

Does Litigation Risk Loss of Potential Insurance for Environmental Harm? New Jersey Court Weighs In

February 22, 2023
By Matthew Karmel

Businesses risk losing potential insurance coverage for investigation and remediation of environmental contamination if they pursue claims against third parties without carefully considering and preserving available coverage.

In fact, in recent litigation in New Jersey with implications nationwide, two insurance companies tried to avoid providing coverage for environmental expenses incurred by the owner of the contaminated property by arguing that the property owner's claims were barred by New Jersey's "entire controversy" doctrine as a result of prior litigation between the property owner and its former tenant and the tenant's insurance company. See *Industrial Corner Corp. v. Public Serv. Mut. Ins. Co.*, Docket No. 20-06677 (D.N.J. February 8, 2023). New Jersey's "entire controversy" doctrine is a unique formulation of the more typical doctrine of "res judicata," which generally bars claims that could have and should have been brought in prior litigation.

However, based on the specific facts at issue, the New Jersey federal district court allowed the property owner to continue to pursue insurance coverage from the insurers despite the prior litigation.

That is, the property owner has owned the New Jersey property at issue since 1971. From 1971 through 2008, the property owner leased the property to a tenant conducting manufacturing. The tenant discharged perchloroethylene ("PCE"), a solvent used to clean metal and dry-clean fabric, through its operations and thereby contaminated the property.

After learning of the contamination, the property owner sued the tenant and the tenant's insurance company in separate litigation for damages under the terms of the lease and the applicable insurance policies. The property owner successfully obtained compensation from these parties but was unable to recover all of its costs. As a result, following the conclusion of this litigation, the property owner sought coverage from its own insurance providers. As noted above, the providers responded by arguing that the property owner's claims were barred by New Jersey's "entire controversy" doctrine.

In evaluating the applicability of the "entire controversy" doctrine, the court determined that two of the three elements of the doctrine weighed in favor of dismissing the property owner's claims. However, the third and final element was not satisfied. In particular, the court determined that the "entire controversy" doctrine did not apply because the claims by the property owner and its insurance providers did not arise from the same transaction or occurrence as the prior litigation against the former tenant and the tenant's insurer. The court weighed several factors and determined that, even though all of the claims arise from the PCE contamination, the claims differ in certain key regards. The court also found it dispositive that the property owner could not have brought all of the claims in the same action because they were not yet ripe, i.e., because its insurance providers had not yet refused to provide coverage.

While this decision is helpful to insureds, it is easy to formulate a set of facts where the property owner's insurers could have escaped liability based on the "entire controversy" doctrine or otherwise. As such, this decision provides a necessary warning

to parties, whether located in New Jersey or beyond: *carefully evaluate all potential recovery options, including private parties and insurance providers, before instituting litigation and take precautions to preserve and maintain all recovery options.*