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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANTS' CORRECTED* REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

Chemtura[1] brought this declaratory judgment action to determine its rights under Umbrella and Excess Liability policies issued to Uniroyal, Inc., a predecessor-in-interest to which Chemtura claims rights as successor by merger. Chemtura seeks reimbursement under these policies for costs expended at two sites for remediation of environmental damage caused by the historic operations of Uniroyal. Chemtura's legacy liability sites at issue are thus purely derivative of Uniroyal's actions, and its rights under the policies must therefore be derivative as well.

This is an action to interpret insurance contracts, not to determine tort liability for environmental contamination. Restatement § 193 specifically provides that it will not apply if there is another state that has the "most significant relationship" to the contract. Only if there is no such state does § 193 apply. In such cases, Delaware courts for the last twenty years have consistently looked to the state of the policyholder's headquarters during the majority of the coverage program at issue as the critical criterion in applying the "most significant relationship" test under Restatement Second (Conflicts) § 188 (1971). *See, e.g.*, *Viking Pump v. Century Indem. Co.*, 2 A.3d 76, 89 (Del. Ch. 2009), *aff'd in*

[1] This reply brief will use the same abbreviations as Appellant's Corrected Opening Brief, filed November 10, 2016.

relevant part, __ A.3d __, 2016 WL 4771312, at *10 (Del. Supr. Sept. 12, 2016). Tellingly, Chemtura does not argue the contrary but instead tries to distinguish the last twenty years of case law on the narrow ground that they did not exclusively involve environmental property damage.

While many of these recent cases concerned products liability claims, in none of them did a Delaware court hold, as Chemtura would have this Court hold, that a different choice of law analysis applies to environmental liability cases as opposed to products claims. In fact, the opposite is true, and where, as here, the policies insure against injuries in various states, and "the location of the subject matter of the contract cannot be ascribed to any single state," *Viking Pump*, 2 A.3d at 88 (emphasis supplied), the location of the insured's headquarters during the coverage period at issue is controlling. The authority cited for this proposition in *Viking Pump* and similar decisions are the Delaware environmental coverage decisions rejecting § 193 as the relevant test. That Uniroyal's headquarters were in New York for a majority of the time period of the policies, and that the environmental and insurance activities of Uniroyal emanated from those headquarters, has not been contested by Chemtura, A774, nor could it be, given the rulings on this issue by the New Jersey and Connecticut courts deciding the prior Uniroyal coverage actions, and finding those facts established. Appellant's

Opening Brief ("O.B.") at 29-30. Under established Delaware precedent, New York law controls the interpretation of the LMI policies.

Nor are the few cases relied upon by Chemtura for its "law of the site" choice of law test apposite to the case at bar. In the cases relied upon by Chemtura, Appellees' Answering Brief ("A.B.") at 4-5, there were ongoing disputes, including litigation, related to the responsibility for remediation at the relevant sites. Chemtura is not a party to any litigation at either the Arkansas site (which was fully remediated in 1998, A633), or the Ohio site, where Chemtura submitted a Feasibility Study to the Ohio EPA with a range of cost estimates for future work, the lowest of which is $0. (AR2340-2341; 2361)[2]. Moreover, the cases cited by Chemtura involved situations in which there either was no one state with the most significant relationship or where there was only one site at issue.

[2] Although Chemtura chides LMI for not apprising this Court of cost estimates for the potential remediation at the Dartron site, A.B.25, Chemtura did not supply a copy of the Feasibility Study to the Court, although it is alleged in the Complaint, A347, and was argued to the Court, A1983. LMI submit it now, minus figures, tables, and appendices, as the Supplemental Record on Appeal ("AR2306-2363"). The chart detailing costs for the remedial alternatives may be found at AR 2361. While the high estimate is $4.6 million, the lowest estimate is $0. *Id*. The remedy recommended by Chemtura's consultant is $404,000. AR2341-2343; AR2361-2362. The mean of the high and low estimates is $2.3 million, not $3 million as Chemtura erroneously claims. A.B.25. Chemtura's citation to the record for this latter point is the FAC's allegations that future damages will be $3 million, not to the Feasibility Study. A347-348.

It is also important to note that the last two Delaware decisions to have considered choice of law in an environmental context (prior to the decision of the Court below) both rejected the authorities cited by Chemtura and ruled that Restatement § 188 called for the application of a single state's law to apply to multi-site coverage actions. *N. Am. Philips Corp. v. Aetna Cas. & Sur. Co.*, 1994 WL 555399 (Del. Super. Ct. Sept. 2, 1994); *Sequa Corp. v. Aetna Cas. & Sur. Co.*, 1995 WL 465192 (Del. Super. Ct. July 13, 1995).

It is precisely because this coverage action is driven by the past activities of Chemtura's historic predecessors during the time period of the policies at issue that the choice of law questions must be focused on that era. The service of suit clauses, which Delaware law recognizes are not choice of law provisions, *see, e.g. Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1990 WL 9496, at *1, *4 (Del. Super. Ct. Jan. 19, 1990), are not relevant to this inquiry. The fact that it is Chemtura bringing suit, rather than Uniroyal, does not affect the analysis under § 188.

Finally, LMI never argued that the Superior Court could not consider, in determining whether the Arkansas Supreme Court would adopt its "all sums" holding, the unpublished Arkansas trial court decision in *Murphy Oil USA, Inc. v. U.S. Fidelity & Guaranty Co.*, 9 Mealey's Litig. Reports: Insurance, No. 19 (Ark. Cir. Ct. Feb. 21, 1995) (O.B., Ex. C), only that the Superior Court should not have given greater weight to it than would an Arkansas court, and that a Delaware court

was not bound by that decision. A2038. The Superior Court, instead of predicting how the Arkansas Supreme Court would rule, consistent with this Court's holding in *Shook & Fletcher Asbestos Settlement Trust v. Safety National Casualty Corp.*, 909 A.2d 125, 128 (Del. Supr. 2006), simply adopted *Murphy Oil* without question. Chemtura has not cited any authority suggesting the Arkansas Supreme Court would follow *Murphy Oil's* ruling and adopt an "all sums" allocation scheme.

ARGUMENT

I. UNDER DELAWARE LAW, THE NEW YORK HEADQUARTERS OF UNIROYAL IS THE CRITICAL FACT IN DETERMINING THE LAW TO BE APPLIED

Contrary to Chemtura's contention that Restatement § 193's "law of the site" test is presumed to apply in complex insurance disputes, A.B.18-19, the caselaw is otherwise. Restatement § 193 by its own terms does not apply if, "with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied." *Sequa*, 1995 WL 465192, at *1, n. 3, (quoting Restatement (Second) Conflicts § 193 (1971)[3]) (emphasis supplied). The particular issue before the Court is contract interpretation, not responsibility for environmental remediation costs, O.B.28; in such a case, "where insurance was provided for risks throughout the United States, Delaware courts apply the general choice of law considerations in § 188." *Viking Pump*, 2 A.3d at 87, n. 23 (citing *Liggett Group Inc. v. Affiliated Ins. Co.*, 788 A.2d 134, 137-38 (Del. Super. Ct. 2001)[4]).

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[3] Chemtura's quote of the Restatement § 193 language omits the underscored language. A.B.19, n. 10.

[4] *Liggett*, in turn, cited to *Hoechst Celanese Corp. v. National Union Fire Insurance Co.*, 1994 WL 721651, at *3-4 (Del. Super. Ct. Mar. 28, 1994). *See infra*, at 10.

In an effort to distance itself from the inevitable corollary to its claim for coverage under the Uniroyal insurance program for damages arising out of Uniroyal's historic operations, *i.e.*, that the center of gravity of those operations and insurance procurement in New York is determinative of the choice of law question under long-standing Delaware precedent, Chemtura suggests that it is really not a successor to Uniroyal, but to Uniroyal Chemical, A.B.9, n.3, an entity that did not exist until 1985, A278, at which point it was added as an insured to the very last policy at issue. A619.[5] This argument is disingenuous at best.

During the briefing of the choice of law issue in the prior Connecticut and New Jersey coverage litigations, Uniroyal adopted the same positions taken by Uniroyal Chemical as to the Uniroyal policies – hardly surprising as Uniroyal Chemical was making claim under these polices as successor to the liabilities of

[5] While Chemtura argues that consent to assignment provisions are not effective, A.B.10-11, n. 6, LMI never defended on this basis, but merely pointed out that any claim for coverage under the Uniroyal policies by Chemtura could not rest on these provisions because there was no evidence of any such assignment of rights under the policies. A2019-2024. Although Chemtura contends that Uniroyal transferred certain assets to Uniroyal Chemical, A.B. at 8, in fact there is no evidence of such a transfer in the record, and none was provided in the Dominitz Declaration. A1-4. This case has proceeded on the basis that Uniroyal Chemical (and thus Chemtura) was claiming rights to the Uniroyal policies under one of the four exceptions to the general rule that a sale of assets from one company to another does not result in a transfer of liabilities. *See, e.g., In re Asbestos Litigation Estate of Franco v. CSX Transp., Inc.*, 2015 WL 4399960, at *2 (Del. Super. Ct. July 13, 2015).

Uniroyal. A523-524; A537-540; A826-829; A841-842.[6] Significantly, Uniroyal Chemical admitted that the broker for the Uniroyal policies was Marsh & McLennan in New York until the late 1970s, A847-849 and A1060, that all premiums were paid from New York until 1971, A1061, and that environmental and insurance matters were managed from New York, A1076-1077, answers entirely consistent with Uniroyal's own admission that it had a principal place of business in New York until 1971 and that it had New York offices from 1941 until 1986. A844-845. These contacts were considered by both the New Jersey and Connecticut courts in arriving at their respective determinations that Uniroyal was principally headquartered in New York during the coverage period, A856 and A834, a fact that Chemtura does not, and cannot, contest. A774. Instead, Chemtura invites this Court to ignore the forest of New York contacts with the Uniroyal insurance program in favor of a tree-by-tree (or even branch-by-branch) analysis of each policy, A.B.26. Yet, not only does every single LMI insurance policy have some connection to New York, A616-621, but Delaware courts have long eschewed this micro-analysis in favor of one that focuses, in cases of insurance policies covering multi-state and multi-peril risks, on the insured's

[6] Although LMI do not include in this interlocutory appeal the Court's rulings on the issues of collateral estoppel and *res judicata*, they reserve their rights to appeal these issues at a later time.

headquarters at the time the policies were issued as being the principal location of the risk for Restatement § 188 purposes.[7]

> This Court has held that the most significant factor for conflict of laws analysis in a complex insurance case with multiple insurers and multiple risks is the principal place of business of the insured because it is "the situs which link[s] all the parties together." This Court has reasoned that "knowing the potential for claims in any number of states, common sense would dictate that the parties would consider the insured's principle [sic] headquarters as the one jurisdiction that ties all potential parties together." Indeed, where, as here, the insurer defendants are located among many different states, the insured's principal place of business naturally assumes a greater significance in the Court's conflict of laws analysis.

Liggett, 788 A.2d at 138 (footnotes omitted). *See also, Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, 2005 WL 2436193, at *3-4 (Del. Super. Ct. Sept. 29, 2005), *aff'd*, 909 A.2d 125 (Del. 2006) and *Viking Pump*, 2

[7] Chemtura suggests, A.B.2-3, that the Superior Court's decision in the *forum non conveniens* motion is determinative of the choice of law issue. It is not, as the lower court made clear that no choice of law ruling was made in that prior decision. A406-407. The Superior Court also specifically acknowledged during oral argument on the choice of law motions that the test employed under a *forum non conveniens* analysis is different from the considerations given on choice of law. A2024-2025.

A.3d at 89, *aff'd in relevant part*, _____ A.3d ____, 2016 WL 4771312, at *10 (Del. Sept. 12, 2016).[8]

Critically, *Liggett Group* cites for this proposition of law three of the choice of law cases relied upon by LMI: *Monsanto Co. v. Aetna Casualty & Surety Co.*, 1991 WL 236936 at, *3 (Del. Super. Ct. Oct. 29, 1991), *E.I. DuPont de Nemours & Co. v. Admiral Insurance Co.*, 1991 WL 236943, at *2, *4 (Del. Super. Ct. Oct. 22, 1991), and *Hoechst Celanese*, 1994 WL 721651, at *4-5. Similarly, *Shook & Fletcher* (2005 WL 2436193) cited *Hoechst* (1994 WL 721651), *Monsanto* (1991 WL 236936), *DuPont* (1991 WL 236943), and *Sequa* (1992 WL 147994 (Del. Super. Ct. May 21, 1992)) and *Viking Pump* (2 A.3d 76) in turn cited *Hoechst* (1994 WL 721651), *Monsanto* (1991 WL 236936), *DuPont* (1991 WL 236943) and *North American Philips* (1994 WL 555399) as precedent for their respective holdings applying § 188. Far from establishing that different choice of law considerations apply to bodily injury cases as opposed to environmental cases, *Liggett, Shook & Fletcher* and *Viking Pump* definitively establish that there is but one principal criterion to be evaluated in complex insurance cases involving multi-risk, multi-state perils: the headquarters of the insured at the time the policies were issued. This is the test applied consistently over the last twenty years, until the

[8] It is of some interest that the Connecticut Superior Court in the Uniroyal Environmental case, in considering the factors to be applied under Restatement §188, came to the same conclusion. A833-834.

decision from which appeal is taken.[9] Under this authority, New York law should be applied to the interpretation of the LMI policies.

[9] *CNH America, LLC v. American Casualty Co. of Reading, Pennsylvania*, 2014 WL 626030 (Del. Super. Ct. Jan. 6, 2014) cited by Chemtura, A.B.11, holds the same. *Id.* at *7 citing *Liggett*, 788 A.2d at 138. Indeed, even where courts have engaged in an analysis of the state interests on a policy-by-policy basis, they have arrived at the conclusion that the state of the insured's headquarters is the state that bears the most significant relationship to the policies. In each of his three *Sequa* decisions, Judge Herlihy engaged in precisely the review urged by Chemtura and yet always returned to the insured's headquarters in New York as the focal point of contract formation. *Sequa Corp. v. Aetna Cas. & Surety Co.*, 1992 WL 147994, at *2-*3 (Del. Super. Ct. May 21, 1992) (ruling on choice of law as to California Union policies); 1992 WL 179386, at *2 (Del. Super. Ct. July 16, 1992) (ruling on National Casualty policies); 1995 WL 465192, at *5 (Del. Super. Ct. July 13, 1995) (ruling on choice of law as to Aetna, American Reinsurance, Commercial Union, ERIC Reinsurance, Fireman's Fund, The Home, and INA policies.)

II. NEITHER ARKANSAS NOR OHIO HAS A COMPELLING INTEREST IN THIS LITIGATION

There is simply nothing in the record that suggests that Chemtura will face any future exposure at the Vertac site in Arkansas. The EPA has stated it is 100% remediated, A1143-1144, the State of Arkansas recognizes that it is remediated, A1148, Chemtura seeks no future costs at the site, A346, and in fact acknowledges that it has no further liability at the site because of its discharge in bankruptcy. A1220.

The trial court finding, *Chemtura Corp. v. Certain Underwriters at Lloyd's*, 2016 WL 3884018, at *5-6 (Del. Super. Ct. Apr. 27, 2016), that Chemtura may face future litigation because of the EPA's continued monitoring at the site – now in its seventeenth year, A1143 – is both puzzling and unsupported in the record.[10]

The Court's finding depends on the following predicate events, none of which is supported by any evidence in the record:

1) That the EPA, after seventeen years of monitoring, will finally discover environmental contamination;

[10] On the one hand, Chemtura argues that this Court may not consider future environmental property damage and bodily injury claims as bearing on the choice of law issue, A.B.25-26, n. 13, while on the other hand arguing that speculative future liability may be appropriately taken into account. A.B.25.

2) That the contamination will be attributable to Chemtura's predecessor Uniroyal;

3) That the Settlement Agreement and judgments fixing Chemtura's assessed share of the past remediation costs will be reopened; and

4) That Chemtura's discharge in bankruptcy will be set aside.

Faced with the burden of proving that all of these improbables will come to pass, Chemtura weakly argues that its bankruptcy discharge for future Vertac liability does not end its potential exposure because the discharge is not "self-executing" – someone could still sue and then the discharge must be pled as a defense. A.B.13-14, n. 9. While perhaps theoretically true, this hardly justifies the consideration of such an extenuated interest by Arkansas as a choice of law factor.

Chemtura does not even try to relate any threatened litigation to the Vertac site, but alludes instead to unspecified bodily injury claimants that purportedly seek to challenge Chemtura's bankruptcy discharge. A.B.13-14, n. 9. Who or what these claimants or claims are or why they are relevant, is unexplained.[11]

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[11] It is certain that, if these are diacetyl claimants, they are not relevant to this appeal because Chemtura acknowledges it withdrew these claims. A.B.13, n. 8. But they cannot be diacetyl claimants, because the Southern District of New York has already held that the bankruptcy discharge is valid as to such claimants. *In Re Chemtura Corp.*, 505 B.R. 427 (S.D.N.Y. 2014). That being said, these unspecified plaintiffs must relate to the bodily injury claims that Chemtura has noticed to the policies and not withdrawn. A1210; A1228-1229. Given the pendency of such claims, it is appropriate for the Court to consider whether choice

Nor does Ohio have an interest in this coverage litigation. While the Ohio EPA is considering a Feasibility Study that outlines six alternative remedies for possible future remediation at the Dartron site, one of the remedies being considered is the "do nothing" remedy. AR2340-2341. Chemtura's consultant has recommended the second least costly remediation alternative of $404,000. AR 2341-2343; AR2361. Given the vast resources of Chemtura, even if the Ohio EPA were to select the most expensive remedy of $4.6 million, it is doubtful that that agency would question Chemtura's financial ability to meet its obligations under any plan selected. A2006-2009. In a similar coverage action in which the financial resources for remediation were not at issue, the question of whether the insurance company was obliged to reimburse the policyholder was held to be essentially a private contractual dispute, and did not implicate any state's interest. "As the District Court aptly noted, 'the interest [of a state in which a waste site is located] diminishes when the question is not whether someone will or can pay for the cleanup but rather who will pay.'" *Maryland Cas. Co. v. Cont'l Cas. Co.*, 332

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of law should be manipulated by a policyholder depending on what claims it selectively chooses to litigate.

F.3d 145, 155 (2nd Cir. 2003) (quoting *Maryland Cas. Co. v. W.R. Grace & Co.*, 1992 WL 142038, at *3 (S.D.N.Y. June 9, 1992)).[12]

The fact that there is no pending litigation at either the Vertac or Dartron site distinguishes this case from *National Union Insurance Co. v. Rhone-Poulenc, Inc.*, 1992 Del Super. LEXIS 571, at *2-*3 (Del. Super. Ct. Aug. 17, 1992), a one site case in which the fact that there were three lawsuits pending in Delaware involving site remediation was found demonstrative of the strong state interest. *See also Chesapeake Utils. Corp. v. Am. Home Assurance Co.*, 704 F. Supp. 551, 553-554 (D. Del. 1989) (discussing the coercive actions taken by administrative agencies). Because of this regulatory interest at polluted sites with ongoing contamination and the uncertainty of financially responsible parties to undertake remediation, which is not the case here, the *Rhone-Poulenc* and *Chesapeake Utilities* courts were persuaded that the states in which the sites were located had the "most significant relationship" to the coverage issues. While LMI submit the rationales of these cases have been superseded by more recent authority, there were considerations present in these cases that do not exist in the case at bar.

The other cases relied upon by Chemtura are distinguishable as well. *Clark Equipment Co. v. Liberty Mutual Insurance Co.*, 1994 WL 466325, at *6 (Del.

[12] Under the terms of the LMI policies, the policyholder is obligated to first make payment to the claimant and then seek reimbursement from LMI. *See e.g.*, A19-23 (insuring agreement, ultimate net loss and loss payable provisions.)

Super. Ct. Aug. 1, 1994), specifically found that there was no one state that had the most significant relationship to the policies, as noted in *Sequa*, 1995 WL 465192, at *5. Because of the impossibility of finding one state that met the § 188 test, the environmental site was used as a default under § 193. Here, of course, three prior courts have all found no difficulty in finding that New York had the most significant relationship with the contracts.

Additionally, *Clark Equipment* relied on *Chesapeake Utilities Corp.*, a case that the Court in *DuPont*, 1991 WL 236943, at *5, refused to follow because of that court's failure to consider the Restatement § 6 factors before determining the law of the site applied. *Accord*, *Cont'l Ins. Co. v. Beecham, Inc.*, 836 F. Supp. 1027, 1036-37, n.4 (D.N.J. 1993) (discussing the *Chesapeake Utilities* court's selective omission of crucial language from Restatement § 193 and its comments).

In a slightly different vein, *Burlington Northern Railroad Co. v. Allianz Underwriters Insurance Co.*, 1994 WL 637011 (Del. Super. Ct. Aug. 25, 1994) involved the merger of four different entities, each with its own separate line of coverage that applied to discrete sites, into a single composite entity. *Id.* at *1-2. Given this, even had the Court utilized the § 188 analysis employed in *Hoechst Celanese* and its later progeny, such as *Shook & Fletcher*, *Liggett* and *Viking Pump*, at least seven states' laws would potentially have applied, given the headquarters of the historic railroad companies and their respective insurance

departments. Thus, no single state had the most significant relationship, unlike the case at bar.

As the 1995 *Sequa* decision noted:

> Furthermore, the frailty of a site-based argument is exposed by the vague circumstances in this case. For example, some of the policies at issue here cover not only sites that were owned by the insured [***i.e.*, like Dartron**] but sites leased by the plaintiffs **[cf., Vertac, where Uniroyal only agreed to store its chemicals]**. The practical effect of those circumstances is that the precise identity and location of those sites might not have been known at the time the policies were written. The legal repercussion as pointed out in *Potomac Electric Power Co. v. California Union Ins. Co.*, D.D.C., 777 F. Supp. 968 (1991), of applying the law where environmental damage occurred could result in "a single insurance contract being interpreted in a multitude of different ways." *Id.* at 972.

Sequa, 1995 WL 465192, at *5 (commentary in bold supplied) (further citing *N. Am. Philips* as the "decisive point" in ruling that § 188 controlled the analysis, at *5-6).

A site-based test does not advance the Restatement § 6 goals of uniformity and predictability. Such goals are further frustrated by a piecemeal approach to a choice of law analysis, such as that invited by Chemtura in urging that this Court ignore the Home Insurance policies in evaluating the "most significant relationship" test. A.B.27-28, at n. 14. Because the LMI policies "followed form"

to the Home policies from 1965-1976 (and the Home policies "follow form" to LMI from 1976-1986), these policies are central to a choice of law analysis:

> … [A] major objective in a choice of law analysis is to promote certainty, predictability and uniformity of result. *See* Restatement (Second) of Conflict of Laws § 6, Comment i at 15-16. If, as certain defendants' [sic] claim, the location of the broker is a significant factor in determining choice of law, then identical "follow form" policies occupying the *same* layer of coverage in the *same* policy year would be subjected to inconsistent interpretations: policies that happened to have been placed by a Delaware broker would be governed by Delaware law, while those in the same layer placed by the Pennsylvania broker would be governed by Pennsylvania law. Under such a view, the application of various states [sic] laws to various parties would prove confusing, burdensome and unfair to plaintiff if it creates gaps in coverage and would be generally unwieldy.[13]

DuPont, 1991 WL 236943, at *4.

Since neither Arkansas nor Ohio has any compelling interest in this coverage action, and since New York has the most significant relationship to the contracts at issue, New York law should apply.

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[13] Chemtura argues that the follow form provisions are irrelevant to the choice of law question, A.B.27, but suggests that the service of suit clauses are relevant. A.B.36-37. This argument has been consistently rejected by Delaware courts. *See Monsanto*, 1990 WL 9496, at *1, *4, and *Burlington N. R.R.*, 1994 WL 637011, at *4 (gathering cases). The court below rejected this argument as well. A1996. Nor does Chemtura's citation to an automobile choice of law case, A.B.28, justify ignoring the Home's contacts with the Uniroyal program.

III. THE MOST SIGNIFICANT RELATIONSHIP IS DETERMINED AT THE TIME POLICIES WERE PLACED

The Superior Court's decision to assess the present interests of the parties under Restatement § 188, rather than determining the most significant relationship that existed when the insurance policies were obtained by Uniroyal, cited no precedent. *Chemtura*, 2016 WL 3884018, at *6. It rested instead on the mischaracterization of the claim before it as involving the responsibility for environmental remediation costs at two locations. *Id.* *See* O.B.28. Chemtura defends this finding on the authority of *Rhone-Poulenc*, 1992 Del. Super. LEXIS 571. A.B.40-41.

However, as discussed *supra* at 15, *Rhone-Poulenc's* facts differed materially from those in this case. That case involved a single site located in Delaware, three lawsuits pending in Delaware (two state and one federal), and ongoing disputes relating to the financial responsibility for environmental remediation.[14]

[14] Chemtura also cites a New Jersey appellate decision involving a single site and similar facts as *Rhone-Poulenc*. A.B.41, n. 18. However, a New Jersey appellate court has already reviewed these policies and affirmed a lower court's determination that, consistent with the principles of Restatement § 188, it was appropriate to interpret these policies under New York law. *Uniroyal Inc. v. Am. Re-Ins. Co.*, 2005 WL 4934215, at *1 (N.J. App. Div. Sept. 13, 2005).

Other than the singular facts of *Rhone-Poulenc*, Chemtura offers no justification for the Superior Court's departure from longstanding Delaware precedent that focuses the § 188 analysis on the time period of the insurance program at issue. Such an analysis is inherently an historical one. But this is appropriate given that Chemtura does not seek recovery for damages caused by its own actions, but for the legacy liabilities of its ultimate predecessor, Uniroyal. *Supra* at 1.

One other point bears noting. Chemtura argues, A.B.35-36, that the service of suit clauses in the policies permit a court to re-examine the contacts of the parties during each new lawsuit because each new forum's choice of law rule must be applied. Despite Chemtura's arguments that the service of suit clauses permit a policyholder to bring suit in different jurisdictions and seek a different law in each action, A.B.35-37, it is difficult to see how such an approach, rife with the potential for a cynical manipulation of local law for forum shopping purposes, would not violate the Restatement § 6 goals of uniformity and predictability. Delaware caselaw, however, prevents this, by appropriately focusing the choice of law inquiry on historic connections that remain fixed.

IV. THE SUPERIOR COURT GAVE UNDUE WEIGHT TO THE *MURPHY OIL* DECISION

In *Shook & Fletcher*, 909 A.2d 125, in affirming the trial court's decision that Alabama was an exposure trigger jurisdiction, this Court expressly undertook its own analysis regarding whether such an exposure trigger would be adopted by the Alabama Supreme Court. *Id.* at 132. In so doing, this Court reviewed the detailed rationale provided by an Alabama trial court in a related case, which in turn was based on a federal appellate court ruling on point that predicted how the Alabama Supreme Court would decide the issue. *Id.* at 128-29. The Alabama Supreme Court, in turn, had previously held that such federal appellate authority predicting Alabama law should be considered. *Id.* at 129.

Notwithstanding that it had both a state trial court decision and a relevant federal appellate court opinion as well, this Court undertook the additional steps of reviewing an Alabama treatise, *id.* at 129-30, and of surveying nationwide caselaw before concluding that the exposure trigger was the majority rule and would indeed likely be adopted by the Alabama Supreme Court. *Id* at 130-32.

The court below undertook none of these additional steps, but merely adopted the summary ruling in *Murphy Oil* as "Arkansas law." *Chemtura*, 2016 WL 3884018, at *2, n.5, *7. LMI never contended that the Supreme Court could

not consider *Murphy Oil*, A2038, but rather that the court below has given that ruling far more weight and deference than an Arkansas court would.

Arkansas did not allow the citation to unpublished appellate court opinions until July 1, 2009; at that time, official reports were abolished, and an electronic publication system was instituted. *See In Re Arkansas Supreme Court and Court of Appeals Rule 5-2*, dated May 28, 2009 (attached hereto as Exhibit A).

Chemtura's suggestion that the abolition of a ban on citing unpublished appellate authority must necessarily mean that unpublished lower court authority was freely citable, AB46, n. 20, not only makes little sense, but ignores reality. In an admittedly non-empirical study, counsel for LMI was unable to find any instance of an Arkansas appellate court relying on an unpublished trial court order such as that exemplified by *Murphy Oil*.

However, one case was located in which an unpublished out-of-state trial court order in a related case was attempted to be cited. The attempt was strongly rebuffed by the Arkansas Supreme Court: "This unpublished trial court order is of absolutely no precedential value for this Court." *DePriest v. AstraZeneca Pharmaceuticals, L.P.*, 351 S.W.3d 168, 176 (Ark. 2009) (decided after the implementation of the Order dated May 28, 2009 attached hereto as Ex. A).

LMI never asked the Superior Court to ignore *Murphy Oil*; but in determining what Arkansas law was (a determination premature in LMI's view,

O.B.31-33), the trial judge should not have given that memorandum decision a binding precedence and authority that it lacks in Arkansas jurisprudence.

It was not LMI's burden to demonstrate that the Arkansas Supreme Court would not adopt an "all sums" allocation regime. A.B.45. Rather, under *Shook & Fletcher*, it was the proponent of the foreign law who should have established how the Arkansas Supreme Court would rule. Chemtura did not do so.

The lower court's ruling that Arkansas would adopt the "all sums" allocation method should be reversed.

CONCLUSION

The decision of the Superior Court should be reversed.

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Corrected: November 16, 2016

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CERTIFICATE OF SERVICE

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