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CASE ALERT

N.J. Supreme Court Issues Opinion in Farmers Mutual v. NJPLIGA

In case handled by Methfessel & Werbel, Supreme Court Alters Carrier's Exposure on Continuous Trigger Claims.

It has long been the law in New Jersey, pursuant to the Owens-Illinois/Carter Wallace doctrine, that there is a continuous trigger in New Jersey for long tail claims such as toxic tort and environmental claims. Every carrier on the risk from first exposure until manifestation is triggered. The Courts have also consistently stated, on more than one occasion, that the insured bears the risk of periods of self insurance and carrier insolvency. The Supreme Court has changed this doctrine.

Our firm handled this case from the outset. It was always understood that this was going to be a test case and numerous other carriers allowed us to carry the ball on behalf of the homeowners carriers who were similarly situated. It was our contention that PLIGA was the entity responsible in the event of insurer insolvency. We were successful at the trial court level and entered into consent judgments against PLIGA. At the Appellate Division level the Court effectively undercut the multiple pronouncements by the Supreme Court over the years that the insured would be responsible in the event of insolvency and ruled that a solvent carrier is responsible for protecting an insured against an insurer insolvency in the event there is more than one insurer applicable to the loss.

In Farmers Mutual the Court was faced directly with the question as to who really bears the risk of insurer insolvency: the insured, the solvent carriers or PLIGA. Traditionally, the risk had been borne by PLIGA. However, in 2004 the Legislature changed the PLIGA Act to state that PLIGA was to stand behind solvent carriers. PLIGA does not have to pay until solvent coverage is exhausted and exhausted was re-defined to include solvent carriers which insured years other than the years insured by the insolvent carrier. Under the old Owens-Illinois scheme, the solvent carriers did not have to be concerned with the insolvency because their policies would not be deemed applicable or triggered for the insolvent years. This has changed.

Under this new case, the solvent carriers are now the guarantors for the insolvent carrier. Any language in prior cases that the insured bore the risk of insolvency has been overruled. It is now the solvent carriers who bear the risk of insolvency and these "years" cannot be charged back to the insured.

Fortunately, there has not been a personal line carrier insolvency in New Jersey in a number of years (this particular case involved Newark). However, in the future, carriers may want to carefully consider their options if approached about taking over risks from a teetering carrier because the suceeding carrier will not only be buying the risks for its years of coverage, but also for the years of the insolvent carrier. Put another way, if

an insured has an insolvent carrier for 10 years and a solvent carrier for one day, the solvent carrier has now become exposed for the entire amount of the claim up to its policy limit with no set off for the amount of time the loss has occurred before it even took over the risk.

Funding agreements also need to be considered before a clean up occurs. A carrier may not wish to fully fund a clean up with the expectation that it will be able to recoup its money in a subsequent claim against other triggered carriers (a right the Supreme Court explicity upheld in the recent decision of POTOMAC INSURANCE COMPANY OF ILLINOIS, by its transferee, ONEBEACON INSURANCE COMPANY, Plaintiff–Respondent, v. PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, Defendant–Appellant,)

Somewhat troubling about the Farmers Mutual decision is that the Supreme Court implicitly stated that carriers cannot rely upon past precedent in trying to determine what is going to happen in the future and the Court reserves the right to change the law at any time to suit the expediency of the current situation. The Court explicitly stated that the insurance industry was on notice that the Owens-Illinois doctrine was a "work in progress" which could change at any time.

This case thus may require a re-evaluation in the manner in which continuous trigger claims are viewed. We at M & W are always available to help our clients navigate these difficult waters. Please do not hesitate to contact us should you wish to discuss this opinion or any other insurance coverage question.