UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARYLAND CASUALTY CO.,	:	
Plaintiff,	:	88 Civ. 4337 (JSM)
vs.	:	
W. R. GRACE & CO., et al.	:	
Defendants.	:	

MEMORANDUM OF LAW OF W. R. GRACE & CO. CONN. IN SUPPORT OF ITS MOTION FOR RELIEF FROM THE COURT'S EARLIER RULING ON CHOICE OF LAW

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PRELIMINARY STATEMENT

Defendant W. R. Grace & Co.—Conn. ("Grace") submits this Memorandum of Law in support of its motion for relief from the Court's previous choice of law determination, based on the Court's inherent authority to modify an interlocutory ruling in the interest of justice. Because choice of law is a substantive matter that directly affects the outcome of cases, courts must be particularly vigilant during the entire pendency of a case to ensure that the proper law is applied.

This Court, on June 8, 1992, ruled that it would interpret the insurance policies in this coverage case pursuant to New York law. In this action, these policies may cover damages arising from what now number 219 alleged environmental cleanup sites in 40 states and two foreign countries.[1] Grace now moves for relief from that ruling for the following reasons:

- New York's choice of law principles have, in the interim since the Court's 1992 ruling, continued their development in the direction originally urged by Grace. New York now requires the application of the local law of the respective environmental sites.
- In 1994, this Court ruled, regarding the pollution exclusion, that as to insurance written prior to 1971 or subsequent to 1982, "Judge Wolin's reasoning in *Hatco* would apply." Judge Wolin applied New Jersey law to the Hatco coverage dispute involving a New Jersey site, consistent with the national trend of applying local law to environmental insurance coverage disputes.
- Since this Court's 1992 choice of law decision, the insurers have broadened this litigation to include 219 sites, of which only twelve are in New York. Moreover, discovery and trial is to proceed on eight representative sites in seven states,

[1] The insurers have identified 219 site claims. With respect to one of those claims, litigation concerning claims arising from Grace's former Hatco facility in Fords, New Jersey, formerly

none of which is New York. Thus, unlike when this case was first filed, New York now has an extremely limited interest in the outcome of this litigation.

- The switch to a representative-site approach has also largely obviated the Court's judicial economy concerns. At the same time, the overall case has grown so dramatically that any inconvenience associated with applying the law of multiple states is reasonably proportional to the stakes in the case.

The "center of gravity" or "grouping of interests" test for deciding conflicts in contracts cases is consistent with the teaching of the Restatement (Second) of Conflict of Laws (the "Restatement") and is long established in New York. But only recently, subsequent to this Court's 1992 decision, has New York applied it to multi-site insurance coverage cases. Under Restatement § 193, a court is to apply the law of the state that is the principal location of the insured risk.

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pending in the Federal District Court for the District of New Jersey, has been settled between Grace and its insurers.

PROCEDURAL HISTORY AND FACTS

This action was filed by The Maryland Casualty Co. ("Maryland") on June 21, 1988. Maryland sought a declaratory judgment as to five alleged environmental cleanup sites for which underlying claims against Grace were pending. Nine of the ten sites named by Maryland were located in New York, including the "New York City Landfill Sites."

Grace's September 5, 1990 answer and counterclaim brought the number of sites in the action up to 19, though Grace added no additional New York sites to the original nine. Throughout 1992, various insurers were joined or sought to intervene in the case. Additional sites were added to the litigation. At the same time, motion practice proceeded on various "black-letter" insurance-law issues. On June 8, 1992, the Court decided which state's law would apply to this dispute. The Court recognized that none of the insurers that had written the subject coverage had headquarters in New York, and that Grace had offices and facilities around the world. Nonetheless, the Court found that, because Grace dealt with the New York offices of various brokers from its then–corporate headquarters in New York, New York law should apply. (In 1992, Grace's corporate headquarters relocated to Florida.)

At the time of the Court's decision, twelve states were represented in the 26 sites in the case. Nine of the 26 were in New York, and the location of such a large fraction of the sites in New York presumably influenced the Court's decision. By the time, however, the insurers had added all the purported claims[2] for which they sought judgment, 219 "claims" had been identified, representing 40 states plus Germany and Australia. Of the 219 claims, the distribution among the top 12 jurisdictions was as follows:

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[2] Grace does not concede that all claims purportedly added by the insurers, or any of them in particular, are ripe for adjudication in this case.

1. New Jersey (22)
2. Massachusetts (20)
3. Texas (19)
4. South Carolina (18)
5. Florida (13)
6. **New York (12)**
7/8. California, Oregon (10)
9. Illinois (8)
10. Louisiana (7), Pennsylvania (7), New Hampshire (7)

Almost two years after this Court ruled that New York law would apply to this dispute, the parties sought, *inter alia*, a ruling on the effect of section 46 of the New York Insurance Law on Grace's claims. The Court ruled that this provision prohibited insurers from writing policies to cover gradual pollution, and was in effect from 1971 to 1982. Specifically, the Court held, in a Memorandum and Order dated April 28, 1994, that "to the extent that a policy purported to provide coverage for non 'sudden and accidental' pollution, either explicitly or through 'follow form' language, such agreements are unenforceable as illegal contracts." *Id.* at 14. The Court further explained, however, that this ruling applied only to contracts entered into during the effective dates of section 46. "As to insurance written prior or subsequent to that period," wrote the Court, "Judge Wolin's reasoning in *Hatco* [*Corp. v. W. R. Grace & Co.—Conn.*, 801 F. Supp. 1334 (D.N.J. 1992)] would apply." Memorandum and Order at 15. *Hatco* involved the application of New Jersey law to a New Jersey site.[3]

[3] As Grace pointed out to the Court in the original choice of law motion in this matter, in *Hatco* Judge Wolin resolved a choice of law dispute in favor of Grace, rejecting the insurers' arguments that New York law should apply. See Memorandum of Law of W.R.

In late 1995 and early 1996, the parties, under the direction of Magistrate Judge Buchwald, agreed to a representative-site procedure whereby claims involving only eight sites would be litigated at this stage of the case. The eight sites chosen by the Court, in conjunction with the parties, were from seven states, of which New York is not one.

Grace & Co.—Conn. Concerning the Choice of Law in this Action dated January 27, 1992, at 12-13 ("Grace's Original Memorandum").

ARGUMENT

I. THIS COURT SHOULD REVISIT ITS 1992 CHOICE OF LAW RULING BECAUSE BOTH THE POSTURE OF THIS CASE AND NEW YORK'S CHOICE OF LAW DOCTRINE HAVE CHANGED.

By its order dated June 8, 1992, this Court ruled New York law should apply to interpretation of the insurance contracts covering all the sites in this environmental insurance coverage case. The Court's ruling was largely based on two fundamental points. First, the case involved 26 alleged environmental cleanup sites, a plurality of which were in New York. Second, and more importantly, New York choice of law principles as they existed at the time seemed to offer little alternative. But that jurisprudence has changed since 1992, now mandating application of the local law of each site to the insurance claims arising from that site. This Court should now conform its earlier ruling to the current state of the applicable law.

A. The Court May Relieve Parties from Application of the Law of the Case Doctrine When the Legal Foundation of a Prior Interlocutory Decision Has Changed.

The law of the case doctrine expresses the practice of courts generally to give continuing effect to a ruling made earlier in the same litigation. The doctrine's purpose is to enhance judicial economy and administrative efficiency. *O'Hagan v. Soto*, 565 F. Supp. 422, 426 (S.D.N.Y. 1983). The rule, however, is neither inexorable nor absolute. *Id.* A court may, at any time before final judgment, modify an order wherever "a revision [is] consonant with equity." *John Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 91, 42 S. Ct. 196, 199, 66 L. Ed. 475, 479 (1922) (Pitney, J.). Thus a court may put the law of the case doctrine aside and depart from an earlier decision for cogent or compelling reasons. *Weitzman v. Stein*, 908 F. Supp. 187, 193 (S.D.N.Y. 1995), *aff'd in part & rev'd in part on other grounds*, 98 F.3d 717 (2d Cir. 1996);

see also John Simmons Co., supra.

The Second Circuit has stated that "the doctrine of the law of the case is not an inviolate rule in this Circuit," and is, "at best, a discretionary doctrine . . ." *United States v. Birney*, 686 F.2d 102, 107 (2d Cir. 1982); *see also Messinger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 743, 56 L. Ed. 1152, 1156 (1912) (Holmes, C.J.). A change in the legal basis of an earlier ruling is a valid reason to depart from the law of the case. *Doe v. New York City Dep't of Social Serv.*, 709 F.2d 782, 789 (2d Cir.), *cert. denied, Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983); *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967) (law of the case doctrine does not apply where there is change in controlling authority).

The limits on the law of the case doctrine have been applied to at least one case nearly on point with this one. In *CPC International, Inc. v. Northbrook Excess & Surplus Insurance Co.*, 46 F.3d 1211 (1st Cir. 1995), the First Circuit affirmed a District Court's reversal of its own prior interlocutory choice of law ruling in an environmental insurance coverage dispute involving a New Jersey–based manufacturer seeking indemnification for environmental cleanup costs. The district court followed then-current New Jersey[4] caselaw, and held that because of the supposed goal of "nationwide" policy interpretation, the location of the risk in Rhode Island did not affect the choice of law. The law of New Jersey, the policyholder's headquarters, was held to govern the policy. *CPC Int'l*, 46 F.3d at 1213. The First Circuit affirmed this ruling, explicitly declaring it the law of the case. *Id.* at 1215.

While the case was pending, the New Jersey Supreme Court issued its decision in *Gilbert*

[4] The case had originally been filed in New Jersey state court, then removed on diversity grounds to the United States District Court for the District of New Jersey. Following that, it was transferred on venue grounds to the District of Rhode Island. The Rhode Island federal court applied the choice of law rules of the pre-transfer venue. 46 F.2d at 1213. *See Ferens v. John Deere Co.*, 494 U.S. 516, 523, 108 L.Ed.2d 443, 453, 110 S. Ct. 1274 (1990).

Spruance Co. v. Pennsylvania Manufacturers Ass'n Insurance Co., 134 N.J. 96, 629 A.2d 885 (1993). *Gilbert Spruance* abandoned the pursuit of a nationwide interpretive standard for insurance contracts, adopting a site-specific approach. In so doing, the court relied on Restatement § 193. 134 N.J. at 112, 629 A.2d at 893.

Following the *Gilbert Spruance* decision, Northbrook, one of the insurance carriers in *CPC Int'l*, petitioned the district court to reconsider its choice of law ruling. The policyholder, in turn, urged the law of the case doctrine. The district court agreed with the carrier, holding that the change in the law overcame the "law of the case" presumption, and that the law of the site (Rhode Island) should apply. 46 F.3d at 1215. The First Circuit affirmed the district court's decision, holding that "the law of the case was not intended . . . to serve as an absolute bar to reconsideration, nor a limitation on a federal court's power." *Id.*

As demonstrated below, New York has now confirmed that insurance contracts should be interpreted by the law of the situs of the insured risk. This Court should therefore apply the respective local laws of the representative sites here.

II. UNDER NEW YORK CHOICE OF LAW DOCTRINE, IN INTERPRETING AND APPLYING MULTI-RISK INSURANCE POLICIES TO SPECIFIC SITES, THIS COURT SHOULD APPLY THE SUBSTANTIVE LAW OF EACH SITE'S STATE.

A federal court sitting in diversity looks to the choice of law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). New York's conflicts law, however, has been in flux in the decades since *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954). One leading scholar has written, "I cannot think of any field of law that has in modern times become as hopelessly jumbled as the present New York law of conflicts." H. Korn, "The Choice of Law Revolution: A Critique," 83 Colum. L. Rev. 772, 956

(1983).

In early 1992, Grace could urge only the Appellate Division decision *Avnet, Inc. v. Aetna Casualty & Surety Co.*, 160 A.D.2d 463, 554 N.Y.S.2d 134 (App. Div., 1st Dept. 1990), as authority for its view of New York conflicts law. Grace maintained that New York was continuing its evolution away from the old rule of *lex loci contractus* and toward a modern "grouping of interests" standard. This is the approach of the Restatement.

In *Borg–Warner Corp. v. Insurance Co. of North America*, 174 A.D.2d 24, 577 N.Y.S.2d 953 (App. Div., 3d Dep't 1992), the Court recognized the authority of the Restatement in New York. *Id.* at 30, 577 N.Y.S.2d at 956. *Borg-Warner*, however, only supported the proposition that the plaintiff's choice of forum deserves deference,[5] consistent with Restatement § 188(1). Thus, at the time of its earlier decision, this Court found that it was bound to apply only New York law here:

> Indeed, Grace has not cited a single New York decision in which a court applied law of more than one jurisdiction to a single insurance policy. Nor has Grace found an opinion in any other jurisdiction which applied more than two different states' laws to the same contract.

Memorandum and Order dated June 8, 1992.

Now, however, the law of New York has been definitively clarified. The modern approach to conflicts of laws in insurance contracts has been applied in three New York multi-site coverage cases decided since 1992, including one in the last few months, and is based on a trend endorsed by the New York Court of Appeals. On the basis of these cases, this Court should now revisit and amend its earlier choice of law ruling.

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[5] Characterizing Grace as the defendant in this case would be only technically correct. This litigation began with an action filed by Grace in another jurisdiction. No deference was afforded to Grace's choice of forum at that time.

A. New York Choice of Law Doctrine Now Follows Restatement §§ 188 and 193 and Mandates that an Insurance Contract Covering Multiple Risks in Multiple States Be Interpreted by the Local Law of the Respective Sites.

In late 1994, the New York Court of Appeals ruled in *Zurich Insurance Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 642 N.E.2d 1065, 618 N.Y.S.2d 609 (1994). A liability insurer sought a declaratory judgment that its comprehensive general liability ("CGL") policy did not provide coverage for punitive damages awarded in other states. In deciding what state's law to apply, the Court of Appeals for the first time recognized Restatement § 193. *Id.* at 318, 642 N.E.2d at 1069, 618 N.Y.S.2d at 613.

1. The Restatement approach to choice of law

In analyzing a choice of law issue, the court must first look to Restatement § 188, which sets out four factors that, in addition to the plaintiff's choice of forum and the place of contracting, determine which state has the most significant relationship to a contract and hence which state's laws should apply to its interpretation. The factors are the locations of (i) negotiation; (ii) performance; (iii) the subject matter (e.g., the location of the insured risk); and (iv) the contracting parties.[6] A critical further provision of §188 reads as follows:

> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, **except as otherwise provided in §§ 189-199 and 203.**

(Emphasis added). In *Zurich*, as here, the court found that the place of negotiation and performance of the contract were the same. Thus the court had to refer to the relevant provision, §193, which reads as follows:

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[6] These are only slight variations of the factors used by this Court in *Olin Corp. v. Insurance Co. of North America*, 743 F. Supp. 1044 (S.D.N.Y.), *aff'd*, 929 F.2d 62 (2d Cir. 1991).

> **Contracts of Fire, Surety or Casualty Insurance**
>
> 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[7] to the transaction and the parties, in which case the local law of the other state will be applied.

(Emphasis added). Official Comment (f) to §193 adds:

> *Multiple risk policies.* A special problem is presented by multiple risk policies which provide insurance against risks located in several states. . . . Presumably, the courts would be inclined to treat such a case, at least with respect to most issues, as if it involved [multiple] policies, each insuring an individual risk.

As of 1992, no New York decision had referred to §193, though it had been applied *sub silentio*. *See, e.g., Munzer v. St. Paul Fire and Marine Ins. Co.*, 203 A.D.2d 770, 610 N.Y.S.2d 389 (App. Div., 3d Dep't 1994) (location of risk provides rule of interpretation); *accord General Star Indem. Co. v. Custom Editions Upholstery Corp.*, 940 F. Supp. 645 (S.D.N.Y. 1996). In *Zurich*, however, the New York Court of Appeals explicitly recognized the applicability of Restatement §193 to New York's choice of law doctrine. Faced with New York's extant, unambiguous policy forbidding indemnification, the court applied §193 and declined to determine the choice of law based on the location of the risk in that case.

Clearly, as of 1994, the New York courts agreed that *lex loci* was dead. The only remaining small step was to apply New York's new rule to multi-site disputes.

2. The *Witco* case

Since the *Zurich* and *Munzer* decisions, two New York decisions have applied the

[7] Section 6 sets out the basic choice of law principles of the Restatement.

reasoning of § 193 and applied the law of the sites in a multi-site coverage case. Both were decided in New York State Supreme Court's Special Commercial Part.

Aetna Casualty & Surety Co. v. Witco Corp. (Sup. Ct. N.Y. Co., Index. No. 118985/93-037), *reported in* 8 *Mealey's Litigation Report: Insurance* (No. 27, May 17, 1994), was a multistate, multi-site environmental insurance case. (A copy is attached hereto as Exhibit A.) The underlying occurrences were claims for environmental damage at 83 sites in 22 states. Aetna filed for a declaratory judgment to allow it to avoid paying out on the insurance policies it had sold to Witco. *Id.*, Memorandum and Order dated May 9, 1994, at G-1.

In May 1994, the court denied Witco's motion to dismiss on forum non conveniens grounds. The court explained that, under *Avnet*, New York choice of law principles dictated a site-by-site approach:

> It is well settled that claims in environmental insurance coverage litigation such as this are site-specific, and the law of the situs states necessarily will be relied upon to resolve the parties' contentions. See *Avnet v. Aetna Casualty and Surety Co.* . . . The outcome of each case will vary according to the forum's law, and the result achieved will most significantly affect that particular state's environment.

Id., Memorandum and Order dated May 9, 1994, at G- 3-4 (citation omitted).

In the interests of judicial economy, and in deference to Aetna's choice of forum, the court held that it would retain jurisdiction and appoint a special master to sort out the state-by-state issues. *Id.* at 4-5. In a subsequent September 15, 1995 order, the court affirmed that its earlier choice of law decision was not dictum but a controlling ruling. *See* "*Witco II*" (attached hereto as Exhibit B).

3. The *American Home Products* case

Until June of this year, *Witco* was the only New York case applying the reasoning of

Zurich. Recently, however, another decision has compelled application of the law of the site to multistate coverage disputes.

Employers Insurance of Wausau v American Home Products Corp., 217 N.Y.L.J. No. 112, at 28 (June 12, 1997) (attached as Exhibit C), involves the insurers' liability for claims arising out of environmental contamination at 32 waste sites across the country. The insurers urged that New York law governed the interpretation of the subject policies. The court disagreed, ruling as follows:

> In environmental clean-up coverage disputes, each state involved in the clean-up of a toxic waste site within its borders has an unquestionably strong interest in the dispute. . . . Thus, New York courts have held that in an environmental coverage dispute, the law of the situs state applies. Here, the substantive law of New York shall apply to all issue pertaining to the waste site located in New York. As to the remaining sites, the law of the state in which those sites are located shall control.

Id. (citations omitted).

The legal basis of this Court's 1992 choice of law decision has undeniably shifted. Consistent with its sister court in *CPC International*, this Court should amend its earlier ruling to reflect the current and most authoritative legal standard.

III. THIS COURT SHOULD APPLY SITE-SPECIFIC LAW TO THE COVERAGE CLAIMS BECAUSE THIS APPROACH IS SUPPORTED BY PUBLIC POLICY.

Not only is this Court required to apply New York's current choice of law doctrine to this case under the rule of *Klaxon*, but it also should do so because, as elucidated in *Witco* and *American Home Products*, application of a site-specific approach represents sound public policy.

As explained in *Zurich*, important conflicts of policy often underlie conflicts of law.

New York retains the right to set aside the grouping of contacts analysis of § 188 to insure the enforcement of a compelling public policy.[8] *Zurich*, 84 N.Y.2d at 318, 642 N.E.2d at 1069, 618 N.Y.S.2d at 613. Here, public policy supports applying the laws of the respective states to environmental sites within their own borders. This approach effectuates each state's policies as to cleanup issues that affect them most.

The *Witco* court put it straightforwardly, in an analysis that applies to this case as well:

> It is well settled that claims in environmental insurance coverage litigation such as this are site-specific, and the laws of the situs states necessarily will be relied upon to resolve the parties' contentions. See *Avnet v. Aetna Casualty and Surety Co.*, *supra*. In our case, California has more sites involving claims against Witco than any other state, but still less than 20 percent of the claims; New Jersey has approximately 14 percent of the sites; New York has less than three percent. Based solely on the situs criterion, no forum has an overriding paramount interest in resolution of all of plaintiff's claims. **The outcome of each case will vary according to the forum's law, and the result achieved obviously will most significantly affect that particular state's environment.**

(Emphasis added). *Accord American Home Products, supra.*

Here too, while the plurality of sites (22) is in New Jersey, this number makes up little more than a tenth of all the sites in the case. New York's eight sites represent an even smaller fraction of the whole. No single state has an "overriding paramount interest" in this litigation. The Restatement approach recognizes that jurisdictions are entitled to have their own law applied to environmental

[8] This principle is also recognized by the Restatement itself, which throughout §188 makes repeated reference to the basic Restatement choice of law principles found in §6. Section 6(2)(b) includes consideration of "the relevant policies of the forum" and §6(2)(c) addresses "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue." Put otherwise, as the *Zurich* court recognized, the "grouping of contacts" result, including as it does aspects of public policy, can be identical to the "compelling public policy" result. 46 F.3d at 1217.

cleanup litigation affecting their state. Such a rule is logical, equitable, and good public policy.[9]

IV. THIS COURT SHOULD APPLY SITE-SPECIFIC LAW TO THE COVERAGE CLAIMS BECAUSE THAT APPROACH IS CONSISTENT WITH THE PARTIES' EXPECTATIONS.

Carrying out the parties' intentions is the prime directive of contract interpretation. It is also the touchstone of the Restatement's conflicts analysis, and should be recognized here by application of the law of the respective sites.

A. The Location of the Risks Being Insured, the Risks of Each Location, and the Law of Each Location Were Essential Parts of the Insuring Contracts.

In its earlier opinion, this Court cited cases such as *National Starch & Chemical Corp. v. Great American Insurance Cos.*, 743 F. Supp. 318, 322-23 (D.N.J. 1990), to the effect that "it would be unreasonable and contrary to the parties' reasonable expectations to apply twelve different bodies of law to the contracts of insurance at issue here." But *National Starch* is among the progeny of *Westinghouse Electric Corp. v. Liberty Mutual Insurance Co.*, 233 N.J. Super. 463, 559 A.2d 435 (Super. Ct. App. Div. 1989), which is no longer authoritative law.

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[9] This Court previously cited two cases, *Potomac Electric Power Co. v. California Union Insurance Co.*, 777 F. Supp. 968, 972 n. 10 (D.D.C. 1991), and *Golotrade v. Shipping and Chartering, Inc. v. Travelers Indemnity Co.*, 706 F. Supp. 214, 218 (S.D.N.Y. 1989), for the proposition that where an insured is wealthy and supposedly can "afford" to conduct an environmental cleanup without insurance funds, the situs state no longer has an interest in the cleanup. This rationale is problematic because, instead of a neutral legal principle, it mandates one rule of law for a well-managed organization and another for one that goes out of business, even if the latter is looted by management or purposely run into the ground in the face of liability.

Moreover, these two cases are of questionable value now. *Potomac Electric* relied on *Westinghouse Electric Corp. v. Liberty Mutual Insurance Co.*, 233 N.J. Super. 463, 559 A.2d 435 (Super. Ct. App. Div. 1989), which has since been overturned; *see Babcock & Wilcox v. Arkwright-Boston Mfg. Ins. Co.*, 867 F. Supp. 573, 581 (N.D. Ohio 1992) (rejecting *Potomac Electric* due to New Jersey's rebuff of the *Westinghouse* approach). Similarly, *Golotrade* is no longer authoritative because it applies the standard of §188 without making proper reference to §193. *Ford Motor Co. v. Insurance Co. of N. Am.*, 35 Cal. App. 4th 604, 41 Cal. Rptr. 2d 342, 348, n.1 (Ct. App. 1995).

New Jersey's Appellate Division renounced *Westinghouse* in *Johnson Matthey Inc. v. Pennsylvania Manufacturers Ass'n Insurance Co.*, 250 N.J. Super. 51, 593 A.2d 367 (Super. Ct. App. Div. 1991) and *Gilbert Spruance, supra. See Babcock & Wilcox v. Arkwright-Boston Mfg. Ins. Co.*, 867 F. Supp. 573, 581 (N.D. Ohio 1992) (demise of *Westinghouse* line of authority). *Westinghouse*'s thesis is that the parties expect the law of the state where the contract is negotiated to apply, regardless of where a conflict regarding the claim arises. That analysis was rejected by §193. Comment (b) to §193 explains that the locations of the risk are fundamental to the insurance contract:

> *Rationale.* The rule of this Section calls for application of 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 . . .
>
> A number of reasons serve to explain why such importance is attached to the principal location of the insured risk. This location has an intimate bearing on the risk's nature and extent and is a factor upon which the terms and conditions of the policy will frequently depend. . . . [T]he location of the risk is a matter of intense concern to the parties to the insurance contract. **And it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the risk is to be principally located would be applied to determine many of the issues arising under the contract.** Likewise, the state where the insured risk will be principally located during the term of the policy has a natural interest in the determination of issues arising under the insurance contract.

(Emphasis added).[10]

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[10] The reasoning of the Restatement rings especially true where, as here, the bargained-for coverage would be eviscerated by application of the law of a state with no connection to the insured risk. Comment (a) to §188(2) reads as follows:

> Parties entertaining a contract will expect at the very least, subject perhaps to rare exceptions, that the provisions of the contract will be binding on them. Their expectations should not be frustrated by application of the local rule of a state which would strike down the contract or a provision thereof unless the expectations of the

This analysis, which is now the law of New York, recognizes the absurdity of the claim that when the carriers wrote and rated Grace's policies, they did not care where Grace's facilities were located. The 219 sites in this case were covered under insurance policies meant to insure Grace's risks in the specific locations identified to the carriers. Nor can the carriers say that they had no concern with the law in those places at the time of contracting. *See NL Indus., Inc. v. Commercial Union Ins. Cos.*, 926 F. Supp. 1213, 1223 (D.N.J. 1996) (absent evidence to the contrary, presumption is that parties intended law of site to govern interpretation of contracts governing that site); *Leksi, Inc. v. Federal Ins. Inc.*, 736 F. Supp. 1331, 1333-34 (D.N.J. 1990) (choice of law determined by foreseeable risk location).

In fact, the record is clear that at least one insurer in this case expected that the law of the state in which the site was located would apply to claims under these policies. In a CNA internal memorandum dated May 22, 1989, concerning Grace's environmental cleanup claim related to its Ft. Pierce, Florida site (one of the representative sites in this matter), the claims specialist's "analysis of liability" states that the "Pollution Exclusion has never been tested in Florida Appellate Courts and other jurisdictions vary[,] with the majority indicating Pollution Exclusion is invalid for long-term waste disposal." Affidavit of Ronald D. Coleman, Exhibit A. CNA, for one, cannot claim that it foresaw application of New York law to these policies.[11] The Restatement presumption of a party's expectation that local law will apply to local claims has been confirmed in fact.

> parties is substantially outweighed by [the public policy exception].

[11] In its 1992 choice of law memorandum, Grace included a number of other examples of insurers relying on the law of the state where the risk (i.e., the site) was located, in stark contrast to the "New York law only" position they have taken in this matter. See Grace's Original Memorandum, at 15-17, 20-21.

B. The Adoption of the Restatement Approach to Conflicts Confirms that the Insurance Policies Here Should Be Interpreted to Achieve Intrastate, not Interstate, Uniformity.

Policyholders in a given state do not expect their respective rights, under identical contractual provisions, to depend on the circumstance of litigation strategy or where their corporate headquarters were once located.[12] Yet the carriers have maintained that like terms of identical policies, written for virtually identical risks in the same state, should be interpreted on just such an arbitrary basis. This strained reasoning is inspired by the fable of a "nationwide interpretive standard."

This Court, relying on *National Starch*, alluded to the need for nationwide consistency in interpreting insurance policies. As demonstrated above, however, that case is no longer the law, and the policy it espoused has largely been abandoned:

> 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 contract**, it is associated with an **arbitrary and usually irrelevant** choice which § 193 . . . 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.**

Gilbert Spruance Co. v. Pennsylvania Mfrs. Assn. Ins. Co., 254 N.J. Super. 43, 49-50, 603 A.2d 61, 64 (N.J. App. Div. 1992) (emphasis added). New York's adoption of the Restatement approach incorporates this view. This Court should also abandon the doomed search for a

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[12] This analysis is not affected by purported "negotiation" over Grace's insurance contracts or Grace's alleged insertion of policy provisions. The pollution exclusion, arguably the most controversial provision in the policies, was an industry-wide standard and certainly not one of Grace's "contributions." Indeed, Judge Wolin found, after full consideration of the same policies, that "all evidence proffered indicates that the ISO pollution exclusion was inserted **at the insistence of the insurers.**" *Hatco Corp. v. W. R. Grace & Co.—Conn.*, 801 F. Supp. 1334,

> The finding that the law of several states will apply spurred this court into creating means by which the litigation could remain intact, in a single forum, despite the strong precedent in favor of dismissal created by the site-specific nature of each claim.

Memorandum and Order dated September 15, 1995, at 4 [see Appendix B]. Similarly, in its earlier opinion, the *Witco* Court explained its decision to appoint a special master as follows:

> The problem is not so insoluble as to tax the resources of this state. A jurisdiction that can handle thousands of asbestos cases in one forum can accommodate itself to handling these multiple insurance cases. The challenge is to use innovative judicial machinery to lay bare the applicable law as it impacts upon particular sites, without unduly burdening the claimants.

Just as different facts apply to each site, requiring site-by-site analysis, so may several different states' laws apply to the disputes. Judicial economy cannot operate to deprive a party of its bargained-for rights. *See NL Indus.*, 926 F. Supp. at 1223 ("Applying site-specific law, while possibly complex, would also be certain, predictable, and, within each state at least, uniform").

Choice of law is a substantive matter, not merely procedural; it directly affects the outcome of cases. If the parties have contracted for certain rights under the law, a concern for judicial efficiency should not operate to deprive them of it. This is all the more true where, as here, such an approach would conflict with the most recent relevant authority.

CONCLUSION

For the foregoing reasons, this Court should relieve defendant W. R. Grace & Co.—Conn. from the Court's June 28, 1992 choice of law decision and apply the law of the respective environmental cleanup sites to interpretation of the policies insuring those sites.

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