

NJ Supreme Court Declines to Review Decision that Exxon Has No Duty to Indemnify Insurers for Environmental Liability Under Prior Settlement Agreement

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The matter dated back almost thirty years, when the New Jersey Department of Environmental Protection notified the Appearing London Market Insurers (ALMI) of the potential liability of Cornell-Dublier Electronics (CDE), a former indirect subsidiary of Exxon, for pollution at a site in New Jersey. Coverage litigation followed in New Jersey, which ALMI defended under policies issued to CDE. Exxon was not named in the CDE suit nor were the policies which ALMI issued to Exxon at issue in that case; Exxon instead had its own pollution coverage case pending in New York. In June 2000, Exxon and its insurers, including ALMI, entered into a settlement agreement which (a) required Exxon to indemnify the insurers for any environmental liability claims involving its subsidiaries, and (b) provided for application of New York substantive law and litigation in New York City court for any dispute between the parties under it.

The CDE coverage case proceeded to trial in New Jersey, and the insurers were held responsible for the claims at issue under the policies at issue. In post-trial proceedings, CDE learned for the first time about the ALMI Exxon policies. CDE tendered the claim to ALMI under those policies in 2008; ALMI, in turn, tendered the claim to Exxon under the settlement agreement in 2009.

This litigation followed with Exxon successfully arguing, in both the trial court and on appeal, that it had no duty to indemnify the insurers because they failed to provide timely notice under the settlement agreement. The agreement had no express notice provision, but the court held it should be implied and that ALMI had known about the claim since the 1990s. While New York substantive law applied, and prejudice was therefore not required, the courts found that ALMI had actually prejudiced Exxon. In short, in an unpublished decision, the appellate court also held that:

- the insurers' "inexplicable delay in notifying Exxon caused it harm by preventing its timely participation as an indemnitor";
- the insurers' claim was barred by New Jersey's "entire controversy doctrine," which required ALMI to litigate the claims involving the Exxon policies in the CDE proceeding; and
- enforcement of the forum selection clause in the settlement agreement would violate New Jersey's public policy (as reflected in the entire controversy doctrine).

The appellate court also essentially upheld an award in the amount of \$7.8 million in fees and costs incurred by Exxon in the case but remanded the award in order for the trial court to enter required findings of fact.

While the case has no precedential value (as an unpublished decision), and presents its own unique facts and circumstances, it provides cautionary guidance as to the importance of both timely tender of claims for indemnification under settlement agreements, and joinder of claims, where required, in pending litigation.

If you have questions or would like additional information, please contact Patti Santelle (santellep@whiteandwilliams.com; 215.864.6205) or or Laura Rossi (rossil@whiteandwilliams.com; 215.864.6366).

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questions.