

Garrett Motion Inc. v. Honeywell International Inc.
Adversary Proceeding No. 20-1223

November 18, 2020

Opposition to Motion to Dismiss



201221220111800000000011

Introduction

- For decades, Honeywell sold asbestos-laden products, knowing of the substantial risk asbestos posed to human life.
- Faced with billions of dollars in asbestos liability, Honeywell devised a plan to rid Honeywell of that liability and foist it upon Garrett through an Indemnification Agreement.
- Honeywell's actions were procedurally and substantively unconscionable, and the result of a substantial breach of fiduciary duties.
- Now, Honeywell seeks to enforce the Indemnification Agreement to obtain indemnity for punitive damages and intentional misconduct in violation of New York law.
- Meanwhile, Honeywell immediately breached the few obligations it has under the Indemnification Agreement, and has failed to satisfy the basic prerequisites to obtain indemnification under New York law.
- Through its motion to dismiss, Honeywell seeks to evade any responsibility for its wrongful actions.

The Indemnification Agreement Is Unconscionable

The Indemnification Agreement is Substantively Unconscionable

Substantive Unconscionability

- 1 Perverse incentives for Honeywell in light of its post-tax profit from the asbestos liability
- 2 Complete lack of control or input in managing the liability for which Garrett must pay 90%
- 3 Blackbox payment obligations for a Honeywell legacy liability, unrelated to Garrett's business
- 4 Egregious covenants that severely restrict Garrett's ability to operate in the ordinary course
- 5 Lack of information, making Garrett's SEC-reporting obligations reliant on Honeywell's representations
- 6 Billions of dollars extracted from Garrett

Substantive Unconscionability

Execution Version

INDEMNIFICATION AND REIMBURSEMENT AGREEMENT

BY AND AMONG

HONEYWELL ASASCO INC.,

HONEYWELL ASASCO 2 INC.,

AND

HONEYWELL INTERNATIONAL INC.

Dated as of September 12, 2018

The 10% liability Honeywell reserved for itself is recouped entirely by tax benefits to Honeywell when it deducts Garrett's payments from its own income taxes, as permitted by the Indemnification Agreement.

Compl. ¶ 144.

Section 2.17 Tax Treatment. Payments under this Agreement shall be treated for U.S. federal income tax purposes as payments made in respect of an obligation contributed by Payor to Payee simultaneously with the contributions by Payor to Payee of AlliedSignal Aerospace Service LLC, a limited liability company organized under the Laws of the State of Delaware, and the payment obligation under Section 3.02(g) of the Tax Matters Agreement immediately prior to and as part of a plan with the distribution of Payee by Payor to HAPI in accordance with the Separation Agreement. Neither Payor nor any of its Affiliates shall claim any deduction for U.S. federal income tax purposes in respect of such payments other than any portion of such payments treated as interest under applicable U.S. federal income tax rules. **Honeywell shall be the only person entitled to claim deductions for U.S. federal, state or local income tax purposes in respect of any Losses relating to Claims.** All Parties hereto shall and shall cause their Affiliates to file all Tax returns on a basis consistent with the foregoing, and neither any Party nor an Affiliate shall take any Tax position inconsistent with this Section 2.17.

Compl. Ex. A § 2.17.

Garrett Has No Control Over The Defense Or Settlement Of Claims

Substantive Unconscionability

Execution Version

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While Garrett is responsible for 90% of the financial burden, Garrett has no control over the management, defense, and settlement of claims.

Section 2.9 Management of Claims. The Claim Manager shall be solely responsible for, and shall have sole discretion with respect to, the Management of all Claims. Payor shall have the right to meet with the Claim Manager's outside litigation or environmental counsel once each Fiscal Quarter to discuss the US Bendix Reports, the 4Q Reports or the True-Up Reports; provided, that (a) the Claim Manager shall have no obligation to implement or adopt Payor's requests during such meeting or otherwise consult, seek the consent of, cooperate with or otherwise inform (except pursuant to this sentence, Section 2.2 and Section 3.3(a)) Payor or any of its Affiliates or their respective Representatives regarding the investigation, defense, compromise, settlement or resolution of any Claim, regardless of the party against whom any such Claim may be asserted, (b) the content of such meetings shall be limited to the information contained in the US Bendix Reports, 4Q Reports or True-Up Reports, and (c) Payor shall pay all fees and expenses relating to such quarterly meetings. All Claims brought against any Payor Party subject to payment hereunder shall be referred to the Claim Manager for Management promptly and, in any event, within fifteen (15) days of notice thereof. Notwithstanding the above, in no event shall the Claim Manager or the Claim Manager's counsel be under any obligation to share privileged information with Payor or Payor's Representatives.

Compl. Ex. A § 2.9.

Substantive Unconscionability

Garrett must make its multi-million-dollar quarterly payments based on bare-bones reports.

The Indemnification Agreement does not provide any mechanism to challenge or question these amounts.

↑ Compl. ¶ 117.

Onerous Covenants Severely Restrict Garrett's Ability To Operate Its Business

Substantive Unconscionability

Execution Version

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HONEYWELL ASASCO INC.,

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The Indemnification Agreement contains onerous thirty-year covenants that **prohibit or restrict** Garrett's ability to:

Engage in significant corporate transactions

Incur debt or grant liens

Make investments

Sell assets

Pay dividends

Amend material agreements

Engage in certain business activities

Compl. ¶¶ 94–98.

Garrett Is Totally Dependent On Honeywell For Required SEC Disclosures

Substantive Unconscionability

Execution Version

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AND

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Garrett is reliant on Honeywell to make its SEC disclosures on the indemnity obligation.

(i) Upon reasonable request, the Claim Manager shall provide such additional information from time to time as may be necessary for Payor to satisfy its obligations as an SEC registrant, in accordance with, and giving due regard to the principles of confidentiality and legal privilege identified in, Section 2.16 hereof.

Compl. Ex. A § 2.2(i).

This already caused Garrett to report a material weakness:

178. Garrett's March 1, 2019 10-K stated, in pertinent part:

In the course of preparing this Annual Report on Form 10-K and our Consolidated and Combined Financial Statements for the year ended December 31, 2018, our management determined that there is a material weakness in our internal control over financial reporting relating to the supporting evidence for our liability to Honeywell under the Indemnification and Reimbursement Agreement. Specifically, we were unable to independently verify the accuracy of certain information Honeywell provided to us that we used to calculate the amount of our Indemnification Liability, including information provided in Honeywell's actuary report and the amounts of settlement values and insurance receivables. For example, Honeywell did not provide us with sufficient information to make an independent assessment of the probable outcome of the underlying asbestos proceedings and whether certain insurance receivables are recoverable.

Compl. ¶ 178.

Honeywell Extracted, And Continues To Extract, Billions From Garrett

Substantive Unconscionability

\$1.6B in debt incurred and paid as a dividend to Honeywell

\$5.25B maximum liability over thirty years (undiscounted)

\$2.1B liability projected by Honeywell

\$1.1B principal amount + **\$750M** in defense costs + **\$240M** already paid

\$303M claimed by Honeywell under Tax Matters Agreement

\$273M claimed by Honeywell + **\$30M** already paid

The Indemnification Agreement Is Substantively Unconscionable

Substantive Unconscionability

Like in *Blackrock*, the Indemnification Agreement . . .

is “unreasonably favorable” to Honeywell

is “outrageous and oppressive”

“does not reflect the freedom of contract”

made Garrett “a hapless pawn destined for sacrifice on the altar of corporate law”

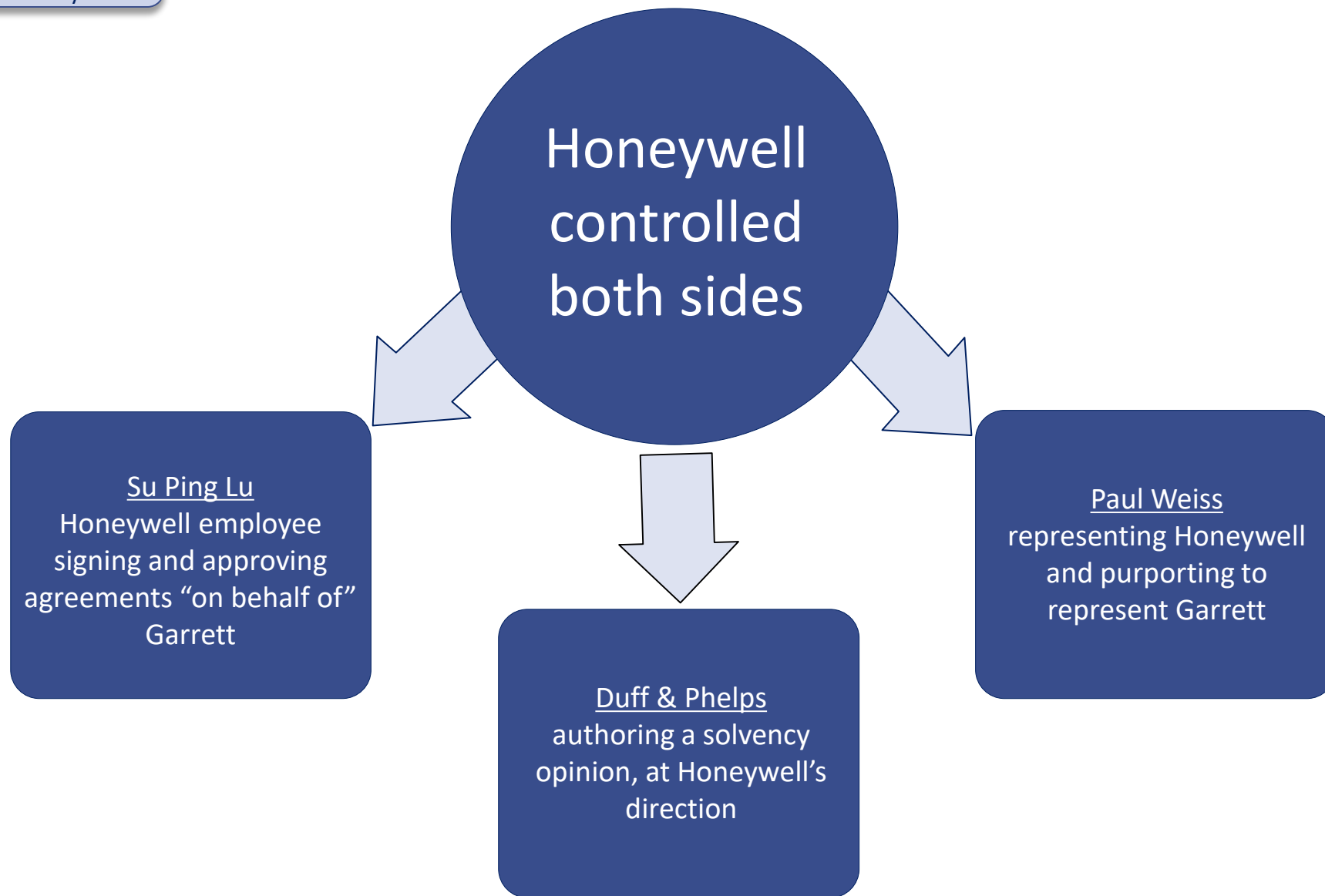
The *Blackrock* decision . . .

- applied New York law on unconscionability
- was decided in the parent/subsidiary context
- found both procedural and substantive unconscionability

Blackrock Capital Inv. Corp. v. Fish,
799 S.E.2d 520, 532–33 (W. Va. 2017).

Honeywell Had Complete Control In The Spin-Off

Procedural Unconscionability



Procedural Unconscionability

Execution Version

INDEMNIFICATION AND REIMBURSEMENT AGREEMENT

BY AND AMONG

HONEYWELL ASASCO INC.,

HONEYWELL ASASCO 2 INC.,

AND

HONEYWELL INTERNATIONAL INC.

Dated as of September 12, 2018

(d) with a copy of any such notice sent to Payee, Payor or the Claim Manager (which shall not constitute notice) to:

Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
New York, NY 10006
Attention: Craig B. Brod
Kimberly R. Spoerri
Fax: (212) 225-3999
Email: cbrod@cgsh.com
kspoerri@cgsh.com

and:

Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Attention: Scott A. Barshay
Steven J. Williams
Fax: 212-492-0040

“[L]egal and other professional services that have been and will be provided prior to the Distribution (whether by outside counsel, in-house counsel or other legal professionals) have been and will be rendered for the collective benefit of each of the members of the Honeywell Group and the [Garrett Group], and each of the members of the Honeywell Group and the [Garrett Group] shall be deemed to be the client with respect to such services”

Compl. ¶ 62 (quoting the Separation and Distribution Agreement).

Paul Weiss is listed as notice counsel for both Honeywell and Garrett entities in several spin-off documents, including:

- Separation and Distribution Agreement
- Tax Matters Agreement
- Trademark License Agreement
- Intellectual Property Agreement

Compl. Ex. A § 4.9.

Compl. ¶ 61.

Su Ping Lu's Involvement Was Pervasive

Procedural Unconscionability

Execution Version

INDEMNIFICATION AND REIMBURSEMENT AGREEMENT

BY AND AMONG

HONEYWELL ASASCO INC.,

HONEYWELL ASASCO 2 INC.,

AND

HONEYWELL INTERNATIONAL INC.

Dated as of September 12, 2018

HONEYWELL ASASCO INC.

By: 

Name: Su Ping Lu

Title: President

HONEYWELL ASASCO 2 INC.

By: 

Name: Su Ping Lu

Title: President

Su Ping Lu signed the Indemnification Agreement on behalf of Indemnitor (Honeywell ASASCO Inc.) and Indemnatee (Honeywell ASASCO 2 Inc.) and the Assignment Agreement on behalf of Assignor (Honeywell ASASCO Inc.) and Assignee (Garrett ASASCO Inc.).

Compl. ¶¶ 76, 90.

In addition to her various roles with Honeywell entities, Su Ping Lu was a representative for numerous Garrett-affiliated entities, including:

Garrett Transportation I Inc.	Director
Garrett Motion LLC	Director, Manager
Garrett Transportation Systems UK II Ltd.	Director
Garrett Turbo Ltd.	Director
Garrett Borrowing LLC	Manager
Garrett Motion Holdings Inc.	President
Garrett Motion Inc.	Director, President
Garrett LX I S.à. r.l.	Class A Manager
Garrett ASASCO Inc.	President
Garrett Transportation Systems Ltd.	Director
Garrett LX II S.à. r.l.	Class A Manager
Garrett LX III S.à. r.l.	Class A Manager
Garrett Transportation Systems Inc.	Director

Compl. Ex. A.

Compl. ¶ 59.

This Case Is Indistinguishable From *Blackrock*

Procedural Unconscionability

Blackrock

This Case

Board of directors “was comprised solely of principals” from the parents

Garrett’s board comprised solely of Su Ping Lu when the Indemnification Agreement was executed

President was an owner of a parent

Su Ping Lu, an employee of Honeywell, was Garrett’s president

No one representing the subsidiary in negotiations and drafting

No one representing Garrett in negotiations and drafting

No attorney present to protect the subsidiary

No independent counsel present to protect Garrett

The person who signed the agreements did not know all of the terms

Su Ping Lu did not have all of the terms in front of her, and failed to inform herself of them

Same person signed on behalf of parent and the subsidiary

Su Ping Lu signed the Indemnification Agreement and Assignment Agreement on behalf of both parties

The Indemnification Agreement Was Procedurally Unconscionable

Procedural Unconscionability

Like in *Blackrock*, Honeywell . . .

was “effectively contracting with [itself] through [its] exclusive control, authority, and dominion”

“disrespected the corporate form”

was engaging in conduct that “may be routine in the business world” but was still “not . . . fair and conscionable”

“clearly [gave Garrett] no meaningful choice in the contract formation process”

Blackrock Capital Inv. Corp. v. Fish, 799 S.E.2d 520, 529, 531 (W. Va. 2017) (applying New York law).

Like in *In re Paragon*, Honeywell . . .

“absolutely and completely dominated [Garrett] at all times through execution of the” agreements

left Garrett “with no control or say of the Spin-Off transactions”

In re Paragon Offshore PLC, 588 B.R. 735, 758 & n.119 (Bankr. D. Del. 2018) (applying New York law).

Aviall And Chemours Do Not Undermine Unconscionability Claim

Unconscionability

Cases Honeywell Relies Upon

- Arbitration clause allegedly oppressive and offends public policy [*Aviall*]
- Arbitration clause allegedly denies certain remedies, reflects imbalance of rights, and imposes one-sided penalties [*Chemours*]



This Case

- Billions of dollars extracted
- Perverse incentives not to manage litigation efficiently
- No control or insight into the claims underlying the indemnity obligation
- Blackbox payment obligations for liability unrelated to Garrett business
- Oppressive covenants, prohibiting Garrett from changing or investing in its business, refinancing debt, or engaging in corporate transactions
- Reliant on another company to comply with SEC rules and regulations

Garrett's Sole Director Breached Her Fiduciary Duty To Garrett

This Case Is Not About *Anadarko*

Breach of Fiduciary Duty

What *Anadarko* says:

“[I]n a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders.”

Anadarko Petroleum Corp. v. Panhandle E. Corp., 545 A.2d 1171, 1174 (Del. 1988).

What *Anadarko* doesn't say:

Anything about the duty of care owed by a director of a wholly-owned subsidiary.

Anadarko confined its holding to the duty of loyalty:

“Our ruling is specifically confined to *Anadarko*’s claim that, under Delaware corporate law, a fiduciary relationship existed between *Anadarko*’s board and its prospective stockholders prior to the issue date of the expected shares. We have concluded that the duty of loyalty arises only upon establishment of the underlying relationship.

Id. at 1178 (describing the “narrow confines of [its] holding”).

“[T]he key word ‘only’ was to distinguish whether duties might also have been due to the prospective shareholders, not to distinguish whether duties might also have been owed to the subsidiary itself.”

In re Sw. Supermarkets, LLC, 376 B.R. 281, 283 (Bankr. D. Ariz. 2007).

Breach of Fiduciary Duty

“The facts of *Anadarko* did not raise the issue of whether any fiduciary duty was owed directly to the subsidiary.”

In re Sw. Supermarkets, LLC, 376 B.R. 281, 283 (Bankr. D. Ariz. 2007).

Anadarko “held that directors of a parent owed no fiduciary duty to prospective shareholders of the subsidiary prior to a spinoff, not that the subsidiary’s directors owed no duty to the subsidiary”

In re Mirant Corp., 326 B.R. 646, 651 (N.D. Tex. 2005).

“[T]he proposition that a wholly-owned subsidiary’s director’s fiduciary duties flow only to the parent . . . overstates the ‘narrow confines’ of the [*Anadarko*] court’s holding.”

First Am. Corp. v. Al-Nahyan, 17 F. Supp. 2d 10, 26 (D.D.C. 1998).

“[C]ourts that have considered the *Anadarko* decision have concluded . . . that the holding should not be read so broadly as to mean that the directors of a wholly-owned subsidiary owe no duties to the subsidiary itself”

Superior Offshore Int’l, Inc. v. Schaefer, 2012 WL 5879608, at *3 (S.D. Tex. Nov. 20, 2012).

“The *Anadarko* ruling has been criticized as having been extended beyond its original intent.”

Wooley v. Lucksinger, 61 So. 3d 507, 589 (La. 2011).

“Later courts have rejected the overly broad reading of *Anadarko*”

In re Touch Am. Holdings, Inc., 401 B.R. 107, 129 (Bankr. D. Del. 2009).

Breach of Fiduciary Duty

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION**

GARRETT MOTION INC. and GARRETT ASASCO
INC.,

Plaintiffs,

v.

HONEYWELL INTERNATIONAL INC., HONEYWELL
ASASCO LLC, HONEYWELL ASASCO 2 LLC,
HONEYWELL HOLDINGS INTERNATIONAL INC.,
SU PING LU, and DARIUS ADAMCZYK,

Defendants.

Index No. 657106/2019

COMPLAINT

IAS Part 53

Hon. Andrew S. Borrok

Plaintiffs designate New York
County as the place of trial.

Plaintiffs Garrett Motion Inc. and Garrett ASASCO Inc. file this action for breach of contract, breach of fiduciary duties, aiding and abetting breach of fiduciary duties, corporate waste, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and declaratory judgment against Honeywell International Inc. ("**Honeywell International**"), Honeywell ASASCO LLC, Honeywell ASASCO 2 LLC, Honeywell Holdings International Inc., Su Ping Lu, and Darius Adamczyk in connection with the 2018 spin-off of Garrett Motion Inc. and its subsidiaries (collectively, "**Garrett**") from Honeywell International and its subsidiaries (collectively, including its predecessors, "**Honeywell**") and the accompanying transactions entered into between the parties.¹

¹ Plaintiffs refer to Honeywell International, Honeywell ASASCO LLC, Honeywell ASASCO 2 LLC, and Honeywell Holdings International Inc. collectively as the Corporate Defendants.

Su Ping Lu breached the duty of care she owed to Garrett by:

Failing to inform herself regarding the implications of the Indemnification Agreement

Failing to inform herself regarding her purported reliance on the Solvency Opinion

Entering into (and binding Garrett to) the Indemnification Agreement, notwithstanding that it is unconscionable and inhibits Garrett's ability to transact business

Approving the Indemnification Agreement based on an incomplete, three-week-old draft, without consulting independent legal counsel

Breach of Fiduciary Duty

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

GARRETT MOTION INC. and GARRETT ASASCO
INC.,

Plaintiffs,

v.

HONEYWELL INTERNATIONAL INC., HONEYWELL
ASASCO LLC, HONEYWELL ASASCO 2 LLC,
HONEYWELL HOLDINGS INTERNATIONAL INC.,
SU PING LU, and DARIUS ADAMCZYK,

Defendants.

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¹ Plaintiffs refer to Honeywell International, Honeywell ASASCO LLC, Honeywell ASASCO 2 LLC, and Honeywell Holdings International Inc. collectively as the Defendants.

79. Specifically, by way of September 4, 2018 Board of Directors Resolutions, the Board of Garrett Motion Inc. found entering into the Indemnification Agreement to be "advisable and in the best interests of the Company and its sole stockholder." At the time, Su Ping Lu was the sole member of the Board of Directors of Garrett Motion Inc. This approval was based on an August 23, 2018 draft of the Indemnification Agreement—meaning the Board (Su Ping Lu) authorized the Indemnification Agreement over a week before it was finalized, and based on a draft that was *almost three weeks old* by the time it was finally signed on September 12.

Compl. ¶ 79.

92. By way of September 14, 2018 Board of Directors Resolutions, Lu, as the sole board member of Garrett ASASCO Inc., "authorized, approved, and adopted" the Assignment Agreement.

Compl. ¶ 92.

Garrett's Charter Did Not Waive The Duty Of Care

Breach of Fiduciary Duty

Honeywell's sole argument regarding a duty of care claim:

⁴ To the extent Garrett alleges breaches of the duty of care, those claims also fail because Garrett's charter waives such claims as to directors like Ms. Lu. *See* Ex. H (charter attached to Garrett Motion Inc. SEC Form S-8), art. IX; *McMillan v. Intercargo Corp.*, 768 A.2d 492, 501 (Del. Ch. 2000).

HON Op. Br. 13 n.4.

Only monetary damages against Su Ping Lu are eliminated.

AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION
OF
GARRETT MOTION INC.

(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:

(7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director

8 Del. C. § 102(b)(7).

ARTICLE IX

SECTION 1. To the fullest extent that the DGCL or any other law of the State of Delaware as it exists or as it may hereafter be amended permits the limitation or elimination of the liability of directors, no director of the Corporation shall be liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director.

HON Ex. H, Article IX, Section 1.

Garrett's Charter Permits Duty Of Care Claims In Remedial Context And Aiding And Abetting Claims

Fiduciary Duty & Aiding and Abetting

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests that this Court enter judgment in favor of Plaintiffs and against Defendants:

- A. Rescinding the Indemnification Agreement or declaring that the Indemnification Agreement is not enforceable;

“Under Delaware law, exculpatory provisions do not bar duty of care claims ‘in remedial contexts’”

London v. Tyrrell, 2010 WL 877528, at *18 (Del. Ch. Mar. 11, 2010) (citation omitted).

Compl. (Prayer for Relief).

Honeywell's sole argument regarding Garrett's aiding and abetting claim:

Because Garrett cannot state a claim for breach for the reasons set forth above, its aiding-and-abetting claims necessarily fail and should be dismissed.

HON Op. Br. 13.

Delaware law “solely exculpates directors (as opposed to secondary actors)” and “an aider and abettor could be liable” even if a director were exculpated.

In re BioClinica, Inc. S'holder Litig., 2013 WL 5631233, at *11 (Del. Ch. Oct. 16, 2013).

The Indemnification Agreement Is Unenforceable For Lack Of Consideration

Lack of Consideration

Execution Version

INDEMNIFICATION AND REIMBURSEMENT AGREEMENT

BY AND AMONG

HONEYWELL ASASCO INC.,

HONEYWELL ASASCO 2 INC.,

AND

HONEYWELL INTERNATIONAL INC.

Dated as of September 12, 2018

The original indemnitor, Honeywell ASASCO Inc., received no consideration when the Indemnification Agreement was executed.

Compl. ¶¶ 75, 308.

INDEMNIFICATION AND REIMBURSEMENT AGREEMENT

This INDEMNIFICATION AND REIMBURSEMENT AGREEMENT (as may be amended, restated, supplemented or otherwise modified from time to time, this “**Agreement**”), dated September 12, 2018, by and among (i) **Honeywell ASASCO Inc.**, a corporation organized under the Laws of the State of Delaware (“**Payor**”), (ii) **Honeywell ASASCO 2 Inc.**, a corporation organized under the Laws of the State of Delaware (“**Payee**”), and (iii) Honeywell International Inc., a corporation organized under the Laws of the State of Delaware (“**Honeywell**” or the “**Claim Manager**” and, together with Payee and Payor, the “**Parties**” and each, a “**Party**”).

Compl. Ex. A.

“[A] void contract cannot be assigned.”

Am. Transit Ins. Co. v. Miranda, 42 Misc. 3d 1212(A), at *3 (N.Y. Sup. Ct. N.Y. Cty. 2013).

“[A]n assignee can only acquire whatever rights the assignor possessed at the time of assignment.”

Spencer Blvd., LLC v. Eustache, 25 Misc. 3d 1239(A), at *3 (N.Y. Sup. Ct. Kings Cty. 2009).

Punitive Damages Are Not Indemnifiable

Punitive Damages Not Indemnifiable

INDEMNIFICATION AND REIMBURSEMENT AGREEMENT

BY AND AMONG

HONEYWELL ASASCO INC.,

HONEYWELL ASASCO 2 INC.,

AND

HONEYWELL INTERNATIONAL INC.

Dated as of September 12, 2018

“**Losses**” shall mean Cash Amounts in respect of losses, damages, liabilities, deficiencies, judgments, interest, awards, penalties, fines, costs, financial assurance or expenses of whatever kind in respect of Managing, investigating, responding to, remediating, defending, settling, compromising or resolving Claims, including attorneys’ fees and costs (including, but not limited to, the costs of experts, consultants, and vendors necessary to defend, compromise and Manage the Claims, security costs and real estate Taxes) **and including, without limitation, punitive,** incidental, consequential, special or indirect Losses (or any other Cash Amounts paid or to be paid to any Person).

Compl. Ex. A § 1.1, at 10.

“[New York] State’s public policy clearly precludes indemnification for punitive damages.”

Soto v. State Farm Ins. Co., 83 N.Y.2d 718, 724 (1994).

“An agreement between two private parties, no matter how explicit, cannot change the public policy of this State.”

Pub. Serv. Mut. Ins. Co. v. Goldfarb, 53 N.Y.2d 392, 400 (1981).

The Prohibition On Indemnification For Punitive Damages Is Rooted In Their Punitive Nature

Punitive Damages Not Indemnifiable

The prohibition on punitive damages is based on “the punitive nature of the award.” Permitting indemnification would “defeat[] the purpose of punitive damages.”

Home Ins. Co. v. Am. Home Prods. Corp., 75 N.Y.2d 196, 201 (1990);
Biondi v. Beekman Hill House Apartment Corp., 94 N.Y.2d 659, 663–64 (2000) (citation omitted).

New York’s bar on indemnification for punitive damages is based on the punitive nature of the damages, not the nature of the underlying conduct.

“[I]f punitive damages are awarded on any ground other than intentional causation of *injury* – for example, gross negligence, recklessness or wantonness – indemnity for compensatory damages would be allowable even though indemnity for the punitive or exemplary component of the damage award would be barred as violative of public policy.”

Pub. Serv. Mut. Ins. Co. v. Goldfarb, 53 N.Y.2d 392, 400 (1981).

Feuer is Inapposite

Punitive Damages Not Indemnifiable

What Honeywell cites *Feuer* for:

New York law does not bar parties from allocating responsibility for already completed acts, including those that arise from intentional misconduct or result in an award of punitive damages.

HON Op. Br. 18.

1

Feuer discusses non-punitive civil liability for illegal conduct, not punitive damages.

“[O]ne may not contract for indemnification for the consequences of a criminal or illegal act to occur in the future.”

Feuer v. Menkes Feuer, Inc., 8 A.D.2d 294, 297 (N.Y. App. Div. 1st Dep’t 1959).

2

Feuer focuses on the allocation of responsibility among wrongdoers, not indemnification.

“[W]ith respect to past events, there may be many quite valid, and . . . desirable, purposes in allocating the ultimate financial responsibility among persons involved in a transaction”

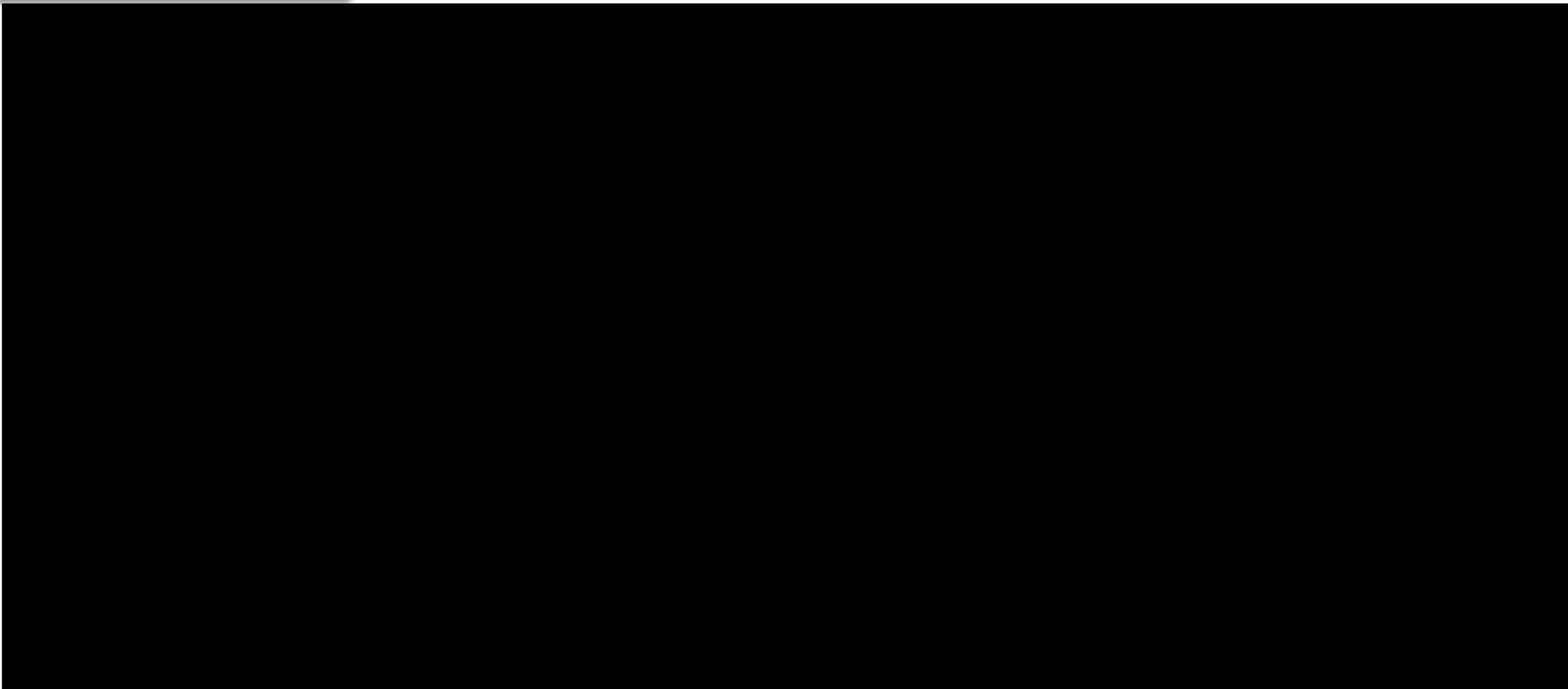
Id. at 298.

Honeywell's Settlements Contain A Punitive Component

Honeywell Overwhelmingly Settles Its Punitive Damages Liability

Pg 32 of 55

Settlements Contain a Punitive Component



Garrett Sufficiently Pleaded Honeywell's Settlements Contain A Punitive Component

Settlements Contain a Punitive Component

1

Juries have returned verdicts imposing multi-million-dollar punitive damage awards against Honeywell

2

It is universally acknowledged that these verdicts provide substantial leverage for plaintiffs in settlement negotiations

3

There is considerable evidence to support punitive damages that is applicable in all cases against Honeywell

4

Honeywell has decades of adverse rulings against it that reflect punitive risk

5

Honeywell's history proves the impact of punitive damages

6

Honeywell has admitted that threats of punitive damages inflate settlements

Settlements Contain a Punitive Component

**\$10 M in punitive damages, compared to only
\$1.6 M in compensatory damages**

Case 4:17-cv-00522-BSM Document 583 Filed 01/29/19 Page 1 of 5

U.S. DISTRICT COURT
EASTERN DISTRICT OF ARKANS.
FILED
JAN 29 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

IN OPEN COURT
BY: JAMES W. MCCORMACK, CLERK
DEPT. CLERK
PLAINTIFF

MICHAEL LYN THOMAS

v. CASE NO. 4:17-CV-00522 BSM

FORD MOTOR COMPANY and
HONEYWELL INTERNATIONAL, INC.

DEFENDANTS

VERDICT FORM

1. Do you find, from a preponderance of the evidence, that Ford Motor Company supplied a product in a defective condition that rendered it unreasonably dangerous and that such defective condition was a proximate cause of any damages sustained by decedent Ronald Thomas?

ANSWER: No (Yes or No)

2. Do you find, from a preponderance of the evidence, that Honeywell International, Inc. supplied a product in a defective condition that rendered it unreasonably dangerous and that such defective condition was a proximate cause of any damages sustained by decedent Ronald Thomas?

ANSWER: Yes (Yes or No)

3. Do you find, from a preponderance of the evidence, that Ford Motor Company was negligent and that such negligence was a proximate cause of any damages sustained by decedent Ronald Thomas?

ANSWER: No (Yes or No)

14. Do you find, by clear and convincing evidence, that Honeywell International, Inc. knew or should have known that its conduct would naturally and probably result in injury and that **it continued such conduct in reckless disregard of the consequences of its actions?**

ANSWER: Yes (Yes or No)

15. If you answered "Yes" to Question 14, **state the amount of punitive damages** that you assess against Honeywell International, Inc.

ANSWER: \$ 10,000,000

Settlements Contain a Punitive Component

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF FRESNOCHARITY FAITH PHILLIPS,
Individually and as Personal
Representative of the Estate of JAMES
LESTER PHILLIPS, Deceased; JAYCEE
LYNNE SMITH; MICHAEL JAMES
PHILLIPS; JAMES ANTHONY
PHILLIPS,

Plaintiffs,

vs.

AMCORD, INC., et al.

Defendant.

Case No. 12CECG04055

Hon. Jeffrey Y. Hamilton, Jr.

**JUDGMENT ON
SPECIAL VERDICT**

The jury found, by clear and convincing evidence, that "one or more of Bendix's officers, directors or managing agents acted with malice or oppression in the conduct upon which the finding of liability was based."

In 2017, the appellate court found there was "substantial evidence in the record to support the jury's finding of malice."

Dated: 9/16/14

JUDGE OF THE SUPERIOR COURT

\$3.5 M in punitive damages,
compared to only \$2.4 M in
compensatory damages

Respectfully submitted by:

Brian P. Barrow

→ \$5,876,540 (\$1,961,530 in noneconomic damage
plus \$414,990 in economic, plus
\$3,500,000 in punitive.)

Universal Acknowledgment That Settlements Include Punitive Exposure

Settlements Contain a Punitive Component

“a weighty factor in settlement negotiations”

“a significant factor in the litigation and settlement calculus”

“a higher marginal effect on settlements than compensatory damages”

“valuable leverage in settlement negotiations”

“inflate settlement values”

“obvious and indisputable that a punitive damages claim increases the magnitude of the ultimate settlement”

“giving strength to what otherwise would be a barely viable allegation”

“plaintiffs are able to exploit risks of crushing punitive awards and managers’ risk averseness”

“the demand itself . . . operates as a major factor in increasing the settlement value”

“leverage to demand exponentially inflated values”

“[t]he shadow of a punitive demand enhances the case’s settlement value”

“punitive damages . . . exert most of their influence by casting a shadow on . . . civil cases that settle”

“[p]laintiffs may threaten a punitive damages claim to force a greater settlement”

“settlements reflect an anticipation of the likelihood and extent of punitive damages”

“inevitably results in a larger settlement”

“*in terrorem* effect of punitive damages”

“raised the settlement value of claims”

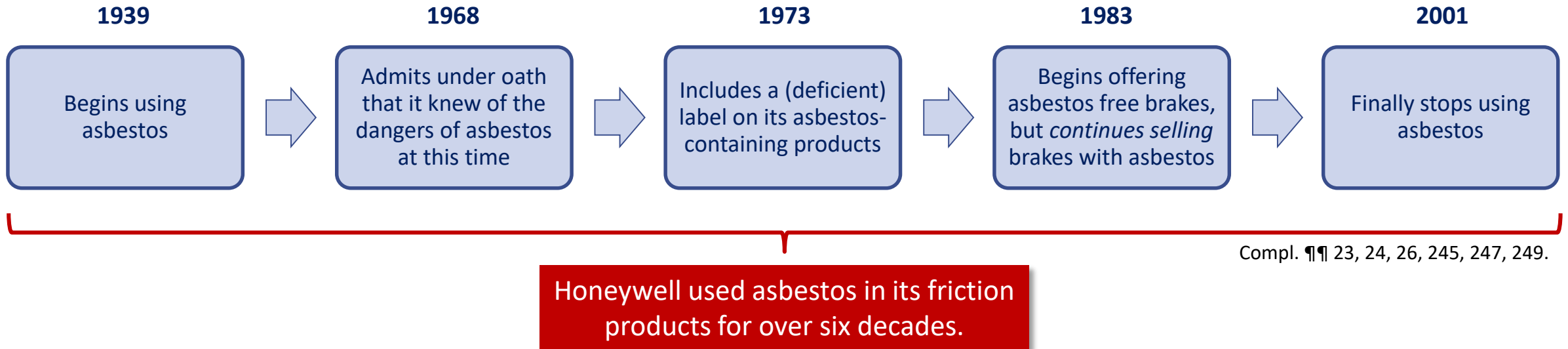
“escalates the settlement amount”

“[t]he mere threat . . . causes defendants to factor such a possibility into the settlement process”

“gives rise to so-called ‘blackmail settlements’ in which defendants pay more”

Bendix's History Of Bad Conduct Shows Significant Punitive Risk

Settlements Contain a Punitive Component

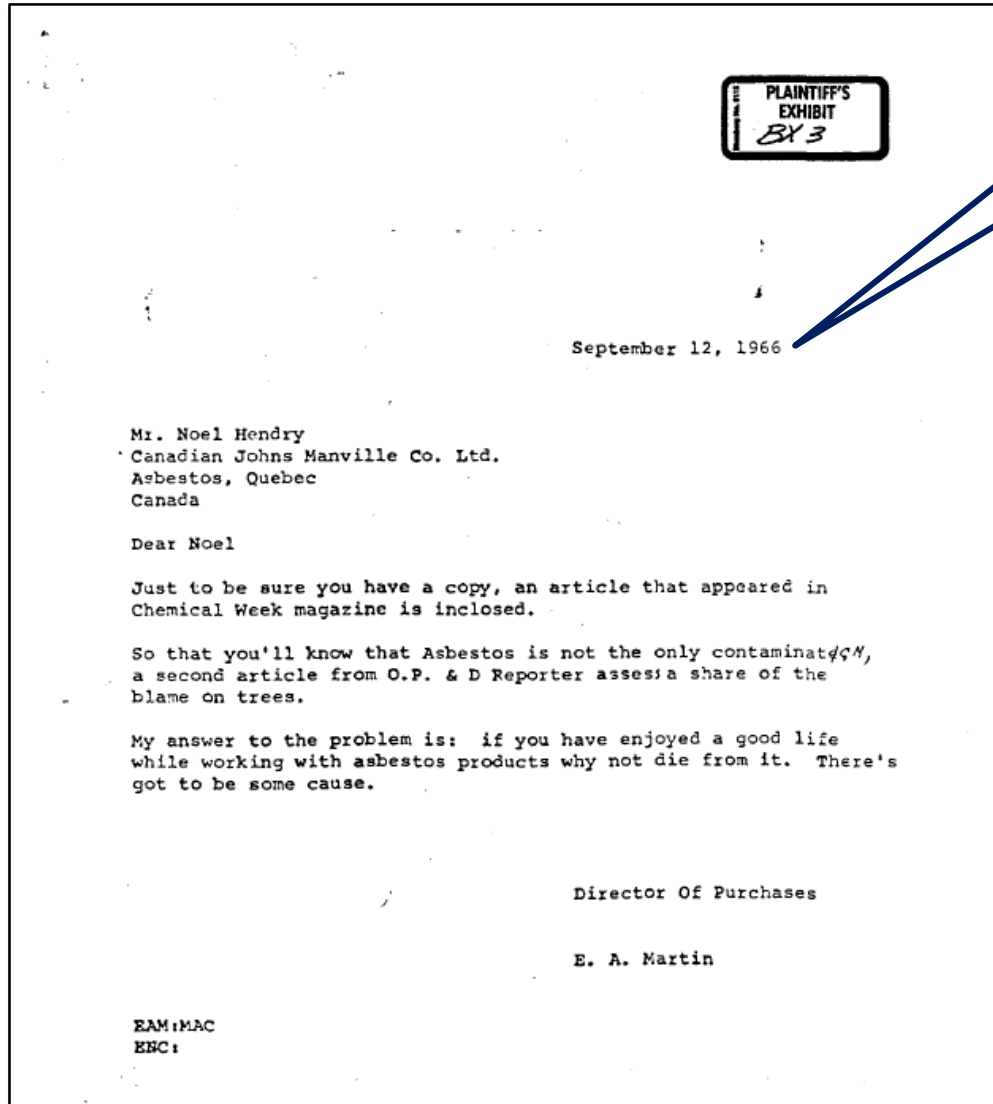


- An October 1966 memorandum noting that Bendix “has a file” on the asbestos health risks and stating that an article “may help to quiet the fear” of a report on the dangers of asbestos
- Decades of articles and research in Bendix’s possession, particularly through its membership in the Asbestos Information Association of North America and the Friction Materials Standard Institute
- Honeywell’s asbestos supplier, Johns Manville, sent Bendix a warning in 1968—five years before it provided any warning on its own products
- As far back as the 1940s, Bendix implemented dust control measures at its Troy facility, was subject to 1956 regulations in New York setting a maximum allowable concentration of airborne asbestos, and began giving employees at the Troy facility annual chest x-rays in the 1950s

Compl. ¶¶ 244–48.

The "Now-Infamous" 1966 Martin Letter

Settlements Contain a Punitive Component



September 12, 1966

“My answer to the problem is: if you have enjoyed a good life while working with asbestos products why not die from it. There’s got to be some cause.”

This memo has been admitted into evidence by numerous courts, including *Thomas* (admitted in part) and *Phillips*.

Honeywell continued using asbestos in its friction products for **thirty-five years** after this letter was sent.

Decades Of Adverse Rulings Against Honeywell Reflect Punitive Risk

Settlements Contain a Punitive Component

Mark SCHWARTZ, Individually and as
Executor of the Estate of Kathleen
Schwartz, et al., Plaintiffs–Appellees
Cross–Appellants

v.

HONEYWELL INTERNATIONAL,
INC., et al., Defendants–Appellants
Cross–Appellees.

{¶ 71} Upon our review, we find plaintiffs presented substantial competent evidence to defeat a motion for directed verdict. Upon construing the evidence most strongly in plaintiffs' favor, reasonable minds could reach different conclusions on the issue of whether there was clear and convincing evidence that Bendix manifested a flagrant disregard of the safety of persons who might be harmed by the product in question. Accordingly, the trial

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO-COURT OF UNLIMITED JURISDICTION

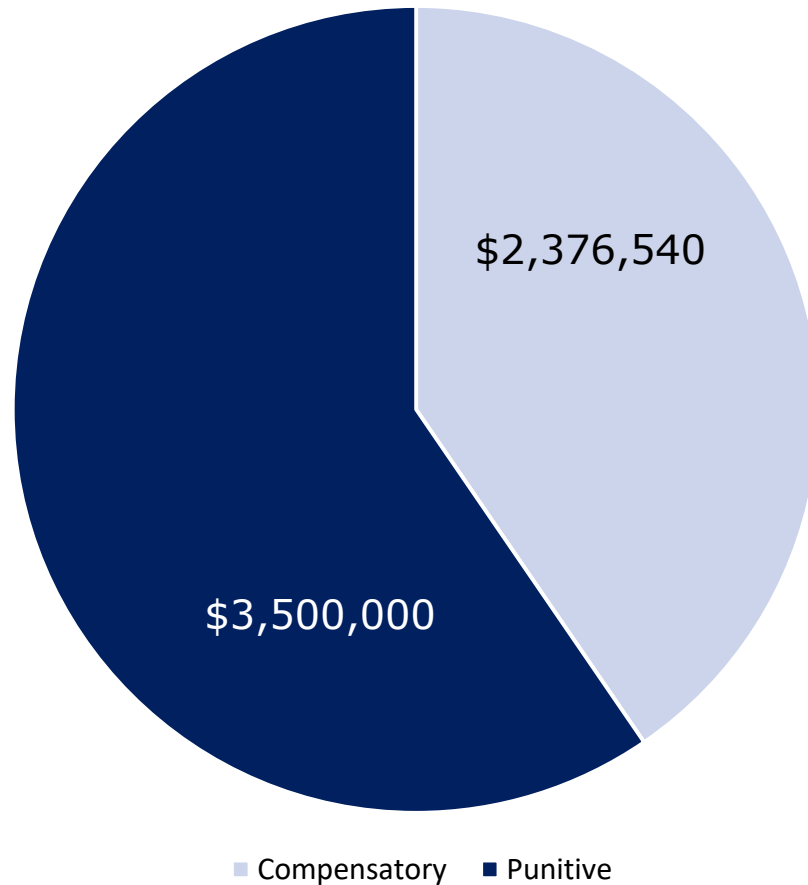
KURT WALTER and SHIRLEY WALTER,)	Case No.: 34-2012-00124037
)	
Plaintiffs,)	PROPOSED ORDER DENYING
)	DEFENDANT HONEYWELL
vs.)	INTERNATIONAL INC.'S MOTION FOR
)	SUMMARY ADJUDICATION
A.W. CHESTERTON COMPANY, et al.,)	
)	
Defendants.)	Date: November 6, 2012

Plaintiffs have demonstrated that there is a triable issue of material fact as to whether Honeywell consciously disregarded customer safety by not providing warnings on its brake products.

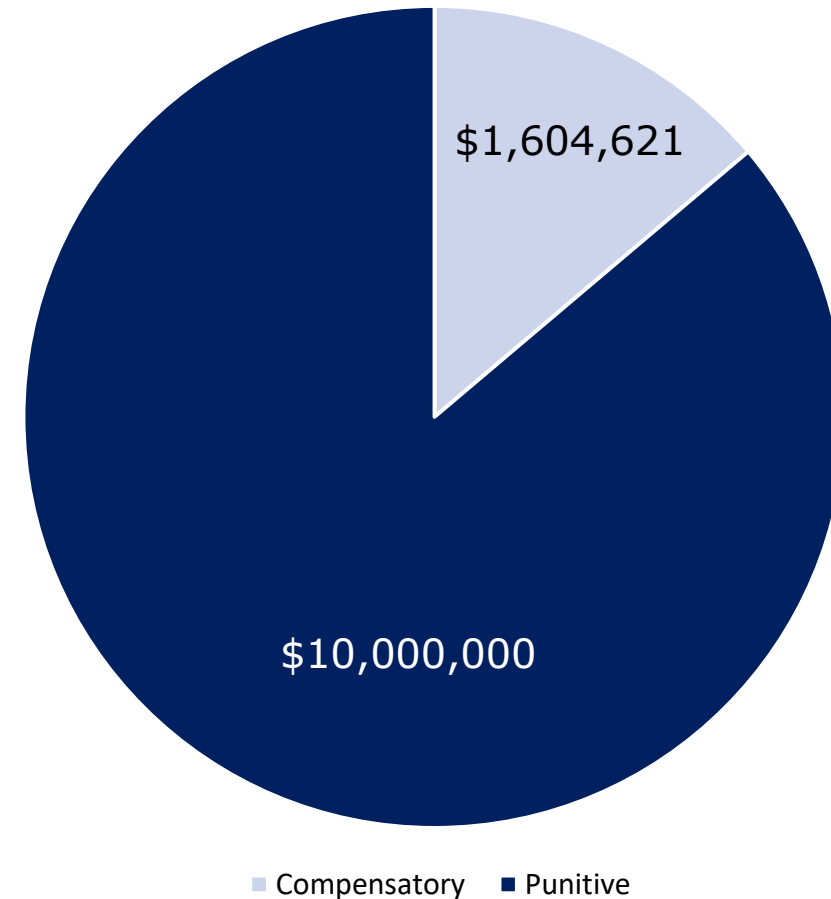
The Punitive Damages In *Phillips* And *Thomas* Exceed Compensatory Damages

Settlements Contain a Punitive Component

Phillips Verdict



Thomas Verdict



Settlements Contain a Punitive Component

Settlements Contain a Punitive Component

1996

Trial court
ordered deferral
of punitive
claims

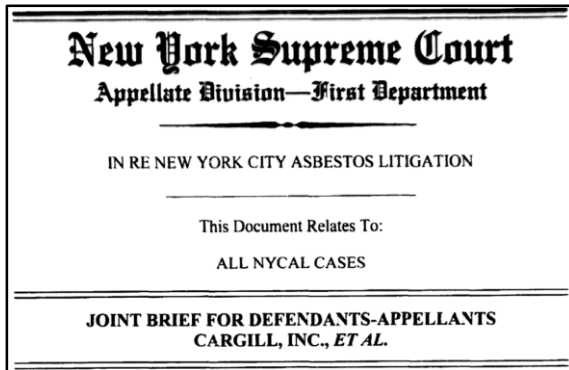
April 2014

Trial court
ended
deferment

July 2015

Affirmed by
appellate court

Settlements Contain a Punitive Component



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dpugliese@mwe.com

*Attorneys for Defendant-Appellant
Honeywell International Inc. f/k/a
AlliedSignal, Inc., as successor-in-
interest to The Bendix Corporation*

“Fears of punitive verdicts undoubtedly will inflate settlement values”

“In truth, the end of the deferral of punitive damages in New York will only tilt the settlement advantage even further in plaintiffs’ favor, enabling them to inflate settlement demands and thereby cause additional depletion of the resources available for compensation of future claimants.”

“It is undeniable that ‘as a general proposition the specter of a large punitive damages award is a very powerful factor in encouraging settlements of entire cases.’”

“When defendants face punitive damages, . . . they are forced to ‘stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability’ These threats are real. . . . [S]taggering punitive damages verdicts have occasionally been awarded in cases that have gone to trial.”

Honeywell Cannot Be Indemnified For The Punitive Component Of Its Settlements

The Extent Of Honeywell's Punitive Damages Liability Is, At Most, An Issue Of Fact

Punitive Component Must Be Allocated

“This issue raises a question of fact which can only be resolved at trial.”

Ansonia Assocs. Ltd. P'ship v. Pub. Serv. Mut. Ins. Co., 180 Misc. 2d 638, 641 (N.Y. Sup. Ct. N.Y. Cty. 1998), *aff'd*, 257 A.D.2d 84 (N.Y. App. Div. 1st Dep't 1999).

“American has presented a question of fact as to which portion of the settlement award, if any, represented punitive damages.”

Am. States Ins. Co. v. Synod of Russ. Orthodox Church Outside of Russ., 183 F. App'x 401, 404 (5th Cir. 2004) (applying New York law).

“[T]here is a factual issue of the apportionment between covered and punitive damages.”

Nat'l Union Fire Ins. Co. of Pittsburgh v. Ambassador Grp., Inc., 157 A.D.2d 293, 299 (N.Y. App. Div. 1st Dep't 1990).

“[O]nce damages are awarded or a settlement entered, defendant may also be entitled to discovery regarding whether the awards are punitive in nature, and thus not indemnifiable.”

STB Invs. Corp. v. Sterling & Sterling, Inc., 140 A.D.3d 449, 451 (N.Y. App. Div. 1st Dep't 2016).

Punitive Component Must Be Allocated

In the analogous context of reinsurance, the Court of Appeals has similarly held that a settlement between an insurer and its insured must be allocated to determine what portion of the settlement was attributable to non-indemnifiable bad faith claims.

“There is evidence in the record from which a factfinder could conclude that an allocation giving no value to the bad faith claims was unreasonable.”

U.S. Fid. & Guar. Co. v. Am. Re-Ins. Co., 962 N.Y.S.2d 566, 574 (2013).

“[W]hen the coverage case went to trial, [insurer] was faced with the possibility of a jury verdict—possibly a very large one—against it on the bad faith claims It was therefore arguably not reasonable, at the time the coverage litigation was settled, to say that the bad faith claims had no value.”

Id.

Gibbs is Inapposite

Punitive Component Must Be Allocated

1

Gibbs did not involve indemnity for punitive damages.

2

The *Gibbs* decision hinged on who the wrongdoer was.

“[T]he settling party seeking indemnification was essentially charged with nonfeasance arising from a more culpable party’s malfeasance.”

Gibbs-Alfano v. Burton, 281 F.3d 12, 23 (2d Cir. 2002).

3

Unlike the indemnitees in *Gibbs*, Honeywell has been found liable for wrongful conduct and punitive damages.

Honeywell, the indemnitee, is the sole wrongdoer.

Honeywell Has Not Established Its Right To Indemnification

Prerequisites to Indemnification

Honeywell must
prove:



Actual (or potential) liability

Reasonableness

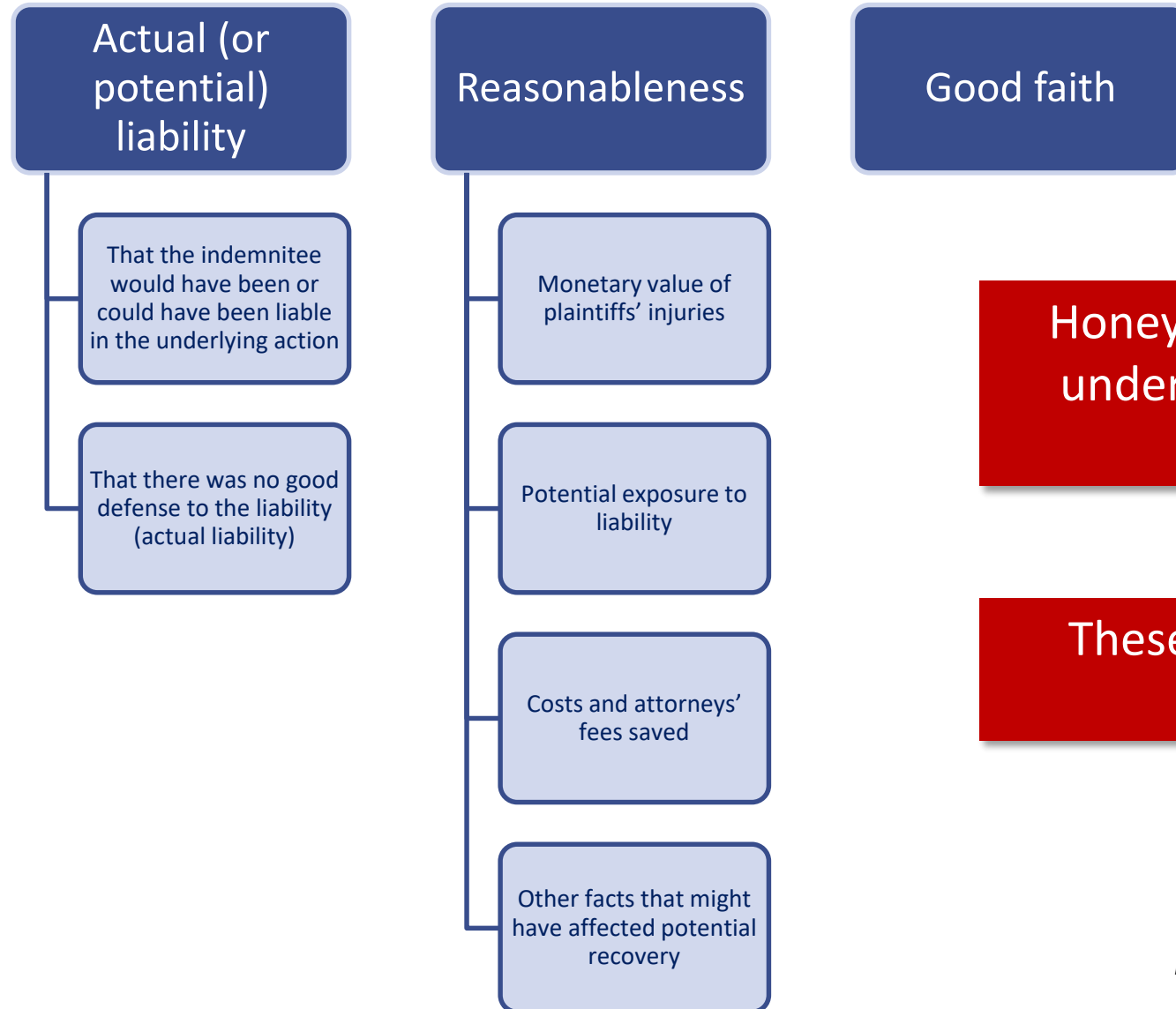
Good Faith

An indemnitee under New York law, is “required to prove the objective reasonableness of the decision to settle and [each] settlement amount,” that the settlement was in good faith, and that it would or could have been liable on the underlying claims.

Deutsche Bank Tr. Co. of Ams. v. Tri-Links Inv. Tr., 43 A.D.3d 56, 63, 67, 69 n.11 (N.Y. App. Div. 1st Dep’t 2007).

Honeywell Must Prove Liability, Reasonableness, And Good Faith

Prerequisites to Indemnification



Honeywell downplays these requirements under New York law, referring to them as “favorable background rules.”

HON Op. Br. 24.

These prerequisites must be established irrespective of notice.

Hendershot v. Consol. Rail Corp., 1998 WL 240495, at *4 (S.D.N.Y. May 12, 1998);
ELRAC, Inc. v. Cruz, 182 Misc. 2d 523, 527 (N.Y. Civ. Ct. 1999).

The “Sole Discretion” Provision Does Not Change These Requirements

Prerequisites to Indemnification

Execution Version

INDEMNIFICATION AND REIMBURSEMENT AGREEMENT

BY AND AMONG

HONEYWELL ASASCO INC.,

HONEYWELL ASASCO 2 INC.,

AND

HONEYWELL INTERNATIONAL INC.

Dated as of September 12, 2018

“[A] party seeking indemnity for a settlement must show that the settlement was reasonable. . . . [N]othing in the [sole discretion provision] . . . overrides this principle.”

In re RFC & RESCAP Liquidating Tr. Action, 332 F. Supp. 3d 1101, 1155–56 (D. Minn. 2018).

**IN RE: RFC AND RESCAP
LIQUIDATING TRUST
ACTION**

Case No. 13-cv-3351 (SRN/HB)

United States District Court,
D. Minnesota.

Signed 08/15/2018

Section 2.9 Management of Claims. The Claim Manager shall be solely responsible for, and shall have sole discretion with respect to, the Management of all Claims. Payor shall have the right to meet with the Claim Manager’s outside litigation or environmental counsel once each Fiscal Quarter to discuss the US Bendix Reports, the 4Q Reports or the True-Up Reports; provided, that (a) the Claim Manager shall have no obligation to implement or adopt Payor’s requests during such meeting or otherwise consult, seek the consent of, cooperate with or otherwise inform (except pursuant to this sentence, Section 2.2 and Section 3.3(a)) Payor or any of its Affiliates or their respective Representatives regarding the investigation, defense, compromise, settlement or resolution of any Claim, regardless of the party against whom any such Claim may be asserted

Compl. Ex. A § 2.9.

Honeywell Materially Breached The Indemnification Agreement

Honeywell Materially Breached The Indemnification Agreement

Breach of Contract

INDEMNIFICATION AND REIMBURSEMENT AGREEMENT

BY AND AMONG

HONEYWELL ASASCO INC.,

HONEYWELL ASASCO 2 INC.,

AND

HONEYWELL INTERNATIONAL INC.

Dated as of September 12, 2018

(i) Upon reasonable request, the Claim Manager shall provide such additional information from time to time as may be necessary for Payor to satisfy its obligations as an SEC registrant, in accordance with, and giving due regard to the principles of confidentiality and legal privilege identified in, Section 2.16 hereof.

Compl. Ex. A § 2.2(i).

- Garrett sought information from Honeywell:
 - (1) to properly account for its indemnity obligation and
 - (2) to ensure that its estimates account for only those amounts that are indemnifiable under New York law
- For months, Honeywell refused to provide this information to Garrett, deeming it not “necessary.”

Compl. ¶¶ 167, 171.

OCT

NOV

DEC

JAN

FEB

MAR

APR

MAY

JUN

JUL

AUG

SEPT

OCT

NOV

DEC

2018

2019

Garrett Sufficiently Pleaded Damages

Breach of Contract

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISIONGARRETT MOTION INC. and GARRETT ASASCO
INC.,*Plaintiffs,*

v.

HONEYWELL INTERNATIONAL INC., HONEYWELL
ASASCO LLC, HONEYWELL ASASCO 2 LLC,
HONEYWELL HOLDINGS INTERNATIONAL INC.,
SU PING LU, and DARIUS ADAMCZYK,*Defendants.*

Index No. 657106/2019

COMPLAINT

IAS Part 53

Hon. Andrew S. Borrok

Plaintiffs designate New York
County as the place of trial.

Plaintiffs Garrett Motion Inc. and Garrett ASASCO Inc. file this action for breach of contract, breach of fiduciary duties, aiding and abetting breach of fiduciary duties, corporate waste, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and declaratory judgment against Honeywell International Inc. ("Honeywell International"), Honeywell ASASCO LLC, Honeywell ASASCO 2 LLC, Honeywell Holdings International Inc., Su Ping Lu, and Darius Adamczyk in connection with the 2018 spin-off of Garrett Motion Inc. and its subsidiaries (collectively, "Garrett") from Honeywell International and its subsidiaries (collectively, including its predecessors, "Honeywell") and the accompanying transactions entered into between the parties.¹

¹ Plaintiffs refer to Honeywell International, Honeywell ASASCO LLC, Honeywell ASASCO 2 LLC, and Honeywell Holdings International Inc. collectively as the Corporate Defendants.

Honeywell's material breach caused Garrett to report a material weakness in March 2019—the second material weakness reported by Garrett that Honeywell caused.

178. Garrett's March 1, 2019 10-K stated, in pertinent part:

In the course of preparing this Annual Report on Form 10-K and our Consolidated and Combined Financial Statements for the year ended December 31, 2018, our management determined that there is a material weakness in our internal control over financial reporting relating to the supporting evidence for our liability to Honeywell under the Indemnification and Reimbursement Agreement. Specifically, we were unable to independently verify the accuracy of certain information Honeywell provided to us that we used to calculate the amount of our Indemnification Liability, including information provided in Honeywell's actuary report and the amounts of settlement values and insurance receivables. For example, Honeywell did not provide us with sufficient information to make an independent assessment of the probable outcome of the underlying asbestos proceedings and whether certain insurance receivables are recoverable.

179. Honeywell put Garrett in the position of needing to report a material weakness by not providing Garrett with the information it needed, in material breach of Section 2.2(i) of the Indemnification Agreement.

Compl. ¶¶ 177–79.

Garrett also seeks fees and expenses pursuant to Section 4.11 of the Indemnification Agreement.

Garrett respectfully requests the Court deny
Honeywell's Motion to Dismiss in its entirety.