No. B129601

COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION ONE

DART INDUSTRIES, INC., Plaintiff and Respondent, v. COMMERCIAL UNION INSURANCE COMPANY, et al., Defendant and Appellants.	Appeal from a Judgment of the Superior Court, County of Los Angeles, No. C519554, Hon. Loren Miller, Judge

DART INDUSTRIES' SUPPLEMENTAL BRIEF AFTER TRANSFER BY THE CALIFORNIA SUPREME COURT (RULE 29.4(f), CALIFORNIA RULES OF COURT)

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INTRODUCTION

The California Supreme Court determined that Dart Industries (Dart) established the duty of Commercial Union Insurance Company (Commercial) to defend suits brought against Dart alleging that *in utero* exposure to diethylstilbestrol (DES) between 1946 and 1951 caused injury that manifested thereafter. This fully disposed of the declaratory relief aspect of the case. The Supreme Court remanded the case for decision on the sole remaining issue whether the award of damages to Dart, ancillary to declaratory relief, is supported by substantial evidence.

The parties fully briefed the substance of the damages issue before the previous decision of the Court of Appeal. (Aplt. Opening Brief, pp. 38-42; Respondent's Brief, pp. 45-48; Aplt. Reply Brief, pp. 39-42; J.A., pp. 2511-2515 [Statement of Decision].) Dart believes that the damages issue requires no further briefing and that it has established the sufficiency of the evidence it presented at trial. Dart files this supplemental brief under the authority of rule 29.4(f) of the California Rules of Court solely to address a question that should not arise – the action that the Court of Appeal should take if it found Dart's trial evidence of damages to be insufficient..

IN THE EVENT OF A REVERSAL, THE REMEDY IS A NEW TRIAL OF THE ISSUE OF DAMAGES

A. Context.

Dart proved its damages by the testimony of Wilbur Pell, its chief litigation counsel. (R.T., p. 228, *ll.* 12-18.) Pell testified that he reviewed Dart's litigation files to identify DES cases in which the drug exposure allegedly occurred during the Commercial policy period and the complaint alleged bodily injury caused by *in utero* DES exposure of the plaintiff's mother or maternal grandmother. (R.T., p. 253, *ll.* 11-25; pp. 255-259.) Under the Supreme Court's decision and basic California insurance law, the allegations of exposure and cause (even if utterly false) triggered Commercial's duty to defend. (*Dart Industries v. Commercial Union Ins. Co.* (Aug. 19, 2002, No. S086518) ___ Cal.4th ___, typed opn. at p. 26; *Waller v. Truck Ins. Exchange* (1995) 11 Cal.4th 1, 19; *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295.)

The substantive question remaining is whether Pell's testimony in the form of a summary accounting of Dart's paid defense costs and settlements through 1992 is sufficient to establish the amount of those damages. No question exists that Dart has incurred damages in that period or that those damages are substantial.

B. An Insured Is Entitled to a Retrial When the Existence of Its Coverage and the Fact of Damages Are Established but a Judgment Is Reversed for Insufficient Evidence of the Amount of Damages.

A very recent decision from the Fourth Appellate District makes clear that if the damages award were reversed here, the appropriate remedy would be a retrial. In *Barratt American Inc. v. Transcontinental Ins. Co.* (Oct. 4, 2002, D036401) ___ Cal.App.4th ___ [2002 Cal.App. LEXIS 4749, Certified for Partial Publication] the court held in the published portion of the decision that an insured had failed to present sufficient evidence to support the defense costs it claimed under its liability insurance policy. Also in the published portion of the decision, the court then held that retrial was the proper remedy, stating:

> On the record before us we conclude there was not sufficient evidence supporting the finding that all of Barratt's repairs to the nonplaintiff homes constituted recoverable defense costs in the Cortina action. Accordingly, we reverse the judgment. We decline, however, to enter judgment in Transcontinental's favor. Because the record establishes Transcontinental is legally obligated to pay defense costs and at least some of the repair costs may qualify as recoverable defense costs upon a proper evidentiary record, Barratt should not be denied the opportunity to prove whether some or all of the repair costs constitute recoverable defense costs. (*Id.*, typed opn. at pp. 23-24.)

This case cannot be distinguished from *Barratt*.

This is not a case in which Dart could not prove damages because their existence or amount is speculative. Neither is it a case in which Dart

suffered damages but is unable to muster proof of what they are. The proof resides in hundreds of thousands of pages of litigation files maintained by Dart's chief litigation counsel's office. Here, the trial court accepted testimony reflecting the accounting summary of that proof which, even if it was error, was a reasonable understanding of Evidence Code section 1523, subdivision (d).

Even cases that discuss denial of a new trials after a reversal on the ground of insufficient evidence show why such a result would not be proper here. Denial of a new trial is appropriate when "the plaintiff has had full and fair opportunity to present the case" and a "retrying the case on the same evidence is a needless exercise. . . ." (*McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1661-1662.) Neither of those grounds exists here.

If the Court of Appeal were to rule that the superior court incorrectly accepted summary accounting evidence as sufficient, Dart did not have a full and fair opportunity to present a damages case. First, Dart had more evidence that it could have offered if the superior court had suggested that the summary was insufficient. Second, to the extent Commercial objected to any other evidence on the ground of failure to produce it in discovery, Dart would have made a different record and the superior court likely would have looked at the issues in a different light if it appeared the court was being asked to exclude the only sufficient evidence of damages. Third, and

perhaps most importantly, if the superior court had not received Dart's evidence as sufficient under Evidence Code section 1523, subdivision (d), Dart could have withdrawn all issues of coercive relief and pursued only its declaration, leaving all monetary issues for a later day. And fourth, Dart could have had a viable cross-appeal if it did not withdraw the issue.

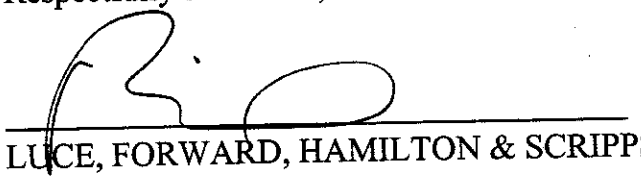
Neither is it true here that a retrial would be on the same evidence. Dart has abundant and detailed evidence establishing its damages, and any objection that it was not produced before trial would evaporate before retrial.

The California Supreme Court's decision in *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 908-909 compels Dart to alert the court to the remedy issue. In *Mycogen*, the court held that a declaratory relief action in which the court also awards a judgment for coercive relief on the basis of a particular breach of contract precludes the party who obtained the relief from bring a second action for additional relief based on the same breach. Here, that appears to mean that if the Court of Appeal were to find insufficient evidence of damages and choose as a remedy directing judgment for Commercial on the coercive relief part of the case, Dart would be foreclosed from recovering the millions of dollars it expended to defend itself through 1992.

CONCLUSION

If the Court of Appeal were to find Dart's evidence of damages insufficient, the correct remedy here is a reversal with directions to enter the judgment for declaratory relief as ordered by the Supreme Court and to retry the issue of damages.

Respectfully submitted,



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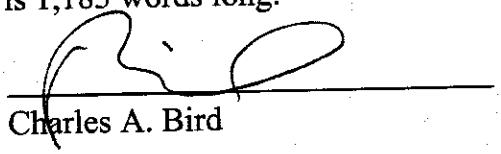
CERTIFICATE OF COMPLIANCE

I, Charles A. Bird, appellate counsel to Dart Industries, certify that the foregoing brief is prepared in proportionally spaced Times New Roman 13 point type and, based on the word count of the word processing system used to prepare the brief, the brief is 1,183 words long.



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PROOF OF SERVICE

Dart Industries, Inc. v. Commercial Union Insurance Company
California Supreme Court, No. S086518
Court of Appeal , Second Appellate District, Div. One, No. B129601
Los Angeles County Superior Court, No. C519554

I, Linda F. Anderson, declare as follows

I am employed in the County of San Diego, State of California. I am over the age of eighteen years and not a party to this action; my business address is 600 West Broadway, Suite 2600, San Diego, California 92101. On October 14, 2002 I served document(s) described as:

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on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

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X **BY MAIL.** By placing a copy in a separate envelope, with postage fully prepaid, for each addressee named below for collection and mailing on the below indicated day following the ordinary business practices at Luce, Forward, Hamilton & Scripps, at 600 west Broadway, Suite 2600, San Diego, California. I certify I am familiar with the ordinary business practices of my place of employment with regard to collection for mailing with the United States Postal Service.

X **(STATE):** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed October 14, 2002 at San Diego, California.

Linda F. Anderson

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Court of Appeal , Second Appellate District, Div. One, No. B129601
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