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NEW JERSEY SUPREME COURT DILUTES FIRST FILED DOCTRINE AND EXERCISES JURISDICTION OVER SECOND FILED NEW JERSEY ENVIRONMENTAL INSURANCE COVERAGE ACTION

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In *Sensient Colors, Inc. v. Allstate Ins. Co.*, 2008 WL 220354 (N.J., Jan. 29, 2008), the New Jersey Supreme Court diluted the first filed doctrine and retained jurisdiction over a second filed New Jersey environmental insurance coverage action involving a pollution site located in New Jersey. The insured plaintiff, Sensient Colors, Inc. ("Sensient") was a New York corporation with its principal place of business in Missouri. From 1922 to 1988, Sensient, then known as H. Kohnstamm & Co., Inc. ("Kohnstamm"), operated a facility in Camden, New Jersey that manufactured colorants, pigments and dispersions for food, drugs and cosmetics. A number of hazardous materials were used in the manufacturing process. Contamination was discovered at the site in 1998, and it was found that the contamination extended to the neighboring property, which housed a low-income housing development. In 2003, the adjacent property owner sued Sensient for the contamination of its property. The NJDEP intervened to assert cross-claims against Sensient, seeking recovery of costs it expended in cleaning up the Camden site. In 2004, the US EPA demanded reimbursement from Sensient of over \$10 million it expended to remediate the site.

Sensient's predecessor in interest, Kohnstamm, had purchased through its New York office commercial liability policies that covered its owned properties, including the Camden site. Zurich Insurance Company ("Zurich"), a New York company, issued primary coverage to Kohnstamm in the 1970s and 1980s. The Zurich policies were brokered through a New York broker.

In 2004, Sensient notified Zurich of the neighboring owner's lawsuit, as well as the EPA's reimbursement demand. Zurich agreed to participate in Sensient's defense subject to a reservation of rights. In March 2005, without notifying Sensient that it disputed coverage, Zurich filed a declaratory judgment action against Sensient in New York state court. Approximately two months later, Sensient filed its own

declaratory judgment action in New Jersey state court. Named as a defendant in the New Jersey action was the New Jersey Property-Liability Insurance Guaranty Association (“NJPLIGA”), which stepped into the shoes of insolvent carriers. In addition, Sensient asserted a claim against Zurich for breach of the duty of good faith and fair dealing. Zurich filed a motion to dismiss the New Jersey action in favor of the first filed New York action. The trial court granted Zurich’s motion, dismissing the New Jersey action, finding that New Jersey’s public policy did not outweigh New York’s, and therefore, the first filed New York action had precedence.

The Appellate Division reversed, finding that there was no demonstration that a New York court could assert jurisdiction over NJPLIGA, nor that New York recognizes a claim for breach of the duty of good faith and fair dealing. The Appellate Division also concluded that the trial court had improperly dismissed the New Jersey action because there were “special equities.” The Appellate Division found that New Jersey had stronger contacts in comparison to New York, because:

- (1) the contaminated site was located in New Jersey (citing *American Home Products Corp. v. Adriatic Ins. Co.*, 286 N.J. Super. 24 (App. Div. 1995));
- (2) New Jersey would not enforce the qualified pollution exclusion in the policies at issue, while New York would; and
- (3) relevant evidence was located in New Jersey.

The New Jersey Supreme Court affirmed the Appellate Division. The Court acknowledged that New Jersey follows the general rule that the “court which first acquires jurisdiction has precedence in the absence of special equities.” *Id.* at 13. However, the Court noted that the first filed rule is not inflexible, and the existence of special equities can lead to a decision to disregard the first filed rule and exercise jurisdiction in a later filed New Jersey action. The Court noted that special equities can be found when one party “forum shops” in order to deny another party of its choice of forum, or when a party acting in bad faith files first in anticipation of the other party’s imminent suit in another, less favorable forum. Special equities can also be found when the state in which the second suit is filed has significant state interests, such as the remediation of pollution sites, or when proceeding in the first filed jurisdiction would undermine the public policy of the forum state. Finally, the Court held that special equities can be found where it would impose hardship and inconvenience to one party by proceeding in the first-filed action and the other party would not suffer any prejudice if the second filed action were to proceed.

The Court noted with approval the Appellate Division’s analysis in *American Home Products, supra*, which had set forth the following test that a party seeking to stay or dismiss a second filed New Jersey action must satisfy:

- (1) that there is a first filed action in another state;

- (2) that both cases involve substantially the same parties, claims and legal issues; and
- (3) that the plaintiff in the second filed New Jersey action will have the opportunity for adequate relief in the first-filed action.

American Home Products, 286 N.J. Super. at 37. Once the party seeking a stay or dismissal satisfies this test, the burden then shifts to the other party, which must show the existence of special equities for permitting the second-filed action to proceed.

Applying these principles to the case before it, the Court found that special equities existed that strongly supported New Jersey retaining jurisdiction over the action. The Court held the following factors to be determinative:

- (1) that Zurich had agreed to defend Sensient, but then preemptively and without warning, filed suit in New York, which served to deny Sensient its own choice of forum;
- (2) that New Jersey had a strong public policy interest in remediating environmental contamination within the state; and
- (3) that unlike New York, New Jersey will not enforce the pollution exclusion unless the insured intentionally discharged a known pollutant.

The Court also noted other factors that supported the New Jersey forum, including that the New Jersey action had proceeded farther than the New York action, and that relevant documents and witnesses were located in New Jersey. The Court affirmed the Appellate Division, retaining jurisdiction in New Jersey.

The *Sensient* opinion serves to erode the first-filed rule in New Jersey, especially where a New Jersey site is involved, and serves to make New Jersey an even more attractive jurisdiction for insureds seeking insurance coverage for environmental liabilities.

For further analysis of this opinion and its impact on the insurance industry, please contact Kevin M. Haas (212.509.9400, khaas@cozen.com) or Marianne May (212.908.1238, mmay@cozen.com) of Cozen's Insurance Department. Cozen O'Connor is a nationally recognized leader in representing the insurance industry in all coverage areas, including environmental contamination claims.