

E-FILE

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Index Number : 602485/2006
AMERICAN HOME ASSURANCE
vs.
AMERICAN RE-INSURANCE
SEQUENCE NUMBER : 006
SUMMARY JUDGEMENT

PART _____

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered _____, are filed in support of this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE 007...

Dated: 5/24/2010


HON. CHARLES E. RAMOS
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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The following papers, numbered 1 to _____ were read on this motion to/for _____

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Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with
 accompanying memorandum decision and order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
 FOR THE FOLLOWING REASON(S):

Dated: 5/24/2010

HON. CHARLES E. RAMOS S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

E-FILE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----x
AMERICAN HOME ASSURANCE COMPANY,
NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA, AND LEXINGTON
INSURANCE COMPANY,

Plaintiffs,

Index No. 602485/06

-against-

AMERICAN RE-INSURANCE COMPANY, EVEREST
REINSURANCE COMPANY, ODYSSEY AMERICAN
REINSURANCE CORPORATION, AND SWISS
REINSURANCE AMERICA CORPORATION,

Defendants.

-----x
Charles Edward Ramos, J.S.C.:

Motion sequence numbers 006-007 are consolidated for disposition.

In motion sequence 006, defendant Everest Reinsurance Company (Everest) moves for summary judgment dismissing the second and sixth claims of plaintiffs American Home Assurance Company, National Union Fire Insurance Company of Pittsburgh, Pa., and Lexington Insurance Company (together, AIG) and for judgment on its seventh through twelfth affirmative defenses (CPLR 3212).

In motion sequence 007, defendant American Re-Insurance Company, n/k/a Munich Reinsurance America, Inc. (American Re) (together with Everest, Reinsurers) moves for summary judgment dismissing AIG's first and fifth claims and for judgment on its seventh affirmative defense (CPLR 3212).

Background

This action arises out of the alleged breach of three

facultative certificates of reinsurance (Certificates) that AIG entered into with various reinsurers, including Everest and American Re (together, Reinsurers), reinsuring excess general liability insurance policies (Policies) covering the years 1975-1978 (Exhibits 6-8, annexed to the Pitchford Aff.).

The Policies are three of approximately sixty general liability policies issued to Monsanto Company (Monsanto) by AIG from 1967 through 1985, and involve many layers of coverage, up to the excess layer of \$250 million.

Monsanto manufactures chemical and agricultural products, including the chemical pollutant, PCB.

The Policies are part of an AIG layer providing fourteen consecutive years of coverage, from 1971 to 1985, excess of \$20 million per year, providing limits of between \$15.5 million and \$18 million with a \$20 million self-insured retention. The limits apply on a per occurrence basis.

In 1988, Monsanto filed an action in Delaware against thirty-six insurers, including AIG, seeking a declaration that the insurers were liable to pay under primary and excess liability policies, including the Policies, in connection with environmental lawsuits filed against Monsanto by the Environmental Protection Agency (EPA), state regulatory authorities and third parties (DJ Action) (*Monsanto Co. v Aetna Cas. and Sur. Co.*, 1993 WL 563253 [Superior Ct Del 1993], *affirmed* 653 A2d 305 [Sup Ct Del 1994]).

In the underlying lawsuits, Monsanto was accused of using,

generating, and storing certain materials that contaminated the environment that caused personal injury and property damage at thirty-eight plants and hazardous waste sites around the country. During the course of the DJ Action, Monsanto amended its complaint to include additional sites, totaling eighty sites subject to litigation.

Certain insurers asserted the defense, amongst others, that pollution exclusions contained in the applicable policies precluded coverage for Monsanto's claims.

The parties engaged in early settlement discussions, while continuing to engage in extensive discovery and motion practice relating to various issues, including the governing law applicable to the interpretation of the policies (Exhibits B, E, annexed to the Windle Aff.).

In 1991, the court in the DJ Action determined that Missouri law applies to determine the rights and obligations of the insurers under the policies (Exhibit 22, annexed to the Pitchford Aff.).

In 1992, the parties resumed serious settlement negotiations (Exhibits J-K, annexed to the Windle Aff.).

1993 Settlement

On August 31, 1993, AIG and Monsanto settled the DJ Action, in order to "avoid the expense and disruption of further litigation" (1993 Settlement, 2). Under the 1993 Settlement, Monsanto agreed to release the insurers for coverage for "clean-

up costs" (Clean-Up Costs) for the sum of \$7,375,000¹ (1993 Settlement, ¶¶ 1 [a], 2, Exhibit 39, annexed to the Pitchford Aff.).

In addition, the parties carved out coverage for claims asserted by individuals, defined as "Third Party Claims"² (1993 Settlement, ¶¶ 4, 14 *Id.*).

With respect to Third Party Claims, the 1993 Settlement contains a reimbursement mechanism, pursuant to which, upon Monsanto's exhaustion of an \$80 million per site "deductible," AIG would pay Monsanto up to fifty percent of its expenses and liability, up to \$150 million per site, and without any allocation or spreading as to underlying coverage (1993 Settlement, ¶ 5).

The Reinsurers represent that they did not receive a copy of the 1993 Settlement until August 2003 (Everest's Rule 19-A

¹ The 1993 Settlement defines Clean-Up Costs as the costs incurred by Monsanto stemming from EPA and other governmental agency orders to remediate sites due to the discharge of chemicals.

² Third Party Claims is defined under the 1993 Settlement as follows:

"[E]nvironmental or pollution related claims asserted by a non-governmental entity as a result of activities attributed to Monsanto at any alleged waste site or Monsanto owned site for any and all sums which Monsanto shall be obligated to pay by reason of liability on account of 1) personal injuries or 2) property damage; provided, however, that monies actually paid by Monsanto prior to date of this Agreement in settlement of liabilities against Monsanto arising from the Brio site near Houston, Texas shall not be regarded as Third Party Claims for the purposes of this Agreement (although any monies hereafter paid arising from such site shall be regarded as Third Party Claims under this Agreement)" (1993 Settlement, ¶ 1 [b]).

Statement, ¶¶ 13-14), although Everest states that it was orally advised of the settlement in January 2004 (Martin Aff., ¶¶ 7-8).

Shortly after execution of the 1993 Settlement, AIG billed the Reinsurers their portion of the Clean-Up Costs under the Certificates, of which Everest's portion was \$37,000. The Reinsurers paid without objection (O'Kane Deposition: 96-97; Martin Deposition: 109-110). At that time, Monsanto did not seek reimbursement for Third Party Claims from AIG.

In September in 2001, approximately eight years after the execution of the 1993 Settlement, Monsanto transmitted a notice to AIG indicating that it had exhausted the \$80 million per site deductible and was seeking reimbursement for Third Party Claims under paragraph 5 of the 1993 Settlement as the result of claims that arose from a Monsanto-affiliated plant located in Anniston, Alabama (Anniston Site) (Exhibit 42, annexed to the Pitchford Aff.).

According to AIG, it investigated Monsanto's payments to determine whether the Anniston Site claims met the definition of Third Party Claims under the 1993 Settlement.

On November 4, 2002, AIG and Monsanto entered into an agreement that partially amended and superseded the 1993 Settlement with respect to Third Party Claims arising from the Anniston Site (2002 Agreement) (2002 Agreement, ¶¶ 1, 14, Exhibit 50, annexed to the Pitchford Aff.).

Under the 2002 Agreement, the parties agreed that, with respect to the Anniston Site, Monsanto had exhausted the \$80

million deductible, and that any disputes would be subject to non-binding mediation (2002 Agreement, ¶¶ 9, 12).

The following year, Monsanto advised AIG that the entire per site coverage of \$150 million available under the 1993 Settlement and 2002 Agreement for reimbursement of Third Party Claims would likely be impacted as the result of Monsanto's settlement of two lawsuits arising out of the Anniston Site for \$600 million, of which Monsanto's portion totaled \$550 million³ (Exhibits 52, 55 annexed to the Pitchford Aff.).

At the time, AIG disputed whether the amounts that Monsanto paid to settle the Abernathy/Tolbert Actions were covered under the 1993 Settlement and the 2002 Agreement as Third Party Claims, and it initiated mediation.

2004 Agreement

In August 2004, AIG and Monsanto resolved the issue and reached a final settlement (2004 Agreement), purporting to resolve any and all of AIG's obligations under the 1993 Settlement and 2002 Agreement with respect to Third Party Claims arising from the Anniston Site (Exhibit 68, annexed to the Pitchford Aff.).

Under the 2004 Agreement, AIG agreed to pay Monsanto \$140,566,79.82, of the \$150 million per site limit for Third Party Claims.

³ The two lawsuits at issue were entitled *Abernathy et al. v Monsanto Company*, instituted in 1996, and *Tolbert et al. v Monsanto Company*, instituted in 2002, in Alabama (together, Abernathy/Tolbert Actions).

Thereafter, AIG billed the Reinsurers their share of the payments (2004 Billings) under the Certificates, based upon a "weighted by limits" allocation of amounts to the Policies (Exhibits 69, 75 at 981, annexed to the Pitchford Aff). The Reinsurers refused to pay on the ground that the 2004 Billings constituted a payment made outside the terms of the Policies that they reinsured.

In 2006, AIG commenced this action against the Reinsurers and other insurers, and asserted causes of action for breach of contract stemming from their failure to pay the 2004 Billings, and seeking a declaration that the Reinsurers are obligated to pay under the Certificates.

The Reinsurers asserted affirmative defenses, including that the 2004 Billings are unreasonable, beyond the terms of the Policies, and amount to ex gratia payments.

Discussion⁴

The parties' dispute centers on whether the 2004 Billings, that stem from AIG's payment to Monsanto of Third Party Claims under the 2004 Agreement and incurred as the result of its settlement of the Abernathy/Tolbert Actions that arose out of its operations at the Anniston Site, are reasonably within the terms of the Policies.

⁴ The facts set forth herein are taken from the parties' Rule 19-A Statements and exhibits and are largely undisputed, except where indicated.

The Reinsurers⁵ move for summary judgment dismissing the complaint, and seek judgment on their affirmative defenses. They assert that they are not bound to pay the 2004 Billings because the Anniston Site claims are not covered under the Policies.

In opposition, AIG asserts that the applicable follow the settlements doctrine mandates that the Reinsurers reimburse it for the 2004 Billings. Further, it contends that the Reinsurers fail to raise a triable issue of fact that the 1993 Settlement or 2004 Agreement was not entered in good faith.

A. Follow the Settlements

Under the follow the settlements doctrine, where there is concurrency of coverage between a reinsured policy and a policy of reinsurance, the ceding company has the right to decide what the scope of coverage is, and to make adjustments and settlements in conformity with its interpretation (*Aetna Cas. and Sur. Co. v Home Ins. Co.*, 882 F Supp 1328, 1346-49, vacate denied 882 F Supp 1355 [SD NY 1995]).

Consequently, a reinsurer will be bound by a settlement agreed to by the ceding company if it is reasonably within the terms of the original policy, even if technically not covered by it (*Travelers Cas. and Sur. Co. v Certain Underwriters at Lloyd's of London*, 96 NY2d 583, 596-597 [2001]; *Allstate Ins. Co. v American Home Assur. Co.*, 43 AD3d 113, 120-21 [1st Dept 2007], lv denied 10 NY3d 711 [2008]).

⁵ American Re adopts and incorporates Point I of Everest's memorandum of law in support of its motion for summary judgment.

The doctrine is applicable so long as the settlement entered into by the ceding company is made in good faith after reasonable investigation, does not call for payments in excess of the reinsurer's agreed-to exposure, and does not involve ex gratia payments (*Travelers Cas. and Sur. Co.*, 96 NY2d at 597).

The dual purposes of the doctrine are to promote settlements and reduce litigation, by preventing the reinsurer from second-guessing the settlement decisions of the ceding company (*Granite State Ins. Co. v ACE American Reinsurance Co.*, 46 AD3d 436, 439 [1st Dept 2007]). Application of the doctrine is implicit in any contract of reinsurance and is customary within the insurance industry (*Id.*; *Aetna Cas. and Sur. Co.*, 882 F Supp at 1348-49).

Guided by these reinsurance principles, once the Court determines that the Anniston Site claims constitute losses arguably covered by the Policies, application of the follow the settlements doctrine will preclude review of AIG's decision to settle with Monsanto (*Global Reinsurance Corp. of American v Argonaut Ins. Co.*, 634 F Supp 2d 342, 350 [SD NY 2009]).

For the reasons set forth below, the Reinsurers have demonstrated that the 2004 Billings call for payments beyond the scope of coverage provided by the Policies, and thus, they are not bound to AIG's settlement of the Anniston Site claims under the follow the settlements doctrine.

A. The Policies

The Certificates contain a standard clause providing that all claims covered by the Certificates are binding on the

Reinsurers when settled. Further, the Certificates, that follow form to the Policies, provide coverage excess of \$20 million per occurrence, up to limits of between \$15 million to \$18 million, for each of the three-year policy period after exhaustion of a self-insured retention of \$20 million.

The Policies contain exclusions for bodily injury or property damage caused by pollution unless the contamination was sudden and accidental, and for punitive and exemplary damages (Policies, Exhibits 9-10, annexed to the Pitchford Aff.).

B. The Anniston Site Claims

The 2004 Billings stem from payments made by AIG to settle claims asserted by Monsanto for losses stemming from its settlement of the Abernathy/Tolbert Actions, and deemed to constitute Third Party Claims under the 2004 Agreement, that superseded the 1993 Settlement and the 2002 Agreement with respect to AIG's reimbursement obligation.

AIG's reimbursement obligation to Monsanto provides coverage for third-party personal injury or property claims, equal to fifty percent of expenses and liability up to \$150 million once Monsanto absorbs an \$80 million deductible, applicable on a per site basis, for any year in which AIG provided coverage (1993 Settlement, ¶ 5).⁶

⁶ Paragraph 5 of the 1993 Settlement states, "The Insurers will reimburse Monsanto for Third Party Claims as described in this Paragraph. The Insurers' obligation for Third Party Claims shall commence once Monsanto has absorbed, either directly or indirectly, an Eighty Million Dollar (\$80,000,000.00) per site deductible (CP with respect to AIG's obligation to reimburse 3rd party claims) with respect to indemnity payments for settlements

In support of its contention that the 2004 Billings include payments for losses that are not covered by the Policies, the Reinsurers submit internal AIG reports and legal memoranda analyzing the Anniston Site claims and AIG's potential defenses to Monsanto's reimbursement demand, drafted prior to the execution of the 2004 Agreement (Exhibits 51, 52, 66, annexed to the Pitchford Aff.).

According to AIG claims reports, Monsanto produced PCBs at the Anniston Site from 1929 to 1971, when it voluntarily ceased its production (*Id.*). As the result of Monsanto's operations at the site, the pollutant PCB was allegedly discharged (*Id.*). A number of lawsuits were filed by individuals who reside in the vicinity of the Anniston Site and claim to have been exposed to PCBs and suffered injury or property damage (Exhibits 49, 52 annexed to the Pitchford Aff.).

and/or judgments of Third Party Claims associated with that site. The Insurers [AIG] agrees to pay Monsanto, subject only to the aforementioned per site deductible, and without any allocation or spreading to underlying coverage provided by other insurers, fifty percent (50%) of any expenses and liabilities associated with Third Party Claims arising from or relating to such site if any portion of such claim falls within the years in which the Insurers provided coverage to Monsanto; provided further, however, that the Insurers' total payments to Monsanto for all Third Party Claims at all sites shall not exceed One Hundred Fifty Million Dollars (\$150,000,000.00), in the aggregate, nor shall the Insurers' payments for any Third Party Claims arising from a single site used by Monsanto exceed the total sum of the Insurers' coverage in effect for all of the years in which the site was used during the term of the Insurers' coverage. ... Payment may be allocated by the Insurers among the Insurers' policies in effect for all of the years in which the site was used by Monsanto during the term of the Insurers' coverage in such manner and with respect to whichever policy years as they determine in their sole discretion.

The payment made to Monsanto under the 1993 Settlement and 2004 Agreement provided coverage to Monsanto regardless of whether the losses fell into any of the exclusions, such as for punitive damages or pollution.

At the time that AIG was investigating Monsanto's reimbursement demand, AIG's head claims analyst, Wendy Feldman, estimated in a March 2003 "captioned report" (Captioned Report) that the punitive damages award in the Abernathy action, where Monsanto was found liable by a jury for wantonness and recklessness, could reach \$900 million (Exhibit 52 at 970-71, annexed to the Pitchford Aff.).

In a memorandum drafted by AIG's coverage counsel in December 2003 (2003 Legal Memo), it was noted that "fear of such an award probably had to play a significant role in Monsanto's decision to settle" that and the Tolbert actions for \$600 million⁷ (Exhibit 66 at 25 n 21, annexed to the Pitchford Aff.).

However, punitive damages are not an insured risk under explicit exclusions contained in the Policies (Exhibits 9-10 at 25273, 24555 ["This Insurance does not cover any liability for ... punitive or exemplary damages"], annexed to the Pitchford Aff.).

Notwithstanding express pollution exclusions contained in the Policies, under applicable Missouri law, an excess policy that covers bodily injury and property damage will not cover

⁷ Monsanto settled the Abernathy action in tandem with the Tolbert action for \$600 million in August 2003.

punitive damages unless the policy expressly provides for payment of punitive damages (*Union L.P. Gas Systems, Inc. v International Surplus Lines Ins. Co.*, 869 F 2d 1109, 1111 [8th Cir 1989]).

In addition, the Policies contain express pollution exclusions unless the contamination is both "sudden and accidental."

According to AIG's Captioned Report, the claims that gave rise to AIG's reimbursement to Monsanto for its settlement of the Abernathy/Tolbert Actions were the result of traditional environmental pollution that was neither sudden nor accidental (Captioned Report, Exhibit 52, annexed to the Pitchford Aff.).

By the time that AIG paid Monsanto for the Anniston Site claims in 2004, the court in the DJ Action had already determined years prior that, under applicable Missouri law, the sudden and accidental pollution exclusions set forth in the Policies bar coverage for losses incurred as the result of Monsanto's repeated disposal of contaminants in the course of its manufacturing activities that spanned decades (*Monsanto Co.*, 1993 WL 563253 at *11).

Therefore, it appears that a sizable portion of the \$140 million paid to Monsanto under the 2004 Agreement, and sought from Reinsurers in the 2004 Billings, was designed to reimburse Monsanto for a potential punitive damages award and for injury and property caused by contamination that was not sudden and accidental.

AIG points out that the court in the DJ Action rendered its

decision with respect to the enforceability of the pollution exclusion several weeks after it executed the 1993 Settlement, and that AIG was not a movant to the motion that sought interpretation of the exclusion. AIG submits the deposition testimony of Robert Kelly, AIG's coverage counsel in the DJ Action, who testified that, at the time that AIG settled with Monsanto in 1993, AIG believed that resolution of its defenses to the pollution exclusion was uncertain due to the state of the law (Kelly Dep 23:4-8, 24:2-5, 25:9-25, 26:2-13, 93:5-8; Exhibit 25, annexed to the Pitchford Aff.).

AIG contends that Kelly's testimony raises an issue of fact as to whether AIG reasonably settled with Monsanto. Where there is ambiguity as to whether the settlement of claims encompasses excluded losses with respect to pollution.

Nonetheless, even viewing AIG's evidence with respect to its belief that the law on pollution exclusions was ambiguous in a manner most favorable to it, AIG was still required to conduct a reasonable and businesslike investigation into Monsanto's claims submitted in 2003 in order to determine if they were covered under the Policies (*Excess Ins. Co. Ltd.*, 3 NY3d at 583).

A reasonable investigation of claims includes keeping apprised of relevant developments in the law affecting coverage determinations (see generally *Unigard Sec. Ins. Co., Inc. v North River Ins. Co.*, 4 F3d 1049, 1054 [2d Cir 1993]). On this point, AIG fails to raise a triable issue that it conducted a reasonable claims investigation in order to determine whether it was legally

liable for the Anniston claims prior to settlement in 2004.

AIG does not submit any evidence that it ever analyzed or investigated the Anniston Site claims in terms of the potential for coverage under the Policies. Rather, its representations and submissions as to the extensive investigation that it conducted, and its negotiation and compromise of the Anniston Site claims refer solely to whether the losses were covered under the 1993 Settlement (AIG's Memo. in Opp., 12; Exhibits 46, 48, 59-62, 65-66, 77 annexed to the Pitchford Aff.; Exhibits O-P, annexed to the Windle Aff.).⁸

The 2003 legal memo analyzing the Anniston Site claims and AIG's potential defenses to Monsanto's reimbursement demand, concluded that AIG's obligations "are not controlled by insurance policies, but by an indemnity agreement under which Monsanto, as indemnitee, should have the burden of proof" (Exhibit 66 at 24, annexed to the Pitchford Aff.).

According to AIG's head claims handler, Wendy Feldman, in preparing her analysis of the Anniston Site claims, she admittedly did not make reference to, nor did she recall reviewing, the terms, conditions, definitions and exclusions of

⁸ For instance, in the Captioned Report, AIG analyzes the facts at issue in the Anniston Site claims, including Monsanto's settlement of certain lawsuits, and applies the costs to the \$80 million deductible and allocation of damages against the mechanism set forth in paragraph 5 of the 1993 Settlement (Exhibit 52, annexed to the Pitchford Aff.).

In the Captioned Report, AIG notes that the potential exposure to AIG "as limited in the [1993] Settlement Agreement (...), is \$150M [million]" (Exhibit 52, annexed to the Pitchford Aff.).

the Policies (Feldman Deposition 70-74, 76-77). Further, she testified that she does not recall conducting an analysis of the pollution exclusions that were contained in the Policies, but that if she had, it probably would be included in the claims file (*Id.* 126-131).

In addition, the Reinsurers enumerate other ways that, in settling the Anniston Site claims, AIG supplanted key terms of the reinsured Policies, that effectively provided for coverage in excess of the Policies' limits of liability and retentions, amongst others.

The Reinsurers point out, and AIG does not refute, that Monsanto's claims arising out of the Anniston Site are based upon pollution that gave rise to loss that was of a continuous nature and resulted in exposure over the years that the plant was in operation, since 1935⁹ (AIG's Memo. in Opp., 19; Exhibit U, annexed to the Windle Aff.; Captioned Report, Exhibit 52 at 6, annexed to the Pitchford Aff.).

However, if the \$550 million that Monsanto paid to settle the Abernathy/Tolbert Actions had been spread over the years of the Anniston Site's operations (approximately fifty), and the amount of underlying self-insured retentions in AIG's excess layer (\$280 million), the \$20 million self-insured retention under the Policies would likely not have been reached under the

⁹ In the Captioned Report it is noted that "Monsanto began operations at the [Anniston] site in the 1930's. The facility remains in operation today. Therefore, the exposure period begins before the first AIG-related company policy and ends after the last AIG-related company policy" (*Id.*).

Certificates.

Nonetheless, by reimbursing Monsanto for the entire amount that it paid to settle the Abernathy/Tolbert Actions under the 1993 Settlement and 2004 Agreement, AIG assumed that Monsanto had exhausted its \$20 million self insured retention, and that the entire loss that it suffered occurred solely during AIG's block of coverage.

These changes in coverage are in contravention of express terms of the Policies, and eliminate the definition of "occurrence." For instance, the Policies require that underlying insurance must be maintained in full effect during the policy period "**without reduction of coverage or limits** except for any reduction of the aggregate limit or limits contained therein solely by payment of claims" in respect to accidents and/or occurrences during the policy period (emphasis added) (Policies at T).

In addition, the Policies state that "with respect to any occurrence, [liability] shall not attach unless and until the Assured, or the Assured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence" (Policies at J).

The Policies contain also contain an anti-stacking clause that states,

"It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Assured [Monsanto] prior to the inception date hereof the limit of liability herein ... shall be reduced by any amounts due to the Assurance on account of such loss under such prior insurance" (Policies at C).

Occurrence is expressly defined as "liability **during the policy period**" (emphasis added) (Policies at 5).

AIG cannot demonstrate that Monsanto suffered a loss within the policy period or that the self-insured retentions under the Policies had been exhausted, where it does not dispute that the loss was the result of contamination that spanned decades, which is arguably the applicable coverage period.

Moreover, the 1993 Settlement provides that AIG would pay Monsanto, "without any allocation or spreading to underlying coverage provided by other insurers ... if any portion of such claim falls within the years in which the insurers provided coverage to Monsanto," and provides that AIG may allocate any payments "in such manner and with respect to whichever policy years as they determine in their sole discretion" (1993 Settlement, ¶ 5).

The effect of this provision removing any obligation to allocate is that, even though coverage provided by other insurers underlie the attachment points of the triggered AIG policies, the other insurers' coverage cannot be factored into the allocation of AIG's reimbursement to Monsanto.

With respect to allocation, a reinsurer cannot be held accountable for any loss that the reinsurance policy does not cover (*North River Ins. Co. v Ace Am. Reins. Co.*, 361 F 3d 134, 141-42 [2d Cir 2004]; see also *Consolidated Edison Co. of New York, Inc. v Allstate Ins. Co.*, 98 NY2d 208, 222 [2002]).

In opposition, AIG's main argument is that the Reinsurers

paid their portion of the Clean-Up Costs in 1993 under the Certificates without protest, which arise from the same activities, and result in the same loss as the Anniston Site claims. According to the Reinsurers, they accepted AIG's representations with respect to the presentation, investigation and settlement by AIG of these claims under the terms of the Policies.

AIG fails to explain how the presumptive application of the follow the settlements doctrine, and the Reinsurers' election not to challenge this presumption with respect to AIG's payment of Clean-up Cost, under different terms than its settlement of Third Party Claims, affects the Reinsurers' present challenge to the 2004 Billings. Otherwise, AIG fails to raise a triable issue that the Reinsurers waived their right to challenge the applicability of the follow the settlements doctrine with respect to the 2004 Billings.

For these reasons, the Reinsurers have demonstrated that the 2004 Billings, that stem from settlement of the Anniston Site claims, are not payments made within the scope of the Policies, and that AIG failed to conduct a reasonable investigation as to coverage, to which AIG fails to raise a triable issue in opposition. Therefore, the Court determines that the Reinsurers are not bound to follow AIG's settlement of the Anniston Site claims.

Accordingly, it is

ORDERED that the motions of defendants Everest Reinsurance

Company and American Re-Insurance Company, n/k/a Munich Reinsurance America, Inc. for summary judgment dismissing the first through second and fifth through sixth claims of plaintiffs are granted; and it is further

ORDERED and ADJUDGED that plaintiffs are not entitled to the declaration that they seek in the fifth and sixth causes of action; and it is further

ORDERED that the complaint is dismissed and the Clerk is directed to enter judgment accordingly.

Dated: May 24, 2010

ENTER:

J.S.C.

HON. CHARLES E. RAMOS