEXIS 15368 (S.D.N.Y. 1999), which held that New York law requires that property damage take place during the policy period to the property that is the subject of the underlying third- party action or complaint against an insured. Id. at 28.

Citing to Spartan Petroleum Co., Inc. v. Federated Mutual Ins. Co, 162 F.3d 805 (4th Cir. 1988), Moving Insurers argue that the insured is required to prove that contamination reached the claimant's property prior to the expiration of the policy. Moving Insurers assert that Syngenta's expert never researched or opined as to whether Atrazine that was applied before 1986 resulted in any property damage before 1984 to any of the CWDs water supplies and that Syngenta has no other evidence to rely on.

Additionally, Moving Insurers assert that New York law holds that within a declaratory judgment action, the establishment of an insurer's liability to indemnify the insured is wholly dependent on the liability that is established in the underlying action against the insured. See Prashker v. United States Guarantee Co., 1 N.Y.2d 584 (N.Y. 1956); Cordial Greens Country Club, Inc. v. Aetna Cas. & sure Co., 41 N.Y.2d 996, 997 (1997). Therefore, the question of whether the policies provide indemnification for the Settlement is to be determined by the actual liability of the insured as it has been established by the Settlement. Moving Insurers insist that the Settlement in the Underlying Actions set forth criteria that do not establish property damage during the Excess Insurers' policy periods.

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**Plaintiff Syngenta's Opposition to Moving Insurers' Motion for Partial Summary Judgment Regarding Syngenta's Failure to Prove Property Damage During the Policy Periods**

Syngenta posits that the facts and expert testimony support the contention that the Atrazine continuously entered and/or migrated through the water of the underlying claimants throughout each of the Moving Insurers' policy periods. Syngenta asserts that the parties' scientific experts disagree as to the extent to which Atrazine that entered the groundwater during the Moving Insurers' policy periods contributed to the claimants' reported detections. Syngenta insists that this is a material issue of fact that only the trier of fact can determine.

Syngenta argues that the injury- in- fact test permits the triggering of multiple policies and does not require it to establish the precise timing of damages. Instead, Syngenta insists that courts may find that successive policies are triggered because "property damage occurs as long as contamination continues to increase or spread, whether or not the contamination is based on active pollution or the passive migration of contamination into the soil or groundwater." Olin Corp. v. Certain Underwriters at at Lloyd's 468 F.2d 120, 131 (2d Cir. 2006).

Syngenta avers that it is only required to demonstrate that "property damage" causally related to the claims in the Underlying Actions more likely than not occurred during the policy periods. Thus, even if Syngenta could not demonstrate at trial that Atrazine more likely than not entered the CWDs' wells and surface water bodies during the Moving Insurers' policy periods, it asserts it could still demonstrate "property damage" by showing that Atrazine, during those policy periods, more likely than not entered or migrated through the groundwater that was hydrologically connected to, and thus contributed, Atrazine to those wells and water bodies.

Syngenta asserts that the factual and scientific evidence demonstrates that property damage more likely than not occurred during the policy periods at issue.[2] Syngenta asserts that the reason for most of the detections reported by CWDs occurring after 1993 was because the

[2] Syngenta asserts that this argument is supported by the six former Geigy and/or Ciba Geigy employees that provided *de bene esse* trial testimony regarding the sale and use of Atrazine during the policy periods at issue. The six employees provided testimony indicating the sale and use of Atrazine in several US states from as early as 1959. (Mike Priola, Jack Forsythe, Kenneth Kemp, J. David DeKraker, Raphael Traen, Dennis Requist). Governmental and Academic documents also buttress the *de bene esse* testimony. Additionally, Plaintiff's allocation expert, Stephen Sellick, estimated that 770 million pounds of Atrazine were sold during the 1960 to 1986 time period.

Voluntary Monitoring Program wasn't implemented by Ciba- Geigy until 1993. Additionally, Syngenta asserts that there is no dispute between the parties' experts that some Atrazine will migrate down into the saturated zone of the groundwater (the aquifer) within 365 days. These aquifers are hydrologically connected with, and feed Atrazine-containing water to, the CWDs groundwater wells and surface water bodies and did so over a period of many years.

Based on this evidence, it is Syngenta's contention that a trier of fact could reasonably conclude that Atrazine continuously entered and migrated to and through unsaturated and saturated zones of the CWDs' groundwater, as well as their well fields, streams, lakes, reservoirs, and other water bodies since its introduction into commerce in 1959.

Additionally, contrary to Moving Insurers' argument, Syngenta urges that both the Settlement Agreement and the order preliminarily approving it, make clear that the Settlement was an agreement to pay $105 million towards a fund in exchange for the class members' release of all claims relating to the presence of Atrazine in their water- at any time. Syngenta asserts that nowhere in the court's March 30, 2012 order, its October 24, 2012 order granting final approval of the Settlement, or the Settlement Agreement itself does there appear any language stating that the $105 million settlement amount was being paid strictly to compensate CWDs for their detections or only for property damage that occurred after April 1, 1986.

Lastly, Syngenta asserts that even if it paid the $105 million only to compensate claimants for their detections, there still would be an issue of fact as to whether "property damage" occurred during the relevant policy periods. Here, Syngenta cites to the testimony of each parties' experts.[3] Dr. Dekker testified, "if that fundamental question is can Atrazine applied to a watershed make its way to a CWD over a long period of time, the answer is 'yes,' it is theoretically possible for that to happen." However, he also stated that Dr. Langseth's conclusion as worded was too absolute and conclusive to support. Syngenta asserts that these conflicting views are an issue for the trier of fact.

[3] Dr. Dekker is the expert for Moving Insurers. Dr. Langseth is the expert for Syngenta.

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**Moving Insurers' Reply to its Motion for Partial Summary Judgment Regarding Syngenta's Failure to Prove Property Damage During the Policy Periods**

Moving Insurers argue that under New York Law, the injury- in- fact test requires Syngenta to establish that the Settlement was for actual Atrazine contamination of the CWDs' water supplies. Moving Insurers aver that the only possible proof of that is based on the submitted test results. Additionally, Moving Insurers asserts that the CWDs were compensated based on proof of measurable concentration of Atrazine, not upon a manifestation of discovery of Atrazine contamination in their water supplies. Moving Insurers contend that Syngenta's asserted burden of proof of "more likely than not" does not overcome the fact that Syngenta paid the Settlement based upon submission of proof of Atrazine contamination of the CWDs' water supplies after the Insurers' policy periods.

Moving Insurers assert that the policies require both occurrence and the resulting injuries to take place during the policy periods. They contend that Syngenta cannot trigger coverage simply by proving Atrazine contamination of the groundwater during the Insurers' policy periods. Moving Insurers assert Syngenta must also prove that the resulting property damage occurred during the Insurers' policy periods and it cannot meet this burden.

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**Discussion**

**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 fact finder 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), and its progeny.

**Requirement to Prove Property Damage**

Under New York law, an insurance policy is a contract "which, like any other contract, must be construed to effectuate the parties' intent as expressed by their words and purposes." American Home Products Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485 (S.D.N.Y. 1983), aff'd as modified, 748 F.2d 760 (2d Cir. 1984). Where the terms of the policy admit of ambiguity, the court should afford the parties an opportunity to adduce extrinsic evidence as to their intent. See Ploen v. Aetna Casualty and Surety Co., 525 N.Y.S.2d 522, 524 (Sup. Ct. Nassau Co. 1988).

It is well established, and conceded by both parties, that Under New York law, coverage under policies containing a definition of occurrence substantially similar to the one at bar is triggered when an "injury-in-fact" -- that is, an actual injury -- takes place during the policy period. See Duplan, supra, 1999 U.S. Dist. LEXIS; American Home Products Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485 (S.D.N.Y. 1983). This holds true regardless of when the cause of the injury happened or when the injury was discovered." Id. citing AHP, supra, 748 F.2d ("a real but undiscovered injury, proved in retrospect to have existed at the relevant time, would establish coverage, irrespective of the time the injury became [diagnosable]") (alteration in original; internal quotation marks omitted) (citations omitted).

In Duplan, the defendant, Fireman's Insurance Company of Newark ("Newark"), challenged its duty to defend plaintiff on the basis that there is no possibility that the covered property damage occurred during the effective period of the policy. Duplan, supra, 1999 U.S. Dist. LEXIS 15368 at 1. The policy Newark issued [insured] covered liability for bodily injury or property damage "caused by an occurrence." "Occurrence," in turn, was defined 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." Id. at 75.

The Duplan court addressed how injury- in-fact applies to property damage, explaining "[w]hen dealing with property, the approach "has translated into a "damage-in-fact" trigger, meaning that coverage will be invoked if it is shown that damage to property actually occurred during the period for which the insurer was on the risk. Duplan, supra, 1999 U.S. Dist. LEXIS 15368 at 85-6, citing Maryland Casualty Co. v. W.R. Grace and Co., 23 F.3d 617, 626-27 (2d Cir. 1994) (applying damage-in-fact meant that coverage was triggered for insurer on the risk when asbestos was installed because actual damage to property occurred upon installation); see

also Cortland Pump & Equipment Inc. v. Firemen's Ins. Co. of Newark, 604 N.Y.S.2d 633, 636 (3d Dep't 1993) (adopting date of injury-in-fact, as opposed to date of discovery of damage, as trigger for occurrence-based property damage coverage); State of New York v. AMRO Realty Corp., 697 F. Supp. 99, 102 n.5 (N.D.N.Y. 1988) (coverage for pollution damage to property triggered upon damage-in-fact, rather than when damage was discovered), aff'd in part rev'd in part on other grounds, 936 F.2d 1420 (2d Cir. 1991) (citations omitted).

Few courts have considered when damage occurs as to pollution. The courts that have, held "coverage is triggered at the time of contamination." Duplan, supra, 1999 U.S. Dist. LEXIS 15368 at 89 citing Unimax Corp. v. Lumbermens Mutual Casualty Co., 908 F. Supp. 148, 155 (S.D.N.Y. 1995) (recognizing that "an 'occurrence' takes place at the time contamination happens"), held that allegations of disposal of waste onto site during policy period were sufficient to trigger the duty to defend in suit seeking costs of clean-up of property); Endicott Johnson Corp. v. Liberty Mutual Ins. Co., 928 F. Supp. 176, 180 (N.D.N.Y. 1996) (in a case seeking insurance coverage for clean-up of landfill and groundwater, court noted that in a prior unpublished decision it had held that "each act of dumping caused property damage on contact" thereby constituting an "occurrence" under the policy). Upon discussing Maryland Casualty, the Duplan Court stated "[...], one can easily conclude that when liability results from the destruction and clean-up of contaminated land upon which pollutants were disposed, the key damage occurs upon contact of the contaminants with the land." Duplan, supra, 1999 U.S. Dist. LEXIS 15368 at 89.

The question of first impression that the Duplan court had to address was "whether coverage for the aquifer damage claims is triggered at the time of the initial releases of the pollutants onto the [...] site; at the time a "significant quantity of the pollutant sufficient to have some potentially damaging effect, reached the groundwater; or some other time." Duplan, supra, 1999 U.S. Dist. LEXIS 15368 at 91. In doing so, the court quoted AHP, stating "injury cannot be read as the equivalent of exposure, because the policy contemplates injury caused by exposure; since a cause normally precedes its effect, it is plain that an injury could occur during the policy period although the exposure that caused it preceded that period." Duplan, supra, 1999 U.S. Dist. LEXIS 15368 at 91, quoting AHP, supra, 748 F.2d at 764.

The occurrence date varies, [i]n certain cases, the cause and damage may be temporally close, as in the case of installation of asbestos, or disposal of pollution directly onto land or

water. Duplan, supra, 1999 U.S. Dist. LEXIS 15368 at 92. However, coverage is predicated on a result. This "means that coverage is not triggered by the release of contaminants alone." Id. Actual property damage must occur during the policy period. Therefore, "mere discharge cannot trigger coverage when the damage allegedly caused thereby did not commence until the pollutants reached, and contaminated, the subject property." Id.

While the AHP court dealt with an illness to individuals that was caused over a period of time, the same analysis can be applied to that of property damage caused over a period of time. The AHP court examined the policy terms to mean:

> The most basic demand of the policy language is that to establish [insurers'] liability the insured must prove that an "occurrence" -- injury, sickness, or disease -- arose during the policy period. The plain language demands that the insured prove the cause of the occurrence (accident or exposure), the result (injury, sickness, or disease), and that the result occurred during the policy period. An exposure that does not result in injury during coverage would not satisfy the policy's terms. On the other hand, a real but undiscovered injury, proved in retrospect to have existed at the relevant time, would establish coverage, irrespective of the time the injury became manifest.

AHP, 748 F.2d 760 (2d Cir. N.Y. 1984)

In Spartan Petroleum Co. v. Federated Mut. Ins. Co., 162 F.3d 805 (5th Cir. 1998) the court addressed the "question of when 'property damage' or 'bodily injury' occurs under the standard [...] policy in cases involving progressive damages, such as latent defects, toxic spills, and asbestos. The court explained that this is a question courts nationwide struggle with because "[...] the time of the injury- causing event (such as defective construction, the fuel leak, or exposure to asbestos), the injury itself, and the injury's discovery or manifestation can be so far apart. Id. at 808. The Spartan court cited to the South Carolina Supreme Court's decision in Joe Harden Builders v. Aetna Cas. & Sur. Co., 486 S.E.2d 89 (S.C. 1997), which defined the policy's requirement that "property damage occur during the policy period" to mean the injury itself. Id. The court further held that, in cases that involve crossing property lines, the insured is required to prove that the contamination had reached the claimant's property prior to the expiration of the policy. Id. at 811.

In Olin Corp. v. Certain Underwriters at Lloyd's, 468 F.3d 120 (2d Cir. N.Y. 2006), the court dealt with the remediation of environmental contaminations at four separate sites. The court held property damage occurs as long as contamination continues to increase or spread,

whether or not the contamination is based on active pollution or the passive migration of contamination into the soil and groundwater. Olin, supra, 468 F.3d 120 at 131. "If that newly contaminated water does spread the contamination to new areas, property damage has clearly occurred." Id. The court came to this holding by comparing holdings from courts that dealt with asbestos related disease that develops over a period of time. Therefore, the courts have given no reason to distinguish the analysis as applied to property related injuries and injuries caused by asbestos type of contamination over a period of time.

Regarding the determination of the precise date of injury, the AHP court stated:

> The courts are wrong to conclude that medical experts and finders of fact will be unable to determine the time of actual injury, sickness, or disease with sufficient accuracy. In many cases, the onset of injury, sickness, or disease will be possible to pinpoint with great certainty, since the time of such an occurrence will be simultaneous with exposure or manifestation. Even where the injury, sickness, or disease cannot be pinpointed, however, experts will be able to place before the parties for purposes of negotiation, and before the finders of fact at trial, estimates based on a reasonable degree of medical certainty as to when the occurrence became diagnosable. This is precisely the manner in which pre-CGL cases were handled, and the manner in which many types of tort and insurance claims are handled today. Of course experts will be unable in many cases to identify the exact day on which an injury, sickness, or disease occurred. But such precision is not required; all that is necessary is reasonably reliable evidence that the injury, sickness, or disease more likely than not occurred during a period of coverage, which usually is at least one year long, and in the policies at issue extends over three years.

AHP, 565 F. Supp.at 1509.

* * *

**Opinion**

This is a policy that included the occurrence language, which triggers an injury in-fact analysis under New York law. While both parties agree that the injury- in- fact analysis should be applied, their application of the test differs. Moving Insurers are correct in arguing that Syngenta must prove that damage occurred as to the CWDs' water supply during the applicable policy period. However, that Moving Insurers are incorrect in asserting that this can't be done, as a matter of law, because the water samples used to test the water were not taken until after that time.

Syngenta bears the burden of proving to the finder of fact, through expert testimony, that more likely than not the CWDs' water supply was contaminated by the Atrazine at the time of the policy. Syngenta meets this burden by proving the injury, which in environmental property damage is the contamination, reached the CWDs' water source before the policy expired. Syngenta is incorrect in asserting that they can meet this burden by establishing that Atrazine contaminated any waters. The damage paid for under the Settlement applies to contaminants in the CWDs' water supply. Therefore, the Syngenta bears the burden to prove the Atrazine was in that water supply at the time the policies were in effect.

Experts from both parties have opined as to the levels, possibility, time needed, and likelihood that Atrazine could have reached the CWDs' water source. Additionally, Syngenta has provided the depositions of six individuals who testify to the use of Atrazine in different states during the policy periods. Syngenta notes that courts dealing with issues of time period for property damage to occur in environmental cases have often held that it is an open question that is one for the factfinder. See, Olin, supra, 468 F.3d at 132; Keyspan Gas E. Corp. v Munich Reins. Am., Inc, 998 N.Y.S.2d 781 (Sup. Ct. N.Y. Co. 1988).

There is an issue of material fact as to whether or not Atrazine could/ did reach the CWDs' water supply during the policy period and whether it could/did contribute to the detections reported by the CWDs in connection with the Settlement.

Moving Insurers are correct in urging that the question of whether the policy provides indemnification for the Settlement is to be determined by the actual liability of the insured as it has been established by the Settlement. As discussed in Prashker, supra, 1 N.Y.2d 584 (1956), [...] it is clear that the liability of the insurance company depends upon the basis for liability which is adjudicated against the assureds in the main actions." Prashker, supra, 1 N.Y.2d 584. Therefore, the question of whether the occurrence is covered under the policy should be determinative of the facts as determined in the underlying action. See Cordial Greens Country Club v. Aetna Casualty & Surety Co., 41 N.Y.2d 996 (N.Y. 1977).

During oral argument on January 19, 2017, defense counsel argued that the bases for the Settlement Agreement was property damage that took place during the period of 1992- 2012. However, the Court agrees with Syngenta that the Settlement does not discuss or circumscribe a finite time frame. Nowhere in the court's March 30, 2012 order, its October 24, 2012 order granting final approval of the Settlement, or the Settlement Agreement itself does there appear

any language stating that the $105 million settlement amount was being paid strictly to compensate CWDs for their detections or only for property damage that occurred after April 1, 1986. Syngenta's expert has opined that pre-1986 applications have contributed to post-1986 detections. The resolution of that hypothesis is for the trier of fact.

Accordingly, Moving Insurers' Motion for Summary Judgment is DENIED.

Kenneth J. Grispin, P.J.Cv.