

# Client Alert

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## New Jersey Decision Highlights Importance of Reviewing Historical Liability Insurance Policies

A New Jersey court recently held that an electrical products manufacturer was entitled to coverage rights provided by a predecessor's commercial general liability policies if it was found liable for environmental remediation costs as a result of cleanup efforts by the US Environmental Protection Agency (EPA) along a 17-mile portion of the Passaic River in New Jersey.

Among many issues addressed in the court's 87-page opinion in *Cooper Industries, LLC v. Employers Insurance of Wausau, et al.*, No. L-9284-11 (N.J. Super. Ct. Law Div. Oct. 16, 2017), was whether the manufacturer, Cooper Industries, could assert a right to coverage under insurance policies issued to electrical equipment manufacturer McGraw-Edison Company, which Cooper acquired in 1985 and which was alleged to have contributed to the polluting activities at issue in the EPA's remediation efforts. Cooper argued that the formal and statutory mergers of McGraw-Edison into various entities that ultimately were acquired by Cooper resulted in a lawful transfer of insurance coverage rights, under which the insurers agreed to provide coverage for liability incurred by McGraw-Edison between 1959 and 1986, like those arising from the Passaic River cleanup. The insurers argued that no such transfer of insurance rights took place.

The court granted summary judgment on this issue in Cooper's favor. The court held that, because Cooper's liability was necessarily linked to the polluting activities of McGraw-Edison and its predecessors and such pollution remained at the site and continues to cause damage today, the insurers owe coverage for any liabilities Cooper ultimately incurred unless the insurers prove that coverage is barred by one or more policy exclusions.

The *Cooper* decision highlights two important insurance coverage issues related to successor liability. First, businesses should not overlook the importance of preserving insurance assets when structuring mergers, acquisitions or other transactions to maximize coverage and minimize the risk of successor liability exposure. This is particularly important where an acquired company or its predecessors have exposure to long-tail liabilities that may not become obvious for years or even decades later. In *Cooper* for example, a 1985 acquisition imposed potential liability for a 2009 claim arising from polluting activities dating back to the early twentieth century. Preserving accurate and complete records of all insurance policies, and obtaining them as part of the due diligence process in a transaction, can help ensure the ability to access coverage in the event of a claim.

Second, companies should carefully consider whether a claim also triggers historical policies. The value of historical insurance policies holds true even where there is a clear case for coverage under a company's current policies or where the policies contain anti-assignment provisions. For example, insurance forms change significantly over time, so historical policies may not include newer exclusions or other limitations contained in more recent insurance policies, and thus provide a broader coverage than that available under more recent policies. Similarly, the majority of courts (including recent decisions in New Jersey, Florida and California) have held that an insurance company may not utilize a "consent-to-assignment" provision in its policy to deny coverage for a loss that occurred prior to the assignment, further underscoring the importance of structuring transactions to ensure that the successor has full access to the predecessor's insurance.

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