

ALERT

## New Jersey Supreme Court Denies Insurance Industry Bid to Allocate Losses to Policyholders

By Robert D. Chesler

On June 27, the New Jersey Supreme Court rejected an insurance industry bid to burden policyholders with a portion of their covered asbestos losses, ruling on an issue of utmost importance to companies facing environmental, asbestos or other claims where the injury occurred over a number of years. In *Continental Insurance Company v. Honeywell International, Inc.*,<sup>1</sup> the court applied the “continuous trigger” of insurance coverage, established in *Owens-Illinois, Inc. v. United Insurance Co.*,<sup>2</sup> to extend insurance company liability into years when coverage was unavailable to *Honeywell*, applying the so-called unavailability rule.

Here is how the issue of when insurance coverage is triggered intertwined with the issue of availability. Assume that a worker is first exposed to asbestos from a company’s product in 1970, and asbestos injury manifests itself in 2000. Under the law of New Jersey, and many other states, each insurance policy from 1970 to 2000 must pay a share of the company’s liability and attorneys’ fees, with the company responsible for years in which it does not have insurance. Next, assume that the insurance industry places an asbestos exclusion in the standard insurance policy in 1987, so that the company does not have insurance for asbestos from 1987 forward. The question arises: who is responsible for injury caused before 1987 but manifesting itself after 1987, the pre-1987 insurance companies or the policyholder? That is the so-called “unavailability” issue, as the policyholder could not obtain insurance for this liability after 1987. The New Jersey Supreme Court held that the insurance companies were liable in this situation.

*Honeywell* involved the Bendix Corporation, which manufactured brake and clutch pads that contained asbestos from 1963 to 2001, resulting in thousands of bodily injury claims. Prior to 2006, Bendix and its successors had already received about 147,000 claims. Bendix was headquartered in Michigan. In 1983, Bendix became part of Honeywell, which was headquartered in New Jersey. (See below for discussion of choice of law issue.) Continental sued Honeywell in New Jersey in 2000 over the Bendix asbestos liability. Honeywell brought third-party claims against dozens of other insurance companies. By 2018, all of the insurance companies had settled, except for excess insurance companies Travelers and St. Paul (now one company).

ANDERSON KILL  
1251 Avenue of the Americas  
New York, NY 10020  
(212) 278-1000

ANDERSON KILL  
1760 Market Street, Suite 600  
Philadelphia, PA 19103  
(267) 216-2700

ANDERSON KILL  
1055 Washington Boulevard, Suite 510  
Stamford, CT 06901  
(203) 388-7950

ANDERSON KILL  
1717 Pennsylvania Avenue, Suite 200  
Washington, DC 20006  
(202) 416-6500

ANDERSON KILL  
One Gateway Center, Suite 1510  
Newark, NJ 07102  
(973) 642-5858

ANDERSON KILL  
Wells Fargo Building  
355 South Grand Avenue  
Los Angeles, CA 90071  
(213) 943-1444

[www.andersonkill.com](http://www.andersonkill.com)





who's  
who

**Robert D. Chesler**  
is a shareholder  
in Anderson

Kill's Newark office. Mr. Chesler represents policyholders in a broad variety of coverage claims against their insurers and advises companies with respect to their insurance programs. Mr. Chesler is also a member of Anderson Kill's Cyber Insurance Recovery group. A leading participant in the birth of modern insurance law in the early 1980s, Mr. Chesler has earned the reputation as "*The Insurance Guru*" for exceptional insurance coverage knowledge, and has emerged as a leader in such new areas of insurance coverage as cyber-insurance, D&O, IP, privacy and "green" insurance.

[rchesler@andersonkill.com](mailto:rchesler@andersonkill.com)  
(973) 642-5864

ANDERSON KILL  
NEWSLETTERS & ALERTS

TO SUBSCRIBE PLEASE VISIT:  
[andersonkill.com/Publication-Subscription.aspx](http://andersonkill.com/Publication-Subscription.aspx)

TO UNSUBSCRIBE PLEASE EMAIL:  
[unsubscribe@andersonkill.com](mailto:unsubscribe@andersonkill.com)

## When Asbestos Coverage Was Unavailable...

*Honeywell* posed a variation on the typical issue of unavailability of insurance. While asbestos insurance became unavailable in 1987, Bendix continued to use asbestos in its products until 2001. Honeywell did not seek insurance coverage for its products manufactured after 1987. Rather, it sought the application of the unavailability rule for products manufactured prior to 1987 when manifestation occurred post-1987. Essentially, Honeywell asserted that it was not responsible for the allocation to the post-1987 years. Travelers and St. Paul basically argued for an exception on equitable grounds to the unavailability rule based on Honeywell's continued manufacture of asbestos-containing products after 1987. An insurance industry group submitted an amicus brief contending that the court should abandon the unavailability rule altogether.

The Supreme Court, relying on its prior decision in *Owens-Illinois*, mandated the application of the unavailability rule. The court relied on the basic policy objectives of *Owens-Illinois*: "Maximizing insurance resources, encouraging the spreading of risk throughout the insurance industry, promoting the purchase of insurance when available, and of simple justice." It held that asbestos insurance was unavailable to Honeywell after 1987, and the unavailability rule applied.

The state Supreme Court ruled that New Jersey law applied to the *Honeywell* case before addressing the merits of the appeal. That ruling turned out to be dispositive of the merits. Bendix had been headquartered in Michigan, and all of the St. Paul and Travelers insurance policies were negotiated and entered into in Michigan. Travelers and St. Paul asserted that Michigan law applied. Michigan law does not contain an unavailability rule.

## Which Forum Was "Available"?

The New Jersey Supreme Court held that New Jersey law applied, basing its decision on several factors. For one, it pointed to Honeywell's residence and domicile in New Jersey since 1983, and stated that performance of the insurance policies occurred in New Jersey. The court also found that application of New Jersey law would advance the public policy of New Jersey, as set forth in *Owens-Illinois*. The court did not see a strong public policy interest on the part of Michigan. It may be that New Jersey courts will apply New Jersey law if possible in order to maximize insurance recovery.

*Honeywell* underscores the importance of choice of forum. Despite choice of law rules, courts often will apply the law of their own jurisdiction. The policyholder that waits to be sued by its insurance company in an unfavorable jurisdiction can lose coverage simply because it did not choose to sue first in a favorable jurisdiction. Insurance companies are quick to fire first in order to gain forum advantage. Every policyholder must analyze forum as early as possible, and be ready to seize the best forum.

That's particularly true when New Jersey and its neighbor across the Hudson River are potential forums. Just months before the New Jersey Supreme Court's decision in *Honeywell*, the New York Court



of Appeals reached the exact opposite result. *KeySpan Gas v. Munich Reinsurance*, 96 N.E. 2d (N.Y. 2018). If a company has ties to both New York and New Jersey and faces an unavailability issue, choice of forum probably is dispositive. On several key issues, New Jersey remains a more favorable forum than New York and many other states for litigating long-term injury insurance claims. Policyholders should recognize that, and act on it. ▲

## ENDNOTES

1 *A-21-16 (078152) (N.J. Supreme Court June 27, 2018)*.

2 *138 N.J. 437 (1994)*

This was prepared by Anderson Kill PC to provide information of interest to readers. Distribution of this publication does not establish an attorney-client relationship or provide legal advice. Prior results do not guarantee a similar outcome. Future developments may supersede this information. We invite you to contact the editor, Mark Garbowski at [mgarbowski@andersonkill.com](mailto:mgarbowski@andersonkill.com) or (212) 278-1169, with any questions.

