



## News

### Law360 Calls Upon Scott Seaman For Perspective On Recent NJ Supreme Court Decision

July 2, 2018

In discussing the New Jersey Supreme Court decision on allocation, Law 360 turned to Hinshaw attorney Scott Seaman, a Chicago-based partner and co-chair of the firm's national Insurance Services Group. Seaman is author of the leading treatise on the subject, *Allocation of Losses in Complex Insurance Coverage Claims* (Thomson Reuters 2017-18), which now in its sixth edition.

On June 27th, in *Continental Insurance Company v. Honeywell International, Inc.*, the New Jersey Supreme Court decided to adhere to its' "unavailability of insurance" exception to the general rule in its *pro rata* allocation scheme that policyholders are responsible for damages or injuries taking place in periods in which they are uninsured. A majority of the justices declined to depart from the so-called unavailability exception set forth in the state high court's landmark 1994 opinion in *Owens-Illinois Inc. v. United Ins. Co.*

Under the *pro rata* allocation method outlined in *Owens-Illinois*, if a policyholder forgoes purchasing available insurance for a particular risk, it is responsible for the portion of the injuries or damages taking place during that time period. Where no insurance is available for purchase in certain years, the policyholder does not have to pay a share of costs attributed to those years. In *Honeywell*, the insurers asked the New Jersey Supreme Court to carve out an "equitable exception" to the rule on the grounds that Bendix (a Honeywell corporate predecessor) continued manufacturing asbestos-containing brake products for 14 years after insurance allegedly ceased to be offered for asbestos claims. The Complex Insurance Claims Litigation Association, a trade organization, argued in an *amicus* brief that the unavailability exception should be completely eliminated. The New Jersey Supreme Court majority concluded, however, that the circumstances of the case did not warrant deviating from the unavailability rule. The court emphasized that *Honeywell* sought coverage only for claims alleging initial exposure to asbestos before 1987 — when the policies covered such risks — even if the alleged injuries manifested after 1987. According to Seaman, New Jersey Law on allocation is the same after *Honeywell* as it was before the decision. Losses are prorated and the policyholder remains responsible for periods of no insurance where insurance was available in the market. The majority of the New Jersey Supreme Court simply decided this was not the right case to chip away at the unavailability exception to allocating to policyholders because it was not warranted by the record.

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The Law360 article asks Seaman to distinguish the outcome of *Honeywell* with the outcome of *KeySpan* decision rendered earlier this year by the New York Court of Appeals. “The difference between *KeySpan* and *Honeywell* lies in the different rationale employed by the New York and New Jersey high courts for applying a *pro rata* allocation,” Seaman explained. “In New York, contract language, such as limiting coverage to injury and damage during the policy period, is enforced. New Jersey Supreme Court jurisprudence on allocation is based upon its public policy considerations.”

He adds that we have seen this difference in rationale play out with non-cumulation clauses, which are enforced as interpreted in New York and are disregarded in New Jersey as conflicting with the *Owens-Illinois* allocation scheme. We also see this on the issue of the unavailability of insurance exception, which was rejected by the New York Court of Appeals in *KeySpan* because no such exception to allocating to the policyholder is found in the language of the contracts. Seaman, who was involved in the *Owens-Illinois* case, believes the dissent was correct. “As Justice Albin’s cogent dissent points out, allocating to the policyholder regardless of the availability of insurance actually is sound policy and true to the principles underlying *Owens-Illinois*.”

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