

NJ Justices Back Coverage Exclusion Reservation Of Rights

By **George Woolston**

Law360 (May 11, 2026, 11:01 PM EDT) -- The New Jersey Supreme Court on Monday said an insurer doesn't waive its right to rely on a policy exclusion after initially defending a claim, backing Berkley Insurance Co. in a coverage dispute stemming from self-dealing suits against a pharmaceutical company and its chairman.

In a 7-2 ruling, the state's high court said that Berkley did not act in bad faith when it withdrew its defense of Mist Pharmaceuticals LLC and Joseph Krivulka and refused to participate in the negotiation of a \$12 million global settlement that resolved the underlying actions brought by CelestialRX Investments LLC.

Berkley repeatedly restated the full text of its capacity exclusion in correspondence with Mist in the five years before the global settlement, and reserved its rights under that exclusion and other policy provisions in letters and emails no fewer than 10 times, Justice Anne M. Patterson wrote for the majority.

"Given that long history of reservations of rights and other communications by Berkley, Mist Pharmaceuticals cannot establish that it entered into the global settlement of CelestialRX's claims in justifiable reliance on any commitment by Berkley to cover those claims or contribute any portion of its policy limit to that settlement," Justice Patterson wrote.

The majority also found that a "capacity exclusion" in the Mist's directors and officers policy barred coverage for claims involving any wrongful act committed by an insured in their role as a director, officer or employee of "any other entity" not covered under the policy. Krivulka was a founder and an official of Akrimax Pharmaceuticals LLC.

"There is no allegation in either of the underlying actions against Mist Pharmaceuticals — or against Krivulka as a director, member, or manager of Mist Pharmaceuticals — that is unrelated to Krivulka's capacity as a director, member, and manager of Akrimax, an entity uninsured under Berkley's policy," Justice Patterson wrote. "Accordingly, the allegations asserted in the underlying actions clearly fall within the scope of the capacity exclusion."

Justice Douglas M. Fasciale, in a dissenting opinion joined by Justice John Jay Hoffman, countered that Berkley's "woefully late and unreasonable delay" in invoking the capacity exclusion foreclosed it from using it as an absolute defense.

"Accordingly, the majority errs in concluding that Berkley can rely on the capacity exclusion as a complete bar to coverage. An insurer cannot be permitted to make representations of coverage for years, only to then reverse course in a thirteenth-hour attempt to disclaim coverage upon which the insured reasonably relied," Justice Fasciale wrote.

He cited the 1982 New Jersey Supreme Court ruling *Griggs v. Bertram* [🔗](#), which outlined good-faith standards for insurance coverage disputes.

Justice Fasciale also objected to the majority's conclusion that the capacity exclusion that it bars all coverage.

"At best, there is more than one way to interpret the exclusion, and we must therefore apply the

meaning that supports coverage. To hold otherwise is violative of our longstanding insurance jurisprudence," Justice Fasciale wrote.

He said Berkley never reserved its rights to rely on the capacity exclusion to disclaim all coverage; it reserved its rights to disclaim coverage only for wrongful acts committed in an uninsured capacity.

To determine if coverage exists, the court must distinguish between Krivulka's insured and uninsured roles, Justice Fasciale said, and some issues of material fact had not been resolved.

"Instead of grappling with those disputed fact issues, the majority bars all insurance coverage and dismisses the coverage complaint. Legal indemnification obligations cannot be resolved by any court on summary judgment due to those disputed issues of material fact," Justice Fasciale wrote.

Mist had **argued before the high court** that Berkley ran afoul of the good-faith standards outlined in Griggs and the 2001 Appellate Division ruling in Fireman's Fund Insurance v. New Jersey Manufacturers Insurance. The company contended that the insurer's refusal to participate in settlement negotiations should prevent it from asserting its rights under the capacity exclusion.

The court, however, said that neither decision addressed a situation in which the insurer invoked an exclusion or provided a reservation of rights.

The Fireman's Fund decision stemmed from the fact that the primary insurer's policy covered the legal malpractice claims at issue, the opinion said.

"Here, in contrast, an exclusion applies," Justice Patterson wrote. "The policy issued by Berkley does not cover Mist Pharmaceuticals for the claims asserted in the Delaware and New Jersey actions. There is, accordingly, no basis for a finding that Berkley acted in bad faith, and indeed no such finding was made in this case."

And in Griggs, the court required that once an insurer was aware of "grounds for questioning coverage" it notify the insured of its intention to disclaim coverage or the possibility that coverage will be denied, the opinion said.

Celestial sued Mist and Krivulka in Delaware Chancery Court, along with Akrimax and several Krivulka family-controlled entities, in 2015. Celestial alleged that Krivulka orchestrated a self-dealing scheme by inserting companies he controlled — including Mist — as intermediaries to take a share of profits from Akrimax's commercialization of some drugs.

After Krivulka's death in 2018, Celestial filed another action in New Jersey asserting claims stemming from the same conduct as the Delaware action. Those disputes culminated in a \$12 million global settlement in October 2020, which assigned 25% of the liability to Mist Pharmaceuticals.

Mist was the only defendant Berkley insured. It filed a claim for coverage under the policy, and Berkley acknowledged that claim but reserved its rights under the policy and the capacity exclusion. The insurer also reiterated that nothing in its letter should be construed as a waiver.

Berkley withdrew its defense of Mist and Krivulka in 2017, saying the claim against Mist arose before the policy period, and Mist filed the current suit a month later. Mist said that Berkley had taken unjustified and inconsistent positions by paying 10% of the defense costs for nearly a year before denying coverage.

While the suit was pending, Berkley also declined to participate in the negotiation of the \$12 million global settlement.

The trial court ultimately ruled in favor of Mist, but the Appellate Division reversed in 2024.

Lynda A. Bennett of Barnes & Thornburg LLP, counsel for Mist, told Law360 in a statement Monday that while they were "disappointed with the result on the insurer's duty to indemnify this claim," they were "pleased that the lower courts' determinations that Berkley had a duty to defend remain undisturbed."

"The length of the majority and dissenting opinions speaks to the importance of the issues presented regarding the scope of the capacity exclusion and an insurer's obligations during the claims handling process and the fact sensitive nature of evaluating coverage for claims," Bennett said.

Counsel for Berkley did not immediately respond to a request for comment on Monday.

Mist Pharmaceuticals is represented by Lynda A. Bennett of Barnes & Thornburg LLP.

Berkley Insurance is represented by Adam M. Smith of Coughlin Midlige & Garland LLP.

The case is Mist Pharmaceuticals LLC v. Berkley Insurance Co., case number A-34-24, in the Supreme Court of the State of New Jersey.

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