AN EMERGING CHOICE OF LAW DOCTRINE IN NEW JERSEY ENVIRONMENTAL INSURANCE COVERAGE DISPUTES: THE NEW BATTLEFIELD AFTER *GILBERT SPRUANCE*†

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I. INTRODUCTION

The past decade has witnessed a literal avalanche of litigation in the area of environmental insurance coverage disputes.[1] The public's heightened sensitivity to environmental pollution over the past quarter century culminated in federal and state legislative enactments, such as the Comprehensive Environmental Response, Compensation and Liability Act[2] (CERCLA) and New Jersey's Spill

† Editor's note: On January 13, 1994, while this Article was being printed, the New Jersey Supreme Court denied the motions for reconsideration in *Morton International.*

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The firm represents insureds in environmental insurance coverage actions, including the policyholders in *Morton International v. General Accident* and *J. Josephson, Inc. v. Crum & Forster Insurance Co.* The views and opinions expressed in this Article are those of the authors and not necessarily those of Archer & Greiner, A Professional Corporation, or its clients.

[1] A recent law review article notes that the insurance industry has chosen to focus its attention in environmental actions on litigation rather than indemnification. The article reports that almost 90% of the monies allocated by insurers in Superfund cases has been spent on legal fees and related transaction costs. Eugene R. Anderson, et. al., *Environmental Insurance Coverage in New Jersey: A Tale of Two Stories*, 24 RUTGERS L.J. 83, 94 n.85 (1992) (citing JAN PAUL ACTON & LLOYD S. DIXON, SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCES OF INSURERS AND VERY LARGE INDUSTRIAL FIRMS xi (Rand Corp. The Institute for Civil Justice 1992)).

[2] 42 U.S.C. §§ 9601-9675 (West 1993). CERCLA imposes liability upon entities or persons who participated in the transportation of hazardous substances to covered facilities or otherwise arranged for the treatment or disposal of hazardous substances at authorized facilities. *See* 42 U.S.C. § 9607(a)(3) (West 1993). CERCLA holds present or past owners or operators of land [hereinafter collectively known as "owners"] responsible for the costs of cleaning up and disposing of wastes that, in some cases, were generated decades ago. CERCLA is sweeping in nature and applies to "any site or area where a hazardous substance . . . has come to be located." 42 U.S.C. § 9601(9)(B) (West 1993).

Retroactive liability under CERCLA has been upheld under constitutional attack. *See* United States v. Northeastern Pharmaceutical & Chemical Co., Inc., 810 F.2d 726, 733-34 (8th Cir. 1986) ("Retroactive application of CERCLA does not violate due process . . . ."); *see also* Amland Properties Corp. v. Aluminum Co. of America, 711 F.

Compensation and Control Act[3] (Spill Act), that impose retroactive strict, joint and several liability for parties implicated in government-mandated cleanups of hazardous waste sites. Because of the significant costs associated with these cleanups, coverage actions have been propelled to the forefront of environmental litigation as insured site owners, operators, transporters, and waste generators [collectively "insureds"] seek indemnity from their insurers.[4]

At the very core of these declaratory judgment actions, which have spawned hundreds of decisions nationwide,[5] is the interpreta-

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Supp. 784, 803-05 (D.N.J. 1989) (holding that CERCLA applies retroactively); United States v. Price, 577 F. Supp. 1103, 1111-12 (D.N.J. 1983) (same).

Furthermore, defendants may be jointly and severally liable under CERCLA. *See, e.g.*, United States v. Rohm and Haas Co., 2 F.3d 1265, 1280 (3d Cir. 1993) (recognizing general rule that joint and several liability is appropriate under CERCLA); United States v. Alcan Aluminum Corp., 964 F.2d 252, 268, 270 (3d Cir. 1990) (noting that joint and several liability is not appropriate where the defendant can demonstrate divisibility). *But see* Idaho v. The Bunker Hill Co., 635 F. Supp. 655, 676-77 (D. Idaho 1986) (declaring that CERCLA neither requires nor bars joint and several liability).

[3] N.J. STAT. ANN. §§ 58:10-23.11 to 23.11(2) (West 1982 & Supp. 1992). Courts have interpreted the Spill Act to apply retroactively. *See* New Jersey Dep't of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 468 A.2d 150 (1983) (applying Spill Act retroactively); New Jersey Dep't of Envtl. Protection v. Arlington Warehouse, 203 N.J. Super. 9, 14, 495 A.2d 882, 885 (App. Div. 1985). The Spill Act was expressly amended in 1979 to ensure retroactive application. N.J. STAT. ANN. § 58:10-23.11f(b)(3) (West Supp. 1993).

Even the most remote parties can be found strictly liable under the Spill Act, on a joint and several basis, for all removal and clean-up costs. N.J. STAT. ANN. § 58:10-23.11g(c) (West Supp. 1992); *see also* New Jersey Dep't of Envtl. Protection v. Arky's Auto Sales, 224 N.J. Super. 200, 539 A.2d 1280 (App. Div. 1988) (finding a landowner, who did not participate in discharge of waste, liable based solely on knowledge of discharge and failure to act); Tree Realty, Inc. v. Department of Treasury, 205 N.J. Super. 346, 500 A.2d 1075 (App. Div. 1985) (per curiam) (holding a landlord liable for tenant's hazardous waste discharge).

Under more recent amendments to the Spill Act, private parties that clean up hazardous substances may now bring private causes of action against other responsible parties for contribution. N.J. STAT. ANN. § 58:10-23.11f(a) (West Supp. 1992).

[4] The Federal Environmental Protection Agency initially calculated that the average cost of cleaning up prioritized waste sites was approximately $8 million per site. *See* Peter J. Kalis & Thomas M. Reiter, *Forum Non Conveniens: A Case Management Tool for Comprehensive Environmental Insurance Coverage Actions?*, 92 W. VA. L. REV. 391, 397-98 n.22 (1990) (citations and quotations omitted). That estimate ballooned to between $30-50 million by 1986. *See* Carl A. Salisbury, *Pollution Liability Insurance Coverage, The Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia*, 21 ENVTL. L. 357, 359 n.5 (1991) (citations omitted).

[5] For comprehensive and well-researched reviews of the hundreds of cases decided in this area, see New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1184-91 (3d Cir. 1991), *on remand*, 788 F. Supp. 812 (D. Del. 1991), *rev'd on other grounds*, 970 F.2d 1267 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1846 (1993); Morton Int'l Inc. v. General Accident Ins. Co. of America, 134 N.J. 1, 31-43, 629 A.2d 831, 848-55 (1993); Diamond Shamrock v. Aetna, 258 N.J. Super. 167, 200-08, 609 A.2d 440, 457-60 (App. Div. 1992), *certif. denied*, — N.J. —, — A.2d — (N.J. July 23, 1993) (Table,

tion to be accorded certain contractual language contained in standard-form comprehensive general liability (CGL) policies. As this body of law evolved over the last decade, considerable judicial resources have been consumed focusing on the interpretation of the so-called "pollution exclusion clause"[6] that appears in most stan-

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No. 35, 462, C-325). *See infra* notes 78-82 and accompanying text (discussing the *Diamond Shamrock* case).

A Florida federal court "colorfully" described the multitude of decisions as follows:

> This court recognizes that there is a plethora of authority from jurisdictions throughout the United States which, depending on the facts presented and the allegations of the underlying complaints, go "both ways" on the issues presented today. The cases swim the reporters like fish in a lake. The Defendants would have this Court pull up its line with a trout on the hook, and argue that the lake is full of trout only, when in fact the water is full of bass, salmon and sunfish too.

Morton, 134 N.J. at 43-44, 629 A.2d at 856 (quoting Pepper's Steel and Alloys v. United States Fidelity and Guar. Co., 668 F. Supp. 1541, 1549-50 (S.D. Fla. 1987)).

[6] A recent decision by the Supreme Court of Florida is illustrative of the difficulty that courts have had with this coverage issue. In a four-to-three decision, the court reversed its previous interpretation of the "sudden and accidental" exception to the pollution exclusion that it had rendered less than a year previously in the same litigation. *See* Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 1993 WL 241520 at *5 (Fla. July 1, 1993) (construing the "sudden and accidental" exception to require abruptness or immediacy and holding that the pollution exclusion clause barred coverage), *withdrawing*, Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 1992 WL 212008 at *4-8 (Fla. Sept. 3, 1992) (construing "sudden and accidental" exception to mean unintended and unexpected, thereby barring only coverage for knowing polluters).

A detailed study of the development of the pollution exclusion clause is set forth in the New Jersey Supreme Court's recent decision in *Morton*. To briefly summarize this extensive history, CGL policies issued prior to 1966 afforded liability coverage for property damage or personal injury "caused by accident," a phrase that the policies left undefined. In the absence of a definition, courts generally construed "caused by accident" to "encompass ongoing events that inflicted injury over an extended period provided the injury was unexpected and unintended from the insured's standpoint." *Id.* at 31, 629 A.2d at 849 (citations omitted).

The insurance industry revised the standard-form CGL policy in 1966 to provide coverage based upon an "occurrence." An "occurrence" was defined as "an accident, including injurious exposure to conditions, which results during the policy period, in bodily injury or property damage that was neither expected nor intended from the standpoint of the insured." *Id.* at 32, 629 A.2d at 849 (citations omitted). The 1966 revision was generally understood to broaden coverage and to specifically provide coverage for liability that arose from gradual pollution. *Id.*; *see also* Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 574 (Wis. 1990); Robert M. Tyler Jr. & Todd J. Wilcox, *Pollution Exclusion Clauses, Problems in Interpretation and Application Under the Comprehensive General Liability Policy*, 17 IDAHO L. REV. 497, 499 (1981)).

Beginning in 1970, the insurance industry, cognizant of the increased coverage provided by the 1966 revisions and the increase of pollution claims both filed and looming on the horizon, began drafting and seeking government approval for a standard "pollution exclusion clause." *Morton*, 134 N.J. at 33, 629 A.2d at 849-50 (citations omitted). This standard-form exclusion bars coverage for:

> [B]odily injury or property damage arising out of the discharge, disper-

dard-form CGL policies purchased between 1970 and 1984.[7] Judicial constructs on this and other important coverage issues have

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> sal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Id. at 11, 629 A.2d at 836 (referred to therein as exclusion "f").

In order to secure regulatory approval, the insurance industry represented to insurance regulators throughout the country that the pollution exclusion clause was simply intended to "clarify" the scope of existing coverage and to make clear that coverage did not exist for polluting events under the 1966 CGL revised policy because such damages were expected and intended and thus excluded from coverage. *Id.* at 34-43, 629 A.2d at 850-55. Specifically, as set forth in an explanatory memorandum submitted to state regulators by the insurance industry's representative and agent, the Insurance Rating Board (IRB) set forth the following:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent.

Id. at 37, 629 A.2d at 852; *see also Just*, 456 N.W.2d at 575 (citations omitted) (setting forth numerous statements from the insurance industry concerning the "clarification" of existing coverage under the new CGL pollution exclusion); Joy Technologies v. Liberty Mut. Ins. Co., 421 S.E.2d 493, 499 (W. Va. 1992) (observing that "the insurance industry thus represented to the State of West Virginia, acting through the West Virginia Commissioner of Insurance, that the exclusion . . . merely clarified the pre-existing 'occurrence' clause").

The New Jersey Supreme Court ultimately concluded that the insurers misrepresented and deceived state regulators as to the breadth of coverage that the insurance industry intended to vitiate through its introduction of the pollution exclusion clause. Consequently, the court held that based on public policy grounds, insurers were estopped from invoking the literal terms of the pollution exclusion clause which "sharply and dramatically" restricted the coverage provided under the 1966 revised CGL policy and yet did not provide a concomitant reduction in premium rates. As the *Morton* court explained: "[t]o describe a reduction in coverage of that magnitude as a 'clarification' not only is misleading, but comes perilously close to deception. Moreover, had the industry acknowledged the true scope of the proposed reduction in coverage, regulators would have been obligated to consider imposing a correlative reduction in rates." *Id.* at 39, 629 A.2d at 853.

[7] After 1984, the insurance industry introduced the so-called "absolute pollution exclusion" clause to remove all doubt that gradual polluting events were not to be covered. *See* KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW 161-63 (1991); *see also* Vantage Dev. Corp., Inc. v. American Envtl. Tech. Corp., 251 N.J. Super. 516, 525, 598 A.2d 948, 952-53 (Law Div. 1991) (discussing the so-called "absolute pollution exclusion clause" which, the court observed, the insurance industry introduced in the mid-1980s to remove doubt as to the scope and intent of what type of polluting event(s) was being excluded); U.S. Bronze Powders, Inc. v. Commerce and Indus. Ins. Co., 259 N.J. Super. 109, 118, 611 A.2d 666, 671-72 (Law Div. 1992) (noting that preceding CGL policies containing the qualified pollution exclusion had a limited exception to allow coverage for discharges that were "sudden and accidental"; thus, the court observed that: "the removal of this limiting language is indicative of the parties' intent that the pollution exclusion be *absolute*"). Additionally, in the mid-1980s, the insurance industry introduced "environmental impairment liability"

been uneven. As a consequence, certain jurisdictions, depending on their interpretations of key policy provisions, are now perceived as having adopted interpretations of the pollution exclusion clause that are considered to be more favorable to insureds, whereas other jurisdictions' interpretations are looked on as more favorable to insurers.

To date, the highest courts of at least thirteen states have interpreted the pollution exclusion clause.[8] While each particular decision settles the law within that state on that issue, there is presently no majority view as these courts of last resort have divided equally concerning their interpretations of the pollution exclusion clause.[9]

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coverage to specifically provide coverage for pollution-type events, although at the expense of substantial premiums. ABRAHAM, *supra*, at 195-204.

[8] *See* Hicks v. American Resources Ins. Co., 544 So. 2d 952 (Ala. 1989); Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991); Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 1993 WL 241520 at *5 (Fla. July 1, 1993), *withdrawing*, Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 1992 WL 212008 at *4-8 (Fla. Sept. 3, 1992); Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686 (Ga. 1989); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204 (Ill. 1992); Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc., 555 N.E.2d 568 (Mass. 1990); Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392 (Mich. 1991); Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374 (N.C. 1986); Morton Int'l, Inc. v. General Accident Ins. Co. of America, 134 N.J. 1, 629 A.2d 831 (1993); Technicon Elecs. Corp. v. American Home Assurance Co., 542 N.E.2d 1048 (N.Y. 1989); Hybud Equip. Corp. v. Sphere Drake Ins. Co. Ltd., 597 N.E.2d 1096 (Ohio 1992); Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493 (W. Va. 1992); Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990).

[9] Two high courts have applied estoppel against insurers based on public policy grounds in refusing to give effect to the carriers' proffered interpretation of the pollution exclusion clause. *See Joy Technologies*, 421 S.E.2d at 499-500 (applying estoppel based on public policy grounds, and essentially holding that the pollution exclusion was to be treated as coextensive with the occurrence clause). The *Joy Technologies* court observed:

> [I]n view of the fact that in the present case the insurance group representing Liberty Mutual unambiguously and officially represented to the West Virginia Insurance Commission that the exclusion in question did not alter coverage under the policies involved . . . this Court must conclude that the polices issued by Liberty Mutual covered pollution damage, even if it resulted over a period of time and was gradual, so long as it was not expected or intended.

Id. at 499-500 (footnote omitted). *See also Morton*, 134 N.J. at 30, 629 A.2d at 848 ("[W]e decline to enforce the standard pollution-exclusion clause as written. To do so would contravene this State's public policy . . . and would condone the industry's misrepresentation to regulators in New Jersey and other states concerning the effect of the clause.").

The highest courts of Colorado, Georgia, Illinois, and Wisconsin have ruled in favor of policyholders, concluding that the phrase "sudden and accidental" is ambiguous. *See, e.g., Hecla*, 811 P.2d at 1092 (footnote omitted) ("Since the term 'sudden' is susceptible to more than one reasonable definition, the term is ambiguous, and we therefore construe the phrase 'sudden and accidental' against the insurer to mean unexpected and unintended."); *Claussen*, 380 S.E.2d at 688 ("[U]nder the pertinent

The outcome of an environmental insurance coverage dispute is largely dependent upon which state's substantive law will be applied to the litigation. Accordingly, where a conflict exists over whether a particular state's substantive law should apply, the outcome of that choice of law motion will often prove dispositive in terms of whether a policyholder or insurer will ultimately prevail in the coverage action.

The purpose of this Article is to trace the evolution of New Jersey's choice of law rules and discuss how these principles have been applied in the context of environmental insurance coverage disputes. In so doing, this Article will discuss the recent New Jersey Supreme Court decision in *Gilbert Spruance Co. v. Pennsylvania Manufacturer's Association Insurance Co.*[10]

II. Choice of Law Development in New Jersey

To appreciate the evolution of New Jersey's choice of law rules in the environmental insurance coverage context, one must first

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rule of construction, the meaning favoring the insured must be applied, that is, 'unexpected.'"); *Outboard*, 570 N.E.2d at 1163 ("[W]e agree . . . with those authorities that define 'accidental' as meaning unintended *and* unexpected."); *Just*, 456 N.W.2d at 578 ("[W]e conclude that the phrase 'sudden and accidental' . . . means unexpected and unintended damages.").

The highest courts of Alabama, Florida, Massachusetts, Michigan, New York, North Carolina, and Ohio, on the other hand, have interpreted the pollution exclusion clause to be unambiguous and to exclude coverage for "gradual" pollution. *See, e.g.*, *Hicks*, 544 So. 2d at 954 ("[W]hile this Court [previously] found the exclusionary clause ambiguous . . . in the present case, the clause is not ambiguous as to the pollutants that contaminated [plaintiff's] property. . . ."); *Lumbermens*, 555 N.E.2d at 571 ("It is the release of pollutants itself that must have occurred suddenly if the exception is to apply so as to provide coverage."); *Upjohn*, 476 N.W.2d at 399 (footnote omitted) ("[T]he release of material . . . could not possibly be considered sudden because the release of by-product . . . was not unexpected by Upjohn."); *Technicon*, 542 N.E.2d at 1049-51 (focusing on the "accidental" term of the phrase "sudden and accidental" and noting that pollution exclusion clause is "unambiguously plain," court found pollution exclusion clause barred coverage because that clause excludes "liability based on all intentional discharges of waste whether consequential damages were intended or unintended"); *Waste Management*, 340 S.E.2d at 381 ("The exclusion limits the insurer's liability for accidental events by excluding damage caused by the gradual release, escape, discharge, or disposal of irritants, contaminants, or pollutants."); Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 1993 WL 241520 at *5 (Fla. July 1, 1993) (construing "sudden and accidental" exception to require abruptness or immediacy and holding that the pollution exclusion clause barred coverage), *withdrawing*, Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 1992 WL 212008 at *4-8 (construing "sudden and accidental" exception to mean unintended and unexpected thereby barring only coverage for knowing polluters); *Hybud*, 597 N.E.2d at 1103 (finding the "sudden and accidental" exception to the pollution exclusion to be unambiguous).

10 134 N.J. 96, 629 A.2d 885 (1993).

understand the changes that have taken place in New Jersey's general approach to choice of law problems. In 1957, the New Jersey Supreme Court, in *Buzzone v. Hartford Accident & Indemnification Co.*,[11] acknowledged that it was "too settled to be questioned that the rights and liabilities of the insurer under the policy and the statutory impact thereon [were] to be determined by the law of the state where the contract was made."[12] This well-accepted principle was known as *lex locus contractus*. A similar theory had developed in tort cases, where courts typically applied the law of the state where the injury took place.[13] These approaches provided certainty and predictability in choice of law determinations, but, over time, courts believed that their mechanical application often led to results that were inconsistent with the affected states' fundamental interests and policies. Eventually, these doctrines lost favor in most jurisdictions and courts started looking for a more flexible approach in order to accommodate the reasonable expectations of the parties and the governmental interests implicated.[14]

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[11] 23 N.J. 447, 452, 129 A.2d 561, 563 (1957).

[12] *Id.* Plaintiffs in *Buzzone* were involved in an automobile accident in New Jersey and sought to collect an unsatisfied New Jersey judgment from the driver's insurer, a Connecticut corporation. The driver, a resident of New York, secured the policy in New York through false pretenses, providing a false name and a counterfeit New York driver's license. The driver's actual New York license had previously been revoked. The policy contained a standard "conforming clause" that provided that the contract would be deemed in compliance with the motor vehicle financial responsibility law of any state with respect to any liability arising from the operation of the vehicle in that state. *Id.* at 450-51, 129 A.2d at 562-63. Finding that the case should be resolved under contract law, the *Buzzone* court followed the basic *lex locus contractus* rule governing choice of law in contract actions and concluded that New York law should be applied because that was where the contract was made. *Id.* at 453, 129 A.2d at 564.

[13] For a critical analysis of the *lex locus delicti* approach, see Pfau v. Trent Aluminum Co., 55 N.J. 511, 521, 263 A.2d 129, 135 (1970).

[14] Courts and commentators alike have noted that this change is due, in part, to changes in society. For example, the drafters of the Restatement, commenting on the adoption of the most significant relationship test in tort choice of law cases, explained that:

> These changes are partly a reflection of a change in our national life. State and national boundaries are of less significance today by reason of the increased mobility of our population and of the increasing tendency of men to conduct their affairs across boundary lines. These changes also reflect a changed attitude on the part of the courts. Judges are more prepared than formerly to consider the basic policies and values underlying choice of law. In reaching their decisions, the judges give greater weight to the choice-of-law policies stated in § 6 than to the demands of some legal theory, as that of vested rights.

RESTATEMENT (SECOND) CONFLICT OF LAWS, Introduction to Chapter 7, at 413 (1971). Similar concepts also explain the demise of *lex loci contractus* in contract choice of law analysis. For example, the New Jersey appellate division recently noted the following in *Johnson Matthey v. Pennsylvania Manufacturers Association Insurance Co.*:

As these principles evolved, the substantive dichotomy between tort and contract law gradually eroded. It was only natural, therefore, that courts started to treat contract and tort choice of law issues more consistently. As part of this evolution, the New Jersey Supreme Court in *State Farm Mutual Auto Insurance v. Estate of Simmons*,[15] abandoned the strict *lex loci contractus* approach[16] in

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> In these days of multistate insurers, multistate insureds, and instantaneous interstate transmission of voice and document, it is not easy to identify a state of contracting. A Delaware company, for example, secures a casualty insurance policy for a New Jersey site, among others, through a Philadelphia agent from an insurer with a Hartford home office that retains final underwriting approval on large policies. The handshake deal for the insurance is made over lunch in Manhattan. Choosing a *locus contractu* in such a case would be a difficult and perhaps pointless exercise. Pointless, because there is nothing about the choice that tells very much about the insurance transaction involved.

Johnson Matthey v. Pennsylvania Manufacturers Association Insurance Co., 250 N.J. Super. 51, 60, 593 A.2d 367, 372 (App. Div. 1991); *see also* Gilbert Spruance v. Pennsylvania Mfrs. Ass'n Ins. Co., 134 N.J. 96, 109, 629 A.2d 885, 892 (App. Div. 1992) (quoting *Johnson Matthey*).

[15] 84 N.J. 28, 417 A.2d 488 (1980).

[16] The court had questioned the viability of the *lex loci contractus* test prior to 1980, but had not abandoned it. *See, e.g.*, Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475, 492, 170 A.2d 22, 32 (1961). The *Kievit* court observed:

> In recent years there has been increased awareness of the unwisdom of rigid application of the traditional conflict of laws doctrines in the field of contracts and steps have been taken towards giving greater recognition to the local law of the state with which the contract has its most significant relationship.

Id. Twelve years later, in *Caribe Hilton Hotel v. Toland*, the court stated:

> Whether we simply say that the legality of a contract is to be determined by the law of the place where the contract is made, or whether we adopt the more modern formulation that rights and duties of contracting parties shall be determined by the law of the jurisdiction having the most significant relationship to the parties and to the transaction, the result in this case will be the same.

Caribe Hilton Hotel v. Toland, 63 N.J. 301, 303, 307 A.2d 85, 86 (1973).

The trend had also been recognized in the lower courts. *See, e.g.*, Breslin v. Liberty Mut. Ins. Co., 134 N.J. Super. 357, 341 A.2d 342 (App. Div. 1975), *aff'd. o.b.*, 69 N.J. 435, 354 A.2d 635 (1976) (noting that *Kievit* evidenced the "trend away from former 'mechanical' formulae in describing the choice of law questions"); Galligan v. Westfield Centre Serv., Inc., 166 N.J. Super. 392, 399, 399 A.2d 1052, 1055 (Law Div. 1979) ("This court, however free to criticize this state of the law, may not disobey what are apparently binding appellate precedents."), *rev'd*, 82 N.J. 188, 191 n.3, 412 A.2d 122, 124 n.3 (1980). In *Lewandowski v. National Grange Mutual Insurance Co.*, the court observed:

> While a trial court need not necessarily agree with our appellate tribunals, it may not disregard them. This court will, therefore, apply the law of the place of the contract in determining the statutory impact upon the omnibus clause. It is hoped, however, that the appellate courts will take this opportunity to re-examine the *Buzzone* application of the 1934 *Restatement* as it relates to the facts of the present case.

contractual choice of law cases in favor of a hybrid approach that combined the "most significant relationship" test of the Restatement (Second) Conflict of Laws (Restatement)[17] with the traditional *lex loci contractus* test. The Restatement choice of law analysis employed in *Simmons* relies on several factors that must be considered to determine the state with the most significant relationship. Specifically, Restatement section 6 identifies seven factors, none of which are dispositive, that are "germane to a court's conflict of law analysis." These factors are:

(a) the needs of the interstate and international system,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relevant interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability, and uniformity of result, and
(g) ease in the determination and application of the law to be applied.[18]

Under the Restatement's significant relationship test, these seven factors must be analyzed in conjunction with several relevant "contacts" identified in Restatement section 188, namely, the place of contracting, the domicile of the parties, and the place of performance.[19] In *Simmons*, the supreme court recognized that these *contacts* are relevant in assessing the Restatement's basic choice of law considerations, such as the interest and policies of the affected states, the protection of the parties' reasonable expectations, the special concerns underlying the particular field of law, the ease in the selection, and application of the appropriate law and the need for uniformity and consistency.[20]

The *Simmons* court also recognized that the Restatement provides a specific provision that offers additional guidance for choice of law determinations involving casualty insurance policies. Restatement section 193 provides that:

Lewandowski v. National Grange Mut. Ins. Co., 149 N.J. Super. 591, 601, 374 A.2d 489, 494 (Law Div. 1977).

A 1987 law review article reported that seventeen states continue to follow the *lex locus contractus* doctrine. Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1050 (1987).

17 *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 188 (1988).

18 *Id.* § 6(2).

19 *Id.* § 188.

20 *See* State Farm Mut. Auto. Ins. Co. v. Estate of Simmons, 84 N.J. 28, 35, 417 A.2d 488, 491 (1980).

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.[21]

The *Simmons* court, however, did not fully embrace any one of the Restatement tests; rather, it fashioned a choice of law rule that combined the *lex loci contractus* approach with the Restatement approach. The court explained that:

> [The] proper approach in resolving conflict-of-law issues in liability insurance contract controversies is that which may be synthesized from this post-*Buzzone* evolution of the law in both the

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[21] *Id.* (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 193). Despite the fact that the *Simmons* court had obviously decided to embark on a new approach in contractual choice of law analysis, for whatever reason, it felt compelled to state that its analysis was not inconsistent with its previous holding in *Buzzone*, asserting that the *Buzzone* result "can be perceived as resting upon some of the factors considered important in the Restatement." *Id.*, 417 A.2d at 491-92.

The court stated that "in effect," the *Buzzone* court considered the states' significant relationships to the parties to the transaction, such as the place of contracting, the location of the subject matter, the domicile of the parties, and the anticipated place of performance. The *Simmons* court also maintained that the *Buzzone* court balanced these contacts:

> [I]n the broader context of the reasonable expectations of the contracting parties concerning the principal location of the insured risk and the governmental interests and legislative policies of each affected state. It also recognized the need for reasonable certainty and consistency in choice-of-law principles and the importance of discouraging forum-shopping.

Id., 417 A.2d at 492.

According to the *Simmons* court, therefore, the *Buzzone* court "gave appropriate emphasis to the significant relationships of the respective states to the parties in the underlying transaction" despite initiating its analysis by stating that choice of law disputes in contract cases are determined by looking to the law of the place of contracting. *Id.*

The court also reasoned that New Jersey cases subsequent to *Buzzone* did not inflexibly apply the *lex loci contractus* rule. *See, e.g.*, Public Serv. Coordinated Transport v. Marlo Trucking Co., Inc., 108 N.J. Super. 232, 236, 260 A.2d 855, 856-57 (App. Div. 1970) (finding that New York law governed when driver, driver's attorney, and company's principal place of business were all located in New York, despite the fact that the accident occurred in New Jersey); Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475, 492-93, 170 A.2d 22, 32 (1961) (holding that New Jersey had a greater concern than Massachusetts in an insurance contract dispute, despite the fact that the contract was negotiated in Massachusetts).

Despite these protestations to the contrary, as noted by Justice Pashman's dissent, the *Simmons* majority clearly departed from its choice of law analysis in *Buzzone*.

> contract field as well as in the somewhat related tort field,[22] particularly in the area of automobile accident litigation. This calls for recognition of the rule that the law of the place of the contract ordinarily governs the choice of law because this rule will generally comport with the reasonable expectations of the parties concerning the principal situs of the insured risk during the term of the policy and will furnish needed certainty and consistency in the selection of the applicable law. At the same time, this choice-of-law rule should not be given controlling or dispositive effect. It should not be applied without a full comparison of the significant relationship of each state with the parties and the transaction. That assessment should encompass an evaluation of important state contacts as well as a consideration of the state policies affected by, and governmental interest in, the outcome of the controversy.[23]

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22 The *Simmons* court recognized that a series of New Jersey tort cases involving conflict of law questions had invoked the "governmental interest" test in deciding the outcome. *See, e.g.*, Pfau v. Trent Aluminum Co., 55 N.J. 511, 521, 263 A.2d 129, 135 (1970) (declaring that Iowa's interest in having its strict guest-host liability law applied was insufficient in case where automobile accident occurred in Iowa; the case involved a New Jersey driver of a New Jersey-registered vehicle and a Connecticut passenger was injured); Mellk v. Sarahson, 49 N.J. 226, 229, 229 A.2d 625, 626 (1967) (declaring that when an automobile accident occurred in Ohio, in which all the parties involved were New Jersey residents, New Jersey guest-host law, which allowed the suit to continue, rather than Ohio law that barred such actions, would apply because application of Ohio law would not have furthered Ohio's interest when the parties were no longer situated in Ohio); Note, *The Application in New Jersey of Government Interest Analysis Approach to Choice of Law Problems of Tort Liability*, 3 RUT.-CAM. L.J. 165 (1971).

The "governmental interest" test examines whether each state has a legitimate concern in the resolution of the controversy and places a special emphasis upon each party's respective status in connection with that state. The Simmons court found that this test was analogous to the "significant relationship test" and that the same Restatement factors were generally relevant to both tests. *See Simmons*, 84 N.J. at 43 n.2, 417 A.2d at 496 n.2 (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 6(b)(c) and (e)).

New Jersey courts have employed the "governmental interest" test rather than the *lex loci delicti* rule (location of the harm) in tort actions, despite the convenience and certainty of the location rule, because the location rule does not always comport with the reasonable expectations of the parties to the contract, nor does it take into account the governmental interests and policies of the affected states. *Id.* at 37, 417 A.2d at 492 (citation omitted). Today, New Jersey continues to follow the governmental interest test to resolve choice of law issues in tort cases. *See, e.g.*, O'Connor v. Busch Gardens, 255 N.J. Super. 545, 548, 605 A.2d 773, 774 (App. Div. 1992).

According to a recent law review note, fifteen states continue to adhere to the *lex locus delecti* doctrine. *See* Leigh Ann Miller, Note, *Choice-of-Law Approaches in Tort Actions*, 16 AM. J. TRIAL ADVOC. 859 (1993).

23 *Simmons*, 84 N.J. at 37, 417 A.2d at 492-93 (citing Buzzone v. Hartford Accident & Indem. Co., 23 N.J. 447, 458, 129 A.2d 561, 564-65 (1957); Mayer v. Roche, 77 N.J.L. 681, 683, 75 A. 235 (E. & A. 1909); A. EHRENZWEIG, A TREATISE ON THE CONFLICTS OF LAW § 174, at 460-61 (1962); ROBERT A. LEFLAR, AMERICAN CONFLICTS OF LAW § 86, at 173 (3d ed. 1977); RESTATEMENT (SECOND) CONFLICT OF LAWS § 193)).

The court went on to hold that in actions involving the interpretation of an automobile insurance contract, the substantive law of the state where the contract was formed will govern the rights and liabilities of the parties, unless "the dominant and significant relationship of another state to the parties and the underlying issue dictates that this basic rule should yield."[24]

Most importantly, the *Simmons* court recognized that the respective states' governmental interests and related public policies are significant considerations in the Restatement's choice of law analysis.[25] Hence, after *Simmons*, courts approached choice of law questions by looking to the competing states' interpretations of the relevant insur-

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24 *Simmons*, 84 N.J. at 37, 417 A.2d at 493.

25 RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 6(b), (c) & (e). In *Simmons*, the court was faced with either applying New Jersey or Alabama law, with the court ultimately choosing to apply the latter. The court examined the public policies of both states regarding automobile liability insurance, noting that both states had passed legislation requiring that all persons who drive an automobile with the implied or expressed permission of the named insured be covered under the owner's liability policy. *See* ALA. CODE § 32-7-22 (West 1993); N.J. STAT. ANN. 39:6A-4 (West 1993). In this regard, the court noted that both states' policies were fundamentally the same. *Simmons*, 84 N.J. at 40, 417 A.2d at 495.

The court found, however, that Alabama took a more restrictive view of the insurance coverage language at issue than New Jersey. *Compare* Alabama Farm Bureau Mut. Casualty Ins. Co. v. Robinson, 113 So. 2d 140, 145 (Ala. 1959) (finding that the classmate of car owner who drove car without the express permission of the owner did not have the insured's implied permission to use the vehicle); *with* Motor Club Fire & Casualty Co. v. New Jersey Mfrs. Ins. Co., 73 N.J. 425, 439, 375 A.2d 639, 647 (holding that a passenger who grabbed steering wheel from the owner without intending to permanently deprive the owner of control of the vehicle was covered under owner's insurance policy), *cert. denied*, 434 U.S. 923 (1977).

Despite these differences, the court noted that all distinctions between the laws of various states do not necessarily represent inconsistent public policies or state interests. *See* Wilson v. Faull, 27 N.J. 105, 123, 141 A.2d 768, 778 (1958). Rather, there must be fundamental differences between the respective state laws before the foreign law will be considered repugnant or offensive to local public policy. *See Simmons*, 84 N.J. at 41-42, 417 A.2d at 495 (citing Caribe Hilton Hotel v. Toland, 63 N.J. 301, 308, 307 A.2d 85, 89 (1973); Keystone Ins. Co. v. Bowman, 138 N.J. Super. 544, 549, 351 A.2d 767, 770 (App. Div. 1976); Breslin v. Liberty Mutual Ins. Co., 134 N.J. Super. 357, 365, 341 A.2d 342, 347 (App. Div. 1975), *aff'd*, 69 N.J. 435, 354 A.2d 635 (1976); Zotta v. Otis Elevator Co., 64 N.J. Super. 344, 349, 165 A.2d 840, 842-43 (App. Div. 1960)).

Hence, the *Simmons* court held that neither state's fundamental public policy would be circumvented if the other state's substantive law was applied, even though their implied consent laws differed as to duration and character. *Id.* Because the court determined that New Jersey's interest was not more significant than Alabama's interest in the outcome of the litigation, the court concluded the basic choice of law standard—namely, that the law of the place of contracting governs the choice of law dispute—applied in this case. Therefore, because Alabama was the place of contracting, the court applied Alabama substantive law. *Simmons*, 84 N.J. at 42-43, 417 A.2d at 496.

ance policy language and how those interpretations related to the particular public policies of the states that were implicated.

Justice Pashman dissented in *Simmons*, arguing for a total abandonment of the *lex loci contractus* test. Justice Pashman strongly believed that a true governmental interest approach could not be properly applied until the approach taken in *Buzzone* was completely overruled. In short, Justice Pashman opined that the *lex loci contractus* standard should be abolished and, in its place, the immediate emphasis should be on the competing public policies at stake. While the majority's hybrid test resulted in the application of Alabama law, Justice Pashman posited that New Jersey's "strong public policy regarding automobile insurance" required that New Jersey substantive law be applied.[26] Although the Justice's dissent was not enough to convince a majority of the court at that time, subsequent courts would adopt Justice Pashman's reasoning.[27]

III. Application of New Jersey's Choice of Law Rules to Environmental Insurance Coverage Cases

A. *The Early Federal Court Decisions*

By the early 1980s, New Jersey had thus abandoned the strict *lex loci contractus* approach in contract choice of law analysis. In its place emerged a more flexible approach that adopted certain guiding principles embodied in the Restatement[28] in an effort to give

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[26] *Simmons*, 84 N.J. at 50, 417 A.2d at 500 (Pashman, J., dissenting). Justice Pashman compared the respective state substantive laws and recognized that New Jersey had rejected the "minor deviation" rule while Alabama had adopted it. Therefore, if New Jersey law applied, insurance coverage would be available, but if Alabama law applied, there would be no coverage. *See* Motor Club Fire & Casualty Co. v. New Jersey Mfrs. Ins. Co., 73 N.J. 425, 375 A.2d 639, *cert. denied*, 434 U.S. 923 (1977); Odolecki v. Hartford Accident & Indem. Co., 55 N.J. 542, 264 A.2d 38 (1970); Small v. Schuncke, 42 N.J. 407, 201 A.2d 56 (1964); Matis v. National Wide Mut. Ins. Co., 33 N.J. 488, 166 A.2d 345 (1960).

[27] In fact, Justice Pashman's approach to resolving the choice of law issue more accurately reflects the current state of the law than does the majority opinion. *See, e.g.*, General Metalcraft, Inc. v. Liberty Mut. Ins. Co., 796 F. Supp. 794, 803 (D.N.J. 1992) ("[W]e predict that if faced with the precise question before us here, the Supreme Court of New Jersey would adopt the approach of the [Simmons] dissent . . . ."); *see also* Gilbert Spruance Co. v. Pennsylvania Mfrs. Ass'n Ins. Co., 134 N.J. 96, 629 A.2d 885 (1993) (requiring an extended Restatement § 6 analysis in place of the *lex loci contractus* test in cases where the subject matter of the insurance contract is transient in nature, such as hazardous waste).

[28] More recently, New Jersey courts have generally applied a governmental interest analysis approach to resolving choice of law questions in both contract and tort actions. *See, e.g.*, O'Connor v. Busch Gardens, 255 N.J. Super. 545, 605 A.2d 773 (App. Div. 1992). In *O'Connor*, Judge Cohen explained that:

> In tort cases, the traditional choice is the law of the place where the

effect to the parties' reasonable expectations and the governmental interests implicated.

Two early cases that applied this evolving choice of law analysis in the context of an environmental insurance coverage dispute arose in the New Jersey federal courts.[29] The first such opinion, which has generated the most attention and debate, was rendered by Judge Brotman in *Leksi, Inc. v. Federal Insurance Co.*[30] The plaintiff, Leksi, Inc. (Leksi), was a Pennsylvania manufacturer of dentures that allegedly transported waste by-products from its Pennsylvania plant to various New Jersey landfills. When Leksi was named as a party in several environmental clean-up actions concerning these sites, it sought coverage from its insurance carriers. The CGL policies at issue had all been delivered, negotiated, and signed in Pennsylvania.[31] When the insurance carriers denied coverage relying on the pollution exclusion clause, Leksi brought a declaratory judgment action to determine its coverage rights. A key question in that litigation was whether New Jersey or Pennsylvania law would be applied to the interpretation of the pollution exclusion clause.[32]

Judge Brotman, relying on *Simmons*, predicted that the New Jersey Supreme Court would follow a strict uniform site-specific approach to choice of law disputes in the environmental insurance coverage context.[33] Judge Brotman explained:

> wrong occurred. Although that rule is simple and relatively certain, its rigidity has led to its widespread rejection and to adoption of the more flexible governmental interest analysis. In contract cases, the same considerations led to abandonment of the rigid choice-of-law rule that applied the law of the place where the contract was formed.

Id. at 548, 605 A.2d at 774 (citations omitted); *see also* D'Agostino v. Johnson & Johnson, 255 N.J. Super. 307, 315-16, 605 A.2d 252, 256 (App. Div. 1992) ("[W]ell settled law of this State has rejected the traditional choice of law rule in tort cases, *lex loci delicti*. . . . To inject more flexibility in the choice of law process, New Jersey has adopted the governmental interest analysis . . . .").

[29] In cases arising under state law that are brought in the federal courts on diversity of citizenship grounds, the federal court must apply the conflict of law rules of the forum state. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). As the *Klaxon* court explained, "[o]therwise the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side-by-side." *Id.* (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74-77 (1938)).

[30] 736 F. Supp. 1331 (D.N.J. 1990).

[31] *Id.* at 1331-32. Likewise, all insurance premiums had been paid in Pennsylvania.

[32] The states differed as to their respective interpretations of the pollution exclusion clause. Under Pennsylvania law, gradual pollution was not covered, whereas under New Jersey Law it was. *See* Lower Paxton Township v. United States Fidelity and Guar. Co., 557 A.2d 393 (Pa. Super. 1989); Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co. of New York, 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987).

[33] Other states have adopted various choice-of-law rules in the environmental in-

surance coverage context. For example, Delaware state courts follow § 188 of the Restatement and have generally applied the law of the state where the principal place of business or corporate headquarters of the insured is situated. *See* Sequa Corp. v. Aetna Casualty & Sur. Co., C.A. No. 89C-AP-1 (July 16, 1992), *reprinted in*, 6 MEALEY'S LITIG. REPS.: INSURANCE, #36, 12 (July 28, 1992); Monsanto Co. v. Aetna Casualty & Sur. Co., C.A. No. 88C-JA-118 (Oct. 29, 1991), *reprinted in*, 6 MEALEY'S LITIG. REPS.: INSURANCE, #2, 8 (Nov. 5, 1991); E. I. DuPont de Nemours & Co. v. Admiral Ins. Co., C.A. No. 89C-AU-99 (Oct. 22, 1991), *reprinted in*, 6 MEALEY'S LITIG. REPS.: INSURANCE, #1, 25 (Nov. 1, 1991).

These three unpublished Delaware state court opinions involved environmental insurance coverage disputes with multiple sites, several of which were located in states other than Delaware. In each of these decisions, the court gave considerable weight to the insured's principal place of business or corporate headquarters in determining which state's law applied. In concluding that the principal headquarters or place of business of the insured is the true nexus which governs choice of law, the Delaware state courts rejected arguments from the carriers that the situs of the waste, location of the broker(s), or place of contract negotiation should be determinative factors. *But see* Chesapeake Utilities Corp. v. American Home Assurance Co., 704 F. Supp. 551 (D. Del. 1989) (applying Delaware choice-of-law rules, the court concluded that Maryland law should be applied to a Maryland waste site and Delaware law to a Delaware waste site).

Wisconsin's choice of law analysis is not as well-defined. As in Delaware, Wisconsin courts look to § 188 of the Restatement. *See* Haines v. Mid-Century Ins. Co., 177 N.W.2d 328 (Wis. 1970). In addition to the § 188 factors, however, Wisconsin courts employ a judicially constructed five-point test. This five-point test is similar to § 6 of the Restatement. The elements considered in this test are: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum government's interests; and (5) application of the better rule of law. *Haines*, 177 N.W.2d at 333. These elements allow for a great deal of flexibility in a court's analysis, especially when it comes to analyzing the fifth factor, the "better rule of law." Minnesota state courts apply a similar five-prong choice of law test that includes a "better rule of law" factor. *See* Board of Regents of Univ. of Minnesota v. Royal Ins. Co., *reprinted in*, 7 MEALEY'S LITIG. REP.: INSURANCE, #36, 1, 6 (July 27, 1993) (also applying the five-prong "better rule of law" test).

Only one published Wisconsin decision has addressed the choice of law issue in the context of an environmental insurance dispute. In *Fortier v. Flambeau Plastics Co.*, the Wisconsin appellate court noted a possible conflict between Illinois and Wisconsin law on the pollution exclusion issue, and in a summary, cryptic fashion, concluded that Wisconsin law should be applied. Fortier v. Flambeau Plastics Co., 476 N.W.2d 593, 609 (Wis. Ct. App. 1991). The court reasoned that because the Wisconsin Supreme Court had recently concluded that the pollution exclusion was ambiguous, *see* Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 573 (Wis. 1990), Wisconsin law was the "better rule" to apply. *Id.* at 609 (citations omitted). In fact, the court believed it was "obligated" to so hold. *Id.*

Pennsylvania choice-of-law rules, on the other hand, combine the Restatement's significant contact analysis with an analysis of the policies and governmental interests of the various jurisdictions. *See* Compagnie des Bauxites de Guinee v. Argonaut-Midwest Ins. Co., 880 F.2d 685, 689 (3d Cir. 1989); Continental Ins. Co. v. Beecham, Inc., 1993 WL 469906 (D.N.J. Aug. 31, 1993) (applying Pennsylvania choice-of-law rules because the case had been transferred to the federal district court in New Jersey from the Middle District of Pennsylvania); Griffith v. United Air Lines, Inc., 203 A.2d 796 (Pa. 1964).

In *Beecham*, for example, Pennsylvania's only significant contact to the litigation was the location of the waste site. Judge Barry found that Pennsylvania's nexus (the

> [I]n the absence of a choice of law provision, the state where the toxic waste comes to rest is the state whose law will apply, provided that it was reasonably foreseeable that the waste would come to rest there. With the exception of situations in which the adjoining states dispute their boundary, this rule is elegant in its simplicity and properly recognizes that the host state's interest in its environment is superior to that of the law of the place of the contract. Although this rule may not provide unerring clarity to the parties at the time of negotiating, this difficulty may be cured by the simple insertion of a choice of law provision.[34]

Even though the sole and dispositive factor in Judge Brotman's

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situs of the waste) was not controlling and, standing alone, did not justify the application of Pennsylvania law. Judge Barry elaborated by stating that Pennsylvania had no true interest in applying its state substantive law because its contacts were unrelated to its state policy favoring environmental cleanup. After finding that New Jersey public policy protected the parties' reasonable expectations, the court applied New Jersey law to the interpretation of the pollution exclusion clause. *Beecham*, 1993 WL at *13-14.

New York courts have applied the substantive law of the state that maintains "the most significant contacts with the matter in dispute." New York courts have thus emphasized the Restatement § 188 factors such as: "the location of the insured risk; the insured's principal place of business; where the policy was issued and delivered; the location of the broker or the agent placing the policy; where the premiums were paid; and the insurer's place of business." Olin Corp. v. Insurance Co. of N. A., 743 F. Supp. 1044, 1049 (S.D.N.Y.), *aff'd*, 929 F.2d 62 (2d Cir. 1991). *But see* Borg-Warner Corp. v. Insurance Co. of N. Am., 577 N.Y.S.2d 953, 956 (App. Div. 1992) (applying New York law to waste sites located in and outside New York based on three primary factors: (1) the fact that 7 of the 19 contaminated sites were located in New York; (2) New York's public policy; and (3) plaintiff's choice of New York as the forum state).

[34] Leksi, Inc. v. Federal Ins. Co., 736 F. Supp. 1331, 1336 (D.N.J. 1990). The utility of allowing the parties to choose the state law that will govern their rights under the contract has been debated by scholars and courts alike. A number of commentators have endorsed the principle that favors party-autonomy and allows choice of law contract provisions, but would disregard the parties' choice only if the law of the governing state would invalidate the contract. These commentators note that parties usually intend their agreements to be enforced and argue that if the parties selected the law of the state that would invalidate the contract, the choice must have been a mistake. They argue that this so-called "rule of validation" fosters certainty and predictability, and also accurately reflects the parties' true intentions. *See, e.g.*, A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 485-90 (1962); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 7.4, at 386 (3d ed. 1986); Earnest G. Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L.J. 655, 673 (1921).

At least one commentator has advocated a rule in contract cases that "true conflicts should be resolved by applying the law chosen by the parties, or, if no express choice is made, by applying whichever law validates the contract." Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 329 (1990). Expressly noting that he was "tentatively" advocating this doctrine, Professor Kramer acknowledged, however, that complete autonomy would be improper. *Id.* at 329. Rather, Professor Kramer posited that "[e]ven if the state decides to resolve true conflicts by delegating the

site-specific test focuses on the situs of the waste, he nevertheless referenced the language of Second Restatement sections 6 and 188, and discussed at length the importance of New Jersey's environmental policies. Judge Brotman thus observed that the New Jersey Legislature had passed several statutes evidencing New Jersey's strong interest in remediating toxic waste found within its boundaries[35] and concluded, therefore, that "it is difficult to imagine any interest that New Jersey could have that would be more compelling, or, in the language of [*Simmons*], more 'dominant and significant,' than its concern in determining the availability of funds for the clean-up of hazardous substances located within its boundaries."[36] Specifically, Judge Brotman found that the New Jersey statutory framework regarding cleanup of hazardous waste sites would, in effect, be negated if the court did not apply New Jersey substantive law to waste sites located in New Jersey. Judge Brotman, therefore, ruled that New Jersey substantive law would apply, despite the fact that a number of the contacts relevant to a choice of law determination under Restatement section 188 were with Pennsylvania.[37]

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power to choose to the parties, it has no reason to make the parties' choice broader than the conflicting laws." *Id.* at 330.

The Restatement approach, on the other hand, suggests giving full autonomy to the parties by allowing them to choose the law of a state that has no substantial relationship to the parties or the contract "on the ground that they know it well and that it is sufficiently developed." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f (1988).

[35] Specifically, Judge Brotman cited to the New Jersey Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11 (West 1982 & Supp. 1992); the Solid Waste Management Act, N.J. STAT. ANN. § 13:1E-1 (West 1982 & Supp. 1992); the Sanitary Landfill Facility Closure and Contingency Fund Act, N.J. STAT. ANN. § 13:1E-100 (West 1982 & Supp. 1992); and the Water Pollution Control Act, N.J. STAT. ANN. § 23:5-28 (West 1982 & Supp. 1992).

[36] Leksi, Inc. v. Federal Ins. Co., 736 F. Supp. 1331, 1335 (D.N.J. 1990) (citing Verlan, Ltd. v. John L. Armitage & Co., 1989 WL 8590 (N.D. Ill. 1989)).

[37] *Id.* at 1335. Specifically, the court noted:

> Virtually all of the contracting occurred in Pennsylvania. The policies were negotiated through agents in Pennsylvania, and were signed and delivered there. Although Leksi is a Delaware corporation, the facilities which produced the wastes are located in Pennsylvania. As the place of the negotiating and contracting, Pennsylvania "has an obvious interest in the negotiations and in the agreement reached."
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> Pennsylvania's interest, however, pales in comparison to that of New Jersey. . . . Although the premiums may have been paid in Pennsylvania, one can safely assume that the insurers would have accepted the premiums if tendered in some other state. Although the insurance policies were negotiated through local agents, there is no reason to believe that the defendant insurance companies would have declined to enter into the agreements if an agent from outside of Pennsylvania had arranged to have Leksi purchase insurance. Finally, it is noteworthy that there are as many or more landfills in New Jersey with close prox-

Following *Leksi*, the New Jersey Superior Court, Appellate Division, while directly addressing the issue of *forum non conveniens* in *Westinghouse v. Liberty Mutual Ins. Co.*,[38] had the occasion to discuss in dicta whether a single state's law should be applied to a comprehensive environmental insurance coverage dispute, even if the insured's waste had been deposited in a number of different states.[39] The court concluded that a uniform contract interpretation approach to this issue, rather than a uniform situs-of-the-waste test, was appropriate. Although that conclusion was clearly dicta, it did influence a number of courts until the New Jersey Supreme Court eventually dismissed it.[40]

For example, the *Westinghouse* dicta persuaded Judge Ackerman to question the viability of *Leksi* when multi-state waste sites were involved in *National Starch & Chemical Co. v. Great American Insurance Co.*[41] *National Starch* presented a different case than *Leksi* in that the insured, National Starch, a Delaware corporation with its principal place of business in New Jersey, had been implicated as a responsible party for the cleanup of waste sites located in twelve different states.[42] Judge Ackerman began his analysis by recognizing the importance of New Jersey's "liberal approach" to environmental insurance coverage,[43] and also how that policy led to a basic dilemma in most environ-

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> imity to the Leksi plants than there are in Pennsylvania. While certainly Pennsylvania has an interest in applying its law, that interest should not be overestimated in light of New Jersey's contacts.

Id. at 1335-36 (citations omitted).

A necessary corollary of Judge Brotman's opinion, therefore, is that if the waste sites had been located in several states, the court would have to apply the laws of several different states to the interpretation of the same policy provision in the same litigation.

38 233 N.J. Super. 463, 559 A.2d 435 (App. Div. 1989).

39 *Id.* at 476, 559 A.2d at 442. *Westinghouse* had been severely criticized by the United States District Court for the District of Maryland in Travelers Indem. Co. v. Allied-Signal, Inc., 718 F. Supp. 1252 (D. Md. 1989). The *Travelers Indemnity* court inferred that the *Westinghouse* panel was motivated by New Jersey's desire to lure large corporations into doing business in New Jersey by creating insurance case law favorable to insureds. For a strong rebuttal to that criticism, see *infra* note 47.

40 *See* Gilbert Spruance v. Pennsylvania Mfrs. Ass'n Ins. Co., 134 N.J. 96, 629 A.2d 885 (1993). The supreme court's decision is discussed *infra* notes 93-103 and accompanying text.

41 743 F. Supp. 318 (D.N.J. 1990).

42 National Starch made claims to its carriers for 22 different sites, nine of which were located in New Jersey. The other affected sites were located in Maryland, North Carolina, Illinois, South Carolina, Rhode Island, Texas, Tennessee, New York, Indiana, California, and Pennsylvania. *Id.* at 320. Only one of the sites was located in New York, and New York's only other significant contact was that the insurance contracts were negotiated and issued there. *Id.* at 321.

43 *Id.* at 319 n.1, 326 (citations omitted).

mental insurance coverage cases: if the court applied, for example, New Jersey substantive law, the insured would likely be covered, but if it applied New York substantive law, coverage was less likely.[44] Tackling this dilemma in the context of New Jersey's prevailing choice of law rules, Judge Ackerman had to choose between following *Leksi*'s uniform site-specific approach, which would have resulted in the application of several states' substantive laws depending on the situs of the waste, or applying one state's substantive law to all the sites involved based on *Westinghouse*'s uniform-contract interpretation approach. Judge Ackerman chose the latter.[45] Rather than completely abandoning *Leksi*, however, Judge Ackerman instead queried "whether Judge Brotman would apply the same [site-specific] rule in cases involving waste sites in more than one state."[46] Without proffering an answer to that question, Judge Ackerman explained why the *Leksi* rule should not apply to multi-state sites:

> [A]lthough the location of the waste sites is of paramount concern, I cannot simply apply the law of the states where the toxic wastes come to rest. Rather, following the reasoning of *Westinghouse*—which is obviously based upon considerations of judicial economy, uniformity and certainty in the law, as well as deterrence of forum shopping—I will apply the law of only one state to interpret the policies in this case.[47]

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[44] *Id.* at 319 n.1 (comparing Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co. of New York, 218 N.J. Super. 516, 528-31, 528 A.2d 76, 82-84 (App. Div. 1987); Jackson Township Mun. Utilities Auth. v. Hartford Accident & Indem. Co., 186 N.J. Super. 156, 164-65, 451 A.2d 990, 994-95 (Law Div. 1982) (concluding that the pollution exclusion clause was coextensive with the occurrence clause and, thus, gradual polluting events were covered provided the insured did not expect or intend the resulting damage), with Technicon Elecs. Corp. v. America Home Assurance Co., 533 N.Y.S.2d 91 (A.D. 1988), *aff'd*, 542 N.E.2d 1948 (N.Y.), *reh'g denied*, 547 N.E.2d 105 (N.Y. 1989); Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1205-06 (2d Cir. 1989) (distinguishing *Technicon*) (concluding that the pollution exclusion clause barred coverage for gradual polluting events), *reh'g denied*, 894 F.2d 498 (2d Cir. 1990), *cert. denied*, 110 S. Ct. 2588 (1989)).

[45] *Id.* at 323 (citation omitted).

[46] *Id.* at 322.

[47] *Id.* at 323 (citing but distinguishing Travelers Indem. Co. v. Allied-Signal, Inc., 718 F. Supp. 1252, 1256 (D. Md. 1989) (applying Maryland law to a Maryland waste site and, without discussion, dismissing claims related to sites in other states); Chesapeake Util. Corp. v. American Home Assurance, 704 F. Supp. 551, 557 (D. Del. 1989) (applying Delaware law to a Delaware waste site and, under the same policy, applying Maryland law to a Maryland waste site)).

Judge Ackerman also took issue with the harsh criticism of *Westinghouse* that had been expressed by another federal district court, *see supra* note 39, by re-emphasizing New Jersey's approach to environmental insurance coverage. Specifically, Judge Ackerman retorted:

> I strongly disagree that such an inference concerning an ulterior motive for a judicial decision can so readily be imputed to New Jersey's appel-

Once he decided to follow the *Westinghouse* approach, Judge Ackerman necessarily had to review the relevant Restatement factors to determine which state's substantive law should apply.[48] In so doing, Judge Ackerman explained that the respective states' public policies are an important factor in the choice of law analysis. Under the facts in *National Starch*, Judge Ackerman concluded that because application of New York substantive law would frustrate New Jersey's environmental public policies, New Jersey substantive law should apply to the New Jersey and non-New Jersey waste sites.[49]

While the uniform-contract interpretation rule articulated in *Westinghouse* has since been rejected by the New Jersey Supreme Court, the result reached in *National Starch* nevertheless would arguably be upheld today under the supreme court's decision in *Gilbert Spruance*.[50] Under an extended Restatement analysis, the relevant facts in *National Starch* demonstrate that New Jersey law was appropri-

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late court. Moreover, the fact—if it is a fact—that large corporations may find it favorable to do business in New Jersey due to its laws on insurance has little (if anything) to do with the *Westinghouse* decision. As revealed by the discussion *infra*, New Jersey's choice of law rules do not turn solely on the location of the insured. Thus, application of one body of law to one policy of insurance could very well result in application of the law of a state other than New Jersey, even where the insured is a large corporation with a substantial presence in New Jersey, (such as where a large number of waste sites are located in another state and/or where, for some other reason, there is a more substantial relationship to another state.) As I opined above, *Westinghouse* is clearly based upon considerations of judicial economy, uniformity in the law and deterrence of forum shopping. As such, the New Jersey Appellate Division's reasoning does not deserve the harsh criticism expressed in *Travelers Indem., supra.*

Id. at 323 n.3.

[48] *Id.* at 322-26 (citing State Farm Ins. Co. v. Estate of Simmons, 84 N.J. 28, 417 A.2d 488 (1980)). Judge Ackerman noted that "[t]he fact that New Jersey houses significantly more waste sites at issue under the subject policies than any other state gives New Jersey a significant and dominant interest in this matter." *Id.* at 326 (citing Leksi, Inc. v. Federal Ins. Co., 736 F. Supp. 1331, 1335 (D.N.J. 1990)). Judge Ackerman also found that, pursuant to Restatement § 188, the place of negotiating and contracting was New York, although the parties did have some contacts in New Jersey at that time; the contracts were performed in both New Jersey and New York; the subject matter of the contracts was principally located in New Jersey; the residence and domicile of the plaintiff was principally in New Jersey; the residence and domicile of the defendant was principally in New York; the defendant had a significant presence in New Jersey because the insureds had paid over $300 million in premiums from New Jersey locations to the insurers in 1987; neither party was incorporated in either New York or New Jersey; and to the extent that any evidence had been presented of the parties' expectations, Judge Ackerman found that such evidence pointed towards New Jersey. *Id.*

[49] *Id.* at 326.

[50] *See infra* notes 93-103 and accompanying text.

ately applied to all the waste sites in that case, including the out-of-state waste sites.[51]

B. *New Jersey State Court Decisions*

Following *Leksi* and *National Starch*, the choice of law question in environmental coverage disputes moved to New Jersey state courts where the holdings in *Leksi* and *National Starch* were explored at length in several important decisions. The first of these decisions, *Johnson Matthey Inc. v. Pennsylvania Manufacturers' Association Insurance Co.*,[52] authored by Judge Cohen, declined to follow the uniform contract interpretation rule announced in *Westinghouse*, choosing instead to adopt a uniform site-specific rule more akin to *Leksi*.

The plaintiff, Johnson Matthey, Inc. (JMI), was a Pennsylvania corporation with its corporate headquarters and principal place of business also situated in that state. JMI was authorized to do business in New Jersey and had, for some time, operated a manufacturing plant in New Jersey. After being named as a potentially responsible party (PRP) at four different New Jersey waste sites where JMI had allegedly deposited waste from its New Jersey plant, JMI brought a declaratory judgment action against several of its insurance carriers seeking a judicial determination that JMI's insurance policies provided coverage for these environmental liabilities. As part of this litigation, the court had to decide whether New Jersey or Pennsylvania substantive law governed the environmental insurance coverage issues. The motion judge held that Pennsylvania law applied, but the appellate division granted JMI's motion for leave to appeal and reversed.[53]

Judge Cohen initially recognized that Pennsylvania and New Jersey courts differed in their interpretations of the "sudden and accidental" language contained in the standard-form pollution exclusion, thus creating a true conflict.[54] He also noted that both the

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[51] *See, e.g.*, J. Josephson, Inc. v. Crum & Forster Ins. Co., 265 N.J. Super. 230, 626 A.2d 81 (Law Div. 1993), *leave to appeal denied*, (App. Div., July 1, 1993).

[52] 250 N.J. Super. 51, 593 A.2d 367 (App. Div. 1991).

[53] *Id.* at 54, 593 A.2d 369.

[54] Judge Cohen recognized that Pennsylvania held "that a pollution discharge occurring gradually over time is not sudden and accidental," *id.* at 54, 593 A.2d at 369 (citing Lower Paxton Township v. United States Fidelity & Guar. Co., 557 A.2d 393 (Pa. Super. 1989)), while New Jersey held "to the contrary that sudden and accidental discharges include a gradual release of pollutants." *Id.* (citing Broadwell Realty Serv., Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987)).

At the time this issue was decided, JMI had contributed over $2.7 million to the settlement of certain claims against it and was facing exposure for additional remedia-

parties and the trial court assumed that a single state's substantive law would govern the entire litigation, meaning that one state's substantive law would be applied to the interpretation of all the insurance contract terms. The appellate division explained that these coverage issues had to be determined separately and proceeded to address them accordingly.[55]

This distinction is important to note because, under this approach, the relevant Restatement factors are examined and evaluated only in the context of the specific coverage issue under review rather than in the broader context of the entire litigation. Analyzing the Restatement factors only as they related to the interpretation of the pollution exclusion clause, Judge Cohen emphasized New Jersey's strong public policy of ensuring the availability of funds for the cleanup of contaminated waste sites within the state's borders. Specifically, Judge Cohen stated:

> The existence or absence of insurance proceeds can very well determine whether or not a waste site is remediated or a toxic tort victim is compensated. Not every polluter or other person responsible for an environmental wrong is financially sound, or is anxious to make personal assets available to satisfy adjudicated liabilities. New Jersey's paramount interest in the remediation of toxic waste sites, and in the fair compensation of victims of pollution, extends to assuring that casualty insurance companies fairly recognize the legal liabilities of their insureds.[56]

Judge Cohen observed that the other Restatement factors were not as significant in this evaluation. For example, Judge Cohen noted

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tion costs relating to other landfills in which JMI was designated as a PRP. *Id.* at 53, 593 A.2d at 368.

[55] *Id.* As the court explained:

> The point is that the law of different states can control the decision of different issues that can arise in coverage litigation, depending on the significance of the states' relationships to the facts and consequences bearing on each issue, and on the governmental concern with its outcome. For that reason it is a rare multistate environmental coverage case that lends itself to a threshold choice-of-law determination for every issue that could conceivably arise. This is not one of the rare cases.

Id. at 66, 593 A.2d at 375 (App. Div. 1991). This dicta was not addressed by the supreme court in Gilbert Spruance v. Pennsylvania Mfrs. Ass'n Ins. Co., 134 N.J. 96, 629 A.2d 885 (1993).

[56] *Id.* at 57, 593 A.2d at 370 (citing Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977, 985 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988)) (noting that the 8th Circuit characterized "the availability of comprehensive liability insurance coverage for the cost of cleaning up hazardous waste sites as a question of substantial importance to the public"); Leksi, Inc. v. Federal Ins. Co., 736 F. Supp. 1331 (D.N.J. 1990); Sandvik, Inc. v. Continental Ins. Co., 724 F. Supp. 303 (D.N.J. 1989)).

that achieving "uniformity" is a "minor virtue," even though that factor was considered significant by the *Westinghouse* court. Judge Cohen supported this characterization by observing the insurers' willingness to issue multi-state policies absent a choice of law provision, even though the insurers knew those policies would be governed by the substantive law of various states.[57] The court further explained:

> The value of uniformity is that it permits persons with knowledge of only one state's law to predict how policy language will be interpreted in 50 jurisdictions. However, the same nationwide policy language may mean different things to different states of contracting. True uniformity is possible only if one body of law governs all insurance contracts, no matter where they are made. The insurers themselves have acted as though they do not value uniformity very highly. They have not taken the simple and obvious step toward uniformity of inserting choice-of-law provisions in their policies. Such clauses may not always prevail, but they surely will in many situations.[58]

Despite recognizing that *Simmons* required the court to first look to the law of the state where the contract was made, the *Johnson Matthey* panel essentially adopted Justice Pashman's dissent in *Simmons* and completely abandoned the *lex loci contractus* standard, noting that the court's new uniform site-specific rule applied regardless of where the policy was written.[59] Therefore, the court held that "a casualty insurance policy, wherever written, which is purchased to cover a New Jersey risk, alone or along with risks in other states, is subject to interpretation of its coverage and exclusion language according to New

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[57] *Id.* at 59, 593 A.2d at 371.

[58] *Id.*, 593 A.2d at 371-72 (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 (1971)). The court characterized uniformity as an "elusive goal" because of the existence of two "opposing axes" of uniformity that are impossible to align at the same time. The court said the first axis is a "uniform nationwide interpretation of a single policy's language." While the court noted that some interest would be served by having a uniform interpretation of the coverage language that would be binding in every state, this result could easily be achieved through a choice of law provision.

The opposing axis concerns the use of a uniform site-specific interpretation. The court noted that environmental coverage cases involve dozens, if not hundreds, of parties charged with liability for causing pollution, many of whom are insured by national insurance companies with multi-state coverage. The court also recognized that these insurance policies had been negotiated in many different states, and covered wide geographic risks. Thus, the court noted that a uniform site-specific approach would facilitate the disposition of many coverage disputes and administrative proceedings because it reduced the possibility that confusion or conflict could occur. *Id.* at 61, 593 A.2d at 372.

[59] Essentially, Judge Cohen recognized that the *lex locus contractus* doctrine had been rendered obsolete by modern technology in today's society, which blurs the ability to determine where the contract was negotiated and entered into by the parties. *See supra* note 14.

Jersey local law."[60]

Realizing the potential ramifications of its decision, the court limited the scope of its holding to the facts before it. Thus, the court explained "[f]or the purpose of our holding, covering a New Jersey risk means at least covering a property or operation owned, occupied or conducted in New Jersey. It may mean more, but we need not look further today."[61] The court determined that because the JMI plant was located in New Jersey, its generated waste predictably would find its way into New Jersey landfills.[62] The court further observed that the carriers were aware that their policies were issued to cover a New Jersey risk. Therefore, the court ultimately concluded that Restate-

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60 *Id.* at 61, 593 A.2d at 373.

61 *Id.* at 62, 593 A.2d at 373 (citing Leksi, Inc. v. Federal Ins. Co., 736 F. Supp. 1331 (D.N.J. 1990)). Because the facts in *Johnson Matthey* did not encompass the situation presented in *Leksi*, where the manufacturing plant generating the waste was located outside New Jersey (in Pennsylvania), the court did not need to reach the question resolved in *Leksi*. *Id.* at 61, 593 A.2d at 373.

Subsequent courts, however, refused to extend the *Johnson Matthey* site-specific rule to waste sites outside New Jersey. For example, applying New Jersey choice of law rules, the Third Circuit in *Armotek Industries v. Employers Insurance of Wausau*, 952 F.2d 756 (3d Cir. 1991), noted that:

> [W]e are not aware of any decision under New Jersey law extending the rule adopted in *Johnson Matthey Inc.* to a case involving a site outside New Jersey. In sum, it is far from clear that the New Jersey Supreme Court would apply Connecticut law [the site of the waste] under the circumstances of the present case.

Id. at 759 n.4.

Some courts in other states, such as Delaware, have rejected the *Johnson Matthey* approach. *See, e.g.*, E.I. DuPont de Nemours & Co. v. Admiral Ins. Co., *reprinted in*, 6 MEALEY'S LITIG. REP.: INSURANCE, #1, 25 (Nov. 1, 1991). In *DuPont*, the Delaware Superior Court rejected both the site-specific approach and also Restatement § 193 in favor of a § 188 analysis that gives significant weight to the insured's principal headquarters. *Id.* at 14, 18-19 n.25. *But see* Chesapeake Util. Corp. v. American Home Assurance Co., 704 F. Supp 551 (D. Del. 1989) (applying Maryland law to a Maryland site and Delaware law to a Delaware site). For other Delaware cases, see *supra* note 33.

Still other states, such as Alaska, have followed the *Johnson Matthey* approach. For example, in *Mapco Alaska Petroleum, Inc. v. Central National Insurance Co. of Omaha*, 795 F. Supp. 941 (D. Alaska 1991), the United States District Court for the District of Alaska noted that:

> Interpretation of insurance contract provisions pertaining to an insured risk located in this state are of significant importance to the State of Alaska. This is especially true when the insurance contract involves coverage for environmental damage. Alaska has a significant interest in determining who will pay for the cleanup of environmental damage since it is directly relevant to whether remediation is accomplished and to what degree. Alaska law will be applied.

Id. at 944. The court also noted that "location of the insured risk is a critical factor and points to the application of Alaska law." *Id.*

62 *Johnson Matthey*, 250 N.J. Super. at 60, 593 A.2d at 372.

ment section 193[63] required the application of New Jersey substantive law.[64]

Following *Johnson Matthey*, the appellate division, in another opinion written by Judge Cohen, had the opportunity to further define the meaning of "covering a New Jersey risk" in *Gilbert Spruance v. Pennsylvania Manufacturer's Association Insurance Co.*[65] The plaintiff, The Gilbert Spruance Company (Gilbert Spruance), a paint manufacturer in Philadelphia, purchased CGL policies from the Pennsylvania Manufacturer's Association Insurance Company (a Pennsylvania insurer licensed to do business in New Jersey) between 1971 and 1978. Each policy contained a standard-form pollution exclusion clause.[66] Over the course of several years, Gilbert Spruance had allegedly generated hazardous substances in Pennsylvania that were claimed to have been deposited in New Jersey landfills. Eventually, the policyholder became implicated at these waste sites and, thus, became subject to significant environmental liabilities.[67]

Thus, the *Gilbert Spruance* facts were different than those presented in *Johnson Matthey* in one significant respect: the waste in *Gilbert Spruance* was generated outside New Jersey and subsequently brought into the state, whereas *Johnson Matthey* concerned waste that was both generated and disposed of in New Jersey. *Gilbert Spruance*, therefore, presented a fact pattern substantially similar to the facts presented in *Leksi*, forcing the court to "look further" than it had to in *Johnson Matthey* to resolve the choice of law question.

Gilbert Spruance's carrier disclaimed coverage based on the pollution exclusion clause.[68] Gilbert Spruance subsequently filed a declaratory judgment action and moved for summary judgment on the

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63 For the text of Restatement § 193, see *supra* text accompanying note 21.

64 The court asserted that while its rule was "peculiarly suitable to environmental cases, it [was] not limited to such actions." *Johnson Matthey*, 250 N.J. Super. at 61, 593 A.2d at 373. Observing that this pronouncement was part of the *Johnson Matthey* choice of law rule, the supreme court in *Gilbert Spruance* did not express that its choice of law rule was to be limited to the environmental insurance coverage choice of law context. *See* Gilbert Spruance Co. v. Pennsylvania Mfrs. Ass'n Ins. Co., 134 N.J. 96, 110, 629 A.2d 885, 892 (1993).

65 254 N.J. Super. 43, 603 A.2d 61 (App. Div. 1992), *certif. granted*, 130 N.J. 14, 611 A.2d 652 (1992), *aff'd*, 134 N.J. 96, 629 A.2d 885 (1993).

66 For the text of the standard pollution exclusion clause, see *supra* note 6.

67 Gilbert Spruance faced various toxic tort claims, including claims for property damage, personal injury, penalties, and remediation brought by the New Jersey Department of Environmental Protection, the federal Environmental Protection Agency, and private individuals. *Id.* at 45, 603 A.2d at 62.

68 The case originally consisted of two consolidated actions against the Pennsylvania Manufacturer's Insurance Company and the Insurance Company of North America (INA). The action against INA was settled and dismissed prior to the court's disposition. *Id.* at 62 n.2.

insurer's duty to defend. The trial court held that the pollution exclusion clause was to be interpreted under Pennsylvania law[69] and, therefore, concluded that coverage was barred because the type of "gradual" pollution involved in this case was not considered "sudden and accidental" under Pennsylvania law.[70]

In reversing the lower court, the appellate division relied on the following significant holdings reached in *Johnson Matthey*, namely: (1) "that a casualty insurance policy . . . purchased to cover a New Jersey risk is subject to interpretation of its coverage and exclusion language according to New Jersey substantive law;"[71] and (2) "that covering a New Jersey risk means at least covering a property or operation owned, occupied or conducted in New Jersey. It may mean more, . . . 'but we need not look further today.'"[72] Judge Cohen observed that "[t]he day has arrived to look further and deal with the issue presented and decided in *Leksi*, because it is the same as the one presented here."[73]

Judge Cohen noted that *Johnson Matthey* had disagreed with the

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[69] *Id.* at 46, 603 A.2d at 62 (citations omitted). The law division judge had ruled prior to the appellate division's *Johnson Matthey* decision. The *Gilbert Spruance* appellate ruling, rendered after *Johnson Matthey*, noted that *Johnson Matthey* recognized that the choice of law issue was controlled by *State Farm Mut. Auto. Ins. Co. v. Estate of Simmons*, 84 N.J. 28, 417 A.2d 488 (1980). The *Gilbert Spruance* panel also noted, however, that *Simmons*'s basic rule (the law of the place where the contract was formed ordinarily governs choice of law), "yields to the dominant and significant relationship of another state with the parties, the transaction and underlying issue as determined by a comparison and evaluation of state contacts, and state policies affected by, and governmental interest in, the outcome of the controversy." *Gilbert Spruance*, 254 N.J. Super. at 46, 603 A.2d at 63 (citations omitted).

[70] The court recognized that under Pennsylvania law, the "'discharge, dispersal, release or escape' of the waste materials was not considered to be 'sudden and accidental.'" *Id.* at 46, 603 A.2d at 62 (quoting Lower Paxton Township v. United States Fidelity & Guar. Co., 557 A.2d 393, 399 (Pa. Super. 1989)). The court contrasted this rule with then-prevailing New Jersey law that considered the gradual release of pollutants to be covered so long as the policyholder did not expect nor intend the resulting environmental harm. *Id.* (citing Broadwell Realty Serv., Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516, 530-36, 528 A.2d 76 (App. Div. 1987)).

[71] *Id.* at 47, 603 A.2d at 63 (citing *Johnson Matthey*, 250 N.J. Super. at 61, 593 A.2d at 372-73).

[72] *Johnson Matthey*, 250 N.J. Super. at 62, 593 A.2d at 373 (citations omitted). The court in *Johnson Matthey* had no need to "look further" as to what insuring a New Jersey risk means because the plant generating the waste and the disposal sites at issue were all located in New Jersey." *Id.*

[73] *Gilbert Spruance*, 254 N.J. Super. at 48, 603 A.2d at 63. The court examined the comparisons between *Leksi* and *Gilbert Spruance*, noting the following factual similarities: both plaintiffs operated out of Pennsylvania and both bought their respective insurance policies in that state. Additionally, both plaintiffs generated waste products that were ultimately hauled to New Jersey waste sites for disposal. *Id.* at 48, 603 A.2d at 63.

approach taken in *Westinghouse*.[74] Siding with *Johnson Matthey*, Judge Cohen observed that uniformity of interpretation based on the place of contracting was outdated and, in fact, should not even be a factor considered under Restatement section 193, while site-specific uniformity was more practical and achievable. As in *Johnson Matthey*, the court observed that the parties' failure to include a choice of law provision in the contract demonstrated that the parties were not consciously concerned about uniformity of interpretation at the time of contracting.[75]

The appellate division held, therefore, that New Jersey courts should interpret the standard-form CGL pollution exclusion clause according to New Jersey substantive law, regardless of where the contract is written, so long as the policy was intended to cover an activity or operation that "generates toxic wastes that predictably come to rest in New Jersey and impose legal liabilities there on the insured."[76] The court explained that this rule applied regardless of where the activity or operation is principally located. According to the court, when a New Jersey waste site is involved, New Jersey maintains the most significant relationship with the transactions, the parties, and the outcome of the controversy based on New Jersey's environmental public

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[74] Specifically, the court observed:

> In *Johnson Matthey*, we explained our disagreement with *Westinghouse*. In short, we concluded that nationwide uniformity of policy interpretation was an illusory goal, not truly achievable or necessarily preferable. If it is associated with the place of the contract, it is associated with an arbitrary and usually irrelevant choice which § 193 of the *Restatement* discards. Site-specific uniformity, on the other hand, is achievable and represents a choice of the law of the jurisdiction that is most concerned with the outcome.
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> If uniformity is achieved on a site-specific basis, the uniformity will relate to a particular legal proceeding and may aid in its resolution. The cost, however, is that it cannot help but make some multistate insurance policy language mean one thing in one state and something else in another.

Id. at 49-50, 603 A.2d at 64 (quoting *Johnson Matthey*, 250 N.J. Super. at 64, 593 A.2d at 374).

[75] *Id.* at 50, 603 A.2d at 64-65. The court posited that if parties to an insurance contract "truly prize uniform interpretation of multistate insurance policy language, they can frequently achieve it by expressing a choice of law in the contract." *Id.*, 603 A.2d at 64 (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 187; McCabe v. Great Pacific Century Corp., 222 N.J. Super. 397, 537 A.2d 303 (App. Div. 1988)). *See also supra* note 34.

[76] *Id.* at 51, 603 A.2d at 65. The court determined that the significance of the "principal location of the insured risk" factor diminishes when the activity or operation is predictably multi-state. The court also indicated that it becomes easier in such situations to identify the state with the most significant relationship by employing the Restatement § 6 factors. *Id.* at 50, 603 A.2d at 65 (footnote omitted).

policies.[77]

The uniform site-specific choice of law rule articulated in *Johnson Matthey* and *Gilbert Spruance* was followed by another panel of the appellate division in *Diamond Shamrock Chemicals v. Aetna Casualty & Surety Co.*[78] In *Diamond Shamrock*, the insured operated a Newark, New Jersey, chemical plant that allegedly released dioxins and other hazardous substances which, over the course of several years, migrated to nearby surrounding areas. The policyholder purchased its insurance coverage through a brokerage firm that had its primary office in New York City. The insurer thus argued that New York law should be applied in interpreting the pollution exclusion clause because New York was the place of contracting.[79] The insurer also argued that while New Jersey may have had an overriding interest in ensuring the clean up of environmental waste sites located within its borders, it did not have an interest in determining who would pay for that clean up.

The appellate division disagreed, noting that it was "difficult to

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[77] *Id.* at 50, 603 A.2d at 65. The court also noted that Restatement § 193 recognizes that while some casualty insurance policy risks are "rooted to a place," others are not. For example, a fire insurance policy generally relates to a particular building, whereas a policy purchased by a manufacturer for products liability coverage does not. Although a CGL policy typically covers the "principal location of the insured risk," the subject matter of the insurance "is an operation or activity and not only a piece of real estate." *Id.* (citing RESTATEMENT § 193 cmt. b).

[78] 258 N.J. Super 167, 609 A.2d 440 (App. Div. 1992), *certif. denied*, — N.J. —, — A.2d — (N.J. July 23, 1993). *Diamond Shamrock* involved two sets of claims. One set concerned claims for environmental pollution resulting from Diamond Shamrock's alleged release of dioxins and other hazardous chemicals from its Newark, New Jersey plant. On these claims, Diamond Shamrock had agreed with the New Jersey's Department of Environmental Protection to engage in certain remedial measures intended to eliminate pollution at the plant itself and other nearby properties. These claims also concerned extensive property damage and personal injury claims brought by neighboring residents. *Id.* at 179, 609 A.2d at 446.

The other set of claims arose from a settlement between Diamond Shamrock and a group of Vietnam War veterans who had been exposed to Agent Orange. Diamond Shamrock, a major manufacturer of Agent Orange, had contributed over $23 million to the settlement of these claims and was seeking reimbursement through this coverage action. *Id.* at 179-80, 609 A.2d at 446.

The suit was filed against Aetna and 123 excess insurers, seeking indemnification on both sets of claims. *Id.* at 180, 609 A.2d at 446. The chancery division judge, after a lengthy non-jury trial, found that under New Jersey law the discharge of hazardous materials from the Newark plant did not constitute either an "occurrence" or an "accident." Further, the chancery judge ruled that the pollution exclusion clause precluded coverage and, accordingly, held that Diamond Shamrock was not entitled to coverage for the environmental claims. *Id.*

Conversely, the chancery court, applying New York law, found against the insurers on the Agent Orange claims, ruling that the injuries "resulted from a single, continuous occurrence that took place in the United States and that the settlement was not excluded by the war risk exception or covered by the foreign risk providers." *Id.*

[79] *Id.* at 198, 609 A.2d at 455.

imagine" a more compelling interest than that of New Jersey's concern that funds be made available to clean up hazardous waste sites within its borders.[80] The court explained that New Jersey's paramount interest in remediating its own waste sites and fairly compensating victims of environmental pollution expanded the legal liabilities of casualty insurance companies to New Jersey and compelled the application of New Jersey substantive law.[81] Thus, the court determined that the state where the waste site and the "ultimate damage" were located maintained the most dominant interest in the outcome.[82]

C. *Post-Johnson Matthey Federal Court Decisions*

Following *Johnson Matthey*, the federal courts had occasion to once again visit the choice of law issue. In *Chemical Leaman Tank*

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80 *Id.* at 197-98, 609 A.2d at 455 (citing Leksi, Inc. v. Federal Ins. Co., 736 F. Supp. 1331, 1335 (D.N.J. 1990)).

81 *Id.* (citing Johnson Matthey, Inc. v. Pennsylvania Mfrs. Ass'n. Ins. Co., 250 N.J. Super. 51, 57, 593 A.2d 367, 370 (App. Div. 1991)).

82 *Id.* at 198, 609 A.2d at 455 (citations omitted). The court reached this conclusion despite recognizing that, as a general rule, "the law of the place of an insurance contract ordinarily governs the choice of law because it will generally comport with the reasonable expectations of the parties concerning the principal location of the insured risk and will furnish needed certainty and consistency." *Id.* at 198, 609 A.2d at 455 (citing State Farm Mut. Auto. Ins. Co. v. Estate of Simmons, 84 N.J. 28, 37 A.2d 488 (1980)). The appellate division explained, however, that the *Simmons* court instructed that this general rule yields when another state has a more significant relationship with the underlying issue, the transaction, and the parties. *Id.* (citations omitted).

Acknowledging that its decision was inconsistent with *Westinghouse*, the court explained that nationwide uniformity was a desirable but illusory goal in the context of environmental insurance coverage litigation. Instead, the court noted that site-specific uniformity was more achievable and generally resulted in a choice of law determination that would apply the substantive law of the state that maintained the most interest in the outcome of the litigation. The court fully adopted the holding of the appellate division in *Gilbert Spruance* and noted that New Jersey courts:

> [S]hould interpret according to this state's substantive law an insurance clause contained in a comprehensive general liability insurance policy, wherever written, which was purchased to cover an operation or activity which generates toxic wastes that "predictably come to rest in New Jersey, and impose legal liabilities there on the insured."

Id. at 199, 609 A.2d at 455 (quoting *Gilbert Spruance*, 254 N.J. Super. at 51, 603 A.2d at 61)).

Applying the same choice of law analysis to the non-environmental Agent Orange claims, the court determined that New York law would apply, because New York, as the place of contracting, bore "the most meaningful and significant relationship to the issues presented." *Id.* at 218-19, 609 A.2d at 465 (citing State Farm Mut. Ins. Co. v. Estate of Simmons, 84 N.J. 28, 37, 417 A.2d 488 (1980)). Interestingly, however, the court noted that because New Jersey law did not differ from New York law on the substantive issues, the court was faced with a false conflict. *Id.* at 219-20, 609 A.2d at 466 (citations omitted).

Lines v. Aetna,[83] the policyholder allegedly generated hazardous material at its New Jersey facility;[84] however, its principal place of business was located in Pennsylvania and the insured had procured and negotiated its insurance policies in Pennsylvania. Relying on *Johnson Matthey* and observing that it was reasonably foreseeable that the waste generated by a New Jersey facility would ultimately come to rest within New Jersey's borders, the court held that New Jersey's substantive law would govern the coverage dispute.[85]

The same result was essentially reached by Chief Judge Gerry, albeit using a slightly different analysis, in *General Metalcraft, Inc. v. Liberty Mutual Insurance Co.*[86] The plaintiff policyholder, a manufacturer of filing cabinets, was incorporated in Pennsylvania and had its manufacturing facilities and principal place of business located in Delaware. The defendant carrier was a Massachusetts insurance company, with its principal headquarters situated in Massachusetts and other offices located in various states including Pennsylvania and New Jersey.[87]

The policyholder's paint waste, generated at its Delaware facility, was transported by a New Jersey waste disposal company that was supposed to deposit the waste at sea but, instead, allegedly deposited the waste in several New Jersey landfills that eventually be-

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83 788 F. Supp. 846 (D.N.J. 1992).

84 *Id.* at 850-51. This opinion was written by Judge Brotman who also authored the *Leksi* opinion. Judge Brotman noted that the facts presented in *Chemical Leaman* differed from the facts in *Leksi* because the waste here, unlike that in *Leksi*, was generated in New Jersey. According to Judge Brotman, the *Chemical Leaman* facts presented a much stronger case for applying New Jersey law because, "[i]f a host state, New Jersey in this instance, can protect its environment by applying its laws to corporations with plants and facilities outside the state, there is no reason it should not apply the same laws to corporations with plants and facilities within its borders." *Id.* at 851.

85 *Id.* Interestingly, Judge Brotman noted that the *Johnson Matthey* court cited *Leksi* with approval. *Id.* It is important to note, however, that the *Johnson Matthey* court expressly stated its holding was not reaching the situation presented in *Leksi*. Further, unlike Judge Brotman in *Leksi*, the *Johnson Matthey* panel required a balancing of the Restatement factors. While Judge Brotman arguably engaged in a balancing of these factors in *Leksi*, the judge's holding ultimately hinged on the situs of the waste as the sole, dispositive factor. The importance of this distinction became more evident in the supreme court's decision in *Gilbert Spruance* and Judge Napolitano's decision in *J. Josephson, Inc. v. Crum & Forster Ins. Co.* *See infra* notes 93-121 and accompanying text.

For a discussion of the substantive issues in *Chemical Leaman*, see 817 F. Supp. 1136 (D.N.J. 1993).

86 796 F. Supp. 794 (D.N.J. 1992).

87 The insured also maintained Pennsylvania offices. *Id.* at 795-96. For approximately nine years, from 1971 to 1980, the insured purchased several CGL policies through its carrier's Pennsylvania office. Numerous other contacts, including the payment of premiums, filing of claims, delivery of policies, and delivery of premiums all took place in Pennsylvania. *Id.*

came the subject of federal and state clean-up actions. When the policyholder was named as a PRP, it brought a coverage action against its insurer for defense and indemnification costs.[88] The carrier asserted that under these facts, Pennsylvania law would govern disposition of the coverage issue.[89]

Chief Judge Gerry, recognizing the fundamental public policy differences between Pennsylvania and New Jersey law regarding the interpretation of insurance policies in environmental coverage disputes, noted that the court was faced with a "true" conflict of law issue.[90] Instead of engaging in a Restatement analysis to determine what state's law should apply, the court recognized that when a waste site is located within New Jersey's borders, New Jersey courts have resoundingly placed New Jersey's interests in having these sites remediated and having the monies available to accomplish that goal at the forefront. The court explained that "[p]erhaps

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88 *Id.*

89 *See supra* notes 32, 54, & 70 (discussing the differences between Pennsylvania and New Jersey substantive law on these coverage issues).

90 The court initially noted that these fundamental differences were enough to supplant *Simmons'* general *lex loci contractus* rule. The court explained:

> Although we recognize the problems associated with concluding that a legislative scheme reveals an intent to apply state law to out-of-state insurance contracts whenever a New Jersey hazardous waste site is involved, at least a judge-made choice of law rule so concluding appears reasonable and consistent with New Jersey's comprehensive environmental laws.
>
> Moreover, the case law forcefully asserts New Jersey's "most significant relationship" and paramount government interests when the clean-up site is located within the state. Although there is merit to the objection that New Jersey's interest should be limited to ensuring that the site is cleaned up and does not extend to who pays the bill, we are persuaded that the nexus between the two is substantial enough to warrant this extension, and that the Supreme Court of New Jersey would also so conclude.

Id. at 802 (footnotes omitted).

While recognizing that its decision appeared to be "pro-insured," the court explained that it assumed New Jersey's stance was based on the assumption that the insurance companies were better prepared to fund expensive environmental clean-ups:

> Because the insurance policies involved were written well before the advent of such animals such as CERCLA liability, we assume that the parties never contemplated such risks and never provided for them. Accordingly, by placing the risk upon the insurer, it cannot be said that New Jersey's site-specific approach thwarts the justified expectations of the parties. We note that this pro-insured stance is neutral as between sovereigns and ensures that insurance funds will be available for those clean-ups in which it is impossible for a polluter to provide for the costs.

Id. at 802 n.12. The court found that the record was devoid of any evidence reflecting the parties' expectations regarding what state's law would govern the interpretation of the insurance contracts.

when the environment itself is at stake, even when the only contact with the state is the disposal of hazardous wastes within its borders, it is fair to conclude that the relationship with that state is the most significant and predominates."[91] The court, accordingly, applied New Jersey substantive law, apparently under a strict *Leksi* approach, focusing more on the situs of the waste as being determinative rather than on the underlying public policies of each affected state.[92]

The composite of these decisions, both federal and state, thus presented essentially two approaches to the choice of law question in environmental coverage disputes: the uniform contract interpretation rule articulated in dicta in *Westinghouse* and followed in *National Starch*, and the uniform site-specific rule first expressed in *Leksi*, and later embraced in *Johnson Matthey*, *Gilbert Spruance*, *Diamond Shamrock*, *Chemical Leaman* and *General Metalcraft*. While most courts addressing this issue had followed the site-specific rule, it was far from clear whether those courts were adopting the uniform site-specific rule announced in *Leksi* or embracing a more extended Restatement analysis to reach their result. Additionally, these cases, except for *National Starch*, presented factual scenarios where, although the insured's plants generating the waste may

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91 *Id.* at 803. The court agreed with the defendant insurer that its approach might be interpreted as adopting Justice Pashman's dissent in *Simmons*. *Id.* at 803 (citing State Farm Mut. Auto Ins. Co. v. Estate of Simmons, 84 N.J. 28, 44-58, 417 A.2d 488, 496-505 (1980) (Pashman, J., dissenting)). The court went on to state:

> Based upon the strength of New Jersey's interests with respect to landfills located within the state, and the negligible expectations of the parties involved, we believe application of either the majority or dissenting approach in *State Farm* produces the same result. In any case, we predict that if faced with the precise question before us here, the Supreme Court of New Jersey would adopt the approach of the *State Farm* dissent and abandon the presumption in favor of the *lex locus contractus*.

Id. (footnotes omitted). The court explained that the *Simmons* majority appeared to hold that its presumption favoring application of the substantive law of the state where the contract was made may be rebutted only when the application of a foreign state's law by a New Jersey court would defeat or otherwise be offensive or repugnant to fundamental New Jersey public policy. *Id.* at 803 n.15 (citing *Simmons*, 84 N.J. at 40-41, 417 A.2d at 494-95). Judge Gerry noted, however, that Justice Pashman's dissent would permit a lower threshold for considering New Jersey's governmental interests. *Id.* (citing *Simmons*, 84 N.J. at 50, 417 A.2d at 500 (Pashman, J., dissenting)). Judge Gerry determined that this lower threshold would be applied by the New Jersey Supreme Court under the facts before him.

92 *See also* Pittston Co. v. Allianz Ins. Co., 795 F. Supp. 678, 686-87 (D.N.J. 1992) (where court, relying on Restatement § 193 and *Johnson Matthey* rejected the carrier's argument that New York law, rather than New Jersey law, should apply in an environmental coverage action for remediation of New Jersey land and water contamination by petroleum leaks and spills occurring over a number of years).

have been located in different states, all the waste sites at issue were located in New Jersey. Other than *National Starch*, none of the cases that applied variations on the site-specific rule faced factual situations involving multi-state waste sites. Guidance from the New Jersey Supreme Court on this evolving substantive area of the law finally came in the *Gilbert Spruance* decision.

D. The Supreme Court's Gilbert Spruance Decision

The New Jersey Supreme Court in *Gilbert Spruance* dealt the final blow to the doctrine of *lex locus contractus* in the context of casualty insurance choice of law disputes.[93] In so doing, the court made clear that New Jersey substantive law will apply when the waste site is located in New Jersey[94] or when New Jersey has the dominant significant relationship under Restatement section 6.

The supreme court noted that prior appellate division panels faced with choice of law questions in environmental insurance coverage actions had adopted either a uniform site-specific or a uniform contract-interpretation approach. The court declined to adopt the uniform contract-interpretation rule,[95] even though the court recognized the virtues of limiting the interpretation of policy language to one meaning. The court also declined to fully embrace the uniform site-specific choice of law rule announced in *Leksi*.[96] Having rejected both approaches, the supreme court devised a new choice of law rule that requires courts to initially focus

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[93] 134 N.J. 96, 629 A.2d 885 (1993). The court noted initially that it granted certification "to address the sole question" of "whether a comprehensive general liability policy containing a pollution exclusion, issued by an out-of-state carrier and covering an out-of-state defendant's operations, should be construed pursuant to New Jersey law." *Id.*

[94] *Id.* at 98, 629 A.2d at 886. The court defined "waste site" as "the place at which the waste comes to rest, irrespective of whether that location is a designated landfill." *Id.*

[95] *Id.* at 114, 629 A.2d at 894-95 (citations omitted). The court rejected the uniform contract-interpretation approach articulated in *Westinghouse*, reasoning that uniform interpretation of an insurance contract does not have "sufficient value to overcome the significant governmental interests of the various jurisdictions where the insured risks are located, or where the insured entity predictably is going to incur legal liabilities." *Id.* at 108, 629 A.2d at 891 (citations omitted).

> As a final note, we distinguish *Westinghouse* as a case that involved multi-state sites while this case involves only one site in one state. Nonetheless, in adopting the aforementioned choice-of-law rule, we necessarily reject the uniform-contract-interpretation approach substantially for the reasons stated by the Appellate Division and by the court in *Johnson Matthey*.

Id. at 114, 629 A.2d at 894-95 (citations omitted).

[96] While rejecting *Leksi*'s uniform site-specific rule, the court recognized that Judge Brotman did purport to apply the Restatement § 6 factors. *Id.*

on Restatement section 193, which provides that the law of the state that "the parties understood was to be the principal location of the insured risk * * * [governs unless] some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties * * * ."[97]

The court observed, however, that it was difficult to designate the principal location of the insured risk where the " 'subject matter of the insurance is an operation or activity' " that is "predictably multistate."[98] Examples of such situations, the court noted, were cases involving hazardous waste. In these circumstances, the court recognized that there were two potential principal locations of the insured risk: (1) the state of generation; or (2) the state of disposal. In choosing not to arbitrarily assign section 193 significance to either of those risk locations, but instead requiring a more extended Restatement section 6 analysis, the court explained:

> We are thus presented with two options: we can arbitrarily choose either the state of generation, or the state of disposal, as the principal location of the insured risk, and assign section 193 significance to that state; or "because the risk at issue here was to some degree transient, a more extended analysis pursuant to § 6(2) is appropriate to determine whether, apart from or in addition to § 193 significance, [New Jersey] or [Pennsylvania] has a more significant relationship to the transaction and the parties." We choose the latter.[99]

Thus, the court made clear that while location of the waste is an important factor under section 6, it is not dispositive. Rather, what is most important is a section 6(2) evaluation and balancing of the competing states' governmental interests that are at issue, i.e., the environmental public policies espoused by the respective states. Applying the factors set forth in section 6(2), the court held that "we agree with the Appellate Division that when applying the principles enunciated in

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97 *Id.* at 112 (quoting RESTATEMENT (SECOND) CONFLICT OF LAWS § 193).

98 *See supra* notes 18-21 and accompanying text. The supreme court observed that Restatement § 193 raised the "knotty problem" of how to determine where the insured "risk" is located. Because the "risk" at issue in environmental insurance coverage cases, namely the waste, is transient in nature rather than fixed, the supreme court fashioned a choice of law rule requiring an extended Restatement § 6 analysis. *Id.* at 113, 629 A.2d at 894.

99 *Id.* (citations omitted). Fashioning this new choice of law test, which emphasizes an analysis of the competing states' governmental interests, the court did not limit or otherwise suggest that its holding was to be confined to the environmental insurance coverage disputes, although it does appear to be limited to casualty insurance policies. *See also Johnson Matthey*, 250 N.J. Super. at 61, 593 A.2d at 373 (noting that while its rule was "peculiarly suitable to environmental litigation[,] . . . it [was] not limited to that setting").

Restatement section 6 to a case in which the out-of-state generated waste foreseeably comes to rest in New Jersey, New Jersey has the dominant significant relationship."[100]

Consequently, it is abundantly clear now that waste sites located in New Jersey will have New Jersey substantive law applied.[101] Thus, where the contract was formed, the traditional *lex locus contractus* test, has no bearing on that determination. So long as the policyholder's waste ends up at a site in New Jersey, regardless of its origin, courts are to construe CGL policy language in accordance with New Jersey substantive law. An issue that the court had "no occasion to consider," however, was "the problem presented when waste generated in New Jersey predictably is disposed of in another state."[102] That precise issue was tackled in *J. Josephson, Inc. v. Crum & Forster, Insurance, Inc.*, which involved application of New Jersey law to multi-state sites.[103]

While the *Gilbert Spruance* court expressly declined to address the multi-state waste site issue which was not before it, its holding clearly impacts on choice of law decisions involving such cases. By recognizing and rejecting the mechanical site-specific rule enunciated in *Leksi*, and requiring instead a more extended analysis under Restatement section 6, as was done by the trial court in *Josephson*, the supreme court clearly indicated a willingness to apply New Jersey substantive law to non-New Jersey waste sites when such application would be in accordance with section 6. Accordingly, the application of New Jersey law to

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100 *Id.* The court noted that the Restatement § 6 analysis, which demonstrated that New Jersey had a "dominant significant relationship" warranting application of New Jersey law was based on factors unique to New Jersey, such as its "urgent concern for the health and safety of its citizens" and the enactment of numerous statutes specifically relating to environmental concerns. *Id.* at 113, 629 A.2d at 894 (citations omitted).

101 The *Gilbert Spruance* court did not indicate that its holding was to be limited to a particular substantive coverage issue. *See supra* note 64.

102 *Id.*

103 265 N.J. Super. 230, 626 A.2d 81 (Law Div. 1993); *see also infra* notes 104-21 and accompanying text for a discussion of the *Josephson* opinion. The court in *Gilbert Spruance* stated:

> [W]e express no view on the proposition stated in *J. Josephson, Inc., supra*, that when another state is the foreseeable location of the waste-site, the court must engage in a section 6 analysis to determine if that state has the most significant relationship with the parties, the transaction, and the outcome of the controversy—an analysis that requires the court "to sift through and analyze, however laborious the task, the competing and varied interests of the states involved * * * ." 265 N.J. Super. at 239, 626 A.2d 81.

Gilbert Spruance, 134 N.J. at 114, 629 A.2d at 894.

Nevertheless, that was the very analysis the *Gilbert Spruance* court held must be applied and did apply in analyzing whether New Jersey law should apply to the New Jersey waste sites at issue. *Id.* at 113, 629 A.2d at 894.

non-New Jersey sites is fully consistent with the teachings of *Gilbert Spruance.*

IV. Application of New Jersey Choice of Law Rules to Multi-State Waste Sites

Prior to the supreme court's *Gilbert Spruance* decision, Judge Napolitano issued his trial court opinion in *J. Josephson, Inc. v. Crum & Forster Insurance Co.*,[104] wherein he applied New Jersey law to hazardous waste sites located both in and outside New Jersey. In reaching this result, Judge Napolitano engaged in the same type of extended Restatement analysis that the supreme court employed and sanctioned in *Gilbert Spruance.*

The policyholder, Josephson, was a Georgia corporation that manufactured wallcoverings at its sole place of business in South Hackensack, New Jersey. Josephson contracted with licensed waste haulers to take wastes generated at its New Jersey plant to approved facilities for disposal. Josephson eventually was named as a PRP at five landfills where its waste had been taken, three of which were located in New Jersey with the other two being located in Pennsylvania and New York. After receiving notice of its PRP status, Josephson submitted claims to its insurance carriers, all of whom denied coverage relying on, among other defenses, the pollution exclusion clause.[105] Josephson had procured these CGL policies through a New York insurance broker.[106] Josephson thereafter filed a declaratory judgment action and moved for partial summary judgment on the choice of law question.[107]

Applying an extended Restatement section 6 analysis, as the supreme court did in *Gilbert Spruance,* Judge Napolitano observed that although the location of the waste site is an important factor in that analysis, it is not necessarily dispositive. Rather, it is only one of "several factors to be considered in the substantial interest analysis."[108] Judge Napolitano expressly rejected *Leksi's* uniform site-specific rule,[109] noting that the "*Leksi* rule implicitly, and erroneously, assumes that if a state has a toxic or hazardous waste site

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104 265 N.J. Super. 230, 626 A.2d 81 (Law Div. 1993).

105 *Id.* at 233, 626 A.2d at 83.

106 The policies were all negotiated in New Jersey and the proceeds were paid out of Josephson's New Jersey bank account.

107 *Id.* at 234, 626 A.2d at 83.

108 *Id.* at 239, 626 A.2d at 86.

109 Asserting that *Simmons,* and not *Leksi,* constituted the governing law of New Jersey, Judge Napolitano proceeded to apply the factors enunciated in *Simmons* to the facts in the case at bar. *Id.*

within its borders, then that state alone has a substantial interest for choice of law purposes, notwithstanding any additional contact between the polluter or its liability carrier and another state."[110] Instead, Judge Napolitano posited that a state must demonstrate a substantial interest in having its law applied, even if the waste is located within that state's borders.[111]

To determine which state's substantive law would apply to the non-New Jersey waste sites,[112] Judge Napolitano reviewed the Restatement section 6 factors in light of the substantial relationship test. Initially, he noted that New Jersey had several relevant and significant contacts to the parties and the litigation, including the location of Josephson's plant, the place of negotiating the insurance policies, and the place where all of the waste was generated.[113]

The court also reviewed the relevant policies of the other affected states pursuant to Restatement section 6(2) and noted that the "crucial inquiry" was whether application of New Jersey law to the Pennsylvania and New York sites impinged or compromised the environmental concerns of Pennsylvania and New York.[114] The

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110 Judge Napolitano recognized that application of the *Leksi* rule would result in a simple choice of law decision that would apply Pennsylvania law to the Pennsylvania waste site, New York law to the New York waste site and New Jersey law to the three New Jersey locations. *Id.*, 626 A.2d at 85-86. Judge Napolitano, however, disagreed "with the sweep and inflexibility that the District Court articulates in *Leksi*, despite the lure of the rule's simplicity." *Id.*, 626 A.2d at 86.

111 To establish a substantial interest, the court posited that a state:

> [M]ust identify some law or policy which generates the state's requisite interest in applying its law to the insurance contract's clauses at issue. Each state, however, has its own particular policies, laws, and jurisprudence concerning environmental regulations which often differ among states. Therefore, the relevance and weight that a state's environmental regulatory scheme enjoys in the substantial interest analysis varies greatly.

Id.

112 Judge Napolitano had no difficulty holding that New Jersey substantive law applied to the three New Jersey waste sites. The more difficult issue was determining what state's law should apply to the New York and Pennsylvania sites. *Id.* at 238-39, 626 A.2d at 85.

113 *Id.* at 240, 626 A.2d at 86. Other factors, including annual on-site inspections by the insurers of the Josephson plant, pointed toward application of New Jersey law. The court explained that the appellate division had not hesitated to require application of New Jersey substantive law to out-of-state waste sites on both jurisdictional and *forum non conveniens* grounds. *Id.* (citing Westinghouse v. Liberty Mut. Ins. Co., 233 N.J. Super. 463, 559 A.2d 435 (App. Div. 1989); Ruetgers-Nease v. Fireman's Ins., 236 N.J. Super. 478, 566 A.2d 227 (App. Div. 1989).

114 While recognizing "that public policy considerations standing alone, even a highly significant one, is generally insufficient to resolve a choice of law question," Judge Napolitano nonetheless asserted that "that is hardly the case here." *Id.* at 245

court concluded that, while application of New Jersey law would not frustrate either of those states' public policies,[115] application of New York or Pennsylvania law would adversely impact on the public policies of all three affected states. The court explained:

> [H]ealth and safety concerns arise when either New York or Pennsylvania law is applied to a New Jersey hazardous waste site because then insurance proceeds are less likely to be available to fund cleanup activity. Conversely, health and safety interests are not implicated when New Jersey's interpretation of the pollution exclusion clause is applied to either New York or Pennsylvania hazardous waste sites because there is a greater likelihood that insurance proceeds will be available to fund cleanup activity. It was this interest in securing cleanup funds that the *Johnson Matthey* and *Gilbert Spruance* courts identified as the substantial interest which compelled these respective courts to apply New Jersey law to New Jersey sites (it was not *Leksi*'s location of the waste rule, despite another state's more traditional contacts with those litigants).[116]

This factor thus balanced in favor of applying New Jersey law.[117]

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n.4, 626 A.2d at 89 n.4 (citing but distinguishing New Jersey Dep't of Envtl. Protection v. Signo Trading Intern Inc., 130 N.J. 51, 66, 612 A.2d 932, 939-40 (1992)). In *Signo*, the supreme court, in a four-to-three decision, concluded that the owned property exclusion barred coverage because there was no evidence of actual third party damage; according to the majority, the threat of imminent damage to a third party's property was insufficient. The court further rejected public policy considerations, noting that such considerations "alone are not sufficient to permit a finding of coverage in an insurance contract when its plain language cannot fairly be read otherwise to provide that coverage." *Id.*, 612 A.2d at 940.

115 *J. Josephson*, 265 N.J. Super. at 241, 626 A.2d at 86-87. Analyzing the respective public policies of New York, New Jersey and Pennsylvania, the court concluded that all three states maintained environmental public policies favoring remediation of contaminated waste sites. Despite that goal, Judge Napolitano recognized that New York and Pennsylvania had adopted interpretations of the pollution exclusion clause that made it less likely that insurance proceeds would be available to fund remediation efforts. *See* Broadwell Realty Serv. Inc. v. Fidelity & Casualty Co. of New York, 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987); Technicon Elec. Corp. v. American Home Assurance Co., 542 N.E.2d 1048 (N.Y. 1989); Lower Paxton Township v. United States Fidelity & Guar. Co., 557 A.2d 393 (Pa. Super. 1989).

116 *Id.* at 241-42, 626 A.2d at 87.

117 The defending carriers in *Josephson* argued that Pennsylvania and New York maintained a substantial interest in applying their respective state laws to the hazardous waste sites within their own borders. Judge Napolitano, however, countered by positing that the carrier's reliance on the cases they cited was misplaced because those decisions did not identify any relevant interest or policies that would compel the application of Pennsylvania or New York law to this matter. *Id.* at 242, 626 A.2d at 87.

Judge Napolitano then posited that New Jersey's interest in securing cleanup funds for hazardous waste sites was the driving force behind the decisions in *Johnson Matthey* and *Gilbert Spruance*. He also discounted the insurer's argument that *Leksi's* "location of the waste rule" should be applied, because Judge Napolitano found that

The court also concluded that application of New Jersey law did not unduly impair the interstate system because application of New Jersey law "to the Pennsylvania and New York sites [did] not increase the risk of further contamination to the Pennsylvania or New York environments, it decrease[d] it."[118]

The court also analyzed the other Restatement factors and concluded that all of the relevant considerations favored application of New Jersey substantive law.[119] Judge Napolitano noted that "[t]he result of this decision extends New Jersey's substantial interest test . . . where highly significant public policies effecting health, safety and welfare are concerned."[120] Therefore, the court held:

Leksi did not accurately articulate existing New Jersey law. The judge rejected the carrier's assertion that New York's and Pennsylvania's interests in applying their narrow interpretations of the pollution exclusion clause, which the carriers argued was designed to deter intentional pollution, would be contradicted by applying New Jersey law in this instance. That was so because under prevailing New Jersey law, *see supra* note 44, coverage would not be available to a policyholder who expected or intended the environmental damage.

The defendant carriers also asserted that their narrow interpretations of the pollution exclusion clause advanced New York and Pennsylvania's respective public policies because, by disfavoring coverage, polluters in New York and Pennsylvania were forced to pay their cleanup costs directly from their business assets instead of through insurance premiums that would be absorbed as part of the cost of doing business. The court, however, disagreed with the carriers' interpretation of New York and Pennsylvania public policy and dismissed the argument. *Id.* Judge Napolitano elaborated:

> Pennsylvania and New York certainly have a strong interest in implementing their environmental policies on those entities that conduct business or are incorporated within their borders. But each state's paramount interest as articulated by their legislators is a healthy, safe, and clean environment. The allocation of costs for maintaining those policies must be subordinate to the enforcement of the policies themselves lest the policies become meaningless, notwithstanding their everyday effect on people's lives.

Id. at 242-43, 626 A.2d at 87 (citing Abbott v. Burke, 100 N.J. 269, 495 A.2d 376 (1985) (right to education); Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982) (right to fund abortion); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973) (right to education)). The court further observed that applying New Jersey law "protects New Jerseyans when they are in New Jersey, New Yorkers and Pennsylvanians when they, too, are in New Jersey and, to a lesser extent, New Jerseyans when they are in New York or Pennsylvania." *Id.* at 244, 626 A.2d at 88.

118 *Id.*

119 The other relevant Restatement § 6 factors that the court examined included: the protection of justified expectations; the need for certainty, predictability, and uniformity of result; the basic policies underlying the particular field of law; and the ease in determination. This § 6 analysis pointed toward application of New Jersey substantive law. *Id.* at 243-45, 626 A.2d at 87-89. This was the extended 6(2) analysis the supreme court applied in *Gilbert Spruance*. *See supra* notes 93-103 and accompanying text.

120 *Id.* at 245, 626 A.2d at 89. Judge Napolitano explained, however, that a state need not have the most substantial interest of the competing states in order to have its

> Hereafter, where New Jersey has (a) a substantial interest in the outcome of the litigation, and (b) a substantial contact with at least one of the principal litigants, and (c) a strong public policy affecting health, safety, and welfare at odds with that of at least one competing state, our courts should apply New Jersey law.[121]

A different approach to the multi-state waste site situation was taken in *In re Environmental Insurance Declaratory Judgment Actions.*[122] There, the trial court did not engage in an extended Restatement section 6 analysis as was done in *Josephson.* Rather, the court applied the *Leksi* uniform site-specific rule and held that New Jersey law would be applied to the New Jersey waste sites at issue, while the law of other states affected would be applied to waste sites located outside New Jersey. That interlocutory choice of law decision was subsequently appealed to the appellate division which, in a two-to-one decision, affirmed the trial court's ruling.[123]

The New Jersey Supreme Court, on October 19, 1993,[124] denied the policyholder's motion for leave to appeal the appellate division's affirmance without prejudice, but further directed that any party who wished to seek reconsideration before the trial court should do so in light of the supreme court's recent decisions in *Gilbert Spruance*[125] and *Morton International v. General Accident Insurance Company of America.*[126] This most recent development signals further support for applying New Jersey law to non-New Jersey waste sites, as was done in *Josephson.* Obviously, the supreme court disagreed with the appellate division's interlocutory decision; otherwise, there would have been no need to

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substantive law applied to the dispute. Under Judge Napolitano's approach, a state merely needs "any" interest in the litigation's outcome and "any" contact with one or more of the litigants that may be characterized as substantial under the prevailing case law in order to have its state's public policies examined to determine if its substantive law will be applied. *Id.* at 245 n.3, 626 A.2d at 89 n.3. Specifically, Judge Napolitano recognized that New York and Pennsylvania each had a substantial interest in cleaning up hazardous waste sites located in their states. The Judge concluded, however, that these affected states' public policies did not outweigh New Jersey's substantial contact with the parties or its substantial interest in the litigation's outcome. *Id.* at 245-46, 626 A.2d at 89.

121 *Id.* at 245, 626 A.2d at 89.

122 Docket Nos. A-5432-91T2, *reprinted in* 7 Mealey's Litig. Rep.: Insurance #38, J-4 (App. Div. July 15, 1993); A-5433-91T2; A-5434-91T2.

123 *Id.*, slip op. at 10 (citations omitted). Interestingly, the appellate panel was comprised of Judges Cohen and Kestin, who were on the panel that decided *Gilbert Spruance,* and Judge Pressler, who wrote the *Westinghouse* opinion. Judges Cohen and Kestin voted to affirm based on their positions taken in *Gilbert Spruance,* while Judge Pressler dissented for the reasons she expressed in *Westinghouse.*

124 Docket No. 37,275 (N.J. Oct. 19, 1993).

125 134 N.J. 96, 629 A.2d 885 (1993).

126 134 N.J. 1, 629 A.2d 831 (1993).

remand the matter without prejudice, giving the parties the opportunity to move for reconsideration before the trial court in light of the supreme court's recent pronouncements.

Moreover, the supreme court's directive that the reconsideration motion should be decided based on the recent decisions in *Gilbert Spruance* and *Morton* suggests that application of New Jersey law to out-of-state waste sites could also be supported by an argument based on public policy grounds. The supreme court in *Morton* concluded that the insurance industry had misrepresented to insurance regulators the intended purpose and effect of the standard-form pollution exclusion clause when it was introduced in the early 1970s, representing in contemporaneous public statements during the regulatory process that the clause was intended to only "clarify" the existing occurrence-based coverage. As a result of that deception, the court held that the insurance industry was now estopped from insisting upon a literal construction of the clause, which dramatically restricted coverage, and would have to provide coverage "at a level consistent with its representations to regulatory authorities."[127]

Thus, it can be argued that a court confronted with the problem of what state's law should apply when the waste site is located outside New Jersey may, as a matter of public policy, hold that New Jersey law should apply. Stated differently, it would be against public policy to apply another state's law in construing the pollution exclusion clause if that law's application would result in a restrictive construction that is the very antithesis of the supreme court's holding in *Morton*.[128]

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127 *Id.* at 72-80, 629 A.2d at 872-76. *See supra* note 6.

128 *See* Joy Technologies, Inc. v. Liberty Mutual Ins. Co., 421 S.E.2d 493 (W. Va. 1992). In *Joy Technologies*, West Virginia's highest court invoked this principle, noting that it would be inconsistent with West Virginia public policy to allow an insurer to argue that another state's law should apply with regard to the interpretation of the pollution exclusion clause if to do so would allow the carrier to "take a position, and act in a manner, inconsistent with [the carrier]'s studied, unambiguous, official and affirmative representations" made to the West Virginia regulatory authorities during the approval process of the pollution exclusion clause. *Id.* at 497. *See supra* note 6. This very argument has recently been embraced by a New Jersey trial court in American Telephone & Telegraph Co. v. Aetna Casualty & Sur. Co., Docket no. W-56581-88, *reprinted in*, 8 MEALEY'S LITIG. REP.: INSURANCE, #6, 26-29 (N.J. Super. Law Div. November 19, 1993) (transcript of motion). In *AT&T*, Judge Humphries concluded that it would be against New Jersey's public policy, in light of *Morton*, to apply Pennsylvania law to a Pennsylvania waste site, even though the insured's operation which generated the waste was also situated in Pennsylvania. Judge Humphries ultimately held that the carriers were estopped from urging that Pennsylvania's restrictive interpretation of the pollution exclusion clause could be applied because of the strong public policy position articulated in *Morton*. *Id.* at 26-27 ("In view of the strong language in the Supreme Court opinion in *Morton* concerning the improper conduct of the insurance industries, it would be incongruous, indeed inconceivable, to conclude that the New

V. CONCLUSION

The New Jersey Supreme Court has now made clear in *Gilbert Spruance* that New Jersey substantive law will be applied to interpret environmental insurance coverage disputes when the waste site in question is located in New Jersey. This decision was not predicated on the strict situs-of-waste rule, as was the case in *Leksi*, but instead was reached through an extended Restatement analysis which takes into account, among other factors, New Jersey's strong environmental public policies favoring remediation of contaminated waste sites.

It is also clear that the court has now departed from the *lex locus contractus* hybrid approach enunciated in *Simmons*, as Justice Pashman had suggested in his dissent. The *Gilbert Spruance* choice of law test now requires in addition to a section 193 analysis a more extended Restatement section 6 analysis, which focuses on the affected states' governmental interests taking into account the various public policies implicated. This choice of law rule would appear not to be confined to the field of environmental coverage disputes but, rather, is most likely to be applied to other areas of substantive law, particularly those areas which implicate significant public policies of the affected states.

Left open in *Gilbert Spruance*, however, is the question of whether New Jersey law should be applied when the waste site is located outside New Jersey. While the court did not expressly reach this issue, nevertheless, the court indirectly approved of the trial court's result in *Josephson*, which applied New Jersey law to waste sites located in Pennsylvania and New York. Just as in *Gilbert Spruance*, the *Josephson* court engaged in an extended Restatement analysis in concluding that New Jersey law should apply to both New Jersey and non-New Jersey waste sites. By requiring New Jersey courts to engage in such an extended analysis of the Restatement factors, focusing on the governmental interests of the affected states, the supreme court has effectively disapproved of *Leksi*'s uniform site-specific approach.

Josephson represents the next step in the evolution of New Jersey's choice of law approach to environmental insurance cover-

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Jersey Supreme Court would construe the meaning of the pollution exclusion clause in this case in such a way as to avoid coverage."); *see also* State Farm Mut. Ins. Co. v. Estate of Simmons, 84 N.J. 28, 41, 42, 417 A.2d 491, 495 (1980) (recognizing that when there are fundamental differences between the competing states' laws, and that application of the foreign state's law may be repugnant or offensive to local public policy, the foreign state's law should not be applied).

age disputes. Since the supreme court's decision in *Simmons*, and now most recently in *Gilbert Spruance*, New Jersey courts have placed significant weight on the Restatement's public policy factors. Under this approach, application of New Jersey law to waste sites located outside New Jersey would be appropriate when it can be demonstrated that New Jersey possesses a dominant significant relationship under Restatement section 6. Moreover, because the supreme court determined in *Morton* that the insurance industry had misrepresented the purpose and effect of the pollution exclusion clause when it was introduced in the 1970s, arguably it would be against public policy for a New Jersey court to apply another state's interpretation of the pollution exclusion clause when such interpretation and application would, in essence, give effect to that misrepresentation.