IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY	)	CIVIL ACTION NUMBER
Plaintiff	)	09C-01-170-JOH
v.	)	
INTEL CORPORATION, XL INSURANCE AMERICAN, INC., XL INSURANCE BERMUDA, LTD., INDEMNITY INSURANCE CO., OF NORTH AMERICA, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, LUMBERMENS MUTUAL CASUALTY COMPANY, TRANSCONTINENTAL INSURANCE COMPANY, MARKEL AMERICAN COMPANY, AIU INSURANCE COMPANY, UNITED STATES FIDELITY & GUARANTEE COMPANY, AMERICAN NATIONAL FIRE INSURANCE COMPANY, RELIANCE NATIONAL INDEMNITY COMPANY, LEXINGTON INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, OLD REPUBLIC INSURANCE COMPANY, and LIBERTY MUTUAL INSURANCE COMPANY	)	
Defendants	)	

Submitted: June 9, 2009
Decided: July 24, 2009

MEMORANDUM OPINION

*Upon Motion of Defendant Intel Corporation to Dismiss or Stay Action - **DENIED***

Appearances:

William J. Cattie, Esquire, of Rawle & Henderson, Wilmington, Delaware, and Kevin Coughlin, Esquire, of Coughlin Duffy, Morristown, New Jersey, attorneys for American Guarantee & Liability Insurance Company

Richard L. Horwitz, Esquire, of Potter Anderson & Corroon, Wilmington, Delaware, and Lester O. Brown, Esquire, of Howrey LLP, Los Angeles, California, attorneys for Intel Corporation

Mary B. Matterer, Esquire, of Morris James LLP, Wilmington, Delaware, and Glen R. Olsen, Esquire, of Long & Levit LLP, San Francisco, California, attorneys for Markel American Insurance Company

Daniel P. Bennett, Esquire, of Mintzer, Sarrowitz, Zeris Ledva & Meyers LLP, attorney for American National Fire Insurance Company

HERLIHY, Judge

Intel Corporation has been sued in the United States District Court for Delaware for alleged anti-trust violations. Indications are that litigation has the potential of being the largest anti-trust case ever, even exceeding that of Standard Oil around one hundred years ago. The allegations of Intel's anti-trust conduct appear to span the years of 1985-2005.

American Guaranty and Liability Insurance Corporation ("AG") is one of Intel's many insurers. It has provided a number of umbrella and excess policies for the period of April 1, 2001 through April 1, 2009. Intel tendered defense to AG for the anti-trust action. The parties engaged in confidential negotiations in an attempt to resolve the coverage issue; however, they were unable to do so.

At the earliest moment each could, suit was filed. AG filed in this Court, not only suing Intel, but all other insurers known to it who might be liable for coverage. It seeks a declaration that it is either not liable for coverage, or if it is, where its obligations fit in with all of its policies and those policies issued by the other fifteen insurers named as defendants in its action.

Approximately thirteen hours after AG filed its suit here, Intel filed an action in the United States District Court for the Northern District of California ("Northern District Action"). In its action, however, Intel sued AG alone to determine its coverage obligations by selecting only one of AG's policies which spanned only one year.

Intel has moved to stay or dismiss the action in this Court in favor of its action in California on the basis of *forum non conveniens*. When this Court considers such a

motion, it utilizes six long-established factors to determine if a stay or dismissal should be granted or denied. If AG's action here in Delaware were considered "first filed," Intel has the burden of showing overwhelming hardship and inconvenience in the application of those factors. In first filed cases, the Court's discretion is somewhat limited. However, if the two actions are viewed as contemporaneously filed, then this Court has more discretion in weighing the six factors. Furthermore, Intel would not have the heavy burden of showing hardship and inconvenience.

The Court views AG's action here and Intel's Northern District Action as contemporaneously filed. Balancing all the *forum non conveniens* factors, the Court finds Intel's motion to stay or dismiss should be DENIED.

Factual Background

On June 27, 2005, Advanced Micro Devices, Inc., and AMD International Sales & Service, Ltd. (herein referenced as "AMD"), filed an anti-trust action against Intel, and its dominated subsidiaries. The suit was filed in the United States District Court for Delaware.[1] That complaint alleges Intel (including its various subsidiaries) violated

[1] Both sides have asked this Court to take Judicial Notice of pleadings and orders in other courts. Neither has objected to what the other submitted. This Court will take judicial notice of those pleadings and orders. D.R.E. 202(d). The AMD complaint against Intel is Exhibit A to AG's response opposing Intel's motion to stay or dismiss. The citation for the initial AMD Action is Case No. 05-441 JJF. Hereafter the Court will use "AG JN" for AG's Judicial Notice of pleadings and "Intel JN" for its pleadings. This particular pleading is AG JN, Ex. A.

Section 2 of the Sherman Act,[2] Sections 4 and 16 of the Clayton Act,[3] and various California statutes. On July 12, 2005, another suit was filed against Intel in the District Court in Delaware.[4] That suit and several others were consolidated into one multi-district action.[5] However, the consolidated actions have been given two separate trial dates. The first trial date is scheduled for February 15, 2010. The parties believe that trial will last two weeks. The second trial is set for March 29, 2010 and is also predicted to last two weeks. In spite of the two trials, the consolidated cases in the District of Delaware will be labeled for this opinion as the "AMD Action."

Both AG and Intel agree that the scale of the AMD Action is extensive. The District Court of Delaware has appointed a special discovery master to streamline the discovery process. Curiously, Intel also told this Court that it is likely the AMD Action will not end at the trial level. Considering the claimed historic size of that litigation and comparisons to the Standard Oil case, that prediction sounds more like a guarantee.

But the Delaware District Court action is only part of this picture, as extensive and of historic proportions as it may be. Intel was sued previously in California and Illinois.

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[2] 15 U.S.C. § 2 (2006).

[3] 15 U.S.C. §§ 15(a), 26 (2006).

[4] *Paul v. Intel Corp.*, No. 05-485.

[5] *In re Intel Microprocessor Anti-trust Litigation*, MDL No. 1717-JJF.

The Illinois case was *Barbara's Sales, Inc. v. Intel Corp.*,[6] ("Barbara's Sales Action") and in California, *Janet Skold, et al v. Intel Corp.*,[7] ("Skold Action"). At this time, this Court does not have copies of the complaints filed in either of those two cases. They are referenced, however, in a declaratory judgment action for coverage which Intel filed in a California court against other insurers.[8]

Intel's first coverage action sought a declaratory judgment that XL Insurance America, Inc. ("XL") – one of the insurer defendants in the action here – was liable to cover defense and indemnification liabilities in the *Skold* and *Barbara's Sales* actions.[9] In those actions, according to Intel, it was being sued for violations of various California statutes, apparently for false advertising in connection with its Pentium processor. Neither the *Barbara's Sales* nor the *Skold* actions, asserted any anti-trust allegations. According to Intel's complaint, XL had declined any coverage responsibility. Intel sought coverage from XL under two policies: one for ten million dollars, XL policy 00-01 covering April 1, 1998 to April 1, 2001, and a fifty million dollar XL policy, XL 01-02 covering the

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[6] No. 02-L-788, Circuit Court, Madison County, Ill.

[7] The Skold Action was filed in Alameda County Superior Court in March 2004, with a case number of RG 0414-5635.

[8] AG JN, Ex. C.

[9] *Intel Corp. v. XL Insurance America, Inc., et al*, No. 106 CV 06120. *See*, Intel JN, Ex. 2 at ¶ 20.

period of April 1, 2001 through April 1, 2002.[10] On these policies, Intel asserted the language compelled XL to provide defense and indemnity. Further, Intel claims coverage from the language in the XL policies contain the policy language potentially at issue here. After some initial skirmishing between Intel and XL, a settlement agreement was reached. The agreement is under seal. It has been supplied, under seal, to the judge in the Northern District Action and now to this Court, under seal.[11]

Intel's separate efforts to obtain coverage for its defense costs continued. It filed a second declaratory judgment action against the Insurance Company of the State of Pennsylvania ("ICSOP") in the United States District Court for the Northern District of California ("ICSOP Action").[12] ICSOP is another insurer defendant in the suit here. Intel again was seeking coverage for defense costs in the *Barbara's Sales* and *Skold* actions, not the AMD Action. ICSOP was the carrier which provided the next layer of coverage above XL.[13] Intel selected an ICSOP policy covering the period April 1, 1998 to April 1, 2001 for twenty-five million dollars.[14]

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[10] The Court has not used more precise, longer policy numbers recited in Intel's complaint.

[11] Markel has objected to these documents being filed under seal. The Court finds it unnecessary to rule on that objection in this opinion.

[12] *Intel Corp. v. Insurance Co. of the State of Pennsylvania*, No. 5:08-03238-JF (D.C. N.D. Cal. 2008). *See,* Intel JN, Ex. 3.

[13] AG JN, Ex. E.

[14] Intel Submission, Ex. B (Jun. 11, 2009). As far as this Court knows, ICSOP does not have a policy covering the year April 1, 2001 to April 1, 2002, which is the year (continued...)

Markel American Insurance Co. ("Markel"), another insurer defendant in this case, sought to intervene in the ICSOP Action. Markel was granted a "limited" right to intervene to oppose Intel's motion for partial summary judgment on the duty to defend issue.[15] Markel, in part, alleged that Intel failed to cooperate with it. Markel also claimed Intel failed to provide it with any information about other insurance coverage even though the two parties had entered into a confidentiality agreement allowing them to exchange information.[16] Prior to any decision in the case concerning coverage, Intel and ICSOP settled. The terms of the settlement are not known to this Court.

In neither the XL Action nor the ICSOP Action, did Intel seek coverage of any kind for the AMD Action pending in the District Court for Delaware though both of Intel's actions were filed subsequent to the AMD complaints. Intel, a Delaware corporation, had to sue XL in a California state court because XL is also a Delaware corporation. However, Intel's suit against ICSOP was placed before a federal court because that insurer is a Pennsylvania corporation and no federal question was considered in the complaint.

Although not all of Intel's settlement with XL is public information, the known record indicates that XL was to provide coverage for a portion of the defense costs in the

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[14](...continued)
at stake in the Northern District Action.

[15] *Intel Corp. v. Insurance Co. of Pennsylvania*, 2009 WL 81393, at *4 (N.D. Cal. Jan. 9, 2009).

[16] AG JN, Ex. E. *See also*, Markel's Br. 3.

AMD Action. One substantive difference, however, between the AMD Action and the *Skold* and *Barbara's Sales* actions is the alleged violation of the Sherman and Clayton Acts in the AMD Action.

Intel, in its Northern District Action, selected a single policy it has with AG, which covers April 1, 2001 to April 1, 2002. In its complaint, Intel states in the same policy year there was a five million dollar "fronting" policy, followed by another fronting policy for eleven million dollars issued by Old Republic Insurance Company ("ORIC").[17] ORIC is another insurer defendant in the matter before this Court, but it has a policy for the period of April 2000 to April 2001 which is not listed in the Intel complaint.[18] Intel further stated in the Northern District Action that after ORIC's policy came XL's fifty million dollar policy.[19] Additionally, Intel asserted at oral argument here that it has exhausted the above sixty-six million dollars total, so far, in defending the AMD Action. That it is why it now seeks AG's fifty million dollars in coverage.[20]

Significantly Intel's Northern District declaratory judgment complaint seeks coverage from AG for not only the AMD Action in Delaware but also for the California

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[17] Intel's First Amended Compl., Intel JN, Ex. 1, ¶¶ 10-11.

[18] AG's Compl. ¶ 41.

[19] Intel JN, Ex. 1, ¶¶ 10-11.

[20] *Id.* at ¶¶ 15-17.

state court actions, now consolidated.[21] Interestingly, Intel lumps the AMD Action in the federal court of Delaware with the action in the California state court into the "AMD Litigation."[22] However, even though XL and ICSOP policies provide coverage for the defense of the AMD Action, Intel never included that Action in its coverage suits against them. Yet, at the time Intel sued XL and ICSOP for the sate court actions in California, AMD had already sued Intel in the District Court for Delaware on anti-trust violations. Intel could, therefore, have notified XL and ICSOP of the AMD Action and sought coverage but, apparently, did not. Now, for the first time, Intel has decided to seek coverage for the AMD Action and the state court actions against AG in the Northern District Action.

On the other hand, AG's action here seeks a determination of the coverage issue for only the District Court of Delaware AMD Action. In its complaint, AG reports Intel gave it early notice of the AMD Action in October, 2006 (which is after Intel sued XL for coverage but before it sued ICSOP).[23] In June 2008, Intel notified AG that XL's policy for April 1, 2001 to April 1, 2002 had been exhausted and asked AG to acknowledge

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[21] *Id.* at ¶ 20.

[22] *Id.*

[23] AG's Compl. at 5, ¶ 9. The page number is provided due to duplicative paragraph numbering in the complaint.

coverage.[24] Communication between AG and Intel led to the formation of a Standstill and Confidentiality Agreement ("Standstill Agreement") that was signed on June 20, 2008.[25]

During the period covered by the Standstill Agreement, Intel was to supply supposedly confidential information to AG to help it determine if it needed to provide coverage and resolve any differences.[26] AG or Intel could terminate the Standstill Agreement by either party giving written notice ten (10) business days in advance.[27] After those ten days, either party could sue the other but only after the passing of seven additional calendar days.

At 12:03 a.m., EST on January 23, 2009, AG filed its declaratory action in this Court. It was able to do so because of the e-filing system this Court utilizes. Intel, apparently unaware of AG's action here, filed its own action in the United States District Court for the Northern District of California on January 23, 2009 at 10:25 PST. In other words, its action was filed there about thirteen and half hours later.

AG's action here, lists a number of other insurers as defendants and a number of their policies by number.[28] Intel claims that its insurance coverage information is

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[24] *Id.* at 6, ¶ 11.

[25] Standstill and Confidentiality Agreement, Intel JN, Ex. G.

[26] *Id.* at ¶ 1.

[27] *Id.* at ¶ 15.

[28] AG's Compl. ¶¶ 24-52.

proprietary and that the information used by AG to bring in the other named insurers as defendants was accomplished by taking Intel's confidential information it divulged to AG in the Standstill Agreement. By that Standstill Agreement, information exchanged was not to be later made public.[29]

At some point after AG's complaint was filed here, Intel stated it viewed AG's complaint. Intel claims the information listed by AG is a breach of the Standstill Agreement. It amended its original Northern District Action complaint to include several causes of action for the alleged breach, such as, breach of contract and breach of the covenant of good faith and fair dealing.[30] At oral argument, AG stated it is ready to defend against those claims.[31]

The Standstill Agreement contains this clause:

> Any disputes with regard to this Standstill and Confidentiality Agreement shall be decided in a California court under California law. This paragraph 17 is limited solely to disputes regarding the interpretation and enforcement of this Standstill and Confidentiality Agreement and does not apply to any disputes involving Intel's requests for coverage under policies issued to Intel by the Insurance Company.[32]

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[29] Intel JN, Ex. G, ¶¶ 7-11.

[30] Intel JN, Ex. 1, ¶¶ 46-54.

[31] The Court notes the covenant runs both ways. (*See, Dunlap v. State Farm Fire & Cas. Co.*, 955 A.2d 132, 144 (Del. Super. 2007)).

[32] Intel JN, Ex. G, ¶ 17.

It is very important to recite the similarities and key differences in the two declaratory judgment actions. AG's action before this Court lists all of its own policies issued to Intel.[33] It also names, of course, fifteen other insurers which it asserts have issued a number of policies to Intel.[34] Those insurers are incorporated in eight different states and Bermuda. They have their principal places of business in nine different states and in Bermuda. Of those nine states only one insurer has its principal place of business in California. The earliest period covered in those policies, according to AG's complaint, started in 1998. Some policy periods are for a year, some span several years.[35] AG also asserts Intel maintained self-insured retentions ("SIRs")[36] for the years 1984 to 2005. It further alleges Intel has failed to provide to it all the details in the SIR program.[37]

The SIR information is of some note because, as pointed out in Intel's Northern District Action, the first layer of defense cost coverage was a retention policy.[38] Similarly,

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[33] AG's Compl. ¶¶ 15–23.

[34] *Id.* at ¶¶ 24-52.

[35] *Id.*

[36] AG's Compl. ¶¶ 54-55. Self-insured retention: The amount of an otherwise covered loss that is not covered by an insurance policy and that usually must be paid before the insurer will pay benefits. *Black's Law Dictionary* 1391, (8th ed. 2004).

[37] AG's Compl.¶ 55.

[38] Intel JN, Ex. 1, ¶10.

a retention policy's exhaustion was noted in Intel's action against ICSOP[39] and in its action against XL for coverage, neither of which involved the policy year in the Northern District Action.[40]

AG also contends that the AMD Action covers, at least, the period 1984 to 2005.[41] It alleges Intel has not given it sufficient information to show AG's policy is triggered. Further, AG contends Intel has failed to show how its underlying coverage, including any SIRs, before its policy or policies has or have been exhausted. Initially, it seeks a declaration it has no duty to provide coverage.

Alternatively, AG seeks a declaration of allocation/apportionment among the other insurers and Intel for the defense of the AMD Action should it have a duty to provide coverage. In seeking that declaration, AG asserts Intel has tendered defense of the AMD Action to some of the defendant insurers in this case.[42] In this vein, AG complains that Intel has failed to provide complete information regarding insurance for the years of the AMD Actions, 1984-2005.[43] Also, AG contends Intel has failed to provide complete information about its SIRs for those years.[44]

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[39] Intel JN, Ex. 2, ¶ 7.

[40] AG JN, Ex. C, ¶ 8.

[41] AG's Compl. ¶ 61.

[42] *Id.* at ¶ 63.

[43] *Id.* at ¶ 64.

[44] *Id.* at ¶ 65.

Intel's original Northern District Action filed thirteen or so hours after this matter involves only AG and no other insurers. It seeks declaratory relief from the federal court to find AG has an obligation to defend and indemnify it and claims a breach of contract for its failure to do so. Intel alleges that, through a California based broker, Marsh, it purchased several layers of insurance polices from a "variety" of insurance companies spanning the period of April 1, 2001 to April 1, 2002.[45] Intel recites it has already exhausted sixty-six million dollars in defense costs.[46] One of the "exhausted" policies was issued by XL. XL's policy has specific risk coverage language; however, AG's does not. AG's policy is following form policy and, therefore, AG insures against the same risk as XL's policy because it contains the same risk coverage language.[47] As noted earlier, Intel's Northern District Action sweeps in several other cases unrelated to the AMD Action in Delaware and places the label "AMD Litigation" over them and the AMD Action.[48]

Subsequent to filing the amended complaint, AG moved to dismiss or stay the Northern District Action primarily because of its suit in this Court. That motion was denied June 11, 2009.[49] Since that time, the Northern District Action has proceeded. On

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[45] Intel JN, Ex. 1, ¶ 10.

[46] *Id.* at ¶ 11.

[47] *Id.* at ¶ 17

[48] *Id.* at ¶¶ 19-20.

[49] *Intel Corp. v. American Guarantee & Liability Ins. Co.*, 2009 WL 1653014 (N.D.
(continued...)

July 10, 2009, AG filed a third party complaint in the Northern District of California against the named insurance defendants in this action in order to protect any rights it may wish preserve against those third parties.[50]

Parties' Contentions

Intel argues that this Court should view these two declaratory judgment actions as contemporaneously filed, even though the filings occurred thirteen hours apart. As such, it contends, less stringent standards apply to determining whether its motion to stay or dismiss should be granted or denied. This approach is taken to avoid a "race to the courthouse" and rewarding the "winner" merely because one got there first.

When considering a motion to stay or dismiss for *forum non conveniens* Delaware courts employ six factors from *General Foods Corp. v. Cryo-Maid, Inc.*,[51] known as the "*Cryo-Maid*" factors. They are: (1) whether the dispute is governed by Delaware law or that of another jurisdiction; (2) the relative ease of access to proof; (3) the availability of compulsory process for witnesses; (4) the pendency or non-pendency of a similar action in another jurisdiction; (5) the possible need to view the premises; and (6) all other practical considerations that would make the trial easy, expeditious and inexpensive.[52]

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[49](...continued)
Cal. Jun. 11, 2009).

[50] AG Supplemental Memorandum (July 15, 2009).

[51] 198 A.2d 681 (Del. 1964).

[52] *Id.* at 684.

Using these *Cryo-Maid* factors, Intel asserts California law applies to the interpretation of the contract. First, it argues the policy at issue in the Northern District Action and one of the policies at issue here, was negotiated through an intermediary (non-party) firm in California by that firm's employees in California. Second, its claim for breach of the Standstill Agreement is to be decided in a "California court" under California law. Intel's witnesses and those of the intermediary agency are in California where ease of proof exists and where the third party witnesses can be brought to court by compulsory process. Intel does not believe a view of any premises will be needed.

Intel points to its Northern District Action as a pending action and claims it is more comprehensive for several reasons. It notes Delaware and California have the same coverage precedent, known as "all sums," which enables it to select the insurer from which it seeks coverage. And it has not, it contends, tendered defense to the majority of other insurers who are parties here so they are not needed for the resolution of the coverage issue. Finally, the action for breach of the Standstill Agreement can only be heard in California, making that action more comprehensive.

AG's response is that Intel has failed to show overwhelming hardship and inconvenience to warrant getting a dismissal or stay because its action was first filed. Furthermore, it contends the *Cryo-Maid* factors do not support granting a stay or dismissal. As to the applicable law standard, AG asserts it is undecided if California law applies to the '01-02 policy's interpretation. Even if it does, Delaware courts have

interpreted laws of other jurisdictions. Also, there is, AG says, the issue of what state's law may apply in connection with the contracts of the other insurers in the case here.

Delaware, AG claims, provides ease of access to proof. It argues that availability of compulsory process is a "neutral" factor. It agrees there are no premises to view.

AG contends the action in this Court is the more comprehensive of the two pending actions, arguing that only this case will have a complete resolution of the coverage issues of all of Intel's insurers. It submits that the case here is broader than an action against it involving only one policy for coverage in a single year. In this regard, AG argues Intel is "cherry picking" one policy and one insurer at a time. Also, there are excess policies above the policy (and in the same year) at issue in the Northern District Action which could be or are affected by the coverage issue here but not before the federal court in California. Intel, AG notes, has sued individual insurers on other policy years which, it contends, buttresses its claim that all of the issues for all the applicable years should be resolved in one setting.

There are other practical considerations, AG asserts, in keeping this case in Delaware without a stay or dismissal. It points to the extensive discovery underway in the AMD Action and contends those documents may become relevant to the coverage issues here. Furthermore, AG notes that Intel has utilized Delaware courts and should not complain of being a party here.

Two insurer defendants, Markel American Insurance Co. ("Markel") and American National Fire Insurance Co. ("American National") have joined with AG to oppose Intel's motion for stay or dismissal. American National's joinder is simply that. It adopts AG's arguments, with no additional considerations.

Markel, on the other hand, presents its own argument and adds to AG's contentions. The first of Markel's arguments is that Intel's tactic of individual actions for coverage are wasteful of the parties' and of judicial resources. Also, Markel views that "tactic" as potentially prejudicial to insurers who are not or were not parties to those individual actions. AG's action here, Markel asserts, avoids all of those pitfalls. Its second argument anticipates Intel will argue that policies of other carriers are not yet implicated since Intel has not yet tendered defense to those carriers. Markel claims that Intel will argue any potential dispute with any of those carriers is, therefore, not "ripe" for adjudication. But, Markel adds, the AMD Action covers many years of Intel's alleged anti-trust misconduct preceding the one policy year, 2001-2002, it has selected from AG.

As part of its opposition to Intel's motion, Markel offers some additional factual background. It states it provided a twenty-five million dollar excess policy to Intel for the period of April 1, 1998 to April 1, 2001 (the latter date being the beginning coverage date for the AG policy Intel is invoking in its Northern District Action). Intel tendered defense to Markel in the *Barabara's Sales* and *Skold* actions in connection with that policy. Markel reports it had "extreme difficulty" in getting information about those actions from

Intel.[53]

That difficulty compelled it, Markel says, to intervene in ICSOP Action.[54] The District Court judge allowed Markel to intervene to enable it to oppose Intel's motion for summary judgment. Markel further reports, thereafter, Intel agreed to allow Markel to be dismissed from the case and withdrew the tender of defense.[55]

Markel notes that, as of this time, Intel has not tendered a defense to it in connection with the AMD Action. But Markel apparently felt compelled to intervene in Intel's new Northern District Action. The District Court granted that motion.[56] This supports its argument, it says, about Intel's serial approach to suing for coverage and waste of resources.

Intel's response, though not directly addressed to Markel, is that the "all-sums" doctrine enables it to bring suit for coverage against any carrier of its choice.

Applicable Standards

Before this Court can consider the motion to stay or dismiss, an initial and essential determination must be made whether to regard this action as "first filed" or

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[53] Joinder of Markel, at 3 (LexisNexis Docket No. 94).

[54] Intel JN, Ex. 2.

[55] Olson Aff. ¶¶ 3-4.

[56] *Intel Corp. v. American Guaranty & Liability Ins. Co.*, 2009 WL 1653014 (N.D. Cal. Jun. 11, 2009).

"contemporaneously" filed when compared to Intel's Northern District Action. "[A]s a general rule, litigation should be confined to the forum in which it is first commenced, and a defendant should not be permitted to defeat the plaintiff's choice of forum in a pending suit by commencing litigation involving the same cause of action in another jurisdiction of its own choosing."[57] However, a court may use its discretion to find an action that may have been technically "first-filed" was contemporaneously filed in another forum.[58]

When a party obtains first filed status, the defendant would carry the burden of showing overwhelming inconvenience and hardship sufficient to convince this Court to delay exercising its jurisdiction in favor of another jurisdiction.[59] But in cases where the two complaints are viewed as being contemporaneously filed, no such burden exists. Instead, the Court exercises broader discretion.[60] That discretion should be used to determine "whether the court's and public's interest really necessitates trial in multiple jurisdictions given the limited resources of the courts and enormous expense of litigation."[61]

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[57] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 263 A.2d 281, 282 (Del. 1970).

[58] *See, Texas Instruments Inc. v. Cyrix Corp.*, 1994 WL 96983, at *3-4 (Del. Ch. Mar. 22, 1994) (finding the filing of one party's complaint five hours before the other party filed did not bestow "first-filed" status upon the party that won the "race to the courthouse").

[59] *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1199 (Del. 1997).

[60] *Friedman v. Alcatel Alsthom*, 752 A.2d 544, 553 (Del. Ch. 1999).

[61] *Id.*

Under these circumstances, this Court will view the two actions as contemporaneously filed.[62] The facts demonstrate both Intel and AG participated in a race to the courthouse. Due to the breakdown of the discussions and the terms of the Standstill Agreement, each side was prepared to file as soon as possible. Hours on the heels of the Standstill Agreement's stay on instituting litigation, each party filed. At midnight on January 23, 2009, the green flag dropped.

The fact that Intel's Northern District Action was filed just filed thirteen hours after AG filed its action here can be adequately explained due to several factors: (1) Eastern Standard Time v. Pacific Standard Time (3 hours); (2) this Court has an e-filing system which the Northern District Court may not, enabling AG to file three minutes after midnight on the first day the Standstill Agreement allowed it to do so (9 hours); and (3) Intel filed its action but not as the federal court opened (1 additional hour). Therefore, this Court will consider Intel's complaint as contemporaneously filed with that of AG's complaint here.

Using the broader discretion employed in contemporaneously filed actions, this Court, therefore, evaluates the issue of whether to grant or deny a stay or dismissal using the following six factors:

(1) whether the dispute is governed by Delaware law or that of another jurisdiction;

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[62] *Azurix Corp. v. Synagro Technologies, Inc.*, 2000 WL 193117 (Del. Ch. Feb. 3, 2000).

(2) the relative case of access to proof;
(3) the availability of compulsory process for witnesses;
(4) the possible need to view the premises;
(5) the pendency or non-pendency of a similar action in another jurisdiction; and
(6) all other practical consideration that would make the trial easy, expeditious and inexpensive.[63]

Discussion

A. Choice of Law

Intel contends California law will apply because the one insurance policy at issue in the Northern District Action was signed in California.[64] Although Intel is incorporated in Delaware, it argues there is no other factual nexus between the formation of the insurance policy and Delaware.

In response, AG argues the choice of law question remains open as to it and Intel. Further, AG suggests the existence of the other named insurers may result in the use of state law other than California or Delaware. Alternatively, in the event California law is applicable to this case, AG submits the use of California law should not be a significant factor and asks this Court to give it minimal weight in its ultimate determination. It argues that Delaware courts have routinely been called upon to rule over cases based upon the laws of sister states.[65]

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[63] *United Phosphorous, Ltd. v. Micro-Flo, LLC*, 808 A.2d 761, 764 (Del. 2002).

[64] Labrador Aff. ¶2 (reciting negotiations over the one disputed AG policy in the Northern District Action).

[65] *Mt. Hawley Ins. Co. v. Jenny Craig, Inc.*, 668 A.2d 763, 769 (Del. Super. 1995).

Even though the question of which state law is to apply here has not been settled, a court must still consider it as a factor in the *forum non conveniens* determination.[66] No formal discovery has commenced for this case, although it appears likely California law will govern the dispute between Intel and AG due to both parties' acknowledgment that the contract was signed in California. According to AG's complaint here, it has other policies with Intel, several preceding periods to the one policy at issue in the Northern District Action and some covering later periods. There is no record yet where these policies were negotiated and executed.

As to the other parties, the Court can only speculate. However, should there be additional disputes between Intel and any other insured parties, it would likely revolve around where those contracts were formed and signed. Therefore, based upon what has been represented, California law will probably apply to the one policy in dispute between Intel and AG and this conclusion favors Intel as to that policy. It is currently unknown about the choice of law as to AG's other policies.

The deeper question, however, is to what degree the choice of law factor should favor Intel. Delaware courts have routinely been called to exercise and apply laws outside of its jurisdiction.[67] Further, if the out-of-state law is one which does not provoke a

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[66] *See, Sequa Corp. v. Aetna Cas. & Sur. Co.*, 1990 WL 123006, at *4 (Del. Super. Jul. 13, 1990).

[67] *AT&T Corp. v. Clarendon American Ins. Co.*, 931 A.2d 409 (Del. 2007) (ruling (continued...)

question of first impression or a particularly novel consideration of state law, then a Delaware court may be able to exercise greater discretion in applying the foreign law in Delaware.[68]

Here, both Intel and AG are in agreement that the question of law, at the moment, is only the duty to defend. In California, the duty to defend is triggered not only when a claim arises from allegations in an underlying complaint but also when an insurance carrier learns of a potential they might be liable for indemnity "in light of facts alleged or otherwise disclosed."[69] This rule is, admittedly, broader than the duty to defend in Delaware;[70] however, the Court finds the application of it would not be particularly novel. Consequently, Intel's application for California law to apply in this case does not prevent this Court from hearing the matter in Delaware. The possibility of using California law in this Court is not a "substantial deterrent" in the greater *forum non conveniens* determination.[71] Therefore, although the choice of law factor somewhat favors Intel, it is of minimal importance in the overall forum determination.

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[67](...continued)
on an insurance dispute based upon California state law).

[68] *Sequa Corp.*, 1990 WL 123006, at *4.

[69] *Buss v. Superior Court*, 939 P.2d 766, 773 (Cal. 1997).

[70] *Pacific Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1254 (Del. 2008). In Delaware, the duty defend is triggered when the allegations within a complaint state a claim that is potentially covered by the insurance policy.

[71] *Sequa Corp.*, 1990 WL 123006, at *4.

B. Relative Ease of Access to Proof

Intel argues that a dismissal or stay in favor of the Northern District Action is prudent because there is little proof here in Delaware when compared to California. While it accepts there may be some relevant documents here in Delaware due to the AMD Action, Intel contends the bulk of applicable documents can be found in either California or Illinois. Additionally, it contends any documents necessary to this action can be accessed through electronic means, thereby diminishing any geographical concerns of transporting necessary documents.

Not surprisingly, AG highlights the geographical proximity of this Court to the federal court, four blocks away, where the AMD Action is located. It further details the extensive nature of the discovery proceedings in the AMD litigation and submits that there are millions of documents being accumulated. AG also contends the existence of the other defendant insurance companies, headquartered in various cities across the country, necessitates that some parties will ultimately incur costs in transporting witnesses and documents wherever litigation ensues.

Ironically, should California law apply in the duty defend analysis, it might require this Court to seek information beyond the four corners of the AMD complaint and potentially turn the discovered documents in the AMD Action into relevant, discoverable information for this case. Although the Court is aware of the extensive discovery being conducted in the District Court of Delaware, there is reason to believe only a small portion of that material would be relevant to the duty to defend question here.

Accordingly, because the choice of law factor tips ever slightly in favor of Intel as to one policy, the Court finds that the ease to which access of proof may be obtained tips this factor slightly in favor of AG due to the proximity of the AMD Action and its evidence. Again, the Court must qualify this finding by stressing this factor is only minimally relevant when taken into consideration of the balancing test as a whole.

Both litigants are national corporations; Intel, of course, has global reach. In the AMD Action, it is alleged Intel's activities have created legal difficulties for it in Japan[72] and makes similar allegations of misconduct in several European countries.[73] Intel is used to litigation in Delaware courts.[74] The production of documents is, in many ways, a cost of doing business for both Intel and AG.[75] The Court also takes note of Intel's contention that these documents can be electronically sent from one location to the other with relative ease. Finally, without further discovery, the Court recognizes this factor is speculative. It is unknown what documentation was exchanged between AG and Intel as the two parties discussed AG's potential duty to defend allegedly triggered by the AMD Action.

For all of these reasons, the Court finds the access of proof slightly favors AG. Furthermore, one can only speculate about any issues of ease of access to proof involving the other insurers considering the geographical spread of their principal places of business.

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[72] AG JN, Ex. A, AMD Action Compl. ¶¶ 6, 40-44.

[73] *Id.* at ¶¶ 65, 75, 93, 94, 100, 106.

[74] *Hifn, Inc. v. Intel Corp.*, 2007 WL 1309376 (Del. Ch. May 2, 2007).

[75] *Sequa Corp.*, 1990 WL 123006, at *5.

C. Compulsory Process for Witnesses

Intel notes, at the current time, it has identified two potential non-party witnesses who were instrumental in the formation of the '01-02 insurance contract between it and AG.[76] Those witnesses are currently employed by an insurance brokerage company located in the state of California. It further argues that the parties are unlikely to call any witnesses that are currently residing in Delaware. For these reasons, Intel contends that these proceedings should be conducted in California because those courts have the requisite power to compel witnesses to appear before the court.

AG argues the two identified witnesses who should be given only passing scrutiny by this Court because of the uncertainty concerning whether they will be needed to resolve this contract dispute, which revolves around an advertising clause. It also states depositions can be taken, in the traditional manner or by videotape, if asked by Intel.

The desire of Intel to have live witnesses testify in open court is a legitimate concern. The Delaware Supreme Court, on a motion to dismiss for *forum non conveniens*, has stated the importance of having live witnesses in civil actions as opposed to deposition testimony. However, the Court also noted "[i]t is quite ordinary for Delaware Courts to determine courses in which all persons involved are non-residents of Delaware and in which none of the events involved occurred here."[77]

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[76] Intel's Br. at 25.

[77] *See generally, Kolber v. Holyoke Shares, Inc.*, 213 A.2d 444, 446 (Del. 1965) (continued...)

Although this Court would, admittedly, not have the jurisdictional power to compel the two non-party witnesses to attend a trial in Delaware, it would have the tools to ensure depositions of those witnesses to take place in California by obtaining a commission to depose an out-of-state witness through Super Ct. Civ. R. 28, 30, and 45(d).[78]

The Court also finds the need for live witnesses in this particular case to be attenuated for multiple reasons. First, the controversy between the two parties appears to be centered upon contract interpretation. At this stage, the only policy at issue in the Northern District Action and one of the ones at issue here is a follow-form policy (the current record does not reveal the nature of AG's other policies with Intel). That strongly suggests the core issue is the coverage language in other insurers' policies and removes the role of any intermediary insurance agency. More specifically, both parties have asked either this Court or the District Court in California to settle questions by granting declaratory relief. If that is the case, the legal question will focus upon the few relevant clauses in the policy and whether that language is determined to be ambiguous or unambiguous. Of course, if the policy is deemed to be unambiguous, no live testimony

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[77](...continued)
(finding there was no undue hardship against moving defendants on a motion to dismiss on *forum non conveniens*) .

[78] *See*, *Rosen v. Wind River Systems, Inc.* 2009 WL 1856460, at *6 (Del. Ch. Jun. 26, 2009) (holding the moving party had not shown "anyone who is outside of this Court's jurisdiction who could not be reached via its commissions procedure").

will be required.[79] However, in the event the contract language is ambiguous, the fact that two witnesses have been identified in California does not tip the scales to benefit Intel. Although Intel has identified two non-party witnesses and stated their relationship in the formation of the one insurance contract between itself and AG, it has failed to explain why, in a case of this nature, live testimony would be superior to a video deposition or to a live transmission from a remote site.[80]

Furthermore, in the event live testimony is required, Intel has admitted the possibility that witnesses may be needed who are currently residing in Illinois or New York.[81] Therefore, no matter where this case is heard, it appears likely that those witnesses are scattered throughout the United States and are not concentrated solely in California. It is likely any trial court would have difficulty exercising the compulsory process for witnesses. Again, in light of the extent of their national business operations, the Court doubts any argument in this litigation concerning the difficulty that would be required to have live witnesses appear in court or obtained through other means.

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[79] *Lorillard Tobacco Co. v. American Legacy Foundation*, 903 A.2d 728, 739 (Del. 2006).

[80] *See, States Marine Lines v. Domingo*, 269 A.2d 223, 226 (Del. 1970) (supporting the use of depositions of third or non-party witnesses in the Philippines, albeit on an undue hardship standard).

[81] Intel's Reply Br. at 9.

This Court's power, with the assistance of the Superior Court in California, to obtain the presence of non-party witnesses can be used to have them appear in California for a video trial deposition. Such depositions are frequently used in jury trials in this Court. In addition, such witnesses could be directed to appear to a convenient location in California where there would be a live video hook-up directly to one of the jury courtrooms in this building. This Court has the technical capability to receive such a live "feed."

The Court also notes the issue of compulsory process was considered by the Northern District Court in its *forum non conveniens* analysis and was found to be neutral.[82] While that decision does not bind any decision in this case (considering there are additional parties in this action), it is instructive given the fact that the non-party witnesses identified by Intel residing in California would be under compulsion to appear before the federal court. Clearly, if Intel believed it important to be able to compel the non-party witnesses it has identified, then it would have made such an argument to the Northern District Court. Yet, such an argument, if made, did not compel the federal court to rule in favor of Intel on this factor. Instead, the District Court stated the factor was neutral.

In sum, this Court also finds the factor to be neutral. This case will be determined by principles of contract law and it is uncertain whether any witnesses will ever be

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[82] *Intel Corp. v. American Guarantee & Liability Ins. Co.*, 2009 WL 1653014, at FN 6 (N. D. Cal. Jun 11, 2009).

required. If they are needed, the Court finds the technology available to it would be sufficient.

D. View of the Premises

There are no premises to view in this matter. This is a non-factor in the overall *forum non conveniens* determination.

E. Pendency of Similar Action in Another Jurisdiction

There is, of course, the related action Intel filed against AG in the United States District Court for the Northern District of California. The Court describes it as "related" because Intel's initial action against AG invoked only one policy insuring one year, April 1, 2001 to April 1, 2002. None of the insurers AG named here were included by Intel in its complaint in the Northern District Action.

On July 10, 2009, AG filed a third party action bringing in all of these insurers to the Northern District Action.[83] AG represents it is entitled to do so under 28 U.S.C. §1367(a). AG and Intel inform this Court that, as a third party action to a case where there was originally diversity, the District Court in California is not divested of jurisdiction and, instead, supplemental jurisdiction may be exercised.[84]

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[83] After being informed of this step, the Court ordered supplemental memoranda concerning the diversity issue and the effect this step had on this case and Intel's pending motion.

[84] Intel's Reply Br. at 13-14; AG's Supplemental Memorandum (July 15, 2009).

Before considering the effect of AG's third party action as it relates to staying or dismissing this case, the Court believes it appropriate that it first undertake an analysis of Intel's original action solely against AG.

Intel argues Delaware would be an inefficient location in dealing with the current insurance dispute between it and AG. Intel points out that AG's '01-02 policy is a follow form policy to XL's, which has been previously litigated. Therefore, the policy adopts the terms and conditions of the policy that precedes it, so that the policies cover the same type of risk. Intel submits the courts in California, have inquired into the *Barbara's Sales* and *Skold* actions in the action Intel had brought against ICSOP. AG's policy also follows form with ICSOP's policy. With this judicial familiarity, Intel submits that the Northern District Court has more experience with this language and, therefore, would be the more efficient forum.[85]

Intel also alleges the Standstill Agreement with AG has been breached and that breach can only be resolved in a "California court". Intel has made a claim for breach in its first amended complaint in Northern District Action. Therefore, it argues the more comprehensive action will resolve the insurance dispute and the breach of contract dispute.

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[85] This argument, however, no longer carries weight. Intel and ICSOP settled their case before that court had a chance to rule on the policy and coverage issues; coincidently the same judge and court which have the Northern District Action. Further, the ISCOP matter involved the law suits in California where no anti-trust allegations were made, and the one ruling was from the Superior Court in the XL case.

Finally, Intel argues it is entitled to engage in an "all sums" approach under either California or Delaware law.[86] Intel submits it is within its discretion to pick which policy from which to seek defense and indemnification, so long as that policy was applicable for any year in which the underlying complaint has stated a potential claim covered as set forth in the insurance policy. Intel argues AG would be able to seek contribution from any party it believes it is entitled to receive contribution. However, Intel submits those concerns are outside of this dispute which centers on the question of a duty to defend. If there are other parties of interest, Intel argues those parties can join the action in California, as Markel has already done in the Northern District Action and the *ICSOP* Action.

In conclusion, Intel argues AG's concerns of contribution are legally premature. To the extent that the other parties are involved in this case, Intel submits these parties have been placed before this Court to inject the idea that such action would be more comprehensive.

In response, AG and Markel assert Intel is engaging in a course of conduct which is intended to "pick-off" one insurer at a time and that this conduct is fostering a waste of judicial resources. AG states its intent in filing suit here in Delaware is to establish a comprehensive litigation in which all parties potentially implicated, including Intel, are brought together in order to determine which party or parties may be responsible to Intel.

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[86] *Aerojet-General Corp. v. Transp. Indem. Co.*, 948 P.2d 909, 930 (Cal. 1997); *Hercules Inc. v. AIU Ins. Co.*, 784 A.2d 481, 489 (Del. 2001). (Neither case expressly upholds Intel's approach; only by inference can such an approach be extracted.)

AG originally argued joinder of all the parties listed in the case before this Court would destroy federal diversity due to some insurers' citizenship in Delaware.

Even though AG has now added a third party complaint against those additional insurers in the Northern District, it maintains the action here is the only forum that can fashion a global resolution with Intel and the underlying AMD Action. AG contends it was compelled to file the third party complaint to protect their rights, following any decision made by the federal court. It continues to maintain that the Northern District Action lacks the comprehensive nature of this case and Intel will necessarily continue to move against individual insurers. Although AG states it is ready to defend the claims revolving around the breach of the Standstill Agreement, AG does not squarely address why that claim does not make the Northern District Action more comprehensive in that single respect.

This Court's analysis of comprehensiveness begins with the jurisdictional concerns AG raised at oral argument. That action initially began with Intel suing AG. Intel's complaint raises no federal question of law; its complaint relies solely on diversity jurisdiction. The Northern District Action, the time of oral argument, did not involve any of the other insurers in the complaint in this Court except Markel. Since oral argument, AG has added its third party complaint against the insurers it added as defendants in this action.

Therefore, given the third party complaint filed by AG, it is fair to say that the Northern District Action is comprehensive when considering the '01-02 policy AG entered into with Intel. Nor is there any doubt the federal court can resolve that dispute. This Court, however, views that action as one piece of large and intricate insurance coverage plan which Intel has obtained over the years in which the AMD Action makes allegations against Intel.

All parties agree the defense costs being accrued by Intel in the underlying AMD Action still will not be covered should Intel obtain the $50 million in defense coverage it believes it is owed from AG for the '01-02 policy. Other policies will be implicated in the future, regardless of how the dispute between Intel and AG resolves. Then, it appears certain Intel will sue another insurer. This Court notes that Intel, at a later date, might also turn around and ask for declaratory relief under another AG policy that Intel purchased for a different period of time.

Defense costs continue to mount. The trials in the underlying AMD Action are scheduled to begin in February and March of 2010 and last four weeks in total. Two hundred-fifty depositions were authorized, but this Court does not know how many were taken, how many remain to be taken, or the length of those depositions to be taken. Furthermore, Intel has represented to this Court that the AMD action, regardless of the outcome at the trial level, will likely be appealed, leading to more money spent for defense.

This Court acknowledges that as to AG, the Northern District Action has one claim this Court cannot resolve. It is Intel's claim for breach of the Standstill Agreement. That claim is due to Intel's amended complaint injecting breach of the Standstill Agreement. What is curious about that claim is the language in the Standstill Agreement itself stating that, "Any disputes regarding the interpretation and enforcement of this Standstill...Agreement...does not apply to any disputes involving Intel's requests for coverage under policies issued to Intel by [AG]."[87] In other words, the breach claims stand alone, unrelated in their resolution to the coverage issues. Any claim for a breach under its terms has to be resolved under California law in a "California court." That wording is, at a minimum, curious if not ambiguous, such that perhaps only a California state court, not federal, has exclusive jurisdiction. Intel argued here that the language meant a California state court or federal court in California. Query?

The Northern District Action, however, represents the third time Intel has brought suit against one of its numerous insurers and Markel has, once again been compelled to intervene. While that action may determine the issue of AG's coverage liability, it is unclear what, if any, precedential effect that decision may have on the other insurer defendants in this case. The California Superior Court in Intel's action against XL determined that XL had a duty to defend the *Barbara's Sales* and *Skold* actions based on the allegations of the violation of California statutes in those complaints and the advertising clause in XL's policies.[88] Apparently, XL settled with Intel after that decision.

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[87] Intel JN, Ex. G, at ¶ 17.

[88] Intel Submission, Ex. C, at 15 (Jun. 11, 2009).

When Intel sued ICSOP, it made passing reference to that decision.[89] It is difficult to discern, however, if Intel cited that decision as a sword against ICSOP. Intel did not use the XL decision as a basis for staying or dismissing the action in this Court. In any event, there will be no judicial interpretation of ICSOP's policy(ies) since that case has also settled.

Intel argues AG's policy uses the same advertising liability language which is found in ICSOP's policy.[90] Presumably, Intel makes that argument based on AG's policy being follow form. But Intel's argument raises another issue. The ICSOP policy for which Intel sued to obtain coverage was for the year preceding the policy year for which it is now seeking coverage from AG. Three flaws appear in Intel's argument.

First, it is undetermined if AG's '01-02 policy specifically incorporates the risk covered in ICSOP's policy for a prior year, and ICSOP's policy is not below AG's in the '01-02 period. Second, arguing a linkage between a '00-01 policy of another insurer to AG's policy of '01-02 strongly supports the arguments of AG and Markel criticizing Intel's strategy of plucking off one insurer at a time. Intel, by linking ICSOP's '00-01 policy to

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[89] Intel JN, Ex. 2 at ¶ 20 ("On or about February 7, 2008, the Honorable Jack Komar, in interpreting the XL 00-01 Policy as part of the lawsuit entitled *Intel Corporation v. XL Insurance America, Inc.*, Superior Court of California for the County of Santa Clara, Case No. 1-06-CV-061620, found that "XL [had] failed to establish that Intel [had] not potentially covered liability in the Underlying Litigation and therefore there is a duty to defend.").

[90] Intel's Br. 29.

AG's '01-02 policy, reinforces AG's and Markel's position that a global resolution is infinitely better. Third, there is the additional consideration of whether there are any insurers in the '00-01 year which are above (or below) ICSOP and perhaps should have been required to defend prior to Intel jumping to another policy year.

The issue of precedential effect is key. The AMD Action covers years preceding Intel's claim for the one policy at issue in the Northern District Action. It is unclear where the other insurers stand in relation to each other in Intel's insurance coverage scheme.[91] Intel has gone up the totem pole of insurers for one year, according to the Northern District Action complaint. ORIC, XL, and now AG have been asked by Intel to defend it for policies covering April 1, 2001 to April 1, 2002. Intel has apparently spent over one hundred million in defense costs, so far, in the AMD Action.

Analogous to AG's action here are two California cases, *Montrose Chemical Corp. of California v. Admiral Ins. Co.*[92] and *Aerojet-General Corp. v. Transport Indemnity Co.*,[93] and two Delaware cases, *Monsanto Co. v. Aetna Casualty & Surety Co.*,[94] and

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[91] It is unknown, at the moment, the hierarchy of policies implicated by the complaint in the underlying AMD Action in Delaware. Additionally, there may be other insurers "at risk" besides AG and the fifteen other defendants here.

[92] 913 P.2d 878 (Cal. 1995).

[93] 948 P.2d 909 (Cal. 1997).

[94] 565 A.2d 268 (Del. Super. 1989).

Hoechst Celanese Corp. v. National Union Fire Ins. Co. of Pittsburgh.[95] There is a role reversal, of course, between this case and three of those cases. The insureds were seeking a declaration of coverage: in *Monsanto* where there were 38 insurer defendants, in *Montrose* there were 7 insurers, and in *Hoechst Celanese* there were 37 insurers. Originally, in *Aerojet-General*, as is the case here, one of the insurers was seeking declaratory relief involving the insured and other insurers.[96] Umbrella and excess policies in those cases were potentially triggered (as here). Indeed, in *Montrose*, the insured sought declaratory relief in relation to its insurers.[97]

However, rather than taking the cumulative approaches of these cases, Intel has sued one insurer at a time under the all sums doctrine. Intel has failed to persuade this Court that its course of conduct is more efficient. Its serial approach may serve some appropriate internal motive but, in a broader context, that approach results in a potentially unwanted imposition on judicial resources.

While the issue in *Monsanto* and *Hoechst Celanese* was "ripeness" of some of those policies (an argument Intel did not raise explicitly but hinted at in its brief),[98] the holdings

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[95] 623 A.2d 1133 (Del. Super. 1992).

[96] Aerojet-General, however, cross-claimed in that action against 54 insurers seeking a declaration they were obligated to defend.

[97] *Montrose*, 913 P.2d at 881.

[98] Intel's Br. 27.

that all the carriers' policies were potentially triggered emphasizes the need to be all-inclusive for all or most the carriers in this case, and maybe others not yet known. In the instant case, that viewpoint is bolstered because Intel has been compelled or has chosen to file three separate suits against three different carriers for the *Skold* and *Barbara's Sales* Actions. In those cases, the carriers (ORIC, XL and ICSOP) replied to Intel that it lacked the necessary information to make a coverage determination. It is the same complaint against Intel that AG and Markel make here.

In addition, there is the possible role of XL. XL was one of the carriers Intel was compelled to sue, albeit over the *Skold* and *Barbara's Sales* actions. AG moved in the Northern District Action to have XL considered an indispensable party. However, the court concluded XL was not indispensable after applying Fed. R. Civ. P. 19 even though Intel admitted the settlement proceeds did not reach XL's full policy limits.[99] That policy sits directly below AG's policy at issue in this Court and the Northern District Action. As a general rule to trigger AG's coverage, the fifty million dollars would have to be paid in full first or AG's consent would be required for a payment of less to constitute exhaustion in order to find that the policy below had been exhausted, barring other language in AG's policy sitting above XL's policy.

[99] *Intel Corp. v. American Guarantee & Liability Ins. Co.*, 2009 WL 1653014, at *8 (N.D. Cal. Jun. 11, 2009).

The District Court determined the Intel/XL settlement agreement meant XL was not an indispensable party as AG contended. However, the settlement agreement, indicating XL paid less than its full policy limits, raises the issue of exhaustion. That issue has not been briefed but lingers on the horizon. XL is on the radar screen in this case and stands as a third party in the Northern District Action. However, it is a party here and it may have to take a key role in the global resolution of the coverage issues.

In spite of the potential jurisdictional question concerning the breach of Standstill Agreement, this Court must take into consideration the magnitude of the claims before it. While the alleged breach of the Standstill Agreement can only be resolved in some court in California, the breach, when compared to insurance questions before this Court, pales in comparison to the amount of money and legal work that will be expended in determining the potential liability of insurers to Intel for the AMD Action.

Intel has devoted a large amount time and words to the "all sums" doctrine within insurance law. It is the legal "hook" that it has employed to reel in whatever individual carrier, policy, or policy year it deems fit, so long as the underlying action states a claim that potentially triggers coverage. Nor is there any dispute that "all sums" is the law in both California and Delaware.[100] As the California Supreme Court went on to explain in *Aerojet-General,* the all sums doctrine is applicable "[i]f specified harm may possibly have

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[100] *See Aerojet-General Corp. v. Transport Indem. Co.*, 948 P.2d 909 (Cal. 1997); *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481 (Del. 2001).

been caused by an included occurrence and may possibly have resulted, at least in part, within the policy period, the duty to defend perdures to all points of time at which some such harm may possibly have resulted thereafter."[101]

Unlike the all-encompassing approaches in *Aerojet-General* and *Hercules*, AG and Markel ask this Court to focus on the pattern of conduct taken by Intel in its individual pursuits for coverage. They contend that Intel's behavior, while permissible under an all sums doctrine, will ultimately lead to excessive waste of judicial resources. Neither *Aerojet-General* nor *Hercules* considered such an issue, that all sums entitled an insured to seek coverage in a serial fashion, as here. As far as this Court is informed, the issue is a novel question of law in the context of a motion such as the one before the Court.

AG's argument has retrospective and prospective viewpoints. First it asks for an examination of other insurers' policies and/or self-insured retentions in policy years preceding the '01-02 policy year at issue in the Northern District Action. There could be an issue of coverage under those policies which may be implicated. That coverage issue may also raise the issue of apportionment now that several insurers have been ensnared. Prospectively, with substantial additional expenses a certainty, those prior insurers and SIRs and future policies and SIRs may be implicated.

Aerojet-General and *Hercules*, however, were retroactively looking at the question of insurance liability for either defense costs or indemnification. In both of those cases,

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[101] *Aerojet-General*, 948 P.2d at 930.

the liability question (i.e. the dollar amount owed) in the underlying suits had been resolved at trial by a jury. Therefore, these cases were looking retrospectively.

The Court does not dispute the use of the all sums doctrine as it pertained to the facts of those particular cases. However, given that this case is only at the duty to defend phase of litigation, which is still active, and Intel is now seeking declaratory relief from its third insurer, there is a serious and real potential for Intel to continue its piecemeal attack to a point that stretches judicial resources in several jurisdictions too thin. In the event that Intel seeks coverage from an insurance carrier that is a Delaware corporation, it will have to sue them in Superior Court in California, or maybe in this Court. Over two years ago, in the XL case, the Superior Court judge noted that Intel had already incurred 32.8 million dollars in defense costs just in the California actions, styled *Intel X86 Microprocessor Cases*.[102] Defense costs continue to climb.

But this Court and the District Court of California do not stand alone as the only entities or parties to be drained of time and resources.[103] Markel is an example of the "cost" of Intel's pattern of selecting one insurance policy to demand defense coverage. Intel tendered claims to Markel due to the *Barbara's Sales* and *Skold* Actions. Markel has alleged it experienced great difficulty in obtaining information on which to base its

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[102] Intel Submission, Ex. C, at 8 (June 11, 2009).

[103] The District Court in California has now been brought into Intel's web on two separate occasions and that pattern, based on history, is likely to continue unless another approach is used.

coverage determination on those Actions. Accordingly, when Intel sought coverage from ICSOP on the same underlying actions, Markel moved to intervene in the *ICSOP* Action. Markel's motion was granted and, once joined, Markel moved to oppose Intel's motion for summary judgment on the issue of ICSOP's duty to defend, which now may be moot due to settlement of the case so long as a final resolution is obtained by the parties. Markel submitted to the Court that Intel was in the process of seeking to dismiss it by stipulation in the *ICSOP* Action before the Court learned of this settlement. Because of the *ICSOP* experience, Markel moved to intervene in the Northern District Action, which was granted because Intel did not oppose the motion. Here, Markel has moved with AG to seek a global resolution of these coverage questions. Therefore, at the time oral arguments were presented before this Court, Markel was an active participant in three matters (*ICSOP*, the Northern District Action, and the suit here), two of which were initiated by Intel.

Curiously, if California law applies to the resolution of the issues in this case, *Montrose* and *Aerojet-General* provide some potential guidance helpful even on the motion to stay or dismiss. This is so even though these cases involved coverage for physical property damage, personal injury or death. *Montrose* held that where there are successive comprehensive or commercial general liability (CGL) policies, bodily injury that continues or is progressively deteriorating throughout more than one policy period is potentially covered by all policies in effect during those periods.[104] That holding was re-enforced in *Aerojet-General*:

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[104] 913 P.2d at 901-02.

> That claim was at least potentially covered in part under each of the policies pertinent here because it might possibly involve specified harm caused by an included occurrence, with triggering harm of that sort within the policy period in question. Each insurer was "on the risk" for at least one such period. None was on the risk for all.[105]

Aerojet-General also made clear that if a covered harm occurs during a policy period, coverage/liability continues past that period if the harm continues.[106] That translates into a potential liability to pay "all sums" up to policy limits discussed earlier.

But both *Aerojet-General* and *Montrose* have holdings pertinent to AG's complaint seeking allocation. In *Montrose*, the California Supreme Court said, "[f]irst, leaving aside the availability of excess (multiple) policies or 'other insurance' clauses, and absent express policy language decreeing the manner of apportionment of contribution among successive liability insurers, the courts will generally apply equitable considerations to spread the cost among the several policies and insurers."[107] The California Supreme Court in *Montrose* went on to state, "[o]ur conclusion that the continuous trigger of coverage should be applied to the third party CGL policies in this case is also in conformity with several important policy considerations."[108]

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[105] *Aerojet-General*, 948 P.2d at 928 (footnote omitted).

[106] *Id.* at 919.

[107] *Montrose*, 913 P.2d at 902 (citations omitted).

[108] *Id.*

Montrose involved the duty to defend, as here, in ongoing litigation and where the coverage suit Montrose filed involved other insurers. What the California Supreme Court did not have before it, however, was this situation where the available policy limit has already been spent or soon will be and the possible need to equitably apportion defense costs among various insurers.

AG is an excess carrier, at least in the 2001-2002 policy year at issue in the Northern District Action, and perhaps other years. Other defendant insurers are probable excess carriers and some may be insurers in line below AG in years other than '01-02. At this point, neither this Court nor the District Court knows of any qualifying language such as the above quote recognizes which could affect any insurer's duty to defend and possibly share in the costs of defense.

Similarly, in *Aerojet-General*, the California Supreme Court said:

> Be that as it may, let us assume that, if Aerojet had been issued policies by INA that were not of the "fronting" kind, INA might have been required to make an equitable contribution to the defense costs. That assumption, however, does not compel the conclusion that, because it was issued "fronting" policies by INA, Aerojet should be required to make such a contribution itself. Although insurers may be required to make an equitable contribution to defense costs *among themselves*, that is all: An insured is not required to make such a contribution *together with insurers*.[109]

The California Supreme Court uses the phrase "equitable" distribution when referring to dividing up costs of defense or indemnification. That is not a "foreign" or

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[109] *Aerojet-General*, 948 P.2d at 929-30 (emphasis in original) (citations omitted).

unheard of concept to Delaware jurisprudence. This Court used it in *E.I. duPont de Nemours and Co. v. Admiral Ins. Co.*[110] In that case, this Court imposed a "modified" pro-rata allocation.

When, however, the Supreme Court in *Hercules*, adopted an "all-sums" liability approach, it seemed to criticize such a modified pro-rata allocation. But it did so, in part, based on a particular provision in the policy at issue in that case.[111]

This Court is not saying that allocation is necessarily an issue now which favors denying dismissal or stay, but the known insurers are here and this Court has jurisdiction over all of them. And if California law applies, the principle of "equitable distribution" may come into play.[112]

In its Northern District Action complaint, Intel refers to ORIC's eleven million dollar policy as a "fronting" policy.[113] It is unclear to this Court why ORIC's policy is so

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[110] 1995 WL 654020 (Del. Super. Oct. 27, 1995). The Superior Court case was originally assigned to (now) Chief Justice Steele while he served on Superior Court, but that assignment moved with him to the Court of Chancery when he became a Vice-Chancellor. It is important to note that Chief Justice Steele, in 1995, recognized continuous trigger.

[111] *Hercules*, 784 A.2d at 494.

[112] This Court notes that in *Aerojet-General* the Supreme Court said such distribution is among insurers and does not include the insured. In *duPont*, this Court included duPont as part of its equitable allocation because there were several years where duPont did not purchase insurance and was "self-insured."

[113] Intel JN, Ex. 1, ¶ 10.

described. The term is not a common one in Delaware jurisprudence, but it has a clear meaning in California jurisprudence: "a policy which does not indemnify the insured but which is issued to satisfy financial responsibility laws...by guaranteeing to third persons who are injured that their claims against [the tortfeasor] are paid."[114] Delaware's mandatory insurance for vehicle ownership registration would meet that definition.[115] Perhaps ORIC's "fronting" policy was like the equivalent "fronting" INA policy in *Aerojet-General*.[116]

It may become very important, if California law applies, to know whether the ORIC or other possible "fronting" policies were such. If the issue of apportionment of defense costs arises, fronting policies cannot be made to contribute, but if they were not fronting policies they may be required to make an equitable contribution to defense costs.[117] At some point, therefore, in the global resolution of this case, the status of alleged "fronting" policies may have to be addressed. In cannot be in a single insurer setting, however.

Though the above analysis covered Intel's suit against AG alone, that analysis is beneficial when considering the effect of AG's recently filed third party complaint. There

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[114] *Columbia Cas. Co. v. Northwestern Nat'l Ins. Co.*, 282 Cal.Rptr. 389, 397 (Cal.App. 4 Dist. 1991).

[115] 21 *Del. C.* § 2118.

[116] *Aerojet-General*, 948 P.2d at 928-29.

[117] *Id.* at 929.

are two threshold considerations. One, AG and Intel agree the District Court is not divested of jurisdiction by non-diverse parties being included in the third party action. Two, AG says it had to file because of Fed. R. Civ. P. 14(a). Intel, counters, by saying AG could have waited to filed until after its suit against AG was resolved. However, AG and Markel have sought to avoid this result, arguing such a course involves continued piecemeal litigation.

The Court does not view AG's third party action as now making the Northern District Action more comprehensive than this action as Intel argues. The Court expressed above why it finds the original Intel action against AG, including considering the claim for breach of the Standstill Agreement, as less comprehensive. The quintessential issue in both actions is coverage of substantial past and future defense costs, and potentially later contribution.

Based on what has been expended to defend the California court suits against Intel and the AMD Action, substantial sums will be needed. Conceivably, that issue may be resolved in AG's third party action, possibly without any binding effect on Intel.[118] To avoid it jumping from one carrier or policy, or both, and to make it a party to that resolution, the action here remains the more comprehensive. What would prevent Intel from claiming that it is not bound by a resolution of AG's third party suit and continuing on its current piecemeal approach unless it is bound? As a party with the insurers here, it becomes bound and the serial law suits end.

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[118] *Sta-Rite Indus. v. Allstate Ins. Co.*, 96 F.3d 281, 286 (7th Cir. 1996).

In sum, AG's third party action in the Northern District Action does not change the Court's overall analysis of Intel's motion. AG's third party action does not make the cases so similar that a stay or dismissal is warranted.

E. Other Considerations

Finally, the Court may consider any other relevant factors which may support one forum over another. In this case, there are additional considerations.

First, the Court has taken note of the retention of this case in the Northern District of California. This Court values highly the importance of judicial comity. However, since both courts may be applying California state law to at least one policy, this Court finds its ability and authority to oversee the present dispute as being, respectfully, on an equal footing with the Court in Northern District Action. Quite simply, this Court has been assigned a case that is different in its makeup from that in California. AG's arguments that have appealed to judicial efficiency are compelling, as well as the Court's own observations, and have convinced this Court, respectfully, that the more comprehensive action is here.

Yet, the action in the Northern District of California will proceed. Of course, this does leave open the possibility that both this Court and the Northern District Court might rule on the same question and hand down two judgments, which may or may not be in accord with each other. To that extent, this Court will attempt to navigate a course that will not impeded on the narrow question of AG's duty to defend Intel when compared

against the broader duty to answer questions that would be before this Court. Communication between this Court and Judge Fogel in California is not out of the question to insure efficiency and maintain comity.[119]

Additionally, there are the thirteen named insurers that took no position at oral argument. Their silence is admittedly a little confusing. However, the Court acknowledges, at this moment, it has, at best, an unclear picture of where these parties and their respective insurance policies fall into Intel's overall coverage scheme. It is possible some parties may not even know where they stand in relation to each other or fully appreciate their potential vulnerability. It is clear, of course, that Intel has not yet tendered any defense to many of these insurers as far as this Court knows. Because the Court does not know whether these additional parties took no position based upon some tactical consideration, a confidential agreement with Intel, a lack of knowledge concerning the situation, or blissful ignorance, the Court cannot say whether the silence of these parties should weigh in either Intel or AG's favor. However, by retaining all of the parties, the potential for a global resolution in this litigation remains possible.

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[119] *See, Rosen v. Wind River Systems, Inc.*, 2009 WL 1856460, at *7 (Del. Ch. Jun. 26, 2009).

Conclusion

For the reasons stated herein, Intel Corporation's Motion to Stay or Dismiss is **DENIED**.

IT IS SO ORDERED.