

public employer, it was well, and properly within the Board's concern, that employee thrift be encouraged and rewarded so that future financial security might be promoted. Success along this line would be of a piece with the public purpose perceptions that validate employer contributions to employee pensions, perhaps precluding a need to increase such contributions. The considerations that underlie the earlier PERC decision are illuminating in this regard. The entire issue of employee compensation, whether by way of salary, customary fringe benefits, or other reasonable modes of payment related to the rendition of employee services or the administration of labor contracts, is generally within the power of the public employer to effect; and the Legislature has chosen to commit such issues to the process of collective negotiations unless specifically precluded by statute. *State v. State Supervisory Employees Ass'n*, 78 N.J. 54, 79-81, 393 A.2d 233 (1978).

[11][6] We note that the State Board has chosen to abrogate, for administrative policy reasons as well as constitutional considerations, the Commissioner's holdings in prior cases that the timing of salary payments to school district employees is subject to strict control. We take this to mean that, in the State Board's view, for example, there is no existing bar, in law or administrative policy, against a school board making periodic advance payments for health coverage on behalf of its employees as a fringe benefit of employment. In our view, there is no constitutional rule that prevents a board of education from making reasonable contractual commitments controlling the details of employee compensation and how it is paid. "[T]he prohibition against lending of credit or money does not mean that the State and its political subdivisions cannot buy and pay for what they need to achieve public purposes." *Roe v. Kervick*, *supra*, 42 N.J. at 217, 199 A.2d 834. "[A]n expenditure of public money is not to be condemned as unconstitutional because an incidental private benefit accompanies pursuit of the public purpose. Where such a double aspect is an accompaniment of a statute, courts seek the objective which is primary, and, for constitutional test, classify the purpose as public or

private accordingly." *Id.* at 223, 199 A.2d 834.

[7] Manifestly, since public funds may validly be used to achieve a variety of public purposes by a variety of means, there can be no constitutional bar against the reasonable use of public funds to provide benefits of public employment, whether direct or indirect, substantial or incidental. The test for public purpose is not who receives the funds or even when, but rather the extent to which their expenditure is connected with valid governmental functions or policies.

Affirmed.



293 N.J. Super. 12

**UNITED STATES BRONZE POW-  
DERS, INCORPORATED, Plaintiff-  
Appellant/Cross-Respondent,**

v.

**COMMERCE AND INDUSTRY INSUR-  
ANCE COMPANY, Lumbermens Mutu-  
al Casualty Company, First State Insur-  
ance Company, Hartford Accident and  
Indemnity Company, Federal Insurance  
Company, Insurance Company of North  
America, and Puritan Insurance Compa-  
ny, Defendants-Respondents/Cross-Appellants,**

and

**Providence Washington Insurance  
Company, Defendant-  
Respondent,**

and

**American Empire Surplus Lines Insurance  
Company, Integrity Insurance Company  
and American Mutual Liability Insur-  
ance Company, Defendants.**

Superior Court of New Jersey,  
Appellate Division.

Argued May 8, 1996.

Decided July 18, 1996.

Insured sought declaration of coverage under several of its general liability policies

for claims and cleanup costs relating to soil pollution caused primarily by spills, leakage, airborne contamination, and contaminated stormwater runoff involving copper sulphates used in insured's manufacturing process. The Superior Court, Law Division, Hunterdon County, entered one series of summary judgments for insurers, 259 N.J.Super. 109, 611 A.2d 667, and later issued other summary judgments for insurers. Insured appealed. The Superior Court, Appellate Division, Landau, J.A.D., held that: (1) "personal injury" coverage for "wrongful entry or eviction or other invasion of the right of private occupancy" did not apply, and (2) intentional nature of insured's discharges of copper sulphates was not affected by its later efforts to reduce extent of discharges.

Affirmed.

### 131. Insurance ⇨435(1)

General liability policy's "personal injury" coverage for "wrongful entry or eviction or other invasion of the right of private occupancy" did not apply to neighboring property owner's allegations of nuisance and negligence concerning soil pollution caused primarily by spills, leakage, airborne contamination, and contaminated stormwater runoff involving copper sulphates used in insured's manufacturing process, where policy contained unambiguous and specific pollution exclusion, even though exclusion referred only to "bodily injury" and "property damage."

### 2. Insurance ⇨433.1

Intentional nature of insured manufacturer's discharges of copper sulphates was not affected by its later efforts to reduce extent of discharges, for purposes of determining whether pollution exclusion in its general liability policies applied to preclude coverage for pollution cleanup costs.

Stephen M. Offen, Somerville, for appellant (Schachter, Trombadore, Offen, Stanton & Pavic, attorneys; Mr. Offen, on the brief).

Karol Corbin Walker, Newark, for respondent/cross-appellant Commerce and Industry

1. The counts against defendants Integrity Insur-

ance Company (St. John & Wayne, attorneys; Marian S. Hertz, on the joint brief).

Sellar, Richardson, Stuart & Chisholm, Roseland, and Michael Morrison, Tressler, Soderstrom, Maloney & Priess, Chicago, IL, Illinois bar, admitted pro hac vice, for respondent/cross-appellant Lumbermens Mutual Casualty Company (Wendy H. Smith, Roseland, on the joint brief).

John Bowens, Bedminster, for respondents/cross-appellants Hartford Accident and Indemnity Company and First State Insurance<sup>14</sup> Company (Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys; Mr. Bowens and Donna M. Stephan, on the joint brief).

Suarez & Suarez, Jersey City, for respondent/cross-appellant Federal Insurance Company (Joseph M. Suarez & Jacqueline F. Cummins, on the joint brief).

Joseph R. McDonough, Morristown, for respondent/cross-appellant Insurance Company of North America (Ribis, Graham, & Curtin, Morristown, attorneys; Paul R. Koepff and Gregory Roer, New York City, on the joint brief).

Gebhardt & Kiefer, Clinton, and Huhnsik Chung, Luce, Forward, Hamilton & Scripps, New York City, New York bar, admitted pro hac vice, for respondent/cross-appellant Westport Insurance Corp. (formerly Puritan Insurance Company) (Kimball Ann Lane, New York City, on the joint brief).

Clemente, Dickson & Mueller, Morristown, for respondent Providence Washington Insurance Company (William F. Mueller, of counsel, and Mr. Mueller and Christina A. Luancing, on the brief).

Before Judges KING, LANDAU and KLEINER.

The opinion of the court was delivered by

LANDAU, J.A.D.

We consider here the appeals by plaintiff United States Bronze Powders, Inc. (U.S. Bronze) from three separate groups of orders affording summary judgments favorable to defendant insurers,<sup>1</sup> and resulting in dis-

ance Company and American Mutual Liability

missal of its declaratory judgment complaint. U.S. Bronze instituted the declaratory action seeking to establish coverage under a number of general liability policies for cleanup costs, future remediation and containment expenses it will incur resulting from soil pollution, including soil of neighboring property,<sup>15</sup> caused primarily by copper sulphates used in its manufacturing processes. The pollutants may be deemed to have migrated by spills, leakage, airborne contamination, and contaminated stormwater runoff.

The first summary judgments were granted under policies containing the so-called "absolute pollution exclusion." Providence Washington Insurance Company (Providence) moved for summary judgment, and Commerce and Industry Insurance Company (C & I) for partial summary judgment under two of its six policies with U.S. Bronze that contained the absolute pollution exclusion. Judge Bernhard's opinion respecting those motions is reported as *United States Bronze Powders, Inc. v. Commerce & Industry Insurance Co.*, 259 N.J.Super. 109, 611 A.2d 667 (Law Div.1992).

A second series of partial summary judgment motions was initiated seeking judgment that plaintiff was not covered for current and future costs, including fines, associated with treatment and disposal of contaminated stormwater runoff. On May 20, 1993, Judge Herr entered an order on those motions, granting partial summary judgment to C & I, and to defendants Lumbermens Mutual Casualty Company (Lumbermens), Federal Insurance Company (Federal), Hartford Accident and Indemnity Company (Hartford), Puritan Insurance Company (Puritan), and First State Insurance Company (First State).

C & I later moved for summary judgment on the remaining U.S. Bronze claims, arguing that they were barred by the standard pollution exclusion clause in its policies; that there was no "occurrence" covered by the policies; and that U.S. Bronze's knowledge of a risk or loss in progress barred coverage. Hartford, First State, Puritan (by its successor, Westport Insurance Company), and In-

Insurance Company were dismissed by reason of liquidation and insolvency, respectively. Additionally, U.S. Bronze entered into a stipulation of

insurance Company of North America (INA) similarly moved, as did Lumbermens. The latter insurer also contended that its policies were not triggered because no property damage was suffered by the neighboring landowner until the Lumbermens policies had expired.

<sup>16</sup>On July 7, 1994, Judge Herr heard oral argument on the third set of motions, upholding application and efficacy of the standard pollution exclusion clauses in defendants' policies because U.S. Bronze was aware that copper emissions were a pollutant, yet intentionally discharged them into the atmosphere.

The judge also denied portions of those motions concerning existence of a covered "occurrence." She ruled that there were material areas of dispute regarding U.S. Bronze's ability and attempts to reduce emissions, the nature of the emissions that were the subject of Department of Environmental Protection concern, toxicity levels on neighboring property, and other factual issues going to the applicability of the "known loss" doctrine (considered in *Astro Pak Corp. v. Fireman's Fund Ins. Co.*, 284 N.J.Super. 491, 665 A.2d 1113 (App.Div.), *certif. denied*, 143 N.J. 323, 670 A.2d 1065 (1995)).

Defendants C & I, Lumbermens, First State, Hartford, Federal, INA and Puritan cross-appealed from the latter rulings. The cross-appeals need not be addressed. First, were we to reverse the grants of summary judgment in favor of the insurers, any other determinations would be rendered interlocutory. More importantly, the cross-appeals are mooted by our view that the U.S. Bronze complaint was properly dismissed following grant of summary judgments to the several insurers, substantially for the reasons set forth in *U.S. Bronze, supra*, and in the oral opinions of Judge Herr dated May 14, 1993 and July 7, 1994.

We add, as to the opinion by Judge Bernhard based upon the absolute pollution exclusion, that *In re Hub Recycling, Inc.*, 106 B.R. 372 (D.N.J.1989), cited by U.S. Bronze, is

dismissal without prejudice with American Empire Surplus Lines Insurance Company.

Cite as 679 A.2d 674 (N.J.Super.A.D. 1996)

clearly distinguishable because here, unlike in *Hub*, there are no confusing examples of pollutants in the policies that might render the pollution clauses ambiguous. All contaminants or pollutants are unambiguously excluded in the C & I and Providence policies that were the subject of the first motions.

[17] Respecting U.S. Bronze's contention (applicable only to C & I) that the neighboring property owner's allegations of nuisance and negligence fall within the C & I coverage for "personal injury," we recognize that the argument was not considered below. It was apparently engendered by a Law Division opinion, *Harvard Industries, Inc. v. Aetna Casualty & Surety Co.*, 273 N.J.Super. 467, 642 A.2d 438 (Law Div.1993).

In *Harvard*, the policy excluded coverage for "bodily injury" and "property damage" caused by pollutants, but specifically included coverage for "personal injury," which had been defined to embrace, *inter alia*, "wrongful entry or eviction, or other invasion of the right of private occupancy." *Id.* at 475-76, 642 A.2d 438. It was there held that permitting environmental contamination to migrate to the property of another was both a trespass and a nuisance, as well as an entry or other invasion of private occupancy. *Id.* at 478-79, 642 A.2d 438.

The C & I policy similarly includes "wrongful entry or eviction or other invasion of the right of private occupancy" within the definition of "personal injury." However, we are not bound by, nor do we agree with, the holding in *Harvard* or its rationale. While the view set forth in *Harvard* is not without some support, we are persuaded by the reasoning of the majority of courts, exemplified by *Harrow Products, Inc. v. Liberty Mutual Insurance Co.*, 64 F.3d 1015 (6th Cir.1995), which have declined to render meaningless the unambiguously stated specific pollution exclusion language in liability policies by distorting the scope of personal injury coverage to a point beyond the reasonable expectations of a sophisticated insured. *Accord Northbrook Indem. Ins. Co. v. Water Dist. Management Co.*, 892 F.Supp. 170, 175-76 (S.D.Tex.1995); *East Quincy Servs. Dist. v. Continental Ins. Co.*, 864 F.Supp. 976, 980-82 (E.D.Cal.1994); *Staefa Control-System*

*Inc. v. St. Paul Fire & Marine Ins. Co.*, 847 F.Supp. 1460, 1473-74 (N.D.Cal.), *opinion amended by* 875 F.Supp. 656 (N.D.Cal.1994); *Union Oil Co. v. International Ins. Co.*, 37 Cal.App.4th 930, 44 Cal.Rptr.2d 4, 7-10 (1995); *Legarra v. Federated Mut. Ins. Co.*, 35 Cal.App.4th 1472, 42 Cal.Rptr.2d 101, 108-09 (1995); *Titan Corp. v. Aetna Casualty & Surety Co.*, 22 Cal.App.4th 457, 27 Cal.Rptr.2d 476, 486-87 (1994); *County of Columbia v. Continental Ins. Co.*, 83 N.Y.2d 618, 612 N.Y.S.2d 345, 634 N.E.2d 946, 948-50 (1994); *O'Brien Energy Sys., Inc. v. American Employers' Ins. Co.*, 427 Pa.Super. 456, 629 A.2d 957, 964 (1993), *appeal denied*, 537 Pa. 633, 642 A.2d 487 (1994). *But see Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir.1992); *Titan Holdings Syndicate v. City of Keene*, 898 F.2d 265 (1st Cir.1990).

[2] Lastly, as to the third and final series of motions, resolved on July 7, 1994, our review of the record confirms Judge Herr's statement, "It is incontrovertible that U.S.B. intentionally discharged a known pollutant." That efforts were made to reduce the extent of the discharges does not alter the validity of the court's observation. Thus, *Morton International, Inc. v. General Accident Insurance Co. of America*, 134 N.J. 1, 78, 629 A.2d 831 (1993), *cert. denied*, — U.S. —, 114 S.Ct. 2764, 129 L.Ed.2d 878 (1994), is apt, as the court held, and summary judgment was properly afforded. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 539-40, 666 A.2d 146 (1995).

It is unnecessary to consider the respondents' arguments on cross-appeal.

Affirmed.

