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INSURANCE LAW

New Decisions Affect Contribution and Allocation in N.J.

Reshaping the landscape of coverage law

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Until late September, 2013 was a quiet year for New Jersey insurance case law, without a single important decision reported. The courts are now catching up, with two recent coverage decisions from the Supreme Court and one from the federal court for the District of New Jersey. All three decisions address issues of allocation and contribution, and should reshape the landscape of New Jersey coverage law.

Farmers Mutual

Farmers Mutual Fire Ins. Co. of Salem v. N.J. Property-Liability Insurance Guaranty Association, 215 N.J. 522 (2013), principally addressed allocation when an insurance company is insolvent. In past years, the New Jersey Property-Liability Insurance Guaranty Association (PLIGA) filled the gap in coverage created by the insolvency. Indeed, it stood in the shoes of the insolvent insurance company. However, in 2004, the legislature changed the governing statute for PLIGA, mandating that PLIGA did not need to pay until all other solvent insurance was exhausted. In *Farmers Mutual*, the solvent insurance company paid the share of the insolvent insurance company, and then sought reimbursement from PLIGA. The New Jersey Supreme Court decided that until all solvent insurance policy limits are exhausted, the amended statute exempts PLIGA from the allocation scheme set forth in *Owens-Illinois v. United Ins. Co.*, 138 N.J. 437 (1994), and *Carter-Wallace v. Admiral Ins. Co.*, 154 N.J. 312 (1998).

Of most interest to policyholders is a single paragraph that definitively states that when liquidation creates a coverage gap, the solvent insurance company and not the policyholder should provide coverage for that gap. This is a major victory for policyholders. Over the years, there has been a tendency to ossify *Owens-Illinois*, in which the New Jersey Supreme Court held that companies that purposely chose to not purchase insurance should be responsible for uncovered years. In fact, the *Owens-Illinois* court noted, as cited in *Farmers Mutual*, that in continuous-trigger cases, *Owens-Illinois* would not be "the last word."

One result of courts' subsequent disregard of that warning is that insurance companies have refused to take responsibility for years when insolvencies created gaps. While *Owens-Illinois* held that companies that purposely chose not to purchase insurance should be responsible for uncovered years, the policyholder who purchases coverage only to suffer the misfortune of having its insurance disappear into liquidation should not be penalized. *Farmers Mutual* at least partially corrects this inequity. The Supreme Court recognized that interpreting the PLIGA Act (N.J.S.A. 17:30A-1, et seq.) to the disadvantage of policyholders would all but turn it on its head.

Potomac Insurance

In *Potomac Ins. Co. v. Pennsylvania Manufacturers Association Ins. Co.*, 215 N.J. 409 (2013), the New Jersey Supreme Court confirmed a cause of action for contribution by one insurance company against another. Frequently, a party is insured under several different insurance policies for the same risk. In an asbestos or environmental case, in which injury stretches out over many years, numerous different insurance companies may be on the risk consecutively. Similarly, a construction company may be an addi-

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tional insured under the policies of numerous contractors and subcontractors, and have simultaneous coverage under multiple policies.

Potomac was a hybrid of these two scenarios. It was a construction claim, but one involving water damage over 10 years, triggering coverage under consecutive policies issued by five different insurance companies. The contractor was Roland Aristone Inc.

Aristone was sued in 2001. Two of the insurance companies, Selective and OneBeacon, paid all of Aristone's defense costs, and then sought contribution from the others. While two settled, Pennsylvania Manufacturers Association Ins. Co. (PMA) refused to pay. PMA had previously entered into a settlement with Aristone, and asserted that the Aristone settlement protected it from claims by other insurance companies. The court found that while the settlement extinguished claims by Aristone against PMA, it did not bar OneBeacon from seeking contribution.

The Supreme Court saw *Potomac* as a natural extension of *Owens-Illinois*, and serving the same public policy purposes. The court found that just as *Owens-Illinois* sanctioned the spreading of damages among insurance companies, it also sanctioned the spreading of defense costs.

Potomac may present an impediment to settlement in multiparty insurance coverage cases. Policyholders and insurance companies have numerous reasons to settle outside of a strict, mathematically correct allocation. A policyholder may offer a better deal to the first insurance company to settle, because of the perceived strategic advantage of an early settlement. The policyholder may need cash and take less from an insurance company than it might be entitled to because of that need. Most importantly, when an insurance company settles, it wants to be totally out of the case and never hear of it again. Insurance companies often will demand a hold-harmless and indemnity from the policyholder with whom they are settling. Policyholders cannot provide repose to a settling insurance company if that insurance company can be sued down the road by another insurance company.

South Jersey Clothing

U.S. v. South Jersey Clothing Co., Civil No. 96–3166, 2013 WL 5467087 (D.N.J. Sep. 30, 2013), also permitted a cause of contribution against an insurance company that had settled. In *South Jersey*, the U.S. Environmental Protection Agency, the New Jersey Department of Environmental Protection, the two polluting parties (who had minimal assets) and their insurance companies lodged a consent decree in federal court in 2002. In the settlement, the insurance companies received full site releases.

In 2006, neighboring landowners, the Marolda parties, sued the two polluters and obtained a default judgment of over $9 million. However, the companies, if they still existed at all, had no assets. Thus, the Marolda parties in 2011 sued the polluters' insurance companies, which had settled with the polluters in 2002. The court performed a detailed analysis of jurisdiction and venue. The Marolda parties argued that the consent decree adversely affected their interests, while the insurance companies argued that the Marolda parties were bound by the earlier consent decree and could not reopen the settlement. The court found that the key issue was whether the Maroldas had a protected interest in the insurance policies at the time of the consent decree in 2002. If the Maroldas had such an interest, they would be entitled to proceed against the consent decree. The court found that the Maroldas had such an interest, and the federal judge then remanded the case to the state court in the interest of comity.

Conclusion

Farmers Mutual is the most explosive of these three decisions. For years, insurance companies have argued for a wooden construction of *Owens-Illinois* that ignored the stricture of the Supreme Court. Almost universally, insurance companies refused to accept a share of the allocation to liquidated years. Now, the Supreme Court has adopted a much more flexible approach.

Potomac and *South Jersey* appear to be neutral, neither pro-policyholder nor pro-insurance company. Rather, they represent the clash of two beneficial concepts—the need for closure to encourage settlement, and the need to compensate victims. The court allowed Marolda's claim to proceed. We will need to wait and see whether *Potomac* and *South Jersey* inhibit settlement. ■