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Insurance Law Alert

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Ruling in Continental Insurance Company v. Honeywell International, Inc.

The New Jersey Supreme Court issued a ruling on June 27, 2018, in Continental Insurance Company v. Honeywell International, Inc. (A-21-16) that answers several critical questions assuming the following facts (or similar facts for property damage claims):

1. I am a New Jersey-based insured with strong contacts with New Jersey and am exposed to bodily injury liability claims across the United States for products that I sold;
2. I have placed my insurance carriers (dating back prior to 1986/1987 for as far back as possible) on notice of these bodily injury claims and they have denied coverage; and
3. The insurance policies at issue contain no provision indicating which state's substantive law will apply to interpret and apply the policy provisions contained in those policies.

Question 1: Should I consider bringing a declaratory judgment action in New Jersey?

Answer: Yes, if the contacts with New Jersey are strong and the amount of money at stake is sufficient to front the resources (but anticipating recouping these fees pursuant to New Jersey Court Rule 4:42-9(6) that permits fee recovery for successful claimants on liability policies). The New Jersey Supreme Court in Continental rejected the antiquated arguments by Travelers Insurance Company that the law of the place of contracting prevails in choosing which state's law applies. Travelers sought to apply Michigan law, rather than New Jersey law, because contract negotiations took place in Michigan and utilization of that forum's law would minimize Traveler's policy exposure. New Jersey would maximize it. The Continental Court rejected Traveler's approach, citing to prior New Jersey precedent and finding that any analysis must center on Restatement (Conflict of Laws) Sections 188 and 6, noting, as most significant, the domicile, residence and places of incorporation and of business of the parties and the place of performance. The Court "gave great weight in this analysis to Honeywell's status as a New Jersey corporation responsible for liability for asbestos-related claims based on pre-1987 exposure to its friction products. We conclude that this factor supports application of New Jersey allocation law." While the Court's choice of law analysis is much more sophisticated than this, insureds should consider the initiation of a declaratory judgment action in New Jersey if they have satisfied the assumed facts set forth above.

Question 2: If I do bring the action, and assuming no policy exclusions apply, can I successfully argue that for any type of claim for which New Jersey applies the continuous trigger of coverage, which is the time between exposure and manifestation of injury (including environmental, faulty workmanship, and asbestos bodily injury claims) every carrier between exposure and the date when insurance is not "reasonably available" is triggered?

Answer: Yes. For environmental claims, this magic "end" date is generally 1986 when liability carriers began using the absolute pollution exclusion on their policies. For asbestos bodily injury cases it is generally 1987, when the asbestos exclusion was included on liability policies. Expect a battle on this "end" date issue because carriers will try, as Travelers did, to make creative arguments so that insureds must "self-insure" beyond these end dates.

Question 3: Can I use the Continental precedent in environmental property damage cases if I disposed of drums of hazardous substances both pre-1986 and post-1986 (when the absolute pollution exclusion took effect) to argue the carriers must also assume post-1986 disposal of hazardous waste?

Answer: No, probably not. In property damage cases the focus is on the timing of the disposal of hazardous waste as either being pre-1986 shipments or disposal (when the much weaker sudden and accidental pollution exclusion was in effect) or post-1986 shipments (when the stronger absolute pollution exclusion became effective).

Question 4: Can I use the Continental precedent in asbestos bodily injury cases (or possibly other types of toxic tort cases) if the initial injury to a plaintiff was pre-1987 (the asbestos exclusion) and manifestation (i.e. diagnosis) occurred in 2010?

Answer: Yes, you can. This is monumental. If you had even one policy in effect at the time of initial exposure, then, according to Continental, that carrier must assume 100% of the defense and indemnity obligation up until the date of manifestation without looking to the insured for any contribution for that post-1987 time period.

This *Insurance Alert* was written by Martha N. Donovan, Esq., Co-Chair of the Environmental Practice Group, and Margaret Raymond-Flood, Esq. If you have any questions about the information contained in this alert or any other questions regarding complex insurance issues, please feel free to contact Martha at **MNDonovan@nmmlaw.com** or Margaret at **MRFlood@nmmlaw.com**.

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