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COURT OF APPEALS

STATE OF NEW YORK

REMET CORPORATION,

Appellant,

-against-

No. 129

ESTATE OF PYNE, et al.,

Respondent.

20 Eagle Street
Albany, New York 12207
September 09, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 129.

2 Counsel, you want any rebuttal time?

3 MR. CHESIN: Two minutes, please.

4 CHIEF JUDGE LIPPMAN: Two minutes. Sure.

5 Go ahead, counsel.

6 MR. CHESIN: May it please the court, Scott
7 Chesin from Mayer Brown for appellant Remet
8 Corporation.

9 Your Honors, in 2002, Remet received a
10 letter from the New York State Department of
11 Environmental Conservation that was marked urgent,
12 stating that a reply was - - -

13 CHIEF JUDGE LIPPMAN: Does that require
14 action?

15 MR. CHESIN: Oh, absolutely. Yes.

16 CHIEF JUDGE LIPPMAN: When - - - when you
17 receive that what do you - - - that notice, what do
18 you have to do?

19 MR. CHESIN: Well, at the very least, what
20 the letter says on its face, on the very first page
21 it says, "prompt reply necessary", and on the very
22 last page it says that if you don't enter into a
23 consent decree within thirty days, this letter serves
24 as a demand for payment.

25 CHIEF JUDGE LIPPMAN: So you're required to

1 do whatever they're telling you to do?

2 MR. CHESIN: You're required, at the very
3 least, to reply to the letter, and reply to the
4 letter doesn't mean just call them up, it means do so
5 in a reasonable - - -

6 CHIEF JUDGE LIPPMAN: But if you don't
7 reply - - -

8 MR. GINGOLD: And if you don't reply it
9 means you're required to pay the State for the
10 remediation.

11 CHIEF JUDGE LIPPMAN: For doing it.

12 MR. CHESIN: For - - -

13 CHIEF JUDGE LIPPMAN: - - - do - - - doing
14 it.

15 MR. CHESIN: Yes.

16 CHIEF JUDGE LIPPMAN: The State will do it,
17 and you'll pay for it.

18 MR. CHESIN: The State - - - the State will
19 do the remediation and - - - and the - - - and - - -
20 and send a bill, with interest, according to the
21 letter, accruing from the date of the letter.

22 JUDGE RIVERA: Is that always certain,
23 there's no way to avoid that?

24 MR. CHESIN: Oh, there may be - - -

25 JUDGE RIVERA: I mean payment to the State?

1 MR. CHESIN: There are opportunities that
2 are granted by the statute for certain types of
3 defenses to be raised. Those defenses are very
4 limited. But at the very least, if you don't reply
5 to the letter immediately, there are immediate
6 consequences.

7 JUDGE PIGOTT: I was surprised in reading
8 all of this that there was a lot of discussion about
9 indemnification and little or no discussion of
10 defense, and it was a defense and indemnification
11 clause which I would have thought would have required
12 Pyne to take it from the day that letter showed up
13 all the way through and that you had little or
14 nothing to do?

15 MR. CHESIN: The agreement gives Pyne that
16 option, an option that the - - - that Pyne - - - that
17 Mr. Pyne and then ultimately the Pyne Estate declined
18 to exercise. In Section 8.3 of the - - - the
19 relevant agreement, it spells out exactly what the
20 procedures are for making a claim of indemnification
21 and a claim for defense. It says when you, as the
22 indemnified party, receive a communication from a
23 third party that they're asserting some sort of claim
24 against you, you have to promptly notify the
25 indemnifying party of the nature of the claim; to the

1 extent feasible you're supposed to give an estimate
2 of what the costs are going to be; and then you have
3 to give the Pyne - - - Mr. Pyne or ultimately the
4 Pyne Estate the opportunity to take over defense of
5 the claim.

6 JUDGE PIGOTT: Did you do that?

7 MR. CHESIN: We - - - absolutely we did.
8 We did it on November 8th, 2002, in a letter that
9 appears in the record at page 239, we cited the
10 relevant section, we said do you want to take over
11 defense of the claim. And what the statute - - - not
12 statute, what the - - - what the agreement says is
13 that Mr. Pyne then had thirty days to determine
14 whether he was going to take over defense of the
15 claim, and if he didn't, then the agreement gave
16 Remet or Remet's predecessor in interest the option
17 to pay, contest, or settle the claim on its own
18 without giving up its claim for indemnity. That's
19 what the - - - that's what the agreement says.

20 JUDGE STEIN: Does Remet have to actually
21 pay out the money within the ten-year period in order
22 to be indemnified?

23 MR. CHESIN: Absolutely not. What the
24 agree - - -

25 JUDGE STEIN: Why not?

1 MR. CHESIN: The agreement doesn't say that
2 claims - - - the - - - the agreement doesn't say that
3 there's an obligation to indemnify for money expended
4 or money paid during the ten-year period. It says
5 that there is an obligation to indemnify and to
6 settle all claims that are made within the ten-year
7 period. This is Section 8.5 of the agreement.

8 JUDGE FAHEY: Are - - -

9 MR. CHESIN: It's the - - -

10 JUDGE FAHEY: Are - - - are the - - -
11 environmental claims are defined very broadly in the
12 PSA.

13 MR. CHESIN: Yes.

14 JUDGE FAHEY: I - - - I think it's 8.5, but
15 what I'm wondering is if does that definition carry
16 over to the phrase "environmental losses", which is
17 what I believe is used in the indemnification
18 agreement?

19 MR. CHESIN: No. It - - - it's very - - -
20 it's peculiar.

21 JUDGE FAHEY: Um-hum.

22 MR. CHESIN: There's a definition of
23 environmental claims - - - it's in the definition
24 section in Section 1 - - - that phrase, it's defined,
25 but then it's never actually used throughout the rest

1 of the agreement. What the agreement does in the
2 indemnification section, in 8.1, it says here are the
3 types of losses that are subject to indemnification.
4 And it's very broad; it says all liabilities,
5 damages, reasonable attorney's fees, reasonable
6 investigatory costs, out-of-pocket costs, et cetera.
7 It says these are the - - - "so long as" - - - and
8 I'll read it to you - - - "those costs result from
9 actions that Remet is required to take under or in
10 connection with any environmental law." These are
11 the things that are reimbursable or that the - - -
12 that the - - - that the indemnifying party can choose
13 to lay out. So - - -

14 JUDGE PIGOTT: Did Mr. Pyne, when - - -
15 when he was alive, was he working with you on this?

16 MR. CHESIN: He absolutely was. When he -
17 - - Mr. Pyne never received the PRP letter directly,
18 the PRP letter was sent to Remet. Two weeks later we
19 sent a copy of it to Mr. Pyne copying his attorneys,
20 and initially Mr. Pyne participated with Remet and
21 with four of the five other PRPs in doing a limited
22 site investigation, in talking with the DEC, and
23 engaging in negotiations.

24 JUDGE FAHEY: Well, that's - - - what - - -
25 what's interesting here is this really comes down to

1 does a - - - does a PRP letter constitute a suit, and
2 in - - - in my research of it, it seems that there
3 are fourteen states where a PRP letter does
4 constitute a suit. What the Fourth Department - - -
5 and - - - and you can comment, both parties can
6 comment - - - it seems - - - the Fourth Department
7 seems to have taken a position of California that - -
8 - that - - - in essence that it - - - it - - - a
9 letter does - - - is not equivalent to a suit, and
10 until the filing of an action, there is no suit.

11 MR. CHESIN: I - - - I would agree with
12 nearly all of what you said but not all of what you
13 said - - -

14 JUDGE FAHEY: It's okay. Tell me what you
15 disagree with.

16 MR. CHESIN: - - - resp - - - respectfully.
17 The issue that has come up broadly in other states is
18 whether, when a party is - - - is insured under a
19 standard comprehensive general liability - - -
20 liability insurance policy, the receipt of a PRP
21 letter is the equivalent to the filing of a lawsuit,
22 and I - - - I think by my count, I think it's act - -
23 - it's fourteen states in total; I think it's eleven
24 states that have said yes, it is the equivalent of
25 filing a law suit and three states, including

1 California, that has said no, it's not the equivalent
2 of filing a lawsuit.

3 That's not the question here. The question
4 here is narrower. The question here is when you
5 receive a PRP letter - - - or at the very least when
6 you receive this PRP letter which says reply
7 necessary, this is a demand for payment - - - when
8 you receive that is some action required.

9 JUDGE STEIN: So are you advocating the - -
10 - the - - - the test referred to, I think, in the
11 Third Department's decision in Borg-Warner, basically
12 that - - - that looks at the particular letter and -
13 - - and asks whether that letter indicates that
14 governmental action is probable and imminent and goes
15 beyond just asking for voluntary participation and
16 negotiation to actually demand that action be taken
17 to - - - in the alternative, to face lawsuits or
18 possible action?

19 MR. CHESIN: We certainly would satisfy
20 that test. I don't think it's necessary to adopt
21 that test or any - - - or any test in particular. I
22 think the - - - the holding in this case is very
23 narrow or the - - - the necess - - - the correct
24 holding I think is very narrow which is that this
25 letter which we received, which directed us to

1 respond and which told us that it was a demand for
2 payment, is sufficiently coercive to require some
3 sort of a response. Whether it constitutes a lawsuit
4 or not, I don't know.

5 JUDGE FAHEY: Well, it could - - - you have
6 two options, either a lawsuit or negotiation, one or
7 the other is going to happen, but your response is
8 involuntary, that's the way you understand, right?

9 MR. CHESIN: The response is involuntary,
10 and - - - and that's the thing and then that's - - -
11 you know, I see my - - - my white light on - - - is
12 on, so I'll - - - I'll close on this until I stand
13 back up again - - - that's the larger consequence
14 here. The holding of the Fourth Department which is
15 way out on the - - - on the - - - as an outlier, well
16 beyond anything else that - - - that has been
17 addressed by certainly any high-state court that has
18 addressed this question, is that when you receive not
19 only any PRP letter but a particularly coercive type
20 of PRP letter, no response is required and any
21 response is purely voluntary. If that is the law in
22 New York State, then that will put New York State
23 well outside the mainstream on this recurring and
24 important issue of law and it would compromise
25 environmental regulation in this state to a

1 significant degree because it means that - - -

2 JUDGE RIVERA: Well, you're - - - you're
3 not subject to criminal penalty if you don't respond.

4 MR. CHESIN: No. But they're - - - but - -
5 -

6 JUDGE RIVERA: It's a - - - it's a risk
7 assessment on your part. If I don't respond, the
8 consequences are absolutely adverse to me so - - -

9 MR. CHESIN: Absolutely.

10 JUDGE RIVERA: - - - there's no sense I'm
11 being coerced to respond.

12 MR. CHESIN: Right. And what I'm saying is
13 if this court were to affirm and the law in New York
14 State was when you receive a letter like this, it's
15 purely voluntary whether to respond, then not just
16 someone covered by this type of indemnity clause but
17 anyone covered by the standard CJL insurance policy
18 is going to have a strong incentive not to respond to
19 such a letter and to force the State to file a
20 lawsuit or force the State to - - - to - - - to
21 engage in the cleanup on its own in order to make
22 sure that they can be defended by their insurance
23 companies.

24 CHIEF JUDGE LIPPMAN: Okay, counsel.

25 MR. CHESIN: Thank you.

1 CHIEF JUDGE LIPPMAN: Thanks, counsel.

2 Counsel.

3 MR. GINGOLD: Good afternoon, Your Honors,
4 Neil Gingold appear - - - appearing on behalf of the
5 Estate of James Pyne.

6 CHIEF JUDGE LIPPMAN: Counsel, what's
7 confusing about the notice that they got? It seems
8 pretty strong, you know, in terms of they're required
9 to do something or they're going to - - - they're
10 going to pay the price or someone's going to pay the
11 price.

12 MR. GINGOLD: Your Honor, it is important
13 for this - - - this court to appreciate the fact this
14 is not a, if you will, a Superfund case the - - - all
15 of the cases that were - - - I should - - - should
16 say out of fifty-three cases that the - - - that the
17 Re - - - Remet people provided to the court, thirty-
18 five of them covered the Superfund statutes.

19 JUDGE PIGOTT: That's because there aren't
20 cases like this. I had a lot of dealings with this
21 when I was an Erie County attorney, and they're not
22 kidding. Your opponent is right. They - - - they're
23 not - - - these are civil lawsuits, these are notices
24 of claim, and if you don't do it, they're going to
25 clean it up. And the real problem is the potentially

1 responsible person, because where you have a
2 landfill, if you threw a tire in there, you can be
3 responsible for the whole thing. So you've got to
4 get there, you've got to say I'm - - - I'm tangential
5 to this thing, you can't charge me all of this, and -
6 - - and that's why you have the potentially
7 responsible people who have to respond, and Mr. Pyne
8 agreed, because that's the only way they would buy
9 this place, is that he would be responsible in the
10 event that this happened.

11 MR. GINGOLD: In - - - in deferen - - -

12 JUDGE PIGOTT: It seems to me.

13 MR. GINGOLD: In deference, Your Honor, we
14 are dealing here with a manuscripted indemnification
15 provision in a - - - in a - - -

16 JUDGE PIGOTT: Doesn't make any difference.
17 You signed it, and you agreed to indem - - - to
18 defend and indemnify and you - - - and so you have to
19 do that, and I was surprised that you'd say don't
20 talk to the DEC or you're going to somehow queer the
21 - - - the - - - the deal.

22 MR. GINGOLD: Your - - - Your Honor, the
23 manuscripted indemnification provision is limited.
24 There - - - there was a - - - there was a broad
25 environmental claim provision sub - - - subsequent

1 within the - - - the - - - the provision of Section
2 8.1(a)(iii) subdivision (b). There was a provision
3 that specifically indicated it's limited. It's
4 limited only to actions that are taken that are
5 absolutely required under the law. In - - - in
6 deferen - - - in deference to your characterization,
7 Judge, that all PRPs - - -

8 JUDGE STEIN: Is that what it says,
9 required under the law?

10 MR. GINGOLD: It - - -

11 JUDGE STEIN: I didn't see that language in
12 the provision.

13 MR. GINGOLD: Well, it - - - it - - - it
14 says as req - - - as req - - -

15 JUDGE STEIN: That's your interpretation.

16 MR. GINGOLD: As - - - as required by - - -
17 as required under an - - - an environmental law.

18 JUDGE RIVERA: Well, it doesn't say - - -
19 what it says is, "is required to take under or in
20 connection with any environmental law." It doesn't
21 say absolutely required.

22 MR. GINGOLD: Well, if - - - if you're
23 looking at - - -

24 JUDGE RIVERA: How is this not in
25 connection with any environmental law?

1 MR. GINGOLD: If - - - if you're looking at
2 the - - - the - - - the entire provision, the - - -
3 the - - - the part that precedes it is a very broad -
4 - -

5 JUDGE PIGOTT: What do you - - - what do
6 you think they meant? I mean, when - - - when Remet
7 was trying to buy this place, it was obviously a
8 possible toxic area, and - - - and Pyne understood
9 that. And they said, you know, we'll buy this, but
10 we're not buying a pig in a poke, in the event
11 somebody comes over and tries to make us clean this
12 thing up, you're going to help us, right? And he
13 says, you bet, and then here's - - - and here's my
14 promise.

15 MR. GINGOLD: This - - - Your - - - Your
16 Honor, this is - - - that's not - - - that's not
17 actually what - - - what took place here. These - -
18 - these parties, two sophisticated bus - - - business
19 people - - - two sophis - - - sophisticated business
20 entities, I should say - - - negotiated over an
21 extended period of time. Burmah Castrol, the - - -
22 the purchaser, was very much aware after - - - after
23 - - -

24 JUDGE PIGOTT: It - - - Section 1 says,
25 "Environmental claims", and the relevant part is,

1 "any and all administrative regulatory judicial
2 action, suits, demands, demand letters, claims,
3 liens, notices of noncompliance, or violation of
4 proceedings relating to the environmental law
5 including, without limitation" - - - and I could go
6 on.

7 MR. GINGOLD: That's - - - that's the - - -
8 that's the definition - - -

9 JUDGE PIGOTT: It's pretty - - -

10 MR. GINGOLD: - - - of environmental claim.

11 JUDGE PIGOTT: It's pretty clear - - -

12 MR. GINGOLD: We - - - we are dealing - - -
13 we are dealing, however - - - we're dealing, however,
14 with a - - - an indemnification claim which - - -

15 JUDGE PIGOTT: Did you escrow some money?

16 MR. GINGOLD: Yes, 2.7 million dollars.

17 JUDGE PIGOTT: For - - - for what?

18 MR. GINGOLD: If - - - if Bur - - - Burmah
19 Castrol, within a ten-year period, absolute - - -
20 absolutely was required to remediate the site, then
21 they had a right to - - -

22 JUDGE PIGOTT: And so - - - so when - - -
23 so when the - - - when the DEC came in and gave them
24 this letter, what did - - - what did you take that to
25 mean?

1 MR. GINGOLD: We - - - we - - - we took it
2 to mean that they were being advised that there might
3 be a possibility down the road that they would be - -
4 - they would - - - they would be considered - - -

5 JUDGE PIGOTT: And wasn't it your
6 requirement, then, to defend them in the event that
7 something happened, so you should have taken that
8 letter and said, don't worry, this is under - - -
9 this is under our agreement, we will defend you?

10 MR. GINGOLD: Well, that - - - that was our
11 option.

12 JUDGE PIGOTT: What did - - - oh, you - - -
13 so you didn't have to?

14 MR. GINGOLD: We didn't have to.

15 JUDGE PIGOTT: So could you take the 2.7
16 and - - - and - - - and cash it out because you don't
17 have to?

18 MR. GINGOLD: The - - - the 2.7 million
19 dollars was set aside within a - - - within a fund.
20 It was there for an - - - an indefinite period of
21 time.

22 JUDGE ABDUS-SALAAM: So - - -

23 MR. GINGOLD: And it was available if - - -
24 if - - - if the provisions under the indemnification
25 provision were met. Tho - - - those requirements req

1 - - - were only triggered if Burmah Castrol, or in
2 this case the current owners of Remet, had a - - - a
3 responsibility.

4 JUDGE PIGOTT: But weren't you supposed to
5 defend them?

6 MR. GINGOLD: We had the option to defend
7 them. It - - - the - - - the language in it - - -

8 JUDGE PIGOTT: All right. So you chose not
9 to defend them.

10 MR. GINGOLD: Yes.

11 JUDGE PIGOTT: They then spend money
12 defending themselves, and then when they come to you
13 saying you didn't defend us so here's - - - here's
14 the bill, you say we didn't have to defend you.

15 MR. GINGOLD: That's - - - that's because
16 they didn't meet the - - - the - - - the language
17 requirements as - - - as to a responsible party as -
18 - - as opposed to a potentially responsible party.

19 CHIEF JUDGE LIPPMAN: What is - - - what's
20 the difference between those two terms?

21 MR. GINGOLD: Only a responsible party
22 under the - - - under CERCLA, the Comprehensive
23 Environmental Resp - - - Responsibility and Liability
24 Act.

25 JUDGE RIVERA: So to clarify, you're saying

1 the PRP letter doesn't trigger the indemnification
2 requirement. What would trigger - - -

3 MR. GINGOLD: What would trigger?

4 JUDGE RIVERA: - - - the requirement? Yes,
5 your responsibility. What would trigger that?

6 MR. GINGOLD: A - - - a finding by a - - -
7 a court or a jury that Remet was responsible would -
8 - - would trigger that - - -

9 CHIEF JUDGE LIPPMAN: So potentially
10 responsible do - - - just means well, it may happen,
11 it may not? Is that your view?

12 MR. GINGOLD: Exactly, Your Honor.

13 JUDGE FAHEY: Negotiate a settlement.

14 JUDGE RIVERA: So where does it court or -
15 - - where does it say court or adjudicatory body?
16 Where - - -

17 MR. GINGOLD: I'm - - - I'm sorry?

18 JUDGE RIVERA: Where does it say court or
19 adjudicatory body? It seems to me you're importing
20 language into your agreement?

21 MR. GINGOLD: I - - - I - - - I'm sorry,
22 Your Honor?

23 JUDGE RIVERA: Sorry. You said when I
24 asked what would trigger the indemnification
25 responsibility, you said an adjudicatory judicial - -

1 -

2 MR. GINGOLD: A - - - a - - - a judi - - -
3 a judi - - -

4 JUDGE RIVERA: - - - finding of liability,
5 and I said well, where is that language here because
6 I - - - I'm not seeing that language?

7 MR. GINGOLD: The - - - the lang - - - the
8 lang - - - the language is in CERCLA. There are four
9 respons - - - there are four responsible parties.
10 Current in - - - in - - - current owners and current
11 operators of a - - - of a site that receives
12 hazardous waste, hazardous substances, a former - - -
13 former owner or operator.

14 JUDGE STEIN: Yeah. But the question is is
15 the language of the contract, and you keep referring
16 to orders of a court or findings of a jury and - - -
17 and - - - and I'm not seeing that within the four
18 corners of this agreement.

19 MR. GINGOLD: But - - - but the - - - the -
20 - - the langu - - -

21 JUDGE STEIN: Even the indemnification
22 clause itself doesn't - - - it says - - - it says
23 required by or in connection, but it doesn't - - - it
24 doesn't say by a court or a jury as you're
25 indicating.

1 MR. GINGOLD: The - - - the section under -
2 - - under the upper part of that indemnification
3 provision at Section 8.1(a) - - -

4 JUDGE RIVERA: Um-hum.

5 MR. GINGOLD: - - - talks - - - talks about
6 an environmental claim very broadly. Down below that
7 is a - - - is - - - is limited language, it says
8 provided that.

9 JUDGE RIVERA: But again, it says with any
10 environmental law. That doesn't mention an
11 adjudicatory body. I mean - - -

12 MR. GINGOLD: Well - - -

13 JUDGE RIVERA: - - - I think that's - - -
14 that's what Judge Stein - - -

15 JUDGE ABDUS-SALAAM: Counsel, are you - - -

16 JUDGE RIVERA: - - - and I were referring
17 to.

18 MR. GINGOLD: The - - - the en - - - the
19 environmental - - -

20 JUDGE RIVERA: What - - - where's the
21 language that there's - - -

22 MR. GINGOLD: The environmental laws are
23 either - - - either enforced administratively by the
24 - - - the State of New York or by the EPA, as the
25 case may be, or - - -

1 JUDGE ABDUS-SALAAM: Just so I'm clear - -
2 -

3 MR. GINGOLD: - - - some - - - some other
4 entity.

5 JUDGE ABDUS-SALAAM: Just so I'm clear are
6 you saying that the definition of environmental law
7 in your agreement includes CERCLA? Is that what
8 you're saying?

9 MR. GINGOLD: CERLCA is the - - - is the -
10 - - is between New York State's in - - - inactive
11 hazardous waste site act which is Article 27 Title 13
12 of the Environmental Conservation Law. That does not
13 define what a responsible party is. The - - - that
14 act does in fact refer to the utilization of CERCLA
15 for - - - for the - - - the case law and for
16 interpretation. And I - - - I'm - - - I'm - - -

17 JUDGE ABDUS-SALAAM: So I'm uncl - - - I'm
18 still unclear where - - - what are you saying the
19 responsible party versus potentially responsible
20 party comes from?

21 MR. GINGOLD: Only - - - only a responsible
22 party has absolute liability and responsibility under
23 the law. Be - - - because someone is issued a - - -
24 a ticket or someone is issued a - - -

25 CHIEF JUDGE LIPPMAN: Yeah. But if they

1 say that if you don't do it, we're going to fix it
2 and you're going to have to pay for it - - -

3 MR. GINGOLD: Yeah. Well, yes. But - - -
4 but only - - - if - - - if you will, only in the - -
5 - in the law - - - only if they are ultimately found
6 to be responsible. Because they're - - - they're
7 potentially responsible doesn't make that they're - -
8 - doesn't mean that they're liable.

9 JUDGE PIGOTT: That's what I - - -

10 MR. GINGOLD: The - - - the development - -
11 -

12 JUDGE PIGOTT: That's why I keep going back
13 to the - - - to the defense part. I mean, you're
14 saying we had the option, so we're not going to
15 defend you. What does that mean, that - - - that if
16 they - - - if they walk away, you're going to be
17 responsible for the whole thing?

18 MR. GINGOLD: Only - - - only if they meet
19 the req - - - requirements under the - - -

20 JUDGE PIGOTT: It's such nonsense to say,
21 you know, we're not going to defend you, good luck,
22 and - - - and by the way, if you get hit we're going
23 to pay for it. That's - - - I never read a defense
24 indemnification contr - - - contract like that.

25 MR. GINGOLD: We - - -

1 JUDGE PIGOTT: Usually the horse and buggy,
2 you know.

3 MR. GINGOLD: Your Honor, this - - - this -
4 - - this ind - - - indemnification provision was
5 written with a - - - with a specific proviso that
6 limited the environmental claim. And - - - and it's
7 - - -

8 JUDGE PIGOTT: I think you're misreading
9 potentially responsible party.

10 MR. GINGOLD: And it's - - - it's the
11 indemnification claim that we're looking at.

12 JUDGE PIGOTT: What the - - - what the PRPs
13 are is I don't - - - I don't know how many went out
14 in this one, it looks like four or five - - - but,
15 you know, it - - - it's been known to send out 50,
16 200 saying, you know, we don't know what's in this
17 dirt but, you know, anybody that touched it may be
18 potentially responsible and you have to defend
19 yourself. Now, if you choose not to defend yourself,
20 you may find yourself stuck with the whole enchilada
21 or a substantial part that you don't want to.

22 MR. GINGOLD: But, Judge, only - - - only
23 your - - - there've been - - - maybe if you were
24 stuck with the whole enchilada, if you want to use
25 that - - -

1 JUDGE PIGOTT: It's a legal term.

2 MR. GINGOLD: Yeah, that legal term. But
3 only if they are ultimately found to be responsible.
4 The - - - the - - - the party that sues them still
5 has to show that they are liable.

6 JUDGE STEIN: But that's a tact - - -
7 that's a - - - that's a catch-22 in this
8 circumstance, isn't it, because if - - - if they sit
9 back and do absolutely nothing and wait to be sued by
10 the State, in the meantime the State can go ahead and
11 do the cleanup and if the State ultimately wins, you
12 got to pay the State. You - - - maybe you could have
13 resolved this a lot less expensively if you had
14 negotiated with them as they give you the option of
15 doing. That's one of the required actions that you
16 might take.

17 MR. GINGOLD: And - - - and, if you will,
18 they had the opt - - - they had every option in the
19 world to voluntarily negotiate with the - - - the
20 State of New York. Yes.

21 JUDGE STEIN: Well - - -

22 MR. GINGOLD: It was - - - it was - - - it
23 was our - - -

24 JUDGE STEIN: The letter says they were
25 required to do one or the other.

1 MR. GINGOLD: Your - - - Your Honor, the -
2 - - the - - - the case law relative to the
3 interpretation of a suit and - - - and responsibility
4 as - - - as regards this law, more of - - - as Judge
5 Pigott had indicated, ostensibly is - - - is tied
6 into Superfund litigation involving insurance
7 companies. And - - - and - - - and if you will,
8 those cases all look solely at whether or not the - -
9 - the insurer has a responsibility to the insured to
10 provide them with def - - - defense responsi - - -
11 def - - - defense coverage. It has nothing to do
12 with liability.

13 CHIEF JUDGE LIPPMAN: Okay.

14 MR. GINGOLD: None of those cases - - -

15 JUDGE STEIN: Is that what the Appellate
16 Division relied heavily on in - - - in ruling in your
17 favor here?

18 MR. GINGOLD: They - - - they - - - they
19 relied on the question of whether or not it was
20 voluntary. What - - - what was not - - - what was
21 not provided in any of those cases was a decision
22 from the court that the - - - the mere - - - the mere
23 issuance of a PRP letter provides a - - - a - - - a
24 coverage for indem - - - indemnification for damages.
25 Those are - - - it's a separate and distinct issue.

1 CHIEF JUDGE LIPPMAN: Okay, counsel.

2 Thanks, counsel.

3 MR. GINGOLD: Thank you.

4 CHIEF JUDGE LIPPMAN: Appreciate it.

5 MR. GINGOLD: Okay.

6 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

7 MR. CHESIN: Just three quick - - - quick
8 points. When you receive a PRP letter, that doesn't
9 necessarily mean that you are responsible for
10 everything. What it does mean is that you're
11 responsible to defend yourself because, as I think
12 Judge Pigott understands - - -

13 CHIEF JUDGE LIPPMAN: Yeah. Yeah. But
14 your adversary's saying all fine and good, he - - -
15 he has an option whether or not to defend you, and
16 his argument is until someone actually - - - a court
17 of law or - - - or someone determines officially that
18 you're responsible, he's making this distinction
19 between - - -

20 MR. CHESIN: Right.

21 CHIEF JUDGE LIPPMAN: - - - potentially
22 responsible and responsible. What's your answer to
23 that? What makes you - - - when you get the PRP and
24 you got to do something, let's say, but he's saying I
25 have a choice not to defend, what - - - what is the -

1 - - the dispositive factor that - - - that shows that
2 you are at that point required to do something when
3 there isn't a court of law or some final authority
4 saying you're responsible? Answer his argument.

5 MR. CHESIN: Sure. That argument is
6 precisely the opposite of the way the contract reads,
7 and the contract is very clear.

8 CHIEF JUDGE LIPPMAN: Tell us. Yeah.

9 MR. GINGOLD: It's Section 8.3, it's on
10 page 214 of the record. It's the section entitled,
11 "Indemnification Procedures."

12 CHIEF JUDGE LIPPMAN: What does it say?

13 MR. CHESIN: It says two things. It says
14 when you get a notice that a third party is asserting
15 some sort of - - -

16 CHIEF JUDGE LIPPMAN: Right.

17 MR. CHESIN: - - - claim against you - - -
18 not that there's been a determination - - -

19 CHIEF JUDGE LIPPMAN: Right.

20 MR. CHESIN: - - - but that there's - - -
21 has been an accusation.

22 CHIEF JUDGE LIPPMAN: Right.

23 MR. CHESIN: You have to give prompt notice
24 to the other side and give them an opportunity to
25 defend themselves.

1 CHIEF JUDGE LIPPMAN: Opportunity. That's
2 what he says. Go ahead.

3 MR. CHESIN: Right, an opportunity to take
4 on the defense.

5 CHIEF JUDGE LIPPMAN: Say they don't do it.

6 MR. CHESIN: Right.

7 CHIEF JUDGE LIPPMAN: Then what happens?

8 MR. CHESIN: Then later in that paragraph
9 it says, if within thirty days the indemnifying party
10 declines or fails to respond or doesn't assume the
11 defense, then the indemnified party shall have the
12 right to pay, contest, or settle the claim without
13 giving up its claim for indemnity, and that sentence
14 refers to - - - note it - - - it refers to that
15 communication, "as a notice of a claim of indemnity
16 under this agreement".

17 And then the only question is timing. Then
18 in 8.5, which is on page 215 of the record, it says
19 that the obligation to indemnify lasts for ten years,
20 except for claims for indemnification that were
21 asserted prior to the end of the period. So we
22 followed this to the letter. Within the period - - -
23 we received a third-party communication saying we're
24 asserting something against you, we sent it over to
25 them.

1 CHIEF JUDGE LIPPMAN: You notified them.
2 Yeah.

3 MR. CHESIN: We sent it over to them. We
4 said in the letter, this is on page 240 of the
5 record, we said do you want to assume - - -

6 CHIEF JUDGE LIPPMAN: Okay. So they don't.
7 Then what happened?

8 MR. CHESIN: Then the said no, then we
9 proceeded to attempt to contest or settle the claim,
10 which were two of our options that are right there in
11 the contract. First we tried to contest it. We went
12 to DEC, we said we didn't dump anything, take a look
13 at the things that we produce, they're not the things
14 that you find in that soil. That was unsuccessful.
15 Then in 2008, we called them up and we said, so we're
16 thinking of settling this claim rather than letting
17 it get more serious. They said don't do it. Not
18 only did they say don't do it, they said if you talk
19 to them at all, then we're going to claim that you
20 breached the contract and you have no indemnification
21 whatsoever, and so we became a little gun shy with
22 respect to trying to settle it, but we still tried to
23 at least minimize our responsibilities.

24 We - - - at this point, that was when the -
25 - - the State had already decided it was going to try

1 to select its own remedy and it put a number of
2 options out to the public and put them out for public
3 comment. And so we did what reasonable people would
4 do and what's covered under 8.1 of the agreement, we
5 hired attorneys for reasonable fees, we hired en - -
6 - environmental consultants for reasonable
7 investigatory fees, and then we commented on the
8 proposal. We said, look, we don't think we're liable
9 but if we're eventually going to be liable, this is
10 the remedy we think you should - - - you should
11 select. These are the things that a rational person
12 does when faced with a PRP letter, because
13 ultimately, if you are designated as a potentially -
14 - -

15 CHIEF JUDGE LIPPMAN: So you - - - cutting
16 to the chase here.

17 MR. CHESIN: Yes.

18 CHIEF JUDGE LIPPMAN: You interpret what
19 you're saying is what happened as things that you
20 were required to do?

21 MR. CHESIN: There are things that we were
22 - - - we were required - - -

23 CHIEF JUDGE LIPPMAN: Required.

24 MR. CHESIN: - - - number one, just because
25 it said so in the letter. I don't care what our

1 designation was, the letters was - - - it was an
2 official communication from the State of New York
3 saying a reply is necessary and also saying that we
4 demand - - -

5 CHIEF JUDGE LIPPMAN: Yeah. But it didn't
6 say you were required to pay, right?

7 MR. CHESIN: It - - - well, it said two
8 things. First it said we were required to respond.

9 CHIEF JUDGE LIPPMAN: Right.

10 MR. CHESIN: And so far, what we've - - -
11 what we have done and what we have billed them for is
12 our response.

13 CHIEF JUDGE LIPPMAN: Right.

14 MR. CHESIN: The other thing that's said is
15 if you don't - - - not just if you don't respond.

16 CHIEF JUDGE LIPPMAN: So because they
17 didn't do it, you did, you can charge them for what
18 you did?

19 MR. CHESIN: We could charge them for what
20 we did but then this, I suppose, is a good place to
21 end.

22 CHIEF JUDGE LIPPMAN: Yeah.

23 MR. CHESIN: Our claim for indemnification
24 is for two things and that was the subject of the
25 summary judgment opinion from the - - -

1 CHIEF JUDGE LIPPMAN: Go ahead.

2 MR. CHESIN: - - - from the trial court.

3 We said we wanted number one, an order to the escrow
4 agent to release funds to reimburse us for what we've
5 done.

6 CHIEF JUDGE LIPPMAN: Right.

7 MR. CHESIN: Which our response cost. But
8 also we said we wanted an order, and this is what the
9 summary judgment order granted us, saying that they
10 are responsible for indemnifying us and for
11 reimbursing us when we eventually get a bill. We
12 haven't yet, but we eventually will. And as to that
13 - - -

14 CHIEF JUDGE LIPPMAN: So you're saying at
15 that point, you would be required - - -

16 MR. CHESIN: Well - - - well, it - - -

17 CHIEF JUDGE LIPPMAN: You're required to
18 contest it and when you get a bill you're required to
19 pay it and that's the - - -

20 MR. CHESIN: Right. And I don't even think
21 the Pyne Estate is disputing that when we eventually
22 get a bill, we'll be required to pay it. As to that
23 all the - - - the only argument they make is a timing
24 argument. They say once we're required to, it's - -
25 -

1 CHIEF JUDGE LIPPMAN: Okay. You're saying
2 in your - - -

3 MR. CHESIN: - - - going to be outside of
4 the ten-year period, and with respect to that, again,
5 that's just - - - that's the opposite of the way the
6 agreement works. The agreement says you make a claim
7 during the ten-year period, you give your best
8 estimate of the costs, which is exactly what we've
9 done, and then that claim survives - - -

10 CHIEF JUDGE LIPPMAN: Okay.

11 MR. CHESIN: - - - until it's finally
12 resolved.

13 CHIEF JUDGE LIPPMAN: Thanks, counsel.

14 MR. CHESIN: Thank you.

15 CHIEF JUDGE LIPPMAN: Thank you both.
16 Appreciate it.

17 (Court is adjourned)

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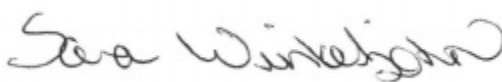
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Remet Corporation v. Estate of Pyne, et al., No. 129 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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