**NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs-Respondents,**

**v.**

**OCCIDENTAL CHEMICAL CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.), and CLH HOLDINGS, Defendants, and**

**MAXUS ENERGY CORPORATION and TIERRA SOLUTIONS, INC., Defendants/Third-Party Plaintiffs-Respondents,**

**v.**

**3M COMPANY, et al.,[1] Third-Party Defendants, and**

**DELEET MERCHANDISING CORPORATION, Third-Party Defendant/Appellant.**

**NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs-Respondents,**

**v.**

**OCCIDENTAL CHEMICAL CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.), and CLH HOLDINGS, Defendants, and**

**MAXUS ENERGY CORPORATION and TIERRA SOLUTIONS, INC., Defendants/Third-Party Plaintiffs-Respondents,**

**v.**

**3M COMPANY, et al., Third-Party Defendants, and**

**CLEAN EARTH OF NORTH JERSEY, INC., HEXION SPECIALITY CHEMICALS, INC., MACE ADHESIVES & COATINGS COMPANY, INC., and R.T. VANDERBILT COMPANY, INC., Third-Party Defendants/Appellants.**

**NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs-Respondents,**

**v.**

**OCCIDENTAL CHEMICAL CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.), and CLH HOLDINGS, Defendants, and**

**MAXUS ENERGY CORPORATION and TIERRA SOLUTIONS, INC., Defendants/Third-Party Plaintiffs-Respondents,**

**v.**

**3M COMPANY, et al., Third-Party Defendants, and**

**TIFFANY & CO., Third-Party Defendant/Appellant.**

**NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs-Respondents,**

**v.**

**OCCIDENTAL CHEMICAL CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL**

**YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.), and CLH HOLDINGS, Defendants, and**
**MAXUS ENERGY CORPORATION and TIERRA SOLUTIONS, INC., Defendants/Third-Party Plaintiffs-Respondents,**
**v.**
**3M COMPANY, et al., Third-Party Defendants, and**
**BORDEN & REMINGTON CORP., ITT CORPORATION, et al., Third-Party Defendants/Appellants.**
**NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs-Respondents,**
**v.**
**OCCIDENTAL CHEMICAL CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.), and CLH HOLDINGS, Defendants, and**
**MAXUS ENERGY CORPORATION and TIERRA SOLUTIONS, INC., Defendants/Third-Party Plaintiffs-Respondents,**
**v.**
**3M COMPANY, et al., Third-Party Defendants, and**
**PHARMACIA CORPORATION, Third-Party Defendant/Appellant.**

Nos. A-4620-10T2, A-4623-10T2, A-4625-10T2, A-4628-10T2, A-0067-11T2.

**Superior Court of New Jersey, Appellate Division.**

Argued March 7, 2012.
Decided April 24, 2012.

John F. Gullace (Manko, Gold, Katcher & Fox) argued the cause for appellant Pharmacia Corporation (Michael A. Carter (Manko, Gold, Katcher & Fox), attorney; Mr. Gullace and Mr. Carter, on the briefs).

Marc L. Dembling argued the cause for appellant Deleet Merchandising Corporation (**Methfessel** & **Werbel**, attorneys; Mr. Dembling and Allison Koenke, of counsel and on the briefs).

Lee Henig-Elona argued the cause for appellants Clean Earth of North Jersey, Inc., Hexion Specialty Chemicals, Inc., Mace Adhesives & Coatings Company, Inc., and R.T. Vanderbilt Company, Inc. (Wolff & Samson, attorneys; Ms. Henig-Elona, Walter A. Saurack (Satterlee Stephens Burke & Burke), and Zoë E. Jasper (Satterlee Stephens Burke & Burke), on the briefs).

John H. Klock argued the cause for appellant Tiffany & Co.; Susanne Peticolas argued the cause for appellant ITT Corporation (Gibbons, attorneys; Ms. Peticolas, of counsel and on the briefs; Mr. Klock, of counsel and on the briefs; Paul M. Hauge, on the briefs).

Thomas A. Buonocore, attorney for appellant Borden & Remington Corp.

Kenneth H. Mack (Fox Rothschild) argued the cause for group of respondents in A-4628-10T2 denominated the Joint Defense Group (John Rousakis (O'Melveny & Myer), attorney; Mr. Rousakis, Mr. Mack, William S. Hatfield (Day Pitney), Camille V. Otero (Day Pitney), Anthony DiLello (O'Melveny & Myer), Andrea Lipuma (Saul Ewing), Glenn A. Harris (Ballard Spahr), Kevin R. Gardner (Connell Foley), of counsel and on the joint briefs).

A. Paul Stofa, Deputy Attorney General, and Wayne D. Greenstone (Gordon & Gordon) argued the cause for respondents New Jersey Department of Environmental Protection, the Commissioner of the New Jersey Department of Environmental Protection and the Administrator of the New Jersey Spill Compensation Fund (Jeffrey S. Chiesa, Attorney General, attorney; Gordon & Gordon, Special Counsel to the Attorney General, and William J. Jackson (Jackson Gilmour & Dobbs) of the Southern District of Texas bar, admitted pro hac vice, Special Counsel to the Attorney General; Melissa H. Raksa, Assistant Attorney General and

John F. Dickinson, Jr., Deputy Attorney General, of counsel; Mr. Greenstone, on the briefs).

Charles M. Crout (Andrews Kurth) of the Maryland bar, admitted pro hac vice, argued the cause for respondents Maxus Energy Corporation and Tierra Solutions, Inc. in A-0067-11T2 (Joseph A. Patella (Andrews Kurth), attorney; Mr. Patella, Mr. Crout, and Michele R. Blythe (Andrews Kurth) of the Iowa bar, admitted pro hac vice, for respondents in A-4623-10T2 and in A-4628-10T2, on the briefs).

Vincent E. Gentile and Ross A. Lewin argued the cause for respondents Maxus Energy Corporation and Tierra Solutions, Inc. (Drinker Biddle & Reath, attorneys; William L. Warren and Thomas E. Starnes (Drinker Biddle & Reath) of the District of Columbia bar, admitted pro hac vice, and Mr. Gentile, on the briefs in A-4620-10T2; Mr. Warren, Mr. Starnes, Mr. Lewin and David J. Wagner, on the briefs in A-4625-10T2).

Before Judges Fuentes, Koblitz and Haas.

## NOT FOR PUBLICATION

PER CURIAM.

In these back-to-back and consolidated interlocutory appeals, we are asked to determine the viability of contribution claims brought under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to-23.24 (Spill Act), and The Joint Tortfeasors Contribution Law (JTCL), N.J.S.A. 2A:53A-1 to -5. The New Jersey Department of Environmental Protection (DEP), the Commissioner of the DEP, and the Administrator of the New Jersey Spill Compensation Fund (collectively plaintiffs) filed environmental cleanup suits against nine business entities for discharging toxic chemicals from a chemical manufacturing plant located at 80 and 120 Lister Avenue in Newark (Lister sites).

Plaintiffs alleged that for at least twenty years, these companies, and/or their predecessors, intentionally polluted the Passaic River with hazardous substances, including a particularly potent form of DDT[2] called TCDD.[3] This caused substantial environmental and economic damage to the Newark Bay Complex, which is comprised of the lower seventeen miles of the Passaic River, the Newark Bay, the lower reaches of the Hackensack River, the Arthur Kill, the Kill Van Kull and adjacent waters and sediments.

Two defendants, Maxus Energy Corporation (Maxus) and Tierra Solutions, Inc. (Tierra), filed third-party complaints against approximately 300 public and private entities, alleging that they had contributed to the contamination described in plaintiffs' complaint. Maxus/Tierra thus sought contribution from these third-party defendants under both the Spill Act and the JTCL.

A number of these third-party defendants filed motions to dismiss under Rule 4:6-2(e), arguing that the claims asserted by Maxus/Tierra were barred by various consent decrees they had previously entered into with DEP. Others contended that Maxus/Tierra failed to establish a common liability with regard to the allegations contained in the primary complaint.

The trial court denied all of the motions for dismissal brought under Rule 4:6-2(e). By leave granted, these third-party defendants are now before us seeking the relief denied to them by the trial court. We affirm. Given the number of appeals and the complexity of the record, we will first describe the procedural history leading to the court's decision under review here. We will then briefly summarize the measures taken by the trial court to manage this complex case. Finally, we will address the merits of the arguments raised by the parties.

## I

## Procedural History

On November 22, 2005, plaintiffs filed suit pursuant to the Spill Act against Occidental Chemical Corporation (Occidental), Tierra, Maxus, Maxus International Energy Company (MIEC), Repsol YPF, S.A. (Repsol), YPF, S.A. (YPF), YPF International S.A. (YPFI), YPF Holdings, Inc. (YPFH) and CLH Holdings, Inc. (CLHH). Although plaintiffs amended their initial complaint several times, they have consistently alleged that, for at least twenty years, defendants and/or their predecessors intentionally polluted the Passaic River with hazardous substances, including a particularly potent form of DDT called TCDD.

Plaintiffs allege that defendants entered into administrative consent orders with the United States Environmental Protection Agency (EPA), through which defendants agreed to determine the extent of the contamination and to perform the work needed to remedy the problem. Instead, plaintiffs claim that defendants deliberately delayed the contamination cleanup, shifting blame for the TCDD-related pollution to unrelated entities, and attempted to evade liability through a complicated series of corporate transactions with each other and with other affiliated companies.

Plaintiffs seek, among other things, past and future damages, and reimbursement of all incurred and anticipated cleanup and remediation costs. Although plaintiffs did not seek natural resource damages, they requested that defendants underwrite the cost to conduct a natural resource damage assessment, and specifically reserved their right to bring a future action to recover natural resource damages for the Passaic River and Newark Bay Complex.

Defendants Maxus/Tierra filed an answer and a counterclaim in October 2008. In February 2009, Maxus/Tierra filed four third-party actions for contribution against approximately 300 public and private parties. On February 4, 2009, these third-party actions were denominated A, B and C, under docket number L-9868-05; complaint D, filed the following day, was assigned docket number L-9869-05. With plaintiffs' and defendants' consent, the court appointed a special master on February 24, 2009.

These appeals encompass over 150 private entities named as third-party defendants in complaint B, including Borden & Remington Corporation (Borden), Deleet Merchandising Corporation (Deleet), ITT Corporation (ITT), Pharmacia Corporation (Pharmacia), and Tiffany & Co. (Tiffany). Clean Earth of North Jersey, Inc. (Clean Earth), Hexion Specialty Chemicals, Inc. (Hexion), Mace Adhesives & Coatings Company, Inc. (Mace), and R.T. Vanderbilt Company, Inc. (R.T.), collectively the Drum parties, are also named as third-party defendants.

Maxus/Tierra alleged that the third-party defendants should be held liable for a proportionate share of any damages because they had also discharged hazardous chemicals into the impacted areas. Maxus/Tierra seek contribution pursuant to the Spill Act and the JTCL. Borden, Tiffany, Deleet, ITT, the Drum parties, and the Joint Defense Group (JDG)[4] filed responsive pleadings to the third-party complaint.[5]

Pursuant to case management order XII (CMO XII), the trial court authorized the special master to issue recommendations on all motions filed by third-party defendants pursuant to Rule 4:6-2(e). The court directed the special master to rule on such motions

> as if she were a Judge of the Superior Court deciding a Motion to Dismiss or for Judgment on the Pleadings pursuant to Rule 4:6-2. Within thirty (60) [sic] days of the issuance of the ruling and/or recommendation from the Special Master, the aggrieved party may appeal the ruling to this [c]ourt.

On August 24, 2011, the court granted plaintiffs' motion for partial summary judgment against Tierra, finding this defendant strictly, jointly and severally liable for discharges from the plant property located at 80 Lister Ave. At this point, a number of third-party defendants filed motions to dismiss Maxus/Tierra's claims. The court's disposition of those motions comprise the basis of this appeal.

## II

## Factual Background

As noted in Diamond Shamrock Chemicals Co. v. Aetna Casualty & Surety Co., 258 N.J. Super. 167 (App. Div. 1992), certif. denied, 134 N.J. 481 (1993), it is undisputed that the owners or users of the Lister Avenue sites "knew about the release of dioxins from [their] plant and the migration of these substances to surrounding areas." Id. at 213. The Lister Avenue sites have had a complicated ownership history. Between 1940 and 1951, Kolker Chemical Works, Inc. (Kolker) acquired 3.4 acres of the site to produce DDT and phenoxy herbicides. Diamond Alkali Company acquired Kolker in 1951, and later became known as the Diamond Shamrock Chemicals Company (DSC).

Under the direction of DSC and its successors, which include the nine businesses named as defendants here, the site continued to host manufacturing operations throughout the 1980s. Those operations involved DDT, TCDD and other hazardous substances such as 2,4-D[6] and 2,4,5-T[7]. Plaintiffs allege that defendants discharged TCDD and "various other pesticides and

chemicals" into the Passaic River and the Newark Bay Complex. The TCDD contamination of the Lister site and the Newark Bay Complex is widely known and has prompted an executive order and responses from the DEP, the EPA and other federal agencies. Plaintiffs allege that defendants have failed to cooperate with authorities to remedy this situation. Plaintiffs view defendants as "dischargers" under the Spill Act, and seek to hold them responsible for the ill-effects of their discharges into the Newark Bay Complex, particularly those related to TCDD.

## III

## Third-Party Complaint

In their counterclaim and third-party complaint B, Maxus/Tierra claim that the contamination of the Newark Bay Complex is the result of a century's worth of pollution, and accused plaintiffs of using defendants as "scapegoats." They seek contribution from the State and a number of third-party defendants whom they claim also polluted the Newark Bay Complex. The following facts summarize Maxus/Tierra's underlying claims and third-party defendants' respective denials of liability.

## Deleet, Docket No. A-4620-10

In their third-party complaint, Maxus/Tierra allege that Deleet is liable for hazardous discharges from an area known as the Ottilio Landfill Site. This site consists of two lots located southwest of the Passaic River, and is designated on Newark's tax maps as block 5001, lots twelve and sixteen. Deleet acquired lot twelve in 1970 and used a portion of it as a landfill. Lot sixteen connects to a tributary of the Passaic River called "Lawyers Ditch" or "Lawyers Creek," and is currently owned by the City of Newark.

Maxus/Tierra allege that from 1951 to the mid-1970s Ottilio & Sons Demolition, Inc. (Ottilio) used both lots as an illegal landfill. It is generally undisputed that the Ottilio site has been the subject of numerous environmental studies, DEP directives and legal actions. In 1974, the DEP brought suit against Ottilio, Deleet and other parties for improperly disposing of solid wastes and chemicals on the lots without approval. In 1976, oil was reportedly leaking from lot sixteen into the Passaic River via the Lawyers Ditch.

Although land-filling activities ceased in 1979, numerous 55-gallon corroded drums filled with liquid waste remained buried in both Ottilio lots. Studies of the area revealed the presence of a wide array of hazardous substances in the site's groundwater, sediments, surface soil and waters, such as pesticides, 1,1-dichloroethane, trichloroethene and 4,4-DDT. The third-party complaint did not specifically reference the chemicals identified in the primary complaint.

Maxus/Tierra allege that the contamination from the Ottilio site discharged into the Passaic River through the Lawyers Ditch and Newark's storm water system, rendering the site's owners liable for the damages alleged in the State's primary complaint. Deleet denies responsibility based on settlements and a release it entered into with DEP.

More specifically, on August 8, 1996, the DEP ordered Deleet and Ottilio to fund the remediation of the Ottilio site. In response, Deleet filed suit against a variety of defendants including DEP, Ottilio and several insurers. On May 17, 2000, Deleet and DEP entered into a stipulation and order of settlement addressing all claims and counterclaims. The stated purpose of the stipulation was to expedite the remediation of the Ottilio site.

In this stipulation, the DEP agreed to settle its "past cleanup and removal costs," "future cleanup and removal costs," and "natural resource damages" for the "Site." Those costs purportedly totaled $20,742,519.[8] The stipulation defined "Site" as "the Ottilio Landfill Site"; it did not reference the Newark Bay Complex, the Lawyers Ditch or the Passaic River. Future and past cleanup and removal costs meant all "direct and indirect costs paid by DEP for the remediation of the [Ottilio site]." (Emphasis added). Finally, the term "natural resource damages" encompassed natural resources "damaged or destroyed by the contamination at and from the [Ottilio site]." (Emphasis added).

In exchange for certain acts to be performed by Deleet, DEP agreed in paragraph 19 that it would not sue or take administrative action against Deleet for the remediation of lot twelve, or for the recovery of future and past cleanup and removal costs, and natural resource damages. However, under paragraph 21, DEP reserved its rights to proceed against Deleet in the event:

> a. DEP discover[ed] conditions on, at, or from Lot 12, previously unknown to DEP; or
>
> b. DEP receive[d] information relating to Lot 12, previously unknown to DEP, in whole or in part; and
>
> c. [Those] previously unknown conditions or information, together with any other relevant information, indicate[d] to DEP that the Lot 12 Remediation [was] not protective of human health and safety, and the environment.

Likewise paragraph 25 provided in pertinent part:

> The covenants contained in Paragraph 19 do not pertain to any matters other than those expressly stated. DEP further reserves, and this Stipulation is without prejudice to, DEP's right to sue or take administrative action against Deleet with respect to all other matters, including... liability arising from the past, present, or future discharge, or threat of discharge, of any hazardous substance outside the Site.
>
> [(Emphasis added).]

Following the stipulation, DEP intervened in Deleet's suit, and brought claims against Ottilio, its predecessors and affiliates, and Ottilio's insurer, to recover cleanup and removal costs the DEP had incurred in connection with the Ottilio site. The parties resolved the matter on January 11, 2006, by executing a final settlement agreement and release.

Paragraph 2.01 of that document defined the Ottilio Landfill Site to mean

> the former landfill encompassing approximately six acres of real property located at 18-60 Blanchard Street, Newark, Essex County, New Jersey, including portions of those properties designated as Block 5001, Lots 10, 12, 16, 18, 80 and 90 on the Tax Map of the City of Newark, and an undesignated triangular lot located between Lots 10 and 12, and any other area where any hazardous substance discharged there has come to be located.

This document specifically excluded the portion of lot 12 that had not been used as part of the landfill. In paragraphs 6.01 and 6.02 of the settlement, DEP agreed that it would not sue or take administrative action against Deleet for any acts taken in connection with its remediation of the Ottilio Landfill Site, or for the recovery of any past and future cleanup and removal costs "related to the Ottilio Landfill Site," or natural resource damages "related to the Ottilio Landfill Site ...." Under paragraph 6.04, DEP reserved its rights to proceed against Deleet with regard to the "disposal, depositing or dumping of additional (`new') waste materials" after the effective date of the settlement.

With respect to protection from future contribution claims, paragraph 8.01 provided that Deleet would be entitled to protection from any contribution claims "that [arose] out of or relate[d] to matters addressed in paragraphs 6.01 or 6.02 of [the settlement]."

Here, prior to submitting its motion to dismiss to the special master, Deleet asked DEP to provide it with protection against Maxus/Tierra's contribution claims in accordance with the stipulation and settlement. By letter dated August 18, 2010, the Attorney General's Office noted, on behalf of DEP, that "it is not certain that the claims asserted by Maxus and Tierra in the Passaic River Litigation are matters covered by either the Stipulation or the Agreement." According to DEP, the Agreement did not address the Newark Bay Complex.

Despite the position taken by DEP, Deleet argued in its motion to dismiss that the settlement materials precluded Maxus/Tierra's contribution claims. According to Deleet, Maxus/Tierra were not entitled to recovery under the Spill Act because they had neither cleaned up the contamination in the Newark Bay Complex nor received approval to perform such a cleanup. In Deleet's view, because Maxus/Tierra failed to establish a "nexus" with the relief sought by DEP, they could not establish a claim for contribution.

The special master recommended that the trial court deny Deleet's motion to dismiss because the documents relied on by Deleet could not be read as protecting it from Maxus/Tierra's contribution claims. The scope of the stipulation and settlement did not encompass the entire Newark Bay Complex. According to the special master, the array of damages DEP seeks in the primary complaint pertain solely to the contamination in the Newark Bay Complex. These damages are dissimilar to the damages included under the Deleet settlement documents because the latter referenced only damages arising at the Ottilio site.

Mindful of the standard of review applicable to a motion to dismiss brought under Rule 4:6-2(e), the special master noted that the factual assertions made by Maxus/Tierra had to be considered as valid. In this light, because the third-party complaint

alleged that "Deleet discharged hazardous substances that found their way into the Newark Bay Complex, and because Maxus and Tierra may be liable to DEP for cleanup and removal of that contamination... a contribution claim under the Spill Act arises."

The trial court agreed with the special master's recommendations and ultimate conclusions. The court found that the stipulation and settlement were ambiguous as to what the parties intended by the phrase "related to the Ottilio site." Additional discovery was thus needed to resolve this ambiguity. Like the special master, the court underscored the fact that the damages sought by plaintiffs in the primary complaint were dissimilar to the damages addressed in the stipulation and settlement.

## Drum Parties, Docket No. A-4623-10

Maxus/Tierra allege that the Drum parties and Borden are liable for hazardous discharges from the Bayonne Barrel and Drum (BBD) site and the Central Steel Drum (CSD) site, collectively the Drum sites. The BBD site is located at 150-154 Raymond Boulevard in Newark. From 1932 through 1983, the Bayonne Barrel and Drum Co. and its predecessors operated a drum reconditioning facility on the BBD site. A portion of the site was also used as a sanitary landfill from 1934 through the 1950s. The CSD site is located at 704-738 Doremus Avenue in Newark; it also hosted various drum reconditioning businesses from 1951 to 1994.

The drum reconditioning process involved here entailed cleaning and reconditioning drums with strong chemicals that typically produced "hazardous sludges, solutions and [incinerator] ashes." The BBD and CSD sites have a long history of spills, leaks, and mechanical failures resulting from poor housekeeping practices. Those sloppy practices have purportedly caused the soil, groundwater, and surface waters at both sites to be contaminated with an array of hazardous substances that included TCDD.

The CSD site is approximately 2,300 feet east of the Newark Bay, and for a time the Harrison Creek ran through the BBD site and emptied into the Passaic River, which was located approximately 2,000 feet away. According to Maxus/Tierra, the discharge from these sites has contaminated the Newark Bay and Passaic River.

Maxus/Tierra allege that the Drum parties are liable because they sent drums containing unidentified hazardous substances to the sites for disposal. Maxus/Tierra specifically assert that Clean Earth's predecessor sent several containers filled with hazardous wastes to the BBD site for disposal, and was therefore a "discharger" under the Spill Act. They make similar allegations against Borden, Hexion, Mace and R.T. because each had shipped containers filled with hazardous substances to the CSD site for reconditioning.

Maxus/Tierra also argue that Conopco was liable because it sold drums to the owners of the BBD site.[9] Conopco argued before the trial court that merely selling drums to a polluter was insufficient to trigger liability under the Spill Act. The Drum parties joined in Conopco's argument.[10]

The special master agreed with Conopco that merely selling containers was insufficient to trigger liability because there was no indication that the drums they sold contained hazardous substances or that Conopco had ever actually disposed of drums at the sites. She therefore recommended that the trial court grant Conopco's motion to dismiss the third party action without prejudice, subject to Maxus/Tierra's right to amend their pleadings.

However, the special master found that the factual allegations against the Drum parties were "materially different" from those asserted against Conopco. Unlike the allegations against Conopco, the third-party complaint alleges that the Drum parties sent containers containing hazardous substances to the BBD and CSD sites. The special master gave the following explanation in support of her findings:

> Third Party Complaint "B" does not allege that the specific drums disposed of by these parties leaked, but it does allege that waste from the sites to which these drums were delivered discharged into the Newark Bay Complex....
>
> Granted, the language is not perfect. But in its most favorable light, it suggests that each of the [Drum] parties sent barrels of hazardous waste to disposal sites, where the waste found its way into the Newark Bay Complex. This states a claim under the Spill Act.

The trial court agreed with the special master. The court found a factual issue as to whether the Drum parties sent the

containers to the sites with an intent to dispose of hazardous substances, knowing that the BBD and CSD sites were "notorious" for their poor housekeeping practices.

## Tiffany, Docket No. A-4625-10

Maxus/Tierra allege that Tiffany is liable for discharges from property it owned at 820 Highland Avenue in Newark (Tiffany site), where Tiffany operated a silverware manufacturing business from 1897 to 1985. According to Maxus/Tierra, the Second River is approximately 250 feet from the Tiffany site, and empties into the Passaic River. They alleged that through spills, leaks and poor housekeeping practices, Tiffany discharged hazardous substances from the site, which entered the Passaic River.

The third-party complaint identified a broad range of substances, including arsenic, tetrachloroethane, and "assorted volatile organic compounds," without a specific reference to the substances identified in the primary complaint. Maxus/Tierra also claimed that on or about December 27, 2006, the EPA sent a general notice letter advising Tiffany that it could be liable for costs related to a Lower Passaic River Study[11] because of its discharges. Based on these facts, Maxus/Tierra argued that Tiffany was a "discharger" under the Spill Act.

Tiffany moved to dismiss the complaint, relying on an approval letter it obtained from DEP in 1993, pursuant to the Industrial Site Recovery Act (ISRA), N.J.S.A. 13:1K-6 to-18. ISRA was enacted in 1993 to replace the Environmental Cleanup Responsibility Act of 1983 (ECRA). L. 1993, c. 139, § 1. It requires owners of properties associated with hazardous substances or wastes to satisfy certain cleanup obligations before selling or otherwise transferring ownership of the property. N.J.S.A. 13:1K-7. To effectuate a stock transaction in 1984, Tiffany made filings and investigations pursuant to the Act, then ECRA.

In the course of those investigations, Tiffany discovered soil contamination on the Tiffany site. However, Tiffany was unable to complete the necessary remedial measures prior to transferring the property. On October 15, 1984, Tiffany entered into an administrative consent order (ACO) with DEP. The ACO indicated that Tiffany intended to close the site after completing the transfer and that the "Order [would] enable the transfer... and the closure anticipated on or about December 14, 1984 to be undertaken in a comprehensive manner, thereby eliminating a subsequent duplicative ECRA review and approval."

Tiffany agreed to clean up the site in accordance with a plan to be approved by DEP. In the interim, DEP agreed not to bring any action based on Tiffany's failure to comply with ECRA. However, DEP expressly reserved its right to "tak[e] whatever action it deem[ed] appropriate to enforce the environmental protection laws of the State of New Jersey in any manner not inconsistent with the terms of [the Tiffany ACO.]" It further provided that nothing in the Tiffany ACO "shall constitute a waiver of any statutory right of [DEP] to require Tiffany to implement additional remedial measures should [DEP] determine that such measures are necessary to protect the public health, safety and welfare."

According to a certification submitted in support of Tiffany's motion to dismiss, a subsequent study purportedly established that Tiffany was not responsible for the groundwater contamination on the site, and DEP relieved Tiffany of taking any further action to remediate the groundwater. Tiffany then addressed the soil contamination in accordance with a cleanup plan, which DEP approved on June 30, 1989.

On July 30, 1993, DEP issued a final letter approving Tiffany's cleanup plan and deeming Tiffany in compliance with ISRA. The letter provided, however, that the approval would "not restrict or prohibit the [DEP] or any other agency from taking regulatory action under any other statute, rule or regulation."

In its motion to dismiss, Tiffany argued that the 1993 DEP letter protected it from Spill Act liability. The special master rejected Tiffany's argument, noting that the 1993 DEP letter expressly limited its applicability. In the view of the special master, the letter did not protect Tiffany against the type of damages sought by plaintiffs in the third amended complaint because the 2006 EPA notice indicated that Tiffany could be liable for discharges into the Lower Passaic River.

The trial court denied Tiffany's motion to dismiss for reasons similar to those articulated by the special master. The court ruled that, as a matter of law, the 1993 DEP letter did not encompass off-site pollution that preceded the date of the letter.

## ITT, Docket No. A-4628-10

Maxus/Tierra alleged that ITT was liable for hazardous discharges from several properties it owned in Clifton and Nutley (collectively "ITT sites"). Portions of the ITT sites directly abut the Passaic River, while other areas abut the Third River, a tributary of the Passaic River.

ITT and its predecessors have occupied the site since 1920, and operated an electrical component manufacturing plant on the premises from 1946 to 1996. According to the third-party complaint, ITT's operations have resulted in several discharges of hazardous substances and pollutants into the Passaic River, and soil and groundwater samples from the ITT sites confirmed the presence of a number of toxic compounds. However, it did not specifically reference the substances identified in plaintiffs' complaint. The complaint further alleged that on June 8, 2006, the EPA sent ITT a notice indicating that it could be liable for costs related to a Lower Passaic River Study because of its discharges.

ITT moved before the special master to dismiss Maxus/Tierra's claims based, in part, on a Natural Resource Damages Restoration Administrative Consent Order and Settlement Agreement (ITT settlement) it had executed in 2007 with DEP. This settlement resolved ITT's liability to DEP for natural resource damages associated with discharges from several of its sites, and provided protection against contribution claims.

The ITT settlement defined "natural resources" as "all land, fish, shellfish, wildlife, biota, air, waters, and other such resources owned, managed, held in trust or otherwise controlled by the State." It defined "natural resource damages" as encompassing claims that arose from any discharges occurring before the settlement date, and which were recoverable "as Natural Resource Damages" under various federal and state acts, including the Spill Act, "or any other state or federal common law, statute or regulation...." Under paragraph 9 of the settlement, those damages included "[t]he payment of compensation for the lost value of, injury to, or destruction of Natural Resources and natural resource services, including but not limited to the costs of assessments, attorney's fees... or any other expenses or costs ...." (Emphasis added). In addition to properties identified in the agreement, the settlement also extended to areas to which the discharges could have migrated.

DEP gave public notice of its intent to enter into the settlement, and received several comments. Tierra commented that the settlement was ambiguous with respect to whether it included off-site natural resource injury in areas such as the Lower Passaic River. DEP responded:

> This settlement agreement is not limited to the Properties and does extend to the definition of Sites, which includes areas outside the Properties to which discharges from each of the Properties have migrated. The record provides confirmation that the only natural resources injured by discharges of hazardous substances at the Properties is groundwater.
>
> [(Emphasis added).]

Tierra also challenged the propriety of the contribution protection under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. §§ 9601 to-75. DEP responded that the intent of the settlement was to protect the released parties "to the greatest extent possible from any contribution claim a third party may assert for natural resource damages," and that issues "regarding the scope of the Release as applied to specific claims under specific laws by private parties" could be addressed in separate legal proceedings.

Another commenter suggested that the settlement include limiting language to ensure that ITT "continue to have natural resource damages liability for the Passaic River and Newark Bay." DEP "determined that it [was] neither appropriate nor necessary to include limiting language" because its record confirmed that the "only natural resources injured by discharges of hazardous substances at the Properties [was] ground water."

ITT complied with the terms of the settlement and on December 15, 2008, DEP executed a natural resource damages release (ITT release) in which it "fully and forever release[d]" ITT and "covenant[ed] not to sue, and not to otherwise take administrative action against ITT... for any and all of [DEP's] and the Spill Fund's causes of action for Natural Resource Damages." The release defined "natural resources" and "natural resource damages" similarly to the way these terms were defined in the settlement.

ITT moved to dismiss the third-party complaint arguing that these documents, particularly the definition of the term "natural resource damages" contained in paragraph 9 of the settlement, precluded the Spill Act claims raised by Maxus/Tierra. According to ITT, Maxus/Tierra failed to show that ITT was connected to any of the hazardous substances discussed in the

primary complaint. Specifically, the third-party complaint did not allege that ITT had discharged TCDD or any of the other chemicals identified in plaintiffs' complaint.

Borden joined in ITT's argument that the third-party claims were based on facts that were unconnected to the Lister site discharges. Although the record is not clear, we will presume that the JDG also joined in this argument.

The special master rejected all of ITT's arguments, and recommended denial of its motion to dismiss. In her view, when considered as a whole, the settlement only resolved ITT's liability with regard to natural resource damages; it did not extend to the broad array of damages sought by the plaintiffs in the primary complaint. The special master found ITT's position— that it was unconnected to the discharges alleged against Maxus/Tierra—to be "factually inaccurate." She noted:

> The references to hazardous substances in the underlying complaint, as well [as in the] Third Party Complaint "B," are not all-encompassing lists, but rather, are examples of the types of chemicals that have contaminated the Newark Bay Complex. ITT cannot splice out the examples-as if they are the only chemicals involved-and disregard the remaining language, which explains that the lists are only illustrative.
>
> ....
>
> It is also difficult to understand how ITT can blithely disclaim any connection to contamination of the lower Newark Bay, especially given how it was [notified] as a party potentially responsible for that contamination by the EPA.

The trial court adopted the special master's reasoning and denied the motions to dismiss filed by ITT, Borden, and the JDG. The court agreed that the ITT settlement was limited to natural resource damages and that it could not, as a matter of law, interpret the settlement language as encompassing the other damages sought by plaintiffs in the primary complaint. The court likewise rejected ITT's contention that there was no factual connection between its discharges and the contamination of the Newark Bay Complex.

## Pharmacia, Docket No. A-0067-11

In their third-party complaint, Maxus/Tierra allege that Pharmacia is liable for property it owned on Pennsylvania Avenue in Kearny, which abuts the Passaic River and is known as the Monsanto site. From 1954 until approximately 1994 when Pharmacia sold the property, Pharmacia's predecessors, the Monsanto Company (Monsanto), operated a chemical manufacturing facility on the site that involved numerous hazardous substances. The chemicals identified in the third-party complaint, however, did not include those referenced in the primary complaint.

The third-party complaint alleges that Monsanto deliberately discharged pollutants and wastewater directly into the Passaic River at various points in the 1960s and 1970s. Specifically, in April 1961, authorities purportedly observed a "turbid liquid" being discharged from the Monsanto site into the Passaic River. On several other occasions in 1972, Monsanto allegedly discharged contaminated wastewater into the Passaic River and surrounding storm sewers.

Maxus/Tierra also claimed that on April 26, 1996, and on September 15, 2003, the EPA sent letters advising Pharmacia that it could be liable for costs related to a Lower Passaic River Study because of its discharges. Similarly, on September 19, 2003, DEP allegedly issued a directive finding that Monsanto discharged hazardous substances into the Lower Passaic River. Based on these facts, Maxus/Tierra argued that Pharmacia was a "discharger."

Pharmacia moved to dismiss, arguing that these claims were barred by res judicata and the entire controversy doctrine. Pharmacia contended that Maxus/Tierra's contribution claims were barred by an ACO that resolved a 1988 suit filed by DEP against Pharmacia pursuant to the Spill Act and the Water Pollution Control Act (WPCA), N.J.S.A. 58:10A-1 to-43. This 1988 litigation arose from an investigation and remedial action plan that Monsanto submitted to DEP on November 14, 1986.

The Pharmacia ACO indicated that Monsanto had land-filled areas of its property with waste liquids containing a hazardous substance known as polychlorinated biphenyls (PCBs). These acts purportedly contaminated the soil and groundwater, and constituted a hazardous discharge within the meaning of the Spill Act and the WPCA. However, the Pharmacia ACO provided that it was necessary to conduct a remedial investigation and feasibility study of remedial action alternatives (RI/FS) to "determine the nature and extent of the problems presented by the discharge of pollutants and hazardous substances at the

[Monsanto] Site...."

Monsanto neither admitted nor denied the allegations in the Pharmacia ACO. To resolve the dispute, Monsanto agreed to fund, complete and implement an RI/FS to "remedy all contamination at the Site, emanating from the Site, or which has emanated from the Site." In exchange, DEP agreed to "settle and release all claims asserted by the [DEP]" in the 1988 litigation. The Pharmacia ACO provided, however, that nothing therein would "preclude the [DEP] from seeking civil or civil administrative penalties against Monsanto," and that the Pharmacia ACO could not "be construed to affect or waive the claims of federal or State natural trustees against any party for damages for injury to, destruction of, or loss of natural resources." Finally, it provided that Monsanto would not be deemed to have satisfied the terms of the settlement until it received "written notice from the [DEP] that Monsanto has demonstrated, to the satisfaction of the [DEP], that all the terms of [the ACO] have been completed."

Against these facts, Pharmacia argued that its ACO with DEP barred Maxus/Tierra's claims. In response, Maxus/Tierra asserted that Pharmacia was not entitled to contribution protection because the Pharmacia ACO did not specifically provide for such protection. At a minimum, the intended scope of the agreement presented a question of fact not ripe for disposition under Rule 4:6-2(e). Finally, Maxus/Tierra argued that the provision extending such protections had been only recently enacted, and thus could not be applied retroactively.

The special master agreed that there were questions of fact regarding the intended scope of the Pharmacia ACO and denied Pharmacia's motion to dismiss. She opined that even if the ACO afforded Pharmacia a defense against Maxus/Tierra's Spill Act claims, the contribution protection only extended to the same "matters addressed" in the settlement. Because the parties had not provided a copy of the complaint underlying the Pharmacia ACO, the special master concluded that it was "impossible to determine the scope of the protection afforded to Pharmacia...." She did not address the retroactivity of the Act's contribution protection provisions.

Before the trial court on this issue, Pharmacia provided the judge with a copy of the 1988 complaint. Similar to the Pharmacia ACO, the 1988 complaint alleged that at some point in the mid-1960s, Monsanto intentionally poured waste liquids into an unlined pit on the property, and contaminated the soil and groundwater. The complaint identified the affected areas "as places where hazardous substances were released, spilled, leaked, poured, emitted, emptied or dumped into and onto the waters, lands which might flow or drain into said waters, and ground in a manner which both contaminated the soil and resulted in these substances being released into the groundwater."

DEP also charged Monsanto with making unilateral attempts to cleanup the contamination without obtaining DEP approval, and failing to timely notify DEP. Among other things, it sought an order requiring Monsanto to pay penalties for its discharges and permanently enjoining Monsanto from making additional discharges without a permit.

The trial court denied Pharmacia's motion to dismiss. Applying the four-pronged CERCLA analysis[12] to determine whether the "matters addressed" by the Pharmacia ACO and the third-party claims were the same, the court concluded that they were not. Specifically, the damages asserted by the DEP in the primary complaint were not the same as those covered by the 1988 litigation. The court noted that Pharmacia had failed to provide a copy of the RI/FS referenced in the ACO, which in the court's view was relevant to determining whether the "matters addressed" in the 1988 litigation encompassed the issues presented in the third-party complaint.

In addressing Pharmacia's contention that Maxus/Tierra's claims were barred by res judicata and the entire controversy doctrine, the court found:

> Such a theory is wholly in contravention of the legislative intent underlying the Spill Act to limit exclusion of contribution claims to only those "matters addressed" in previous settlements with the DEP. Accepting [Pharmacia's] argument, there would be no need for such statutory language under the Spill Act....

Referring to its December 15, 2010, order granting the State's motion to reserve its claims against the existing third-party defendants and future parties, the court rejected Pharmacia's argument that Maxus/Tierra's claims were barred by either res judicata or the entire controversy doctrine. The court did not address the retroactivity of the Spill Act's contribution protection provisions.

Against this factual backdrop and mindful of the procedural posture of these cases, we will now address the legal issues

presented by the parties.

## IV

## Standard of Review

Relying on their prior settlements with DEP, Deleet, ITT and Pharmacia argue that the trial court erred in denying their respective motions to dismiss. Although plaintiffs did not take a position on these issues before the trial court, they urge us on appeal to affirm, asserting that a complete factual record is necessary to determine whether Maxus/Tierra's contribution claims are based on matters previously addressed in the disputed settlements.

As a threshold issue, we must first identify the applicable standard of review. Maxus/Tierra argue that we should treat Pharmacia's motion to dismiss as a request for summary judgment because it relied on materials outside the pleadings. Maxus/Tierra's argument in this respect is directed only against Pharmacia. We disagree that Pharmacia's motion, or for that matter any of the motions underlying these appeals, should be analyzed as summary judgment applications.

The primary distinction between a motion to dismiss for failure to state a claim pursuant to Rule 4:6-2(e) and a motion for summary judgment pursuant to Rule 4:46-2 "is that the former is based on the pleadings themselves." Pressler & Verniero, Current N.J. Court Rules, comment 4.1.2 on R. 4:6-2 (2012).

In assessing a Rule 4:6-2(e) motion, courts should view the complaint indulgently, assume the truthfulness of the allegations in the complaint and afford the complainant every reasonable inference. NCP Litig. Trust v. KPMG L.L.P., 187 N.J. 353, 365 (2006). A court's inquiry at such an early stage in the proceedings is limited to the adequacy of the pleadings, not the complaining party's ability to prove its allegations. See Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). To this end, a court should search "`the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" Ibid. (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). Accordingly, a complaint will be sustained as long as a cause of action is "suggested" by the allegations. Ibid.

If, however, a moving party relies on material outside the pleadings, our rules provide that such motion should be "treated as one for summary judgment and disposed of as provided by [Rule] 4:46, and [that] all parties... be given reasonable opportunity to present all material pertinent to such a motion." R. 4:6-2. Thereafter, a motion for summary judgment will be granted only if the pretrial record "show[s] that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c).

Maxus/Tierra argue that Pharmacia's reliance on settlement documents converted its motion into a request for summary judgment because it introduced facts outside the four corners of the third-party complaint. This mechanistic approach is inconsistent with the underlying principles governing our review of Pharmacia's motion. In reviewing a motion under Rule 4:6-2(e), a court may consider documents referred to in the complaint, matters of public record, or documents explicitly relied on in the complaint, without converting the motion to dismiss into one for summary judgment. See N.J. Citizen Action, Inc. v. Cnty. of Bergen, 391 N.J. Super. 596, 605 (App. Div.), certif. denied, 192 N.J. 597 (2007); see also N.J. Sports Prods., Inc. v. Bobby Bostick Promotions, L.L.C., 405 N.J. Super. 173, 178 (Ch. Div. 2007); Acevedo v. Monsignor Donovan High Sch., 420 F. Supp. 2d 337, 340 (D.N.J. 2006).

Although Maxus/Tierra may not have expressly cited Pharmacia's ACO in their third-party complaint, the allegations therein allegedly arise from the same universe of facts encompassed by Pharmacia's settlement materials. In this respect, it is reasonable to treat the various settlement documents in this case, which are presumably public records, as "integral" to the facts alleged in Maxus/Tierra's third-party complaint. See Acevedo, supra, 420 F. Supp. 2d at 340. We will thus apply the same standard of review employed by the trial court. Donato v. Moldow, 374 N.J. Super. 475, 483 (App. Div. 2005).

## V

## The Spill Act

The Spill Act was enacted to protect and preserve the lands and waters of our State. N.J.S.A. 58:10-23.11a. With its passage, the Legislature sought to "control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of said substances...." Ibid. Given the public interest at stake, the statute directs that we construe its provisions liberally "for the general health, safety, and welfare of the people of this State...." N.J.S.A. 58:10-23.11x.

Maxus/Tierra's Spill Act claims against each of the appealing third-party defendants are predicated on N.J.S.A. 58:10-23.11f(a)(2)(a) (contribution provision), which was enacted in 1991 "to encourage prompt and effective remediation by any responsible party who might otherwise be disinclined to do so because of the risk and burden of bearing the entire cost despite the responsibility of others for the creation and continuation of the problem." Pitney Bowes, Inc. v. Baker Indus., Inc., 277 N.J. Super. 484, 487 (App. Div. 1994); L. 1991, c. 372, § 14. It provides in pertinent part:

> Whenever one or more dischargers or persons cleans up and removes a discharge of a hazardous substance, those dischargers and persons shall have a right of contribution against all other dischargers and persons in any way responsible for a discharged hazardous substance or other persons who are liable for the cost of the cleanup and removal of that discharge of a hazardous substance.
>
> [N.J.S.A. 58:10-23.11f(a)(2)(a).]

This provision is intended to "accomplish a fair and equitable ultimate sharing of the remediation burden among all responsible parties and thereby to promote contamination cleanup... [by] cast[ing] a broad net" that encompasses all parties that would be liable under N.J.S.A. 58:10-23.11g. Pitney, supra, 277 N.J. Super. at 487-88.

According to the express terms of the statute, to plead a valid contribution claim, Maxus/Tierra need only allege "that a discharge occurred for which the contribution... defendants [were] liable pursuant to... [N.J.S.A. 58:10-23.11g.]" N.J.S.A. 58:10-23.11f(a)(2)(a). After identifying the liable parties, the court must then "allocate the costs of cleanup and removal among [the] liable parties using such equitable factors as the court determines are appropriate." Ibid.

N.J.S.A. 58:10-23.11g(c)(1) provides that "any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred." "Discharge" as used in the Spill Act, is defined broadly to include "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters or onto the lands of the State ...." N.J.S.A. 58:10-23.11b.

The third-party defendants addressed in this issue do not, and indeed cannot, dispute that Maxus/Tierra satisfied the basic requirement to show that the third-party defendants made discharges. Maxus/Tierra allege that each of the third-party defendants made, or were otherwise responsible for discharging hazardous substances into the Newark Bay Complex, and these third-party defendants have not denied these allegations.

Instead, the third-party defendants based their motions to dismiss on N.J.S.A. 58:10-23.11f(a)(2)(b) (contribution protection provision). Enacted in 2005, this section provides that a party that has previously resolved its liability to the State, and has thereby obtained "a final remediation document[] or ... has entered into an administrative or judicially approved settlement with the State, shall not be liable for claims for contribution regarding matters addressed in the settlement or the final remediation document[.]" L. 2005, c. 348, § 1 (emphasis added) (codified as amended at N.J.S.A. 58:10-23.11f(a)(2)(b)).

## VI

## Deleet's Settlement

Deleet argues that the trial court's ruling violates the clear intent of its settlement with DEP because the stipulation and settlement unambiguously protect it from any contribution claims "related to the Ottilio Landfill Site." We disagree.

The trial court found that the intended scope of Deleet's stipulation and settlement was ambiguous, requiring additional fact-finding on the subject. That being said, our review of the court's decision is de novo because the interpretation of settlements and releases, as with any other contract, is a matter of law. Domanske v. Rapid-Am. Corp., 330 N.J. Super. 241,

246 (App. Div. 2000); Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998) ("Interpretation and construction of a contract is a matter of law....").

In construing a contract, our role is to "find the intention of the parties as revealed by the language used by them." Homann v. Torchinsky, 296 N.J. Super. 326, 334 (App. Div.), certif. denied, 149 N.J. 141 (1997). Such language should be interpreted in accordance with common sense and fairness, and clear and unambiguous contracts must be enforced as written. Id. at 334, 336. A release is not "restricted by its terms to particular claims or demands, [and] ordinarily covers all claims and demands due at the time of its execution and within the contemplation of the parties." Bilotti v. Accurate Forming Corp., 39 N.J. 184, 204 (1963).

The dispositive issue in Deleet's appeal is whether the contribution protection provided in the proffered settlement documents encompassed and therefore barred Maxus/Tierra's current claims as a matter of law. We agree with the trial court that, at this stage of the proceedings, the answer to this question is no. Agreements that are reasonably susceptible to more than one interpretation are deemed ambiguous, and require extrinsic evidence to ascertain intent. See Grow Co., Inc. v. Chokshi, 403 N.J. Super. 443, 474-75 (App. Div. 2008). Contrary to Deleet's assertions, the scope of its settlement with DEP is not clear from the face of the agreement.

Particularly debatable is whether Deleet's settlement with DEP encompassed contamination in areas outside the Ottilio site. Deleet relies on the definition provided in paragraph 2.01 of the settlement to argue that the "Ottilio Landfill site" included "any other area where any hazardous substance discharged has come to be located." However, this language can also be reasonably read as modifying those areas already described within the paragraph, and not extending to off-site locations. Such an approach would arguably be consistent with the Attorney General's August 18, 2010 position-letter on this subject.

Other provisions in the settlement materials also support this construction. In paragraphs 21 and 25 of the Deleet stipulation, the DEP reserved its rights to bring future actions in the event it discovered conditions "at or from" the site that were previously unknown to DEP, and posed a risk to "human health and safety, and the environment." Adopting Deleet's position that the settlement materials unambiguously preclude any suit related to the Ottilio site, no matter how tenuous the connection, would nullify the reservation of rights provisions in paragraphs 21 and 25. Such a result is inconsistent with accepted rules of contract interpretation. See J.L. Davis & Assocs. v. Heidler, 263 N.J. Super. 264, 270-72 (App. Div. 1993) (rejecting an interpretation of a contractual provision that "would nullify its very terms and render the provision useless").

Deleet also argues that Maxus/Tierra has no basis on which to seek contribution under the JTCL. Mindful of our standard of review, we again disagree. The JTCL was enacted to ensure that fault be fairly apportioned among joint tortfeasors and to prevent plaintiffs from selecting defendants arbitrarily. Vernix ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 207 (App. Div. 2006), certif. denied, 189 N.J. 429 (2007). The JTCL thus establishes a right of contribution among joint tortfeasors. N.J.S.A. 2A:53A-2.

In order to obtain relief under the JTCL, the party seeking contribution must establish that it and the potential contributor are jointly and severally liable to the plaintiff. Miraglia v. Miraglia, 106 N.J. Super. 266, 270 (App. Div. 1969). However, the actual right to contribution does not accrue until "the injured third person has brought action and recovers judgment against one or more of the joint tortfeasors and the latter has paid the judgment in whole or in part." Ibid.

In applying the JTCL to a settlement, we must be mindful of two important principles:

> [First,] that a settling tortfeasor shall have no further liability to any party beyond that provided in the terms of settlement, and [second,] that a non-settling defendant's right to a credit reflecting the settler's fair share of the amount of the verdict—regardless of the actual settlement—represents the judicial implementation of the statutory right to contribution.
>
> [Young v. Latta, 123 N.J. 584, 591 (1991).]

Thus, although a settling defendant's liability is extinguished as to matters set forth in the settlement, the non-settling defendant retains the right to a credit in the amount equal to the settling party's share, and to have that "settling defendant's liability apportioned by the jury." Vernix, supra, 387 N.J. Super. at 207. Regardless of whether there has been a settlement, the essential element for recovery under the JTCL is that the defendants share a common liability to the plaintiff, even where the actual liability of each tortfeasor derives from a different theory of recovery. Cartel Capital Corp. v. Fireco, 81 N.J. 548, 567

(1980); Tomkovich v. Pub. Serv. Coordinated Transp., 61 N.J. Super. 270, 274 (App. Div.), certif. denied, 33 N.J. 116 (1960).

Deleet argues that it cannot be held liable under the JTCL, presumably because its settlement with DEP concerned the same claims asserted in the third-party complaint. However, as we noted earlier in this opinion, the scope of Deleet's settlement with DEP remains unclear. In the absence of a more comprehensive record, this argument is not ripe for appellate review.

## VII

## ITT's Settlement

The trial court found that ITT's settlement with DEP only resolved ITT's liability for natural resource damages and that it did not encompass the other forms of damages sought by plaintiffs in the third amended complaint.

ITT challenges this finding, arguing that its settlement precludes Maxus/Tierra's contribution claims under both the Spill Act and the JTCL. ITT acknowledges, however, that its prior suit with DEP and the current action are not identical. Indeed, ITT does not dispute that plaintiffs are not seeking natural resource damages in their primary complaint.[13]

ITT argues that the damages plaintiffs seek in the third amended complaint fit within the broad definition of "natural resource damages" provided in paragraph 9 of its settlement because this definition includes "the costs of assessments, attorneys' fees, consultant's or expert fees, interest, or any other expenses or costs." (Emphasis added). ITT contends that the underscored language bars Maxus/Tierra's third-party claims for contribution. We reject this argument.

ITT's argument is predicated on the premise that Maxus/Tierra's third-party claims concern the same "matters addressed" in ITT's 2007 settlement with DEP. See N.J.S.A. 58:10-23.11f(a)(2)(b). In order to reach this result, we would have to find that the parties to the ITT settlement intended the term "natural resource damages" in paragraph 9 to encompass the various damages sought by plaintiffs in the third amended complaint. There is no basis for such a finding as a matter of law.

The Spill Act and its implementing regulations provide separate definitions for the terms "natural resources" and "cleanup and removal costs." However there is no statute or regulation that defines the term "natural resource damages." N.J.S.A. 58:10-23.11b; N.J.A.C. 7:1J-1.4. This regulation defines "damages" to mean

> all cleanup and removal costs and all direct and indirect damages actually incurred, no matter by whom sustained, arising in connection with a discharge of a hazardous substance, or in connection with a threatened discharge, which costs and damages include, but are not limited to, the following:
>
> 1. The cost of restoring, repairing or replacing any real or personal property damaged or destroyed by a discharge, any income lost from the time such property is damaged to the time such property is restored, repaired or replaced, and any reduction in value of such property caused by such discharge in comparison with its value absent the discharge;
>
> 2. The cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge;
>
> 3. Loss of income or impairment of earning capacity due to damage to real or personal property, including natural resources destroyed or damaged by a discharge, provided that such loss or impairment exceeds 10 percent of the amount which the claimant derives, based upon income or business records, exclusive of other sources of income, from activities related to the particular real or personal property or natural resources damaged or destroyed by such discharge during the week, month or year for which the claim is filed;
>
> 4. Loss of tax revenue by a state or local government for a period not to exceed one year, due to damage to real or personal property proximately resulting from a discharge (which one-year period, in the case of lost real property tax revenue, commences on the effective date of the first reduction in the assessed value of real property for damage proximately resulting from the discharge);
>
> 5. Interest on loans obtained or other obligations incurred by a claimant for the purpose of ameliorating the

adverse effects of a discharge pending the payment or settlement of a claim;

6. Such sums as may be necessary to reimburse a local unit for costs incurred in an emergency response action taken to prevent, contain, mitigate, cleanup or remove a discharge or threatened discharge of a hazardous substance; and

7. Costs for legal services necessary for remediating contamination, including attorney's fees for contracting or obtaining permits, drawing of ordinances, acquisition of land and rights of way, drawing and administering construction contracts, and for legal work connected with necessary financing for the construction by a municipal utility authority of a new water system. Damages do not include costs normally associated with the listing, sale and transfer of property which is the subject of a claim.

[N.J.A.C. 7:1J-1.4.]

This regulatory scheme does not support ITT's contention that the specific term "natural resource damages" encompasses the array of damages sought in plaintiffs' primary complaint. A plausible interpretation of the settlement would lead to the conclusion that the settlement resolved ITT's liability, but only as to a limited subcategory of damages. See N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., 393 N.J. Super. 388, 394 (App. Div. 2007) (explaining that DEP rules treat "natural resource damages" as a type of "remedial action cost").

This approach is also consistent with the section of the ITT settlement that expressly excludes from the definition of "natural resource damages" a number of costs, such as remediation costs, that plaintiffs seek to recover pursuant to the third amended complaint.

The legislative history of the Spill Act's contribution protection provisions supports this construction. When the provision was initially proposed, the bill conditioned contribution protection on polluters resolving their "liability to the State for cleanup and removal costs[.]" S.B. 2612, 2004-05 Leg. Sess. (N.J. 2005). The Senate Environment Committee proposed amendments to require a settling polluter to resolve liability for "cleanup and removal costs including natural resource damages." Senate Env't Comm., Statement to S.B. 2612, 2004-05 Leg. Sess. (N.J. June 16, 2005) (emphasis added); see also Statement to S.B. 2612, 2004-05 Leg. Sess. (Dec. 8, 2005) (proposing similar changes).

The Legislature adopted this recommendation, and the current version of the law extends protection to a party who has "resolved his liability to the State for cleanup and removal costs, including the payment of compensation for damage to, or the loss of, natural resources, or for the restoration of natural resources ...." N.J.S.A. 58:10-23.11f(a)(2)(b) (emphasis added). This strongly suggests that the Legislature contemplated "natural resource damages" to be a distinct subset of Spill Act damages.

In short, on this record, we cannot determine whether plaintiffs' request for payment to cover the cost of conducting a natural resource damage assessment is covered by ITT's 2007 Settlement.

## VIII

## Pharmacia's Settlement

The trial court denied Pharmacia's motion to dismiss primarily on the basis that additional discovery was needed to assess whether the Pharmacia ACO resolved the matters raised in the third-party complaint. We agree.

Pharmacia argues that its ACO with DEP clearly insulates it from liability. According to Pharmacia, the trial court erroneously focused on the "work done" by Pharmacia to satisfy the terms of the ACO, rather than the terms of the ACO itself. In Pharmacia's view, the degree to which it actually complied with the terms of the agreement is irrelevant because the settlement is sufficient under the Spill Act to protect it from Maxus/Tierra's third-party claims. Pharmacia acknowledges, however, that the ACO did not set forth all of the damages sought by plaintiffs in the primary complaint. Nonetheless, it contends that the ACO covered the present claims.

Maxus/Tierra argue that the Pharmacia ACO does not bar their claims because it did not specifically provide for such protection, and the Spill Act's contribution protection provision was not enacted until 2005, several years after the Pharmacia ACO was

executed. As such, Maxus/Tierra urges us to hold that the contribution protection adopted in 2005 does not apply retroactively to the Pharmacia ACO.

Although properly raised before it, the trial court did not address the retroactivity argument. Plaintiffs urge us to refrain from addressing any substantive issues until a full record is developed. We are satisfied that prudence and sound principles of appellate review militate in favor of proceeding cautiously in this regard. We thus decline to address this issue at this stage in the proceedings.

We turn our attention now to the applicability of the JTCL. As noted earlier, the JTCL calls for contribution between parties who are jointly and severally liable to a plaintiff. N.J.S.A. 2A:53A-2. To qualify for protection against Maxus/Tierra's claims, Pharmacia would need to establish that its settlement with DEP covered the discharges and consequent damages alleged in the third amended complaint. See Young, supra, 123 N.J. at 591 (finding that settling tortfeasor is no longer liable for matters "provided in the terms of settlement"). At this early juncture, Pharmacia is unable to satisfy this burden as a matter of law because, as the trial court correctly found, several material facts remain in dispute, particularly as to the intended scope of the settlement agreement. The remaining arguments raised by Pharmacia lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

## IX

## Factual Nexus

ITT, the JDG, and Borden argue that the claims made by Maxus/Tierra in the third-party complaint should have been dismissed because they failed to demonstrate a factual nexus to the allegations raised by plaintiffs in the third amended complaint. Specifically, ITT, the JDG and Borden argue that Maxus/Tierra's claims are not sustainable because they are not connected to the Lister sites and do not refer to TCDD, the main contaminant referenced in the primary complaint. ITT and JDG also argue that Maxus/Tierra cannot seek contribution under the Spill Act because they have not yet remediated their discharges.

According to Maxus/Tierra, third-party defendants misread the principal complaint by suggesting that the scope of damages pertains solely to TCDD or is narrowly confined to the Lister sites. Although plaintiffs did not participate in the proceedings before the trial court, they argue on appeal that liability under the Spill Act must be based on the commonality of the injured resource, not, as the third-party defendants suggest, on the commonality of the polluting substance.

Our review of the record leads us to reject the arguments advanced by these third-party defendants. As a general proposition, liability under the Spill Act is established when there is a causal link between a defendant's discharge and the contamination for which the plaintiff seeks to impose liability. N.J. Dep't of Envtl. Prot. v. Dimant, 418 N.J. Super. 530, 544 (App. Div.), certif. granted, 208 N.J. 381 (2011). Stated differently, liability under the Spill Act requires "some act or omission of human conduct which causes a hazardous material not previously present to enter the waters or land." White Oak Funding, Inc. v. Winning, 341 N.J. Super. 294, 299 (App. Div.), certif. denied, 170 N.J. 209 (2001).

Here, plaintiffs' third amended complaint emphasizes the effects of TCDD on the Newark Bay Complex. However, there is no indication that the TCDD-related effects are the only environmental liabilities that plaintiffs seek to address in the underlying action. Indeed, plaintiffs specifically allege that for over forty years Maxus/Tierra have caused "myriad and substantial economic injuries" by discharging a number of hazardous substances that included, but were not limited to, TCDD. Consistent with this approach, plaintiffs characterize third-party defendants' attempt to disclaim liability under these circumstances as "factually and legally baseless."

The principal issue before us, however, is far more narrow. Given the procedural posture of these cases, the arguments raised by ITT, the JDG and Borden are simply premature. The pleadings state a sufficient basis to withstand dismissal at this stage of the litigation. See Printing Mart-Morristown, supra, 116 N.J. at 746.

We also reject third-party defendants' related arguments that Maxus/Tierra cannot bring a contribution claim because Maxus/Tierra have not yet remediated their discharges. More specifically, ITT argues that contribution pursuant to N.J.S.A. 58:10-23.11f(a)(2)(a) is limited to "dischargers or persons [who have] clean[ed] up and remove[d] a discharge of a hazardous substance...." JDG joins in this argument. These arguments are not supported by the Spill Act.

To implement the Legislature's goals, the Spill Act imposed a tax on major chemical and petroleum facilities, and gathered the proceeds into the Spill Fund. Exxon Mobil Corp., supra, 393 N.J. Super. at 399.

The Act

> explicitly gives DEP two options regarding a hazardous discharge: (1) cleanup the discharge and bring an action to recover the costs, or (2) direct the discharger to cleanup or arrange for the cleanup of the discharge. A third option, implicit in DEP's broad implied powers, is that DEP can require responsible polluters to pay for cleanup and removal costs prior to remedial action.
>
> [Id. at 399-400 (citations omitted).]

DEP's implied power to order payment from polluters before a cleanup is effectuated undermines ITT's position that a party cannot seek contribution without first performing a cleanup. Such an interpretation would frustrate the underlying intent of the contribution provision, to encourage the fair sharing of burdens, because it would deprive parties of their contribution rights based solely on the means through which a cleanup is performed. See also Pitney, supra, 277 N.J. Super. at 487-88 (explaining that in regard to defenses, the Spill Act "treats all parties the same... whether they are directly responsible to the appropriate government agency under [N.J.S.A. 58:10-] 23.11g or responsible by way of contribution obligations under [N.J.S.A. 58:10-]23.11f").

For these reasons, we affirm the trial court's decision denying these third-party defendants' motion to dismiss.

## X

## The Drum Parties

In rejecting these parties' motion to dismiss, the trial court found additional discovery was necessary as to the circumstances under which the Drum parties shipped their containers.

Relying on our decisions in Department of Environmental Protection v. Dimant, supra, and Atlantic City Municipal Utilities Authority v. Hunt, 210 N.J. Super. 76 (App. Div. 1986), the Drum parties argue that they cannot be held liable for causing a discharge as defined by the Spill Act because they "merely shipped intact drums" to the BBD and CSD sites. We reject this argument because it wrongly conflates the standards for establishing liability under the Spill Act, which Maxus/Tierra must meet to prevail, with the significantly less stringent standard for stating a claim upon which relief may be granted under Rule 4:6-2(e).

N.J.S.A. 58:10-23.11g(c)(1) imposes liability on those who have either "discharged a hazardous substance" or are "in any way responsible for any hazardous substance." Consistent with the remedial aims of the Act, courts have interpreted this language broadly so that "[a] party even remotely responsible for causing contamination will be deemed a responsible party...." In re Kimber Petroleum Corp., 110 N.J. 69, 85 (1988).

The facts in Hunt are similar to the facts we confront here, to the extent Hunt involved the placement of drums in the ground. Hunt, supra, 210 N.J. Super. at 80. In contrast to the procedural posture of this case, Hunt involved the review of a summary judgment record that showed "no evidence that the drums [had] corroded and released their contents." Id. at 79-80. On those facts, we held that the "placement of the waste stored in containers was not a discharge because there was and has been no interaction with the environment." Id. at 96.

We reached a similar result in Dimant, supra, 418 N.J. Super. at 544, in which we held that "some nexus between the use or discharge of a substance and its contamination of the surrounding area is needed to support a finding of Spill Act liability." Distilled to their essence, these cases stand for the principle that a discharge or a contamination, standing alone, is not enough to trigger liability; there must be a causal connection between the two.

The Drum parties' reliance on these cases is misplaced at this early juncture. Unlike Hunt, the record does not conclusively show whether the containers shipped by the Drum parties to the BBD and CSD sites leaked. The dispositive question at this point is not whether Maxus/Tierra have shown a causal connection. The issue is whether their pleadings are capable of "suggesting" a causal connection between the Drum parties' conduct and the contamination alleged in the primary complaint.

Maxus/Tierra alleged that the Drum parties shipped containers to reconditioning sites that had a history of poor housekeeping practices, and that those drums contained hazardous substances. A contribution claim under the Spill Act is "suggested" by these facts because, when viewed in the light most favorable to Maxus/Tierra, one could reasonably infer that the hazardous substances contained in those drums made their way into the environment, thereby making the Drum parties "in any way responsible for any hazardous substance." N.J.S.A. 58:10-23.11g(c)(1).

The Drum parties also take issue with the trial court's reference to the notoriety of the sites. In their view, the court's consideration of this point was tantamount to imputing liability to the Drum parties based only on the alleged improper conduct of the site operators. This argument mischaracterizes the trial court's reasoning.

In the course of oral argument, the trial court noted that the Drum parties could be liable as "dischargers" if Maxus/Tierra could show that the Drum parties had reason to suspect, based on how the Drum sites were operated, that the contents of their drums could make their way into the environment. There is nothing improper about this observation because, although the statute does not require a party to show that a polluter acted intentionally, showing that the polluter acted or failed to act, with knowledge that its conduct would result in a discharge, is one of the ways liability may be established. Indeed, the statute defines the term "discharge" to include "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters or onto the lands of the State... when damage may result ...." N.J.S.A. 58:10-23.11b (emphasis added).

Finally, the Drum parties fault the trial court for relying on decisions interpreting CERCLA because the standards for imposing liability under CERCLA and the Spill Act differ. This argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

## XI

## Tiffany

As noted earlier, Tiffany argues that its ACO with the DEP and compliance with ISRA, as evidenced by the 1993 DEP letter, shields it from any liability under the Spill Act. The trial court denied Tiffany's motion to dismiss because insufficient facts were presented to conclude, as a matter of law, that the 1993 letter encompassed off-site pollution.

We reject Tiffany's arguments substantially for the reasons expressed by the trial court. The 1993 letter does "not restrict or prohibit the [DEP] or any other agency from taking regulatory action under any other statute, rule or regulation." The Tiffany ACO likewise was not intended to preclude future environmental actions. The limiting language in these documents provided the trial court with a reasonable basis for denying Tiffany's motion to dismiss, and for requiring further fact-finding to ascertain the intended scope of the settlements.

Tiffany next argues that: (1) it did not make any discharges which would render it liable for the allegations contained in plaintiffs' third amended complaint; and (2) Maxus/Tierra's claims fail because they have not yet cleaned up their discharges. We reject these arguments for the same reasons we rejected the arguments raised by ITT, Borden and the JDG. We also reject Tiffany's arguments predicated on the applicability of the JTCL for the reasons expressed herein.

## XII

## Res Judicata and Entire Controversy Doctrine

Pharmacia argues that the trial court should have precluded Maxus/Tierra's contribution claims based on res judicata and the entire controversy doctrine. We disagree.

Res judicata, or claim preclusion, prevents the re-litigation of claims that have already been resolved, and seeks thereby to protect the integrity of judgments and to prevent the harassment of parties. Velasquez v. Franz, 123 N.J. 498, 505 (1991); Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 409 (1991). This exclusionary principle is inapplicable, however, unless three elements are met:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.
>
> [Watkins, supra, 124 N.J. at 412.]

Similarly, the entire controversy doctrine

> requires a litigant to present all aspects of a controversy in one legal proceeding. It is intended to be applied to prevent a party from voluntarily electing to hold back a related component of the controversy in the first proceeding by precluding it from being raised in a subsequent proceeding thereafter.
>
> As with many legal principles, it is more easily stated than applied. The entire controversy doctrine is, at bottom, an equitable one. It rests upon the twin pillars [of] fairness to the parties and fairness to the system of judicial administration.
>
> The application of the entire controversy doctrine requires us to consider fairness to the parties, as the polestar of the application of the rule is judicial fairness. Consequently, the boundaries of the entire controversy doctrine are not limitless. It remains an equitable doctrine whose application is left to judicial discretion based on the factual circumstances of individual cases.
>
> [Hobart Bros. Co. v. Nat'l Union Fire Ins. Co., 354 N.J. Super. 229, 240-41 (App. Div.) (alteration in original) (internal quotation marks and citations omitted), certif. denied, 175 N.J. 170 (2002)]

According to Pharmacia, the trial court erred in ruling that these doctrines did not bar Maxus/Tierra's claims. However, this argument mischaracterizes the court's ruling. The court ruled that the Spill Act only excluded Maxus/Tierra's contribution claims to the extent they were "matters addressed" in the Pharmacia ACO. This determination was fully consistent with the plain text of the Spill Act, see N.J.S.A. 58:10-23.11f(a)(2)(b) (a party who has previously resolved its liability to the State is entitled to contribution protection, but only "regarding matters addressed in the settlement"), as well as case law applying these exclusionary principles, see Mystic Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. 310, 323 (1995) (entire controversy doctrine does not bar claims that were "unknown, unarisen, or unaccrued at the time of the original action"); Culver v. Ins. Co. of N. Am., 115 N.J. 451, 460 (1989) ("The application of res judicata doctrine requires substantially similar or identical causes of action and issues, parties, and relief sought.").

It is at least debatable whether the Pharmacia ACO could be viewed as a final adjudication on the merits of the claims that DEP raised in 1988. Monsanto did not admit or deny those allegations as part of its settlement. See Pressler & Verniero, supra, comment 3.5 on R. 4:30A (explaining that the entire controversy "doctrine does not apply to preclude a successive action if the first action did not result in any adjudication on the merits").

It is also questionable whether the claims asserted in the 1988 litigation and the present matter are identical because the factual circumstances surrounding each case remain unclear at this early point in the proceedings. Although a different picture may emerge after discovery, there is an insufficient basis on which to conclude, as a matter of law, that the facts that gave rise to the 1988 litigation between DEP and Monsanto are the same as those on which the present contribution action is based.

## XIII

## Conclusion

The orders of the trial court denying appellants' motion to dismiss Maxus/Tierra's third-party complaint are affirmed. The matter is remanded to the trial court for further proceedings. We do not retain jurisdiction.

[1] Because of the large number of third-party defendants named in this action "et al." has been used in the caption.

[2] dioxin dichlorodiphenyltrichloroethane.

[3] 2, 3, 7, 8-tetrachlorodibenzo-p-dioxin.

[4] Ninety-seven of the third-party defendants named in complaint B, and twelve of the entities named in complaints C and D, coordinated their defenses before the trial court. These third-party defendants are referred to throughout the record as the Joint Defense Group (JDG). The JDG joined the appeal filed by ITT under docket number A-4628-10.

[5] Although the record is unclear whether Pharmacia filed an answer, we will proceed under the assumption that joinder of issue was perfected as to all of the relevant parties.

[6] 2, 4-dichloropheoxyacetic acid.

[7] 2, 4, 5-trichlorophenoxyacetic acid.

[8] This figure appears in one of the "whereas" clauses in the stipulation. It is not clear from this document how this figure was computed and whether any of the included costs pertained to the Newark Bay Complex. The stipulation noted, however, that through this settlement, Deleet was avoiding exposure to treble damages under N.J.S.A. 58:10-23.11f(a)(1), converting the $20,742,519 into $62,227,557.

[9] Although Conopco is not part of this appeal, the arguments Conopco successfully asserted before the trial court are useful for distinguishing the arguments raised by the Drum parties in this appeal.

[10] Although Borden did not join Conopco's motion, it joined in a similar application for relief filed by ITT.

[11] "The Lower Passaic River is the [seventeen]-mile tidally influenced portion of the Passaic River in northern New Jersey that flows from the Dundee Dam to the confluence with Newark Bay." United States Army Corps of Engineers, Lower Passaic River Restoration Project, NJ (February 2012), http://www.nan.usace.army.mil/project/newjers/factsh/pdf/lowerpa ss.pdf.

[12] In the absence of a definition of "matters addressed" within the consent decree, courts have looked to the following factors in determining the scope of contribution protection: 1) the particular hazardous substance at issue in the settlement; 2) the location or site in question; 3) the time frame covered by the settlement; and 4) the cost of the cleanup. United States v. Union Gas Co., 743 F. Supp. 1144, 1154 (E.D. Pa. 1990); accord Akzo Coatings of America, Inc. v. American Renovating, 842 F. Supp. 267, 271 (E.D. Mich. 1993); United States v. Colorado & E. R.R., 832 F. Supp. 304, 307 (D. Colo. 1993); United States v. Pretty Products, Inc., 780 F. Supp. 1488, 1494-95 n.4 (S.D. Ohio 1991).

[13] Plaintiffs only requested fees to conduct a natural resource damages assessment.