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No. 04-3244

Related Case No. 04-3377

In the

United States Court of Appeals
for the Sixth Circuit

GENCORP INC.,
Plaintiff-Appellant,

v.

AIU INSURANCE COMPANY, *et al.*,
Defendants-Appellees.

AMERICAN RE-INSURANCE COMPANY; FEDERAL INSURANCE COMPANY; CENTURY INDEMNITY COMPANY,
Third Party Plaintiffs-Appellants,

v.

AMERICAN INSURANCE COMPANY; LIBERTY MUTUAL INSURANCE COMPANY; CONTINENTAL CASUALTY COMPANY,
Third Party Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Ohio at Cleveland

FINAL BRIEF OF EXCESS INSURER APPELLEES

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST OF AMERICAN RE-INSURANCE COMPANY

Pursuant to 6th Cir. R. 26.1, American Re-Insurance Company makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **Yes**

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   American Re-Insurance Company is a subsidiary of the Munich Re Group, which is owned by Munich Reinsurance Company of Munich, Germany.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest: **Not Applicable**

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DATED: September 7, 2004

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST OF CENTURY INDEMNITY COMPANY

Pursuant to 6th Cir. R. 26.1, Century Indemnity Company makes the following disclosure:

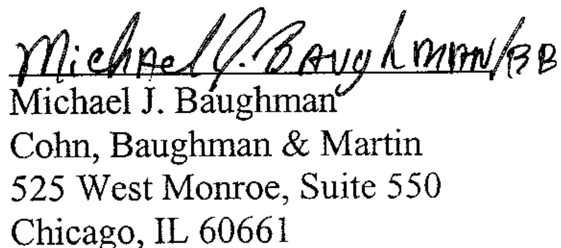
1. Is said party a subsidiary or affiliate of a publicly owned corporation? **Yes**

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   Century Indemnity Company is an indirect, wholly owned subsidiary of ACE Limited, the ultimate parent and a publicly traded company on the New York Stock Exchange.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **Yes**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest: **ACE Limited.**



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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST OF FEDERAL INSURANCE COMPANY

Pursuant to 6th Cir. R. 26.1, Federal Insurance Company makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **Yes**

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   Federal Insurance Company is a subsidiary of The Chubb Corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest: **Not Applicable**

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST OF LUMBERMENS MUTUAL CASUALTY COMPANY

Pursuant to 6th Cir. R. 26.1, Defendant-Appellee Lumbermens Mutual Casualty Company makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **No**

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST OF AIU INSURANCE COMPANY

Pursuant to 6th Cir. R. 26.1, AIU Insurance Company makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **Yes**

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   AIU Insurance Company is a member company of American International Group.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest: **Not Applicable**

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST OF AMERICAN HOME ASSURANCE COMPANY

Pursuant to 6th Cir. R. 26.1, American Home Assurance Company makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **Yes**

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   American Home Assurance Company is a member company of American International Group.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest: **Not Applicable**

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST OF LEXINGTON INSURANCE COMPANY

Pursuant to 6th Cir. R. 26.1, Lexington Insurance Company makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **Yes**

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   Lexington Insurance Company is a member company of American International Group.

2. Is there a publicly owned corporation, not a party to the appeal,that has a financial interest in the outcome? **No**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest: **Not Applicable**

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DATED: September 7, 2004

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST OF TWIN CITY FIRE INSURANCE COMPANY

Pursuant to 6th Cir. R.26.1, Twin City Fire Insurance Company makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **Yes**

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   The Hartford Financial Services Group, Inc., an indirect parent corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **Yes**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

   The Hartford Financial Services Group, Inc.; indirect 100 percent ownership interest.

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Dated: September 7, 2004

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST OF FIRST STATE INSURANCE COMPANY

Pursuant to 6th Cir. R.26.1, First State Insurance Company makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **Yes**

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   The Hartford Financial Services Group, Inc., an indirect parent corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **Yes**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

   The Hartford Financial Services Group, Inc.; indirect 100 percent ownership interest.

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Dated: September 7, 2004

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST OF EVEREST REINSURANCE COMPANY, FORMERLY KNOWN AS PRUDENTIAL REINSURANCE COMPANY

Pursuant to 6th Cir. R. 26.1, Everest Reinsurance Company, formerly known as Prudential Reinsurance Company, makes the following disclosure:

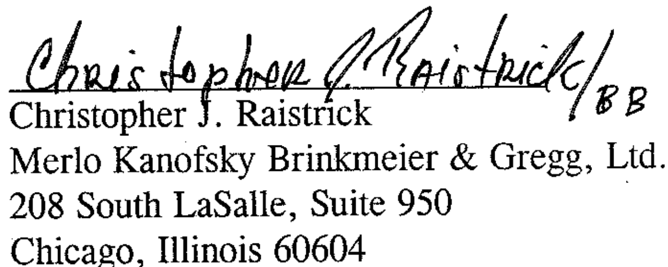
1. Is said party a subsidiary or affiliate of a publicly owned corporation? **Yes**

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   Everest Reinsurance Company is a direct subsidiary of Everest Reinsurance Holdings, Inc., and Everest Re Group, Ltd., a Bermuda company and the parent holding company of Everest Reinsurance Holdings, Inc.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest: **Not Applicable**



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Dated: September 7, 2004

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST OF MT. MCKINLEY INSURANCE CO., FORMERLY KNOWN AS GIBRALTAR CASUALTY COMPANY

Pursuant to 6th Cir. R. 26.1, Mt. McKinley Insurance Co., formerly known as Gibraltar Casualty Company, makes the following disclosure:

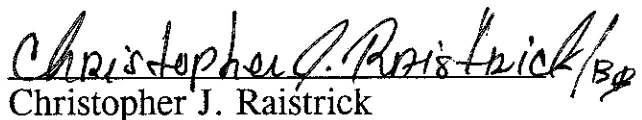
1. Is said party a subsidiary or affiliate of a publicly owned corporation? **Yes**

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   Mt. McKinley Insurance Co. is a wholly owned subsidiary of Everest Re Group, Ltd., a Bermuda company.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest: **Not Applicable**



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Dated: September 7, 2004

DISCLOSURE OF CORPORATE AFFILIATIONSAND FINANCIAL INTERESTS OF ST. PAUL FIRE AND MARINE INSURANCE COMPANY

Pursuant to Sixth Cir. R. 26.1, St. Paul Fire and Marine Insurance Company

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **Yes**

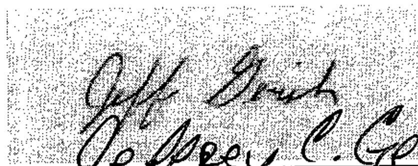
   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   St. Paul Fire and Marine Insurance Company is a wholly-owned subsidiary of The St. Paul Travelers Companies, Inc., a publicly-held corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   Other than as indicated above, no.

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:



Jeffrey C. Gerish (P51338)

Dated: September 7, 2004

TABLE OF CONTENTS

DISCLOSURES OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST .... i-xii

TABLE OF AUTHORITIES xv

STATEMENT REGARDING ORAL ARGUMENT xix

ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

1. Policy Provisions 4

2. The Environmental Sites 5

3. *GenCorp I* & GenCorp's Settlements 6

4. The 2002 GenCorp Action 7

I. SUMMARY OF ARGUMENT 11

II. ARGUMENT 11

A. The District Court Properly Granted Summary Judgment Based On GenCorp's Failure To Present Any Evidence Of Loss Triggering The Excess Insurers' Policies 12

1. The Abuse Of Discretion Standard Of Review Applies Based On GenCorp's Failure To File A Rule 56(f) Motion 12

2. The Excess Insurers' Motion And Brief Were Directed To The Feasibility Of GenCorp's Entire Action 13

3. **GenCorp Failed To Present Any Evidence Of Loss Exceeding Its Settled Policy Limits Or To File A Rule 56(f) Motion** 15

B. **Absent A Showing Of Loss In Excess Of The Settled Policy Limits Triggering The Excess Policies, Allocation Is Improper And Unnecessary** 22

C. **The Arguments Of GenCorp's *Amici* Further Support The Threshold Requirement That A Policyholder Establish Loss Before Allocation** 25

D. **The Actual Settlement Agreements Are Irrelevant Because GenCorp Concedes That The Settled Underlying Limits Must Be Deemed Exhausted Because The Excess Policies Do Not "Drop Down"** 27

E. **Assuming *Arguendo* That The Court Granted "Settlement Credits," Such Ruling Was Proper Under Ohio Law** 29

1. ***Goodyear* Permits Settlement Credits** 30

2. **Settlement Credits Must Be Allowed In An "All Sums" Jurisdiction Like Ohio In Order to Ensure A Fair Distribution of Loss** 32

F. **GenCorp's Appeal Improperly Raises An Argument Not Raised Below Regarding The "Bargain" Between The Parties** 35

G. **The District Court Properly Denied GenCorp's Rule 59 Motion For Reconsideration** 35

H. **The Rulings Below Would Promote Early Settlements And Streamline Litigation** 39

CONCLUSION 42

TABLE OF AUTHORITIES

Cases

Armstrong World Indus., Inc. v. Aetna Cas. & Surety Co., 52 Cal. Rptr. 2d 690 (Cal. Ct. App. 1996), *review denied* (Cal. 1996) 33

Boling v. Romer, 101 F.3d 1336 (10th Cir. 1997) 19

Bradley v. United States, 299 F.3d 197 (3d Cir. 2002) 17, 18

Cacevic v. City of Hazel Park, 226 F.3d 483 (6th Cir. 2000) 12

Carr v. Castle, 337 F.3d 1221 (10th Cir. 2003) 19

Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co., 177 F.3d 210 (3d Cir. 1999) 32-33

City Management Corp. v. U.S. Chem. Co., Inc., 43 F.3d 244 (6th Cir. 1994) 13

DiBenedetto v. Pan Am World Service, Inc., 359 F.3d 627 (2d Cir. 2004) 18

E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., No. 82 Civ 7327, 1997 WL 251548 (S.D.N.Y. May 13, 1997) 26, 40

E.R. Squibb & Sons, Inc. v. Lloyd's & Cos., 241 F.3d 154 (2d Cir. 2001) 26

Emmons v. McLaughlin, 874 F.2d 351 (6th Cir. 1989) 17

Evans v. Technologies Application & Service Co., 80 F.3d 954 (4th Cir. 1996) 18-19

Foster v. Barilow, 6 F.3d 405 (6th Cir. 1993) 35

GenCorp Inc. v. AIU Ins. Co.,
104 F. Supp. 2d 740 (N.D. Ohio 2000) 7

GenCorp Inc. v. AIU Ins. Co.,
297 F. Supp. 2d 995 (N.D. Ohio 2003) 3, 9, 10, 20, 21, 22, 29, 30, 36, 37, 40

GenCorp Inc. v. AIU Ins. Co.,
304 F. Supp. 2d 955 (N.D. Ohio 2004) 3, 10, 36-37, 38

GenCorp Inc. v. AIU Ins. Co.,
Civil Action No. 5:95CV2464-DDD (N.D. Ohio) 2

GenCorp, Inc. v. AIU Ins. Co.,
178 F.3d 804, 809 (6th Cir. 1999) 2

Glen Eden Hosp., Inc. v. Blue Cross &Blue Shield of Mich., Inc.,
740 F.2d 423 (6th Cir. 1984) 16

Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.,
769 N.E.2d 835 (Ohio 2002),
reconsideration denied, 744 N.E.2d 762
(Ohio 2002) 3, 8, 23, 24, 25, 26, 30, 31

Huff v. Metro. Life Ins. Co., 675 F.2d 119 (6th Cir. 1982) 12

Ins. Co. of North America v. Kayser-Roth Corp.,
770 A.2d 403 (R.I. 2001) 26

Keene Corp. v. Ins. Co. of North America,
667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*,
455 U.S. 1007 (1982) 24, 25

Klepper v. First Am. Bank, 916 F.2d 337 (6th Cir. 1990) 16-17

Koppers Co. v. Aetna Cas. & Sur. Co.,
98 F.3d 1440 (3d Cir. 1996) 24, 25, 32

Logan v. Dayton Hudson Corp.,
865 F.2d 789, 790 (6th Cir. 1989) 12

Metropolitan Life Ins. Co. v. Aetna Cas. & Surety Co.,
765 A.2d 891 (Conn. 2001) 34

Mounts v. Grand Trunk W. R.R., 198 F.3d 578 (6th Cir. 2000) 12

Nguyen v. CNA Corp., 44 F.3d 234 (4th Cir. 1995) 19

Plott v. General Motors Corp.,
71 F.3d 1190 (6th Cir. 1995) 12, 16, 17

Shavrnoch v. Clark Oil & Refining Corp.,
726 F.2d 291 (6th Cir. 1984) 17

Sommer v. Davis, 317 F.3d 686 (6th Cir. 2003) 12

Thurman v. Yellow Freight Systems, Inc.,
97 F.3d 833 (6th Cir. 1996) 35

UMC/Stamford, Inc. v. Allianz Underwriters Ins. Co.,
647 A.2d 182 (N.J. Super. Ct. Law Div. 1994) 34

United States v. $515,060.42,
152 F.3d 491, 497 (6th Cir. 1998) 12

Weyerhaeuser Co. v. Commercial Union Ins. Co.,
15 P.3d 115 (Wash. 2001) 26

White v. Anchor Motor Freight, Inc.,
899 F.2d 555 (6th Cir. 1990) 35

White's Landing Fisheries, Inc. v. Buchholzer,
29 F.3d 229 (6th Cir. 1994) 16

Rules

Fed. R. Civ. P. 56 .... *passim*

Fed. R. Civ. P. 56(f) .... *passim*

Fed. R. Civ. P. 59(e) 22

STATEMENT REGARDING ORAL ARGUMENT

The Excess Insurers do not believe that oral argument is warranted or necessary because there was no abuse of discretion by the District Court in granting their motion for summary judgment based on GenCorp's noncompliance with *Fed. R. Civ. P.* 56. In the event that this Court allows GenCorp's request for oral argument, the Excess Insurers request the right to argue their position on appeal in favor of affirmance.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court properly grant summary judgment in favor of the Excess Insurers based on GenCorp's failure to provide "even a scintilla of evidence" that it had suffered any loss in excess of its underlying settled policies triggering the excess insurance policies?

2. Did the District Court properly grant summary judgment in favor of the Excess Insurers where GenCorp settled with all of its primary and umbrella insurers, and failed to show that its liabilities exceeded the limits of its settled policies?

3. Did the District Court properly grant summary judgment in favor of the Excess Insurers where GenCorp failed to file a motion or affidavit pursuant to *Fed. R. Civ. P.* 56(f) challenging the Excess Insurers' summary judgment motion or showing the need for additional discovery?

4. Did the District Court properly deny GenCorp's Motion for Reconsideration when it impermissibly reargued the case and referred to matters outside of the record that should have been raised in a motion and affidavit required under *Fed. R. Civ. P.* 56(f)?

5. Must this Court disregard those arguments presented by GenCorp on appeal that were not raised in the District Court?

STATEMENT OF THE CASE

This appeal follows eight years of litigation in the United States District Court for the Northern District of Ohio by GenCorp against its insurers seeking insurance coverage for GenCorp's environmental liabilities.[1] Appellees in this action are GenCorp's non-settled Excess Insurers.[2] GenCorp previously settled with its underlying primary and umbrella insurers ("the Settled Insurers") for the same environmental liabilities during an earlier action filed by GenCorp in 1995, *"GenCorp I." GenCorp Inc. v. AIU Ins. Co., et al.,* Civil Action No. 5:95CV2464-DDD (N.D. Ohio) ("*GenCorp I*"). (11/22/95 Complaint.)

The Excess Insurers' policies provide that they are liable only for losses exceeding the applicable underlying insurance. Based on this policy requirement

---

[1] In fact, this is the third time that GenCorp has initiated environmental coverage litigation against its insurers in Ohio. The first such action was filed in 1989 in Ohio state court and involved different sites and some of the same carriers that were made parties to the subsequent federal court case. *See GenCorp, Inc. v. AIU Ins. Co., et al.*, 178 F.3d 804, 809 (6th Cir. 1999).

[2] Appellees are the following Excess Insurers: American Re-Insurance Company ("American Re"), Federal Insurance Company ("Federal"), Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America ("Century"), Mt. McKinley Insurance Company (formerly known as Gibraltar Casualty Company), Everest Reinsurance Company (formerly known as Prudential Reinsurance Company), American Home Assurance Company, AIU Insurance Company, Lexington Insurance Company, Lumbermens Mutual Casualty Company, St. Paul Fire and Marine Insurance Company, First State Insurance Company, and Twin City Fire Insurance Company (the "Excess Insurers"). Three of these Excess Insurers are appellants in related Case No. 04-3377: American Re, Federal, and Century.

and the underlying settled policy limits, the Excess Insurers moved for summary judgment that GenCorp had no losses in excess of the settled policy limits triggering the excess policies. In response, GenCorp never argued or showed that its liabilities exceeded the limits of the policies it had settled. GenCorp failed to file a motion pursuant to *Fed. R. Civ. P.* 56(f) ("Rule 56(f)") arguing that the motion was "premature" or an affidavit disputing any of the bases of the Excess Insurers' motion. Accordingly, the District Court granted the Excess Insurers' motion, ruling that GenCorp had failed to show that its environmental liabilities exceeded the limits of its settled policies, and that GenCorp had no claim against the Excess Insurers as a matter of law. *GenCorp Inc. v. AIU Ins. Co., et al.*, 297 F. Supp. 2d 995 (N.D. Ohio 2003). The District Court denied GenCorp's motion for reconsideration of that ruling on January 21, 2004. *GenCorp Inc. v. AIU Ins. Co., et al.*, 304 F. Supp. 2d 955 (N.D. Ohio 2004).

In sum, the District Court found that the limits of GenCorp's settled policies were greater than GenCorp's own estimate of liability, and that the Appellees' excess policies therefore would not be triggered. The court did not rule on the issue of allocation under the Ohio Supreme Court's opinion in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835 (Ohio 2002), *reconsideration denied*, 744 N.E.2d 762 (Ohio 2002) . In fact, the District Court expressly refused to rule on the issues of "settlement credits" or "justiciability" --

two of the issues identified by GenCorp as "Issues Presented For Review." (GenCorp Br. at 2.) Thus, this appeal does not involve "novel legal issues" or "important issues of public policy." It simply involves GenCorp's failure to establish that it suffered any loss in excess of the settled policy limits, triggering the Excess Insurers' policies.

STATEMENT OF FACTS

1. Policy Provisions

Each of the Excess Insurers' policies contains provisions requiring the exhaustion of underlying insurance. For example, the "Insuring Agreement" of policy M 6665-0001 issued by American Re-Insurance Company agrees to indemnify the policyholder against losses exceeding the underlying insurance and "ultimate net loss":

> INSURING AGREEMENT
>
> … this Certificate is to further indemnify the Insured against ultimate net loss arising out of the hazards covered and as defined in the underlying insurance but only up to an amount not exceeding the limit(s) shown in Item 3. of the Declarations.

(R. 99, Appendix B to Defendants' Motion for Summary Judgment, Tab 3, Enriquez Affidavit, Apx. Pg. 426, and Insurance policy Bates #000001, ¶4 Apx. Pg. 432.) The policy defines "Ultimate Net Loss" as sums paid for losses after making deductions for all recoveries and other insurance, other than "underlying insurance":

> ULTIMATE NET LOSS, as used herein, shall be understood to mean the sums paid in settlement of losses for which the Insured is liable after making deductions for all recoveries, salvages and other insurance (***other than recoveries under the Underlying Insurance***, policies of coinsurance, or policies specifically in excess hereof), whether recoverable or not, and shall exclude all "Costs." (Emphasis added.)

(*Id.*, ¶ 13, Apx. Pg. 439.) Thus, the excess policies require not only exhaustion of underlying insurance, but also require that they apply in excess of other recoveries and other insurance.

2. The Environmental Sites

There are six environmental sites at issue in this action. (R. 68, Second Amended Complaint, Apx. Pg.133.) Discovery in the District Court in *GenCorp I* and the pleadings show that GenCorp's total alleged maximum liability at the six sites was approximately $34 million:

(1)	Big D Campground:	$28.7 million
(2)	SRSNE:	$ 2.4 million
(3)	Stickney/Tyler:	$ 1.5 million
(4)	Old Southington:	$ 930,000
(5)	Organic Chemical:	$ 416,000
(6)	Auburn Road:	$ 200,000

(R. 99, Defendants' Motion for Summary Judgment, Apx. Pg. 202.)

3. *GenCorp I* & GenCorp's Settlements

On November 22, 1993, GenCorp filed an insurance coverage action in the United States District Court for the Northern District of Ohio against more than three dozen of its primary, umbrella, and excess layer insurers regarding the same six sites at issue in this action. During the course of *GenCorp I*, GenCorp settled with Continental Casualty Co. ("Continental"), an umbrella layer insurer, on July 31, 1997. (R. 91, Continental Casualty Co.'s Joinder, Apx. Pg. 167.) GenCorp settled with American Insurance Co. ("American"), a primary insurer, on April 13, 1999. (R. 94, American Insurance Company's Joinder, Apx. Pg. 167.) GenCorp then settled with its remaining primary insurer, Liberty Mutual Insurance Co. ("Liberty Mutual") on November 29, 2000. (R. 80, Liberty Mutual's Motion for Summary Judgment, Apx. Pg. 148.) After these settlements, GenCorp dismissed its claims against Continental, American, and Liberty Mutual.

Prior to *GenCorp I*, GenCorp also settled with Genco Insurance Limited ("Genco"), another of its umbrella layer insurers. The limits of these settled policies total at least $68 million:

American policies (1960 to 1966):	$ 4 million
Liberty Mutual policies (1966 to 1970):	$ 5 million
Continental policies (1960 to 1975):	$22 million
Genco policies (1975 to 1982):	$37 million

The District Court in *GenCorp I* applied a continuous trigger of coverage for GenCorp's environmental claims, spreading the damages for the periods between the "first point of injury-in-fact and manifestation." *GenCorp Inc. v. AIU Ins. Co.*, 104 F. Supp. 2d 740, 746, 748 (N.D. Ohio 2000). On October 20, 1999, the District Court in *GenCorp I* granted summary judgment to those insurers whose policies attached at levels of $11 million or more, finding that there was no "practical likelihood" that these excess policies would be reached. (10/20/99 Opinion at 5-8.) On March 30, 2001, the District Court dismissed GenCorp's claims against all remaining excess insurers, again finding that there was little likelihood that the excess policies could be reached. (3/30/01 Opinion at 4.)

4. The 2002 GenCorp Action

In September 2002, GenCorp filed the present case, seeking coverage from its non-settled Excess Insurers.[3] (R. 1, Complaint, Apx. Pg. 26.) GenCorp did not name American, Continental, Genco, or Liberty Mutual (the "Settled Insurers") as defendants.

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[3] Excess Insurers American Re, Federal, and Century filed a Third Party Complaint against the settled insurers Liberty Mutual, Continental, and American seeking to hold them responsible to the Third Party Plaintiff Insurers for any liability they may have to GenCorp. They are appellants in related Case No. 04-3377, and have filed a conditional appeal from the District Court's Order of July 23, 2003 dismissing their contribution claims against the Third Party Defendants.

Certain Excess Insurers filed a Third Party Complaint naming as Third Party Defendants the "Settled Insurers" that had issued underlying primary or umbrella insurance to GenCorp and that had settled with GenCorp. (R. 63, Third Party Complaint, Apx. Pg. 55.) By Order dated July 23, 2003, the District Court granted the Settled Insurers' Motion For Summary Judgment, dismissing the Excess Insurers' claims for contribution. (R. 95, Order, Apx. Pg. 192.) As part of this ruling, however, the District Court correctly found that GenCorp "must absorb any difference" between the amounts for which it settled its claims with the Settling Insurers and the "thresholds" or inception levels of the excess policies.

Shortly thereafter, the Excess Insurers filed the motion for summary judgment which resulted in this appeal, arguing that GenCorp had no losses that triggered the excess policies due to GenCorp's settled underlying policy limits. (R. 99, Defendants' Motion for Summary Judgment, Apx. Pg. 202.) Thus, the excess policies were not obligated to respond to GenCorp's claims for coverage and the case must be dismissed as a matter of law.

GenCorp opposed the Excess Insurers' Motion arguing that under *Goodyear*,[4] it was entitled to pick any policy to respond to its liabilities and that credit for settlements was inconsistent with *Goodyear*. GenCorp also argued that it

[4] *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835 (Ohio 2002), *reconsideration denied*, 744 N.E.2d 764 (Ohio 2002).

would be "premature" to grant summary judgment because (1) no right to indemnity had been established; (2) the amount of indemnity had not been determined; and (3) the coverage period triggered by GenCorp's liabilities had not been established. GenCorp never filed a Rule 56(f) motion to support its "prematurity" argument as to any of these three purported issues.

The District Court rejected GenCorp's arguments and granted summary judgment to the Excess Insurers, explaining that the Excess Insurers' Motion had conceded, for purposes of summary judgment, each of the issues GenCorp claimed had not yet been resolved: the Excess Insurers' Motion assumed coverage under the terms of the policies, GenCorp's own estimates as to its total liabilities, which GenCorp had not challenged, and the broadest coverage period as suggested by GenCorp.

The District Court agreed with the Excess Insurers, finding that:

> [T]he combined limits of GenCorp's primary policies exceed GenCorp's own maximum estimates of its liability at the six sites. In opposing this motion GenCorp offers no evidence that those estimates are erroneous or uncertain. ***The Court concludes, therefore, that the defendant Excess Insurers have no obligation to reimburse GenCorp for its losses due to environmental damage at the six sites and grants defendants' motion for summary judgment.*** The Court does not reach the issue of whether Ohio law supports a theory of "settlement credits."

GenCorp Inc. v. AIU Ins. Co., et al., 297 F. Supp. 2d 995, 1000 (N.D. Ohio 2003), emphasis added throughout. The District Court noted that the term "settlement credits" is a term of art. Since the court found that GenCorp failed to show that its environmental liability implicated the Excess Insurers' coverage as a matter of law, it declined to reach the issue of whether Ohio law allows "settlement credits." *Id.* at 1001 & n.6.

GenCorp filed a motion for reconsideration, that was denied by Order and Opinion issued in January 2004. *GenCorp Inc. v. AIU Ins. Co., et al.*, 304 F. Supp. 2d 955 (N.D. Ohio 2004). The District Court reiterated its earlier finding that GenCorp had offered no evidence that the Excess Insurers' estimates of liability were "erroneous or uncertain," or that the Excess Insurers' assumptions were erroneous. *Id.* at 1000. Likewise, as to the purported "new evidence" raised by GenCorp on reconsideration, the District Court found that GenCorp had failed to timely make these points, and had defaulted these arguments. *Id.* at 959. On the "justiciability" issue belatedly raised in GenCorp's Motion for Reconsideration, the District Court pointed out that it had not denied GenCorp its right to obtain a declaratory judgment as to coverage on the basis of justiciability, but, instead, had ruled on the merits of the case, "and GenCorp lost." Thus, "GenCorp's inability to reach the excess insurers' policies was dispositive of the controversy." 304 F. Supp. 2d at 959.

I. SUMMARY OF ARGUMENT

The District Court properly found that the limits of GenCorp's underlying settled policies must be factored in to determine whether GenCorp's losses reached the excess policies. After taking into account the limits of the settled policies (which GenCorp did not challenge by affidavit), the District Court found that GenCorp's "own maximum estimates" could not implicate the excess policies. To the extent that GenCorp suffered any losses in excess of its underlying settled policies, it should have established such loss in its opposition to the Excess Insurers' motion, as mandated under *Fed. R. Civ. P.* 56 (hereinafter referred to as "Rule 56"). Because it failed to do so, the District Court did not abuse its discretion in granting the Excess Insurers' motion.

II. ARGUMENT

INTRODUCTION

This appeal involves whether the District Court properly granted the Excess Insurers' summary judgment motion where GenCorp failed to establish that it had suffered any losses above its settled policy limits triggering the excess policies. The issue on appeal is not a "complex" issue of "public policy" and does not affect "the entire insurance industry" (GenCorp Br. at p. x.). It is simply whether the District Court abused its discretion based on GenCorp's failure to file a Rule 56(f)

opposition or an affidavit contesting the Excess Insurers' motion or arguing that it required additional discovery. The District Court's rulings must be affirmed.

A. The District Court Properly Granted Summary Judgment Based On GenCorp's Failure To Present Any Evidence Of Loss Triggering The Excess Insurers' Policies

1. The Abuse Of Discretion Standard Of Review Applies Based On GenCorp's Failure To File A Rule 56(f) Motion

The Sixth Circuit applies an "abuse of discretion" standard in determining whether the District Court properly entered summary judgment where the non-movant failed to file a Rule 56(f) motion. All of the issues identified by the Excess Insurer-Appellees go to the issue of GenCorp's failure to file a Rule 56(f) motion. *Sommer v. Davis*, 317 F.3d 686, 691 (6th Cir. 2003); *Huff v. Metro. Life Ins. Co.*, 675 F.2d 119, 123 (6th Cir. 1982); *Plott v. General Motors Corp.*, 71 F.3d 1190, 1196 (6th Cir. 1995). There can be an "abuse of discretion" only when the Sixth Circuit has "a definite and firm conviction that the trial court committed a clear error of judgment." *Cacevic v. City of Hazel Park*, 226 F.3d 483, 490 (6th Cir. 2000), *citing Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989).

In the event that this Court declines to apply the "abuse of discretion" standard, it must review the summary judgment ruling under a *de novo* standard of review. *Mounts v. Grand Trunk W. R.R.*, 198 F.3d 578, 580 (6th Cir. 2000); *United States v. $515,060.42*, 152 F.3d 491, 497 (6th Cir. 1998). Under this standard, this Court views all facts and inferences in the light most favorable to the

appellant. *City Management Corp. v. U.S. Chem. Co., Inc.*, 43 F.3d 244, 250 (6th Cir. 1994). Whether reviewed *de novo* or for an abuse of discretion, the District Court must be affirmed because there was no evidence of any loss that would trigger Excess Insurers' policies.

2. The Excess Insurers' Motion And Brief Were Directed To The Feasibility Of GenCorp's Entire Action

The Excess Insurers' motion for summary judgment requested precisely the relief granted by the District Court. Thus, the record flatly contradicts GenCorp's claim that it was not "on notice" that the Excess Insurers' summary judgment motion was directed to the merits of its "entire case" or that the opinion was issued *"sua sponte."* As set forth below, the motion was directed to the fundamental and undisputed fact that based on its settlements of underlying primary and excess coverage, GenCorp had shown no damages exceeding its underlying settled policy limits, and, accordingly, summary judgment was proper:

- "Because the combined limits provided by [GenCorp's] settled primary and umbrella policies far exceed [GenCorp's] liability for any one environmental-related occurrence at issue in this action, ***the Excess Insurers' policies are not triggered and are not obligated to respond to [GenCorp's] claims for coverage***." (R. 99, Insurers' Motion for Summary Judgment at 2, Apx. Pg. 203.)

- "These policy provisions unequivocally establish that ***the Excess Insurers have no indemnity obligation to GenCorp*** unless and until the limits of liability in the underlying policies are fully and properly exhausted." (R. 99, Memorandum In Support at 4, Apx. Pg. 208.)

- "Thus, the Excess Insurers' policies are triggered, or are obligated to respond to GenCorp's claims, ***only if GenCorp's liability … is more than the combined total limits of the settled Underlying Insurers' policies.***" (*Id.* at 6, Apx. Pg. 210.)

- "After applying the credit of the Underlying Insurers' settled policy limits … ***it is clear that no excess policy can become obligated to indemnify GenCorp for its losses.*** Therefore, the Excess Insurers are entitled to summary judgment." (*Id.* at 11, Apx. Pg. 215.)

In response to these arguments, GenCorp failed to come forward with ***any*** evidence of loss exceeding its settled policy limits. Instead, it advanced a "prematurity" argument, but failed to file a Rule 56(f) motion or opposition showing that it was unable to respond to the motion or that it required additional discovery.

The Excess Insurers' Reply reiterated their argument that dismissal was mandated based on GenCorp's failure to establish ***any*** unreimbursed liabilities:

- "This fundamental failure remains as ***GenCorp still cannot establish that its liabilities exceed the limits of the underlying policies it has settled.***" (R. 110, Insurers' Reply Brief at 1, Apx. Pg. 540.)

- "Assuming … that GenCorp has received the maximum amount available under the settled primary and umbrella policies, ***there is nothing left for GenCorp to recover from the Excess Insurers.*** The policy limits of the settled policies exceed GenCorp's environmental-related liabilities." (*Id.*, Apx. Pg. 540.)

- "GenCorp offers no evidence to controvert the fact that there is at least $39 million in settled underlying coverage." (*Id.* at 4, n.1, Apx. Pg. 543.)

- "Despite GenCorp's assertion that this Motion is premature, there are no material questions of fact that preclude this Court from granting Excess Insurers' Motion because the Excess Insurers have assumed the worst-case scenarios for purposes of this Motion for Summary Judgment and ***GenCorp has not come forward with any controverting evidence.***" (*Id.* at 10, Apx. Pg. 549.)

- "Nowhere in GenCorp's brief does it address the figures presented by the Excess Insurers as the worst-case scenario liabilities of GenCorp for the six sites at issue ... ***Absent GenCorp meeting its burden to present material facts that are in dispute sufficient to deny the ...*** motion [under Rule 56], something it has not and cannot do, GenCorp's feeble arguments on this point must fail." (*Id.*, Apx. Pg. 549.)

In short, in opposing summary judgment, GenCorp never established that it had any loss exceeding its settled policy limits to warrant recovery under the Excess Insurers' policies. Not surprisingly, based on GenCorp's failure of proof, the District Court found that GenCorp had "defaulted," and had no choice under Rule 56 but to enter judgment in favor of the Excess Insurers. GenCorp's argument that the ruling was issued *"sua sponte"* is frivolous.

3. GenCorp Failed To Present Any Evidence Of Loss Exceeding Its Settled Policy Limits Or To File A Rule 56(f) Motion

It is undisputed that GenCorp never presented evidence that it had suffered any loss exceeding its settled policy limits to the District Court. In flagrant disregard of Rule 56(f), GenCorp simply argued that it should be permitted to proceed with its case -- without providing evidence that it had suffered any losses

above its settled policy limits, or that it required additional discovery to oppose the motion.

An unbroken line of precedent in the Sixth Circuit mandates affirmance of the District Court's ruling based on GenCorp's failure to come forward with a Rule 56(f) motion -- or any evidence whatsoever -- to rebut the Excess Insurers' summary judgment motion. In *Plott v. General Motors Corp.*, 71 F.3d 1190, 1196 (6th Cir. 1995), the Sixth Circuit rejected the appellant's claim that the District Court "acted prematurely" by granting summary judgment "before discovery was complete." The court reviewed the well-established Sixth Circuit rule that appellants must comply with the strictures of Rule 56(f), which allows the District Court to defer summary judgment pending discovery, but ***only*** if the non-movant submits affidavits stating that "the party cannot for reasons stated present by affidavit facts essential to justify the parties' opposition."[5] Under *Plott*, if the appellant does not file either a Rule 56(f) affidavit or a motion showing a need for additional discovery, the Sixth Circuit "will not normally address whether there was adequate time for discovery." *Id.* at 1196. *Citing Klepper v. First Am. Bank,*

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[5] *Citing White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 231-32 (6th Cir. 1994) (reversing summary judgment in light of appellant's Rule 56(f) affidavit); *Glen Eden Hosp., Inc. v. Blue Cross and Blue Shield of Mich., Inc.*, 740 F.2d 423, 428 (6th Cir. 1984) (summary judgment premature given opposing party's Rule 56(f) affidavit).

916 F.2d 337, 343 (6th Cir. 1990) (affirming grant of summary judgment despite insufficient discovery opportunity where appellant never filed Rule 56(f) affidavit); *Emmons v. McLaughlin*, 874 F.2d 351, 356-57 (6th Cir. 1989) (affirming summary judgment due to lack of adequate Rule 56(f) affidavit); *Shavrnoch v. Clark Oil & Refining Corp.*, 726 F.2d 291, 294 (6th Cir. 1984) (absent Rule 56(f) affidavit by non-movant, district court could rule on summary judgment motion at any time).

In this case, based on *Plott* and its progeny, GenCorp's failure to present an affidavit to oppose summary judgment is fatal to its appeal. Rule 56 expressly permits briefing to be stayed in order to complete discovery, but ***only*** if the non-movant presents its position in a Rule 56(f) motion and affidavit. GenCorp's vague and unsupported "prematurity" arguments fall far short of the controlling rule, which provides a precise guideline on how a non-movant must proceed. GenCorp has not asserted its failure to abide by Rule 56 as an issue on appeal, and the District Court did not abuse its discretion in granting the Excess Insurers' motion in the absence of a Rule 56(f) motion by GenCorp. There is no basis for this Court to cure GenCorp's failure to follow the rules by reversing the District Court.

Like the Sixth Circuit, other Courts of Appeal have ruled that an appellant's failure to file a Rule 56(f) affidavit may not be excused on appeal. For instance, in *Bradley v. United States*, 299 F.3d 197 (3d Cir. 2002), the Third Circuit rejected an

appellant's claim that summary judgment was granted prematurely. Applying the abuse of discretion standard, the Court ruled that failure to comply with Rule 56(f) "is fatal to a claim of insufficient discovery on appeal." *Id.* at 206. In *Bradley*, the non-movant had failed to file an affidavit under Rule 56(f) identifying with specificity "what particular information is sought." Thus, the court rejected the appellant's claim that she "constructively" met the Rule 56(f) affidavit requirement:

> Given the strong presumption against a finding of constructive compliance with Rule 56(f), the District Court did not abuse its discretion when it granted summary judgment without allowing additional discovery.

Id. at 207. The *Bradley* court further noted that the appellant did not present an "exceptional" case falling outside the Rule 56(f) requirement, since the discovery purportedly needed had been obtained and was irrelevant.

Likewise, the Second Circuit in *DiBenedetto v. Pan Am World Service, Inc.*, 359 F.3d 627, 630 (2d Cir. 2004), rejected a claim that discovery was inadequate absent a Rule 56 affidavit:

> The plaintiffs' first claim is easily disposed of. Plaintiffs did not argue the point to the District Court and did not file, in that court, a Rule 56(f) affidavit necessary to support such a contention.

In *Evans v. Technologies Application & Service Co.*, 80 F.3d 954 (4th Cir. 1996), the plaintiff failed to file a Rule 56(f) affidavit, but claimed that she voiced

her discovery concerns in the brief opposing the summary judgment motion. The Fourth Circuit found that this argument was not sufficient to reverse summary judgment:

> While courts generally are concerned about granting summary judgment when the opposing party has not had a fair opportunity to discover essential information, ***they reasonably expect notification and explanation when more time for discovery is needed***. In light of [plaintiff's] failure to take any affirmative steps regarding discovery, we do not find the District Court's grant of summary judgment to [movant] TAS improper.

Id. at 961-62 (emphasis added).

See also Carr v. Castle, 337 F.3d 1221 (10th Cir. 2003) (applying Rule 56(f), including affidavit requirement, as it reads: "We cannot and do not find that the District Court abused its discretion in finding [plaintiff's] motion to compel rendered moot because of the absence of a Rule 56(f) request"); *Nguyen v. CNA Corp.*, 44 F.3d 234 (4th Cir. 1995) (where appellant failed to file an affidavit specifying which aspects of discovery required more time to complete, District Court did not abuse its discretion in denying appellant's Rule 56(f) motion; vague assertions as to matters where discovery was required are not enough absent an affidavit); *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1997) (appellant's argument barred by failure to submit a Rule 56(f) affidavit stating that he was unable to oppose summary judgment without discovery).

In the District Court, rather than come forward with affirmative evidence opposing the Excess Insurers' motion, GenCorp's Opposition merely raised vague assertions of potential "fact questions," such as:

- Whether the insurers breached their contracts.
- Whether GenCorp was entitled to indemnity under the excess policies.
- The appropriate trigger period.
- The effect of the Court's 1997 ruling dismissing excess policies based on an alleged retroactive pollution exclusion.

(R. 109, GenCorp Opp., Apx. Pg. 501.)

As to each of the purported "fact issues" raised by GenCorp, but not supported by a Rule 56(f) motion or affidavit, the District Court made all assumptions in GenCorp's favor. These favorable assumptions included applying: (1) the maximum amount of GenCorp's liability, (2) the broadest possible trigger of coverage advocated by GenCorp's own experts, and (3) the retroactive pollution exclusions, even though GenCorp disputed whether they barred coverage. *GenCorp Inc. v. AIU Ins. Co., et al.*, 297 F. Supp. 2d at 1005.

GenCorp argued that the 1997 dismissal of certain policies based on retroactive pollution exclusion resulted in "little" coverage, or "virtually eliminated" coverage for GenCorp's pollution liabilities. (R. 109, GenCorp Opp., Apx. Pg. 501.) Yet, GenCorp failed to quantify either how much coverage had

been purportedly "eliminated," or how much remained.[6] As the District Court noted regarding the pollution exclusions: "Having raised the argument to resist defendants' motion for summary judgment, the burden is on GenCorp to support the argument. GenCorp has not carried its burden." *GenCorp Inc. v. AIU Ins. Co., et al.*, 297 F. Supp. 2d at 1006.

Thus, the District Court observed that its ruling was compelled by the absence of any contrary evidence by GenCorp:

> Even presuming those trigger periods most favorable to GenCorp given the evidence in the record, GenCorp's liabilities at the six sites will not exceed the limits of its primary policy coverage during any policy period. GenCorp offers no evidence that the defendants erred in their estimates of the extent of GenCorp's primary coverage, in their estimates of GenCorp's potential liability at the six sites or in their estimates of the trigger periods most favorable to GenCorp. ***GenCorp has failed, therefore, to offer even a scintilla of the evidence it must offer to resist defendants' motion for summary judgment. As a result, there is insufficient evidence to***

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[6] GenCorp refuses to acknowledge the existence of pollution exclusions in certain Continental Casualty first layer policies, yet criticizes the District Court for including these policy limits in determining GenCorp's underlying settled coverage. (GenCorp Br. at 26-27.) Thus, GenCorp wants to have its cake and eat it too. GenCorp claims that it could not raise this in its opposition to the summary judgment motion, since depositions addressing this issue were conducted after its opposition was filed. *Id.* at n.6. This is plainly false. GenCorp was on notice of this issue all along. All of the "key" depositions, including the deposition of its corporate designee, William Marlow, took place ***before*** GenCorp filed its opposition. In reality, the only thing that prevented GenCorp from raising this "issue" with the District Court prior to its ruling was its own stubborn refusal to admit that the referenced Continental policies exclude coverage for pollution.

allow a reasonable jury to find for GenCorp on issue of material fact.

GenCorp Inc. v. AIU Ins. Co., et al., 297 F. Supp. 2d at 1008.

In sum, GenCorp never disputed that the limits of its settled policies exceeded its claimed damages for the subject environmental damage. Instead, it made vague claims that some of the assumptions in the Excess Insurers' motion were not 100% accurate, but failed to rebut any of those assertions. Thus, the District Court properly entered summary judgment in favor of the Excess Insurers. The District Court also properly rejected GenCorp's belated attempts in its Motion for Reconsideration pursuant to *Fed. R. Civ. P.* 59(e) (hereinafter referred to as "Rule 59(e)") to present evidence and argument that the summary judgment ruling was "premature" based on arguments not raised in its summary judgment opposition brief.

B. Absent A Showing Of Loss In Excess Of The Settled Policy Limits Triggering The Excess Policies, Allocation Is Improper And Unnecessary

The District Court properly found that GenCorp failed to provide any evidence that it suffered losses exceeding its underlying settled policy limits with respect to the environmental claims. No fewer than ten times, GenCorp argues on appeal that the District Court erred in not applying a "two-step" allocation process. (GenCorp Br. at 15-18; 23-25.) Similarly, GenCorp asserts that the Court required it to exhaust its primary coverage "horizontally" and/or waived its right to exhaust

its insurance coverage "vertically." These arguments suffer a fatal flaw: Unless a policyholder can establish that it has a loss triggering excess coverage, the Court need not and should not undertake an allocation or "horizontal" exhaustion analysis, and the District Court did not do so in this case.

GenCorp's arguments ignore a fact fundamental to the Excess Insurers' arguments below and the District Court's decision: GenCorp previously *chose* to settle with its primary and umbrella insurers. GenCorp now seeks to ignore its settlements in arguing that each of the Excess Insurers is responsible under *Goodyear* for GenCorp's entire loss. The District Court properly rejected this theory, which is not supported by *Goodyear* or any of the other "all sums" cases cited by GenCorp.

In all of the cases cited by GenCorp in support of its "two-step" allocation argument, the policyholder had established as a threshold matter ***that it had sustained losses that must be indemnified by the insurer***. Here, the Excess Insurers' motion was premised on GenCorp's failure to show any losses above its underlying settled policy limits. Because GenCorp failed to place in the record on

summary judgment any evidence of such losses, the District Court properly granted the Excess Insurers' motion.[7]

The "all sums" cases cited by GenCorp -- *Goodyear, Koppers,* and *Keene*[8] -- establish that allocation is improper absent a showing of damages or losses implicating the subject excess policies. The landmark opinion in *Keene* found that the policyholder is not entitled to collect more than it owed in damages, ruling that, as a factual predicate to resolving allocation, "***Keene cannot collect more than it owes in damages***." 667 F.2d at 1050.

Likewise, in *Koppers*, the Third Circuit only commenced an allocation analysis after the $70 million jury award. *Koppers* stressed the importance of applying a credit for underlying policies, and held that recovery under an excess policy is contingent upon establishing a "***proven loss***" that exceeds the underlying limits. *Koppers*, 98 F.3d at 1454. In this case, allocation is both unnecessary and

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[7] In fact, GenCorp never established that it was out of pocket any money whatsoever, regardless of whether the Court looks to the underlying settled policy limits. The record is devoid of ***any*** evidence that GenCorp has recovered less than what it paid for the environmental sites at issue.

[8] *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835, 841-42 (Ohio 2002), *reconsideration denied*, 744 N.E.2d 764 (Ohio 2002); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1454 (3d Cir. 1996); and *Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034, 1050-52 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

inappropriate because GenCorp never established that it had "damages" or a "proven loss," as did the policyholders in *Koppers* and *Keene.*

Finally, in *Goodyear*, the Ohio Supreme Court adopted the *Keene* "all sums" allocation approach, finding that it promoted economy for the insured, "while still permitting insurers to seek contribution from other responsible parties when possible." 769 N.E.2d at 841. Significantly, the *Goodyear* allocation discussion was expressly premised on a finding of a "***covered loss***" across multiple triggered insurance policies -- a fact that is absent from the record here. *Id.* at 840. Thus, none of the cases cited by GenCorp support the so-called "two step" allocation process, since GenCorp failed to establish any compensable loss.

C. The Arguments Of GenCorp's *Amici* Further Support The Threshold Requirement That A Policyholder Establish Loss Before Allocation

Amici The Ohio Companies[9] agree with the notion that a "covered loss" is a necessary predicate to allocation, pointing out that the policyholder must establish "uncompensated losses" prior to allocation. Thus, *Amici* assert that an excess

[9] Two *Amici Curiae* have filed briefs in support of GenCorp's appeal: (1) The Ohio Chemistry Technology Council; Aeroquip-Vickers, Inc.; The Babcock & Wilcox Company; Eaton Corporation; The Glidden Company; Goodrich Corporation; The Goodyear Tire & Rubber Company; The Lincoln Electric Company; Millennium Holdings, LLC; NCR Corporation; The Sherwin-Williams Company ("The Ohio Companies"); and (2) United Policyholders.

policy responds only when the claimant's liability reaches a "sufficient magnitude":

> For an excess policy to be liable on a claim, it must not only be triggered, ***but the policyholder's liability must be of sufficient magnitude that it may reach the coverage provided by the excess policy***. *See Goodyear*, 95 Ohio St. 3d at 517.

(*Amici* The Ohio Companies' Br. at 7, emphasis added.) The Ohio Companies argue (mistakenly) that GenCorp sought to recover its "uncompensated losses." (*Amici* The Ohio Companies' Br. at 20.) Because GenCorp ***failed*** to establish that it had any "uncompensated losses" in excess of the limits of its settled policies, the entire premise for recovery, as postulated by *Amici* The Ohio Companies, is belied by the record.

Amicus United Policyholders cite four cases in support of their argument that no settlement credits should be allowed: *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, No. 82 Civ 7327, 1997 WL 251548 (S.D.N.Y. May 13, 1997); *E.R. Squibb & Sons, Inc. v. Lloyd's & Cos.*, 241 F.3d 154 (2d Cir. 2001); *Ins. Co. of North America v. Kayser-Roth Corp.*, 770 A.2d 403 (R.I. 2001); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 15 P.3d 115 (Wash. 2001). These cases have nothing to do with the issue addressed by the District Court below. United Policyholders dispute allowing any credits whatsoever, a proposition that not even GenCorp urges. None of these cases go to the issue presented to the District Court

here: In an "all sums" jurisdiction, where the policyholder has entered into settlements with the underlying insurers, should the court permit the Excess Insurers either a right of contribution against the underlying insurers or a right of set-off in the amount of the limits of the settled underlying policies? Here, the District Court ruled that no contribution action would lie against the settling insurers (Appeal No. 04-3377) and that, therefore, based on the limits of the settled underlying policies, GenCorp's liabilities would never reach the excess policies. In an "all sums" jurisdiction such as Ohio, the Court must permit either contribution or a consideration of underlying settled policy limits in order to ensure a fair distribution of losses among all implicated insurers. Even GenCorp does not dispute this principle.

D. The Actual Settlement Agreements Are Irrelevant Because GenCorp Concedes That The Settled Underlying Limits Must Be Deemed Exhausted Because The Excess Policies Do Not "Drop Down"

Both GenCorp and *Amici* The Ohio Companies refer to GenCorp's "offer" for the District Court to conduct an *in camera* review of GenCorp's settlement agreements. (GenCorp Br. at 29 n.7; *Amici* The Ohio Companies' Br. at 20.) This "offer" was never made during briefing on summary judgment, but only after the fact, in GenCorp's Motion for Reconsideration, in a footnote. (R. 114, GenCorp's Memorandum In Support of Motion for Reconsideration at 9, n.3., Apx. Pg. 579.) This belated offer not only was too little, too late, but irrelevant. The settlement

agreements have no bearing on the Excess Insurers' summary judgment motion, which was based solely on the amount of the underlying settled policy limits. *Amici* The Ohio Companies claim that these agreements would have shown that GenCorp "had not been fully compensated for its losses." (*Amici* The Ohio Companies' Br. at 20.) But this is precisely what GenCorp ***failed*** to show in the District Court -- it never established by affidavit or otherwise that it had suffered any losses exceeding the limits of its underlying settled policies.

GenCorp conceded in the District Court that the full limits of the settled underlying policies must be deemed exhausted, and that the excess policies do not "drop down" to make up the difference between the full policy limits and the settlement amounts:

> To the extent that GenCorp's settlement with Liberty Mutual was for less than the liability limits under Liberty Mutual's policies, ***GenCorp has effectively forfeited the right to recover the difference from its excess insurers.*** Put another way, GenCorp is not asking its excess insurers to "drop down" to cover any additional liabilities that GenCorp may have assumed as a result of its settlement with Liberty Mutual.

(R. 83, GenCorp Joinder to Liberty Mutual's Motion for Summary Judgment, Apx. Pg. 160.)

Likewise, in its Opposition to the Excess Insurers' Summary Judgment motion, GenCorp stated: "Before a particular excess policy must respond, the liability limits of the policy directly underlying that excess policy must be

exhausted. Indeed, [the District Court] has ruled that GenCorp's settlements with its primary and umbrella insurers serve to exhaust the liability limits of those policies." (R. 109, GenCorp Opp., Apx. Pg. 501.) Thus, it is undisputed that the underlying limits of GenCorp's settled policies must be deemed exhausted before accessing the excess policies. Based on this concession, the terms of the actual settlement agreements are irrelevant.

E. Assuming *Arguendo* That The Court Granted "Settlement Credits," Such Ruling Was Proper Under Ohio Law

The District Court never reached the issue of whether Ohio law permits "settlement credits." *GenCorp Inc. v. AIU Ins. Co., et al.*, 297 F. Supp. 2d at 1001 & n.6; 1004, n. 8. Instead, the Court ruled that GenCorp had failed to establish as a matter of law that its losses reached or triggered the levels of the excess policies, and that, therefore, the Court need not reach the issue of whether "settlement credits" are allowed:

> Thus, the Court does not reach the question of whether Ohio law permits "settlement credits" because it does not need to do so. In settling fully with its primary insurers, GenCorp allocated the liability it accrued during any policy period as broadly as possible among all primary policies in effect during that period. The excess insurers have liability, therefore, only if ... the payment limits of any primary policy are exceeded.

Id. at 1008. Thus, the ruling on appeal is limited to the issue of whether GenCorp established any losses exceeding the limits of its settled policies. Because it did

not, the District Court's ruling was not an abuse of discretion and must be affirmed.

1. *Goodyear* Permits Settlement Credits

While this Court does not need to reach the "settlement credit" issue since GenCorp never established any loss in excess of the underlying limits, such a ruling would be consistent with Ohio law. On the issue of whether Ohio law supports a theory of "settlement credits," the District Court noted that "[t]his might be seen as a matter of semantics." *GenCorp Inc. v. AIU Ins. Co., et al.*, 297 F. Supp. 2d at 1001, n.6.

> "Settlement credits" is a term of art, referring to an amount by which an excess insurer's liability is reduced when the underlying insurer settles with the insured. In the instant case, the court finds that the excess insurers' liability has not been triggered. The court prefers to express the matter in those terms rather than in terms of "settlement credits," an expression which unnecessarily imports into Ohio law a term of art from the law of other states.

Id. Therefore, in the event that this Court addresses the ruling on appeal in the context of "settlement credits," such credits clearly are allowed under Ohio law and consistent with *Goodyear*,[10] particularly where the District Court has ruled that the Excess Insurers may ***not*** pursue a contribution action against the Settled Insurers.

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[10] *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835, 841-42 (Ohio 2002), *reconsideration denied*, 744 N.E.2d 764 (Ohio 2002).

The District Court's ruling that the Excess Insurers are entitled to rely upon their contractual threshold of liability and that GenCorp had not established any loss triggering the excess policies is consistent with the holding in *Goodyear* that once "all sums" is applied, the selected insurer may seek contribution as it deems necessary. In *Goodyear*, the Ohio Supreme Court noted the importance of allowing an insurer to seek contribution in order to address the unfairness of saddling a single insurer with all of the policyholder's liabilities. The *Goodyear* Court thus adopted "all sums," but acknowledged that insurers must be permitted "to seek contribution from other responsible parties," not at the court's discretion, but "as they deem necessary."

In this case, the District Court ruled that those insurers that filed a third-party complaint against the Settled Insurers (Appellants in related case No. 04-3377) were not entitled to pursue that action, granting the Settled Insurers' motion for summary judgment on that issue. (R. 95, Order, Apx. Pg. 192.) In its ruling, however, the District Court recognized that the Excess Insurers had the same obligation to pay GenCorp's environmental liabilities as they would have had if GenCorp's primary insurers had paid GenCorp the maximum amount covered by GenCorp's primary insurance policies. Accordingly, the only equitable way to account for GenCorp's recoveries under its settled policies was to permit a credit for the limits of all settled underlying coverage.

2. Settlement Credits Must Be Allowed In An "All Sums" Jurisdiction Like Ohio In Order to Ensure A Fair Distribution of Loss

The District Court properly considered GenCorp's underlying settled limits, which is appropriate in long-tail coverage litigation where multiple policy years are triggered. In the Third Circuit's decision in *Koppers Co., Inc. v. Aetna Cas. & Surety Co.*, 98 F.3d 1440 (3d Cir. 1996), as in this case, the plaintiff had reached settlements with many of its underlying insurers. The Third Circuit noted that it had two choices to ensure a fair result: (1) either permit contribution against the settled insurers, or (2) apply a settlement credit. The Court allowed a credit, holding the excess insurer liable only for that portion of the policyholder's liability that exceeded the applicable policy limits of the underlying settled policies: "there must be a set-off, rather than a subsequent contribution action, to avoid a double recovery." 98 F.2d at 1453 (*footnotes omitted*).

The Third Circuit held that allowing settlement credits for the settled underlying policies was further required because: (1) an excess policy is not required to pay until the underlying coverage has been exhausted; and (2) the policyholder can recover on an excess policy for a proven loss, but only to the extent that the loss exceeds the primary policy's limits. *Koppers*, 98 F.3d at 1454.

Similarly, the Third Circuit allowed credit for the full limits of settled policies in *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 177 F.3d

210 (3d Cir. 1999) (applying New Jersey law). There, the court applied a credit of $11 million to the excess insurers based on the policyholder's settlement with its primary insurer. The Third Circuit upheld the credit, based on the "widely followed" corollary to the doctrine that a settlement with a primary insurer exhausts the primary coverage: "Under this approach, the insured forfeits any right to coverage of any dollar difference between the settlement amount and the primary insurer's policy limits." *Id.* at 227. This rule prevents double recovery for the insured, and ensures that a policyholder does not settle a primary policy for less than full policy limits, expecting the excess insurer to "eat" the difference. Rather, the policyholder is responsible for the difference between the settlement amount and the policy limit.[11] *See also Armstrong World Indus., Inc. v. Aetna Cas. & Surety Co.*, 52 Cal. Rptr. 2d 690, 705-10 (Cal. Ct. App. 1996), *review denied* (Cal. 1996) ("all sums" language obligates each insurer to respond "in full" to a claim, ***but insurer has right to contribution from other insurers).***

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[11] GenCorp does not dispute this rule, and, in fact, has conceded in the District Court that: "before a particular excess policy must respond, the liability limits of the policies directly underlying that excess policy must be exhausted. Indeed, this Court [the District Court] has ruled that GenCorp's settlements with its primary and umbrella insurers serve to exhaust the liability limits of those policies." (R. 109, GenCorp Opposition to Defendants' Motion for Summary Judgment, Pg. 19, Apx. Pg. 520.)

Other courts also have adopted the rule that an excess insurer is entitled to a credit, not from the primary insurer's settlement, but from the amount allocable to the primary under its policies. Thus, the excess insurer is entitled to a credit for the full amount of the primary insurer's coverage before it is required to pay any loss or expense. This credit has nothing to do with the details of the underlying settlements. *UMC/Stamford, Inc. v. Allianz Underwriters Ins. Co.*, 647 A.2d 182, 190-91 (N.J. Super. Ct. Law Div. 1994) (excess insurer entitled to credit for amount allocable to the primary insurer before it is required to pay any expense without regard to details or content of the underlying settlements); *Metropolitan Life Ins. Co. v. Aetna Cas. & Surety Co.*, 765 A.2d 891 (Conn. 2001) (following the widely-accepted rule that a policyholder is liable for any gap caused by its below-limits settlement with an underlying insurer, and that such obligations could not be foisted upon the nonsettled excess insurers).

Thus, contrary to GenCorp's argument, the District Court's decision, even if interpreted to allow "settlement credits," is consistent with Ohio law and other cases establishing the principle of fair allocation by taking prior settlements into consideration. In determining whether there are any losses triggering the excess policies, the Court must take into account the full limits of the settled primary and umbrella policies.

F. GenCorp's Appeal Improperly Raises An Argument Not Raised Below Regarding The "Bargain" Between The Parties

GenCorp's appeal brief raises a new argument not raised below that the District Court erred in "overlooking" the "nature of the bargain" between GenCorp and an excess insurer. (GenCorp Br. at 38-39.) Sixth Circuit law is crystal clear that because GenCorp did not raise this argument before the District Court, it is improper on appeal.[12] GenCorp's claim that the District Court "overlooked" the nature of the bargain is nonsensical, since there is no evidence in the record as to "the nature of the bargain" between GenCorp and the Excess Insurers -- other than the policies themselves. They require that the policyholder establish exhaustion of all applicable underlying limits before seeking indemnity under the excess policies.

G. The District Court Properly Denied GenCorp's Rule 59 Motion For Reconsideration

GenCorp offered no evidence that the Excess Insurers' statements of GenCorp's liability were erroneous or uncertain or that GenCorp suffered any loss exceeding its underlying settled policy limits. (R. 109, GenCorp Opp., Apx.

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[12] *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555 (6th Cir. 1990) (Sixth Circuit refused to decide issues or claims not litigated before the district court; "we review the case presented to the district court rather than a better case fashioned after the district court's order."); *Foster v. Barilow*, 6 F.3d 405, 407 (6th Cir. 1993) (issues not presented to the District Court but raised for the first time on appeal are not properly before the Court); *Thurman v. Yellow Freight Systems, Inc.*, 97 F.3d 833, 835 (6th Cir. 1996) ("vague references to an issue fail to clearly present it to a district court so as to preserve the issue for appeal").

Pg.501.) Likewise, GenCorp never disputed by affidavit the Excess Insurers' claims regarding GenCorp's settled policy limits. (*Id.*) In rejecting GenCorp's Rule 59(e) motion, the District Court correctly ruled: "By failing to make this point timely in its opposition brief, GenCorp defaulted on its argument." *GenCorp Inc. v. AIU Ins. Co., et al.*, 304 F. Supp. 2d at 959.

GenCorp claims that the District Court erred in "imposing" a "horizontal exhaustion scheme" on GenCorp. (GenCorp Br. at 33-35.) The District Court never "imposed" any exhaustion scheme on GenCorp -- whether horizontal or vertical.[13] The Court simply found that GenCorp's losses did not exceed its settled policy limits:

> [T]he combined limits of GenCorp's primary policies exceed GenCorp's own maximum estimates of its liability at the six sites. ***In opposing this motion, GenCorp offered no evidence that those estimates are erroneous or uncertain. The Court concludes, therefore, that the defendant Excess Insurers have no obligation to reimburse GenCorp for its losses due to environmental damage at the six sites and grants defendants' motion for summary judgment.***

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[13] With respect to the "horizontal exhaustion" arguments, these points were never addressed in GenCorp's opposition brief, but raised for the first time in its Rule 59(e) motion. (R. 114, Motion for Reconsideration at 10-16 Apx. Pg. 580-86.) The District Court's opinion denying GenCorp's Motion for Reconsideration addressed and rejected most of the same arguments GenCorp raises on appeal. *GenCorp*, 304 F. Supp. 2d 955 (N.D. Ohio 2004).

GenCorp Inc. v. AIU Ins. Co., et al., 297 F. Supp. 2d at 1001. GenCorp's "exhaustion" and "election" arguments are after-the-fact creations, and irrelevant to the District Court's ruling below.

GenCorp argues that "the record was not fully developed on the amount of GenCorp's liabilities" (GenCorp Br. at 45). Yet, GenCorp never filed a Rule 56(f) affidavit stating the need to develop the record any further. GenCorp refers to the deposition of one of its employees, Chris Conley, that was taken shortly after GenCorp filed its summary judgment opposition brief, but was noticed and scheduled well in advance of that filing. GenCorp waived any argument based on the supposed deficient record, since GenCorp never raised the need to "complete the record" on its liabilities in order to oppose summary judgment.

GenCorp made the same argument based on the Conley deposition in its Rule 59(e) Motion, and the District Court properly rejected the argument based on the fact that GenCorp had ample opportunity to alert the Court if the Conley deposition impacted the issues on summary judgment:

> GenCorp filed its brief in opposition to defendants' motion for summary judgment on September 8, 2003. On September 17, 2003, defendants and GenCorp took the deposition of Chris Conley ("Conley") … [I]n their deposition notice the defendants indicated that one of the topics to be covered in the deposition was ongoing costs and liabilities related to the environmental claims at issue in the case. ***GenCorp could have told the Court by way of a R. 56(f) affidavit of its need for more time before opposing defendants' motion, of the upcoming Conley***

> ***deposition, and of the material facts it hoped to uncover by means of the deposition. GenCorp chose not to do so. The court will not hear, therefore, GenCorp's current assertion that the court's judgment was premature because GenCorp needed more time for discovery.***

GenCorp Inc. v. AIU Ins. Co., et al., 304 F. Supp. 2d at 960-61.

GenCorp also argued on reconsideration that the District Court improperly ruled on "justiciability" -- the same "justiciability" argument advanced by GenCorp on appeal. (GenCorp Br. at 47-50.) Contrary to GenCorp's claim, the District Court ruled on the exact issue raised in the Excess Insurers' summary judgment motion, and did ***not*** deny GenCorp the opportunity to adjudicate its claims:

> But GenCorp misinterprets the nature of the court's action. The court ***did*** adjudicate the controversy between GenCorp and the defendants and ***GenCorp lost.*** GenCorp's inability to reach the excess insurers' policies was dispositive of the controversy.

GenCorp Inc. v. AIU Ins. Co., et al., 304 F. Supp. 2d at 959.

As to the purported "new evidence" that GenCorp raised in its Rule 59 Motion, the Court correctly stated GenCorp should have raised any need for

discovery in a Rule 56(f) affidavit.[14] This requirement is no mere formality; GenCorp had to file a Rule 56(f) affidavit stating that it needed more time to oppose the summary judgment motion. Based on GenCorp's failure to do so, the District Court refused to entertain GenCorp's claim that its ruling had been "premature."

H. The Rulings Below Would Promote Early Settlements And Streamline Litigation

All *Amici* advance the thoroughly discredited argument that the District Court's decision will impede settlements and result in "lengthy, expensive" insurance coverage litigation. (The Ohio Companies' Motion for Leave to File *Amici Curiae* Brief, 5/6/04.) Even GenCorp has abandoned this argument in its appeal.

Given the absence of any loss exceeding GenCorp's settled policy limits, it would make no sense for the District Court to undertake an allocation exercise. Such a ruling would be unnecessary, and possibly result in a windfall or a double recovery to GenCorp to the extent that it were permitted to recover for losses that do not exceed the limits of its underlying settled policies.

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[14] As the Excess Insurers pointed out below, the evidence was not "new" and was exclusively within the possession of GenCorp., R.116 Insurers' Response to Motion for Reconsideration at pp. 2-4, Apx Pgs. 699-701. GenCorp readily could have raised this evidence either in an affidavit or a Rule 56(f) motion if GenCorp believed it was relevant to the summary judgment motion.

In fact, the District Court's ruling would encourage early settlements in complex insurance coverage cases such as this and avoid costly and complex allocation trials absent proof of damages. If this Court affirms the ruling below, excess insurers would have a greater incentive to settle with policyholders for those losses that fall within their coverage because they could assess their exposure based on a complete record. Where, as here, the policyholder cannot establish compensable damages, litigation is unnecessary. As the District Court aptly noted, absent a loss, "the questions of whether the defendants are ***actually*** liable … and the ***actual*** amount of any such liability are beside the point." *GenCorp*, 297 F. Supp. 2d at 1005. This ruling prevented years of wasteful and unnecessary litigation regarding allocation.

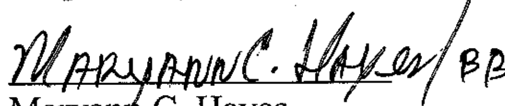
The District Court addressed the same "dog in the manger" argument advanced by *Amicus* United Policyholders, citing the unpublished opinion in *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, No. 82 Civ. 7327, 1997 WL 251548 (S.D. N.Y. May 13, 1997) (Amicus United Policyholder Br. at 12-20). As the District Court observed, the "windfall" referenced in *Squibb* was to the fact that a party might receive ***more*** than it could recover at trial for claims settled on a *pro rata* basis. *GenCorp Inc. v. AIU Ins. Co., et al.*, 297 F. Supp. 2d at 1003. *Squibb* has no bearing here, because, according to the District Court's opinion, there can be a "windfall" only if GenCorp is allowed to "load the whole of the remainder of

its liability on the excess insurers." *Id.* Thus, the *Squibb* reference to a "windfall" and a "dog in the manger" approach to litigation is inapplicable to this appeal.

CONCLUSION

This Court should affirm the rulings below because the District Court did not commit a "clear error of judgment" in granting the Excess Insurers' motion for summary judgment where GenCorp failed to file a Rule 56(f) motion in opposition to the Excess Insurers' motion. Even if *de novo* review were to apply rather than the abuse of discretion standard, the District Court must be affirmed, since GenCorp failed to present any evidence of a loss in excess of the underlying settled limits in the District Court.

Respectfully submitted,



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DATED: September 7, 2004

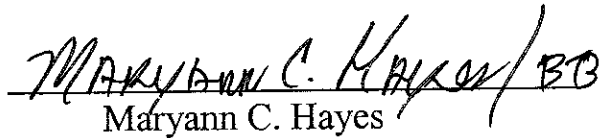
JOINT APPENDIX DESIGNATION

Item	Record No.	File Date
GenCorp's Complaint	1	9/9/02
Insurers' Third Party Complaint	63	3/12/03
GenCorp's Second Amended Complaint	68	4/10/03
Liberty Mutual Insurance Company's Motion for Summary Judgment	80	5/13/03
GenCorp's Joinder in Liberty Mutual's Motion for Summary Judgment	83	6/3/03
Joinder of Continental Casualty Company in Liberty Mutual's Motion for Summary Judgment	91	6/26/03
Joinder of American Insurance Company in Liberty Mutual's Motion for Summary Judgment	94	7/7/03
Order Granting Third Party Defendants' Motion for Summary Judgment	95	7/23/03
Insurers' Motion for Summary Judgment	99	7/31/03
GenCorp's Opposition to Insurers' Motion for Summary Judgment	109	9/8/03
Insurers' Reply in Support of Motion for Summary Judgment	110	9/19/03
First State Insurance Company's Joinder in Motion for Summary Judgment	111	9/29/03
District Court's Memorandum of Opinion Granting Insurers' Motion for Summary Judgment	112	10/15/03
District Court Order entering Judgment in Favor of Insurers on Motion for Summary Judgment	113	10/15/03
GenCorp's Rule 59(e) Motion for Reconsideration of October 15, 2003 Ruling	114	10/29/03

Insurers' Response to GenCorp's Motion for Reconsideration	116	11/12/03
District Court's Order Denying GenCorp's Motion for Reconsideration	118	1/21/04

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I certify that the foregoing Appellee Brief of the Excess Insurers uses proportionately spaced type of 14 points or more, is double spaced using Times New Roman font, and contains 9,744 words including headings and footnotes but excluding the cover sheet, corporate disclosure statements, table of contents, table of citations, certificate of service, and certificate of compliance.



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CERTIFICATE OF SERVICE

In accordance with Rule 25 of the Federal Rules of Appellate Procedure, I verify that I have served two true copies of the foregoing FINAL BRIEF OF EXCESS INSURER APPELLEES, Case No. 04-3244, upon Counsel for appellant listed below, and all counsel listed on the attached service list by First Class U.S. Mail this 7th day of September, 2004.

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