



Case Alert

New Jersey Supreme Court Hears Arguments On Coverage Gap Dispute

On Tuesday, October 24, the New Jersey Supreme Court heard arguments in a 17-year-old battle over whether Honeywell International Inc. (Honeywell) will have to help cover the costs of asbestos-related injury suits that were filed against it after insurers began to universally exclude coverage for asbestos-related liabilities. The Court considered the arguments made by two excess insurers, St. Paul Fire and Marine Insurance Co. (St. Paul) and parent Travelers Casualty and Surety Co. (Travelers), that the Court should overturn a state appellate court's ruling that Honeywell does not have to contribute to these costs.

During the course of this case, Honeywell has sought coverage under more than 300 different policies, ultimately settling with all insurers except St. Paul and Travelers, who had issued a total of 10 excess policies to Honeywell's predecessor, Bendix Corp. (Bendix) between 1968 and 1983. Honeywell has only sought coverage for claims made by individuals who allege that they were first exposed to asbestos prior to 1987.

The lower court's ruling was based on the unavailability doctrine, established in New Jersey in *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 650 A.2d 974 (1994). Under this doctrine, liability for continuous injuries is allocated between insurers on a pro rata basis based on the degree of risk assumed and the amount of time each policy was on the risk. In the event that a policyholder did not purchase insurance for a particular risk for some period during the continuing injury, it must cover a portion of the liability as if it was the insurer during that period. However, if no insurance for that risk was available, the unavailability exception applies and the policyholder is not required to contribute. Asbestos exclusions became ubiquitous in 1987. The lower court ruled that because asbestos coverage was not available after 1987, Honeywell would not be responsible on a pro rata basis.

The insurers have argued that the unavailability doctrine should not apply in this case because Bendix made the deliberate decision to continue to manufacture asbestos products after 1987, when the risks of asbestos were well known. They argue that the lower court's decision allows manufacturers to continue to engage in dangerous activities without insurance coverage, knowing that they can count on prior insurers to foot the bill. Honeywell has countered that this fact is irrelevant because it has only sought coverage for claims brought by individuals who allege that they were first exposed to asbestos prior to 1987.

Additionally, the insurers have objected to the lower court's application of New Jersey law, arguing that Michigan law should be applied instead. Michigan applies a "time-on-the-risk" allocation rather than a pro rata approach. The insurers argue that Michigan law should apply because the relevant policies were underwritten and delivered to Bendix in Michigan. Honeywell counters that the parties to the suit do not have sufficient ties to Michigan and that courts have already applied Michigan law to hundreds of other policies related to this case.

It is unlikely that the New Jersey Supreme Court will overturn the well-established unavailability doctrine in full. However, there is a possibility that the Court will make a narrow exception based on the specific facts of this case – that Bendix continued to manufacture asbestos products after the risks were well known. This possibility is slight, however, given Honeywell's strategic decision to only seek coverage for claims brought by individuals who allege that they were first exposed to asbestos prior to 1987.

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