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5 Key NJ Insurance Coverage Decisions From 2018

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From a policyholder's point of view, 2018 insurance coverage decisions in New Jersey left state law on insurance coverage matters scattered at best. Three decisions forged ahead, validating and expanding the rights of policyholders, while two other decisions took a step backward from established New Jersey law and reduced policyholders' protections.

The New Jersey Supreme Court decision in Cont'l Insurance Co. v. Honeywell Int'l Inc.,[1] upheld the application of the "unavailability rule" in New Jersey, just months after the New York Court of Appeals rejected it in KeySpan Gas E. Corp. v. Munich Reins. Am. Inc.[2] The unavailability rule comes into play when, pursuant to the continuous trigger, consecutive annual insurance policies are triggered, the more recent of which do not apply because of new exclusions placed into the policy by the insurance industry. In a typical instance in Honeywell, a worker may have been first exposed to asbestos in 1970, with a manifestation of asbestosis in 2010. In about 1986, the insurance industry inserted an absolute asbestos exclusion in the general liability policy, so that asbestos insurance coverage became unavailable in the marketplace. Thus, the issue is whether the policyholder or insurance companies that issued policies prior to 1986 are liable for the uncovered period between 1986 and 2010. The New Jersey Supreme Court held that the insurance companies were responsible for the uninsured years. In doing so, the court relied principally on public policy grounds, as set forth in Owens-Illinois Inc. v. United Insurance Co.[3]

The Third Circuit issued a major ruling in 2018 holding that New Jersey's Consumer Fraud Act applied not just to the sale of insurance but also to claims-handling.[4] In Alpizar-Fallas , the Third Circuit addressed extreme egregious misconduct by the insurance company. After an auto accident, the insurance company's representative visited the victim and had her sign paperwork, telling her that it would expedite the claim process. The representative did not reveal that the papers included a release of the other driver in the accident, who was insured by the same insurance company. On these facts, the Third Circuit found that the New Jersey Supreme Court would extend the reach of the Consumer Fraud Act to include claims handling. In view of New Jersey's weak law on bad faith, this is a major advance for New Jersey policyholders since the Consumer Fraud Act mandates treble damages and an award of attorneys' fees.

It is also noteworthy that in 2018 the New Jersey Senate passed an insurance bad faith bill that would apply to first party policies. The bill is currently before the Assembly.

Cooper Indus. LLC v. Columbia Cas. Co. is another valuable decision for policyholders.[5] The case concerned a policyholder that underwent corporate restructuring. The successor company was then sued by the United States Environmental Protection Agency. The insurance companies asserted that the bill of sale in the key corporate transaction was silent on the transfer of insurance rights, and that as a result, the parties did not transfer those rights. The insurance companies also argued that even if a transfer had occurred, the anti-assignment clause in the insurance policies foreclosed coverage. The Appellate Division ultimately rejected both of those arguments. Instead, the court relied on extrinsic evidence to find that the insured parties who effectuated the transfer believed that they were transferring insurance rights as well. The court also reaffirmed that the anti-assignment clause did not apply to post-loss transfers.

In two other cases, the Appellate Division ruled in favor of insurance companies. Wear v. Selective Insurance Co.[6] concerned an insurance company's duty to defend, an area in which New Jersey insurance law from a policyholder's point of view has lagged behind that of every other state. Importantly, Burd v. Sussex Mut. Insurance Co.[7] has bedeviled New Jersey policyholders for decades. There, the Supreme Court of New Jersey held that if a complaint asserted two causes of action, one potentially covered by insurance and the other not, and the underlying action would not resolve the factual dispute, the duty to defend, paying for defense bills as incurred could be converted to a duty to reimburse after the fact. Many commentators thought that in Flomerfelt v. Cardiello,[8] the New Jersey Supreme Court had limited the reach of Burd, if not extinguished it.

In Wear the underlying plaintiff alleged injury from both mold and other environmental factors. The insurance policy contained a mold exclusion, and also an anti-concurrent clause. The trial court ordered the insurance company to defend because of the allegations of injury from environmental factors in the complaint. The Appellate Division reversed the trial court's grant of summary judgment to the policyholder on the duty to defend, citing Burd, and other authority. Specifically, the Appellate Division held that "the duty to defend should be converted to a duty to reimburse pending resolution of the coverage action." In so holding, the court may have given new vitality to Burd, to the regret of New Jersey policyholders.

The Appellate Division's decision in Northfield Insurance Co. v. Mt. Hawley Insurance Co.[9] also represented a step backward for policyholders. In that case, Empress Properties Inc. hired CDA Roofing Consultants LLC to perform roof installation work on one of their hotels in Asbury Park, New Jersey. Once Sandy made landfall, however, the hotel sustained significant roof damage, which in turn caused water damage to the interior. CDA was insured by Northfield Insurance Company during the installation process and when Sandy hit. Empress Properties and its insurance company, Mt. Hawley, asserted a claim against CDA, and ultimately filed suit.

Northfield then advised its policyholder, CDA, that it was "disclaiming any obligation to indemnify", but, "[n]otwithstanding [a denial of coverage, it was] willing to provide [CDA] with a courtesy defense for this lawsuit." Northfield also expressly "reserve[d] any legal and policy defenses it may have in connection with these matters whether stated or not in this letter" and further "reserve[d] the right to modify its coverage position at any time upon receipt of additional information."

Six months later, Northfield filed suit against CDA, Empress and Mt. Hawley seeking a declaratory

judgment that it had no obligation to defend or indemnify CDA in Mt. Hawley and Empress's suit against CDA. Empress and Mt. Hawley filed a motion for summary judgment arguing that Northfield should be estopped from denying CDA coverage in the underlying action. The trial court granted Empress and Mt. Hawley's motion and found that Northfield's actions were in violation of Merchants Indemnity Corp. v. Eggleston.[10] Specifically, Northfield failed to expressly seek CDA's consent to its control of the defense and, therefore, Northfield could not properly disclaim coverage in the underlying action.

The Appellate Division reversed and found that Northfield's "willingness" to provide a "courtesy defense" could have been interpreted as an "offer of a defense, and not as the insurer's insistence on controlling the defense." The Appellate Division made clear that circumstances exist necessitating that the estoppel doctrine of Eggleston be inapplicable. Policyholders should, therefore, must be cautious in responding to such offers.

While 2018 presented advancements and setbacks for policyholders as far as New Jersey precedent is concerned, policyholders and insurance companies alike will likely see the effects of these decisions for years to come.

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[1] 234 N.J. 23, 188 A.3d 297 (2018)

[2] 31 N.Y.3d 51, 73 N.Y.S.3d 113, 96 N.E.3d 209, 214-16 (N.Y. 2018)

[3] 138 N.J. 437, 478-79, 650 A.2d 974 (1994).

[4] Alpizar-Fallas, 908 F. 3d 910 (3d Cir. 2018).

[5] 2018 N.J. Super. Unpub. LEXIS 868 (App. Div. Apr. 13, 2018).

[6] 455 N.J. Super. 440, 190 A.3d 519 (App. Div. 2018)

[7] 56 N.J. 383, 267 A.2d 7 (1970)

[8] 202 N.J. 432, 997 A.2d 991 (2010)

[9] 454 N.J. Super. 135, 184 A.3d 517 (App. Div. 2018)

[10] 37 N.J. 114 (1962)