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New Jersey Supreme Court Rejects Equitable Exception to "Unavailability Rule" for Owens-Illinois/Carter-Wallace Allocations and Clarifies Choice of Law Analysis for Insurance Coverage Disputes Involving Nationwide Products Liability Claims

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On June 26, 2018, the New Jersey Supreme Court issued its long-awaited decision in *Continental Insurance Company v. Honeywell International*, addressing choice of law and whether there should be an equitable exception to the unavailability rule under New Jersey's *Owens-Illinois/Carter-Wallace* long-tail allocation approach if an insured continues to manufacture and sell asbestos products after insurance for asbestos bodily injury claims became unavailable. Coughlin Duffy LLC represented plaintiff Continental Insurance Company, who had settled prior to the appeal.

The Court clarified the choice of law analysis applicable to insurance coverage disputes involving "nationwide products-liability claims spanning many years of product exposure rather than a single occurrence event." Slip op. at 46. It held that the choice of law analysis for these claims should focus on the parties' Restatement (Second) Conflicts of Laws §188 contacts with the respective states in relation to the Restatement §6 factors as "condensed" by *Pfizer Inc. v. Employers Ins.*, 154 N.J. 187 (1998). In holding that New Jersey allocation law should apply, the Court minimized the importance of the place of contracting, and instead stressed the Insured's principal place of business and domicile at the time the underlying claims were made, and the place of performance of the insurers' defense and indemnity obligations. The Court rejected Travelers' and St. Paul's arguments that, upon finding an actual conflict exists, the choice of law analysis should commence with the presumption that the law of the place of contracting should govern, unless a competing state has a more compelling interest in the subject matter. The decision will be helpful for New Jersey domiciled insureds who seek to have New Jersey law apply to their products coverage actions.

The Court declined to adopt an equitable exception to *Owens-Illinois*' unavailability rule, under which periods where insurance for the relevant risk was unavailable to the insured are excluded from the allocation block. Travelers and St. Paul had argued that Honeywell should be treated as self-insured from 1987, when excess insurance for its asbestos products became unavailable, through 2003, because Honeywell continued to manufacture asbestos-containing friction products from 1987 to 2003. The Court rejected that argument. The Court stressed that Honeywell was not asking the insurers to provide coverage for claims where the first exposure was after 1987. The Court characterized the insurers' proposal to extend the allocation block as "a novel equitable exception … that would retroactively deprive parties of paid-for insurance coverage due to their post-coverage-period conduct," slip op. at 55, and held that the insurers did "not present a proper factual basis to revisit the unavailability rule that is part of the coherent principles that comprise [New Jersey's] allocation methodology." *Id.* At 61-62.

Justice Albin filed a vigorous dissent to the Court's ruling on the unavailability rule, noting that although Honeywell was seeking coverage for claims with first exposures before 1987, its manufacture and sale of asbestos products after 1987 increased the asbestos exposure of workers exposed before 1987, increasing the risk and severity of asbestos-related injury. Justice Albin characterized the majority's decision as shifting the manufactures' liability to its prior insurers and "incentiviz[ing] corporations to manufacture products that are dangerous, and even lethal …" Dissent at 11.

Although the Court's decision on the unavailability rule is a setback for insurers, it should not come as a surprise given that New Jersey's "*pro rata* by time and limits" allocation methodology is based on the degree of risk transferred and retained by the insured, and it incorporated the unavailability rule at its inception. The majority's reasoning is closely tied to the policies and principles behind New Jersey's unique allocation approach, rather than the language of the insurance policies. Therefore, the decision may have limited impact on other states looking at the unavailability rule. Courts applying a more traditional *pro rata* allocation method may find Justice Albin's concerns, and the New York Court of Appeal's policy-language based decision rejecting the unavailability rule in *KeySpan Gas East Corp. v. Munich Reinsurance America, Inc*., 31 N.Y.3d 51 (2018), more persuasive and relevant. With *Honeywell* and *KeySpan*, we have now heard from two of the three Northeastern state high courts considering the application and scope of the unavailability rule. Whether the third state, Connecticut, follows New York or New Jersey, or goes its own way, may be decided in the pending appeal of *R.T. Vanderbilt Company, Inc. v. Hartford Accident & Indemnity Co.*, 171 Conn. App. 61 (App. Ct. 2018).