NEW JERSEY SUPREME COURT AFFIRMS PRO-POLICYHOLDER RULINGS IN HONEYWELL

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U.S. Insurance Coverage Alert

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Honeywell International Inc. ("Honeywell"), represented by its counsel at K&L Gates LLP, achieved a decisive victory for policyholders in a ruling from the Supreme Court of New Jersey on June 27, 2018, in the long-running litigation *Continental Insurance Co. v. Honeywell International, Inc* [1]. In its decision, the New Jersey Supreme Court affirmed lower court rulings (1) applying New Jersey law and (2) reaffirming the Supreme Court's holding in *Owens-Illinois v. United Ins. Co*. [2] that a policyholder is not required to contribute in the allocation of insurance liability for periods when the relevant insurance coverage was unavailable to that policyholder in the marketplace. Significantly for policyholders in New Jersey and elsewhere, this decision rejects insurer efforts to overturn the "unavailability rule" and thus shift a substantial portion of otherwise-covered costs onto their policyholders.

BACKGROUND TO THE NEW JERSEY SUPREME COURT RULING

Honeywell faces liability for asbestos-related bodily injury claims allegedly arising from exposure to asbestos-containing friction materials manufactured by Honeywell predecessors The Bendix Corporation and Allied Corporation [3]. Bendix completed its transition to non-asbestos friction products in 2001 [4]. In 2000, Continental Insurance Company launched this insurance coverage declaratory judgment action, and several other insurers were ultimately added to the litigation, which encompassed over 330 insurance policies [5]. Honeywell eventually settled with all of its insurers except for Travelers Casualty and Surety Company and St. Paul Fire and Marine Insurance Company (collectively, "Travelers") [6].

In 2006, the trial court granted Honeywell's motion for partial summary judgment that New Jersey insurance allocation law applied to the case [7]. Later, in 2011, the trial court ruled that the allocation of insurance would stop in 1987 when insurance for asbestos liability was no longer commercially available to Honeywell [8], rejecting Travelers' argument that Honeywell should bear responsibility for the post-1987 period when Honeywell lacked the relevant insurance but continued to manufacture some asbestos-containing friction products [9]. After the Appellate Division of the New Jersey Superior Court affirmed the trial court's rulings [10], Travelers petitioned the New Jersey Supreme Court for review, and that petition was granted.

NEW JERSEY CHOICE OF LAW RULES LOOK FOR STATE WITH THE GREATEST GOVERNMENTAL INTEREST

In analyzing the lower court ruling applying New Jersey law, the New Jersey Supreme Court considered a number of potentially relevant facts. Bendix was a multinational corporation with its headquarters in Indiana from about 1940 to 1969, before moving its headquarters (and its insurance office) to Michigan, where it stayed from 1969 until 1983. In 1983, Bendix was acquired by another Honeywell predecessor (Allied Corporation) which was

based in New Jersey with its insurance office located in New Jersey as well [11]. Since 1983, all insurance operations for Bendix and its successors have been in New Jersey, where Honeywell also is headquartered [12]. Travelers issued excess policies to Bendix while its headquarters and insurance office were in Michigan [13]. Bendix manufactured asbestos products in New York and Tennessee [14], but Honeywell has faced claims relating to Bendix products throughout the United States. Travelers argued that Michigan law should apply, rather than New Jersey law, because the Travelers policies were issued to Bendix in Michigan.

The Supreme Court began its discussion by first addressing whether a conflict existed between New Jersey and Michigan law on the relevant allocation issues that would require it to undertake a choice of law analysis. On this issue, the Court found that a conflict did exist, because Michigan applies a pro rata time-on-the-risk method whereas New Jersey considers both time on the risk as well as the degree of risk assumed by insurers [15].

The Supreme Court began its choice of law analysis by noting that it had rejected the former choice of law rule mandating application of the law of the place of contracting for insurance contracts [16]. Instead, New Jersey applies "a more flexible 'governmental interest' standard" as set forth under the Restatement (Second) of Conflict of Laws [17]. In particular, the Supreme Court focused on §§ 6 and 188 of the Restatement, which set forth a number of factors relevant to the choice of law determination [18]. Among the various factors, the Court found that both the place of performance under § 188(c), as well as the domicile, residence, and places of incorporation and business of the parties under § 188(e), pointed to the choice of New Jersey law [19]. Furthermore, under the § 6 analysis of the competing governmental interests of the relevant states, the Supreme Court determined that New Jersey had a strong interest in this case involving a New Jersey policyholder, whereas Michigan did not have a strong interest in this insurance dispute in which no party was a Michigan business [20]. Based on these and other factors, the Supreme Court affirmed the lower courts' choice of New Jersey law to the dispute [21].

In addition, the Supreme Court rejected Travelers' argument that its prior decision in *State Farm Mutual Automobile Insurance Co. v. Estate of Simmons* [22], required the choice of law analysis to begin with Restatement § 193 and its presumption that the law of the place of contracting applies [23]. Instead, the Court clarified that, unlike in the case of *Simmons,* the conflict analysis should center on §§ 6 and 188 in the context of insurance allocation for nationwide products liability claims asserting bodily injury due to asbestos exposure [24].

NEW JERSEY REAFFIRMS THE UNAVAILABILITY RULE

Under the New Jersey Supreme Court's prior ruling in *Owens-Illinois*, a continuous trigger applies to asbestos-related bodily injury claims. Furthermore, under *Owens-Illinois*, liability is allocated among insurance policies based on both an insurer's time on the risk as well as the degree of risk assumed by the insurer [25]. Under the unavailability exception to this allocation method, costs are not allocated to the insured for periods in which the relevant coverage was not available to that insured for purchase [26]. As explained by the Supreme Court in *Owens-Illinois*, "when periods of no insurance reflect a decision by an actor to assume or retain a risk, as opposed to periods when coverage for a risk is not available, to expect the risk-bearer to share in the allocation is reasonable." [27] The Court explained in *Honeywell*, "[t]he continuous-trigger method assumes the availability of insurance and incorporates recognition of an unavailability exception," [28] rejecting arguments by the insurance industry *amici* that the unavailability exception was inconsistent with a continuous trigger.

Travelers sought to create an exception to this unavailability rule, arguing that costs should be allocated to Honeywell from 1987 (when asbestos insurance no longer was available to Honeywell) to 2001 (when the

company no longer manufactured any asbestos-containing friction materials), because Honeywell chose to continue to make those products after insurance was no longer available to it for liabilities arising from them [29]. In response, Honeywell argued that *Owens-Illinois* expressly cuts off the coverage block when insurance is no longer available to the policyholder and does not allow for any kind of exception. Even if Owens-Illinois could be construed to allow for the possibility of an exception to the unavailability rule, Honeywell argued, the facts did not support the creation of such an exception in this case, because there was no evidence that Bendix friction materials caused harm, and Honeywell was only seeking insurance coverage for claims alleging first exposure to a Bendix product before 1987, when it had insurance [30].

The New Jersey Supreme Court was convinced by Honeywell's arguments. The Court found, "[T]he record in this appeal, carefully addressed by the trial court, indisputably demonstrates when insurance became unavailable in the marketplace. Importantly, none of the initial asbestos exposures, on which claims Honeywell is seeking insurance coverage, occurred after insurance became available." [31] The Court determined that this case did not present a sufficient basis "to create a novel equitable exception to that [unavailability] exception that would retroactively deprive parties of paid-for insurance coverage due to their post-coverage-period conduct." [32] Finally, the Supreme Court concluded its decision by reaffirming the policy objectives of *Owens-Illinois*, "of maximizing insurance resources, encouraging the spreading of risk throughout the insurance industry, promoting the purchase of insurance when available, and of simple justice." [33] The New Jersey Supreme Court affirmed the lower courts' rulings that costs would not be allocated to the policyholder during periods when insurance was unavailable to that policyholder [34].

Honeywell's success before the New Jersey Supreme Court preserves the essential, coverage-saving unavailability rule, at least in New Jersey. However, policyholders must remain vigilant as insurers continue their coordinated efforts to chip away at the unavailability rule (as seen in New York and elsewhere) and escape their obligations under policies they sold decades ago.

Notes

[1] A-21-16, Case No. 078152 (N.J.).
[2] 138 N.J. 437 (1994).
[3] *See* Slip Op. at 14.
[4] *See id*.
[5] *See id*. at 15.
[6] *See id*.
[7] *See id*. at 16.
[8] Honeywell previously had been awarded summary judgment on the issue of whether insurance for its asbestos liabilities was commercially available to it.
[9] *See id*. at 24.
[10] *See id*. at 27.
[11] *See id*. at 16–17.
[12] *See id*. at 18.
[13] *See id*.
[14] *See id*. at 17.

[15] *See id.* at 31–37.
[16] *See id*. at 37.
[17] *See id*.
[18] *See id*. at 39–40, 47.
[19] *See id*. at 48.
[20] *See id*. at 50.
[21] *See id*. at 53–54.
[22] 84 N.J. 28 (1980).
[23] *See* Slip Op. at 46.
[24] *See id*. at 47.
[25] *See id*. at 32.
[26] *See id*. at 55.
[27] *See id*. (quoting Owens-Illinois, 138 N.J. at 479).
[28] *See id*. at 55.
[29] *See id*. at 22.
[30] *See id*. at 57.
[31] *See id*. at 62.
[32] *See id*.
[33] *See id*. at 63.
[34] *See id*. at 64.

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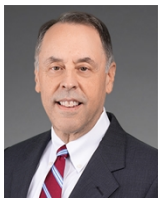

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