Mist Pharmaceuticals, LLC v. Berkley Insurance Company

By Robert Chesler, Steven Pudell, and Kennedy Aldrich

The New Jersey Supreme Court, in *Mist Pharmaceuticals, LLC v. Berkley Ins. Co.,* No. 089689, 2026 WL 1278954 (N.J. May 11, 2026), recently held that an insurance company was not estopped from withdrawing its defense of a policyholder where the insurance company consistently reserved its rights under a policy exclusion throughout the course of a coverage dispute. In that case, the policyholder, Mist Pharmaceuticals, sued its insurance company, Berkley, to seek coverage after allegations arose that the Chair of the company's Board of Directors was engaged in self-dealing through Mist Pharmaceuticals and other entities he controlled.

After lawsuits were filed alleging the Board Chair's misconduct, Mist Pharmaceuticals[as1.1] sought coverage under their Director's and Officer's liability policy. Initially, the insurance company agreed to reimburse a portion of the legal fees but reserved all rights under the policy. Specifically, Berkley pointed to a "capacity exclusion" in the policy, asserting that coverage was not available for the allegations pertaining to the Chair's dealings with other, uninsured entities, only those involving the policyholder. Berkley later fully withdrew its participation in the defense of Mist and the Board Chair asserting, based on discovery, that the claim against them arose prior to the policy period.

Mist subsequently filed a coverage action, contending that the insurance company "had taken unjustified and inconsistent positions by agreeing to pay a portion of defense costs for a year and then denying coverage, terminating its contribution to defense costs, and declining to participate further in the defense prior to meditation." Berkley filed an answer and counterclaims seeking restitution of the legal fees it had already paid.

While the coverage matter was pending, Mist repeatedly requested that Berkley participate in negotiation of a global settlement. Berkley declined, reiterating that it believed it did not owe coverage.

The trial court entered judgment for Mist, requiring Berkley to provide coverage up to what remained of the policy limit. The Appellate Division reversed the trial court's holding and the Supreme Court of New Jersey granted certification.

The Supreme Court of New Jersey considered two questions: 1) whether the capacity exclusion applied to bar coverage and 2) whether the insurance company was precluded from asserting its rights under the capacity exclusion.

The Supreme Court first considered whether the capacity exclusion in the policy applied to bar coverage. The policy's capacity exclusion states that an insurance company will not be liable for loss in connection with a claim made against a policyholder

based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any Wrongful Act of an Insured Person serving in the capacity as director, officer, trustee, employee, member or governor of any other entity other than an Insured Entity or an Outside Entity, or by reason of their status as director, officer, trustee, employee, member or governor of such other entity.

The Supreme Court of New Jersey found, consistent with its decision in *Norman International*, "the disjunctive 'or'

© 2026 Anderson Kill P.C.

means that each term in the exclusion is alone sufficient to bar coverage." Consequently, the Court found, "the exclusionary clause does not turn on a causal nexus between the excluded activities and harm alleged." Therefore, because all underlying claims arose out of the Board Chair's simultaneous involvement with Mist and other, uninsured entities, the Court held that the capacity exclusion applied to bar coverage.

The Court also considered whether Berkley was precluded from asserting its rights under the capacity exclusion after withdrawing defense coverage. The Court considered two cases relied on by Mist, *Fireman's Fund Insurance Co. v. Security Insurance Co.*, 367 A.2d 864 (N.J. 1976) and *Griggs v. Bertram* 443 A.2d 163 (N.J. 1982) but found that the cases were inapplicable to the situation at bar.

In *Fireman's Fund*, the insurance company breached its obligations under the policy and acted in bad faith. Thus, the court held that the insurance company forfeited its right to control the settlement of the underlying claims. Here, the Court held that because the policy did not cover Mist for the claims asserted, there was no basis for finding that Berkley acted in bad faith. Accordingly, Berkley did not forfeit any rights when it declined to participate in the global settlement of the claim when the claim was correctly determined not to be covered by the policy. Therefore, the Court found that *Fireman's Fund* was inapplicable.

In *Griggs*, a policyholder provided his insurance company with notice that a claim may be brought against him after he punched someone at a baseball game. Although the insurance policy excluded coverage for intentional torts, it "gave no indication that any potential claim of legal action arising from this incidence would not be covered under the policy or that it would disclaim coverage in the event such a claim or action were brought." The insurance company then disclaimed coverage based on the intentional tort exclusion 17 months later.

The *Griggs* court held that "where, after timely notice, adequate opportunity to investigate a claim, and the knowledge of a basis for denying or questioning insurance coverage," an insurance company "fails for an unreasonable time to inform the insured of a potential disclaimer, that insurer is estopped from later denying coverage under the insurance policy in the event a legal action is subsequently brought against its insured." Here, the Court found that the doctrine of estoppel as articulated in *Griggs* was not applicable because Berkley repeatedly and continuously reserved its rights under the capacity exclusion in its communications with Mist.

Ultimately, the New Jersey Supreme Court affirmed the case, as modified, and remanded it for proceedings in accordance with its opinion.

New Jersey policyholders should be warned that the *Griggs* decision may have lost some of its force in light of the leverage insurance companies may gain by consistently reserving their rights throughout a coverage dispute. It is important to note, however, that the *Mist* court found that Berkly had substantive grounds to reserve its rights. The decision does not imply that an insurance company should be granted carte blanche to claw back coverage merely by purporting to "reserve its rights" pro forma, as many do. An insurance company's obligations to its policyholder should not be easily written off through a form letter – and no one should read the *Mist* decision as license to do so.

© 2026 Anderson Kill P.C.

Author

Robert Chesler / *rchesler@andersonkill.com*
Bob is a shareholder in Anderson Kill's Newark office and is a member of the firm's Cyber Insurance Recovery Group. Bob represents policyholders in a broad variety of coverage claims against their insurers and advises companies with respect to their insurance programs.

Steven Pudell / *spudell@andersonkill.com*
Steve is the managing shareholder of Anderson Kill's Newark office. He represents insurance policyholders in coverage disputes. Steve's practice concentrates on insurance recovery, exclusively on behalf of policyholders, as well as on commercial litigation.

Kennedy Aldrich / *kaldrich@andersonkill.com*
Kennedy is an attorney in Anderson Kill's New York office and focuses her practice on insurance recovery. She is a member of the firm's Restaurants, Retail, and Hospitality Group and Sports, Media, and Entertainment Group.

ANDERSON KILL

Known as the Policyholder Powerhouse™, Anderson Kill is a pioneer in insurance coverage litigation: we have more experience in litigating, trying and settling insurance coverage disputes than any other law firm. As the only four-time winner of Business Insurance's **Legal Team of the Year**, our firm has an extraordinary record of obtaining insurance coverage for policyholders in connection with all manner of insured losses. The firm has offices in New York, NY; Boston, MA; Los Angeles, CA; Newark, NJ; Philadelphia, PA; Stamford, CT; and Washington, D.C.

© 2026 Anderson Kill P.C.