FARMERS MUTUAL FIRE INSURANCE COMPANY OF SALEM, Plaintiff-Respondent,

v.

NEW JERSEY PROPERTY-LIABILITY INSURANCE GUARANTY ASSOCIATION AS ADMINISTRATOR OF CLAIMS AGAINST NEWARK INSURANCE COMPANY, Defendant-Appellant.

Nos. A-0015-10T3, A-0016-10T3

Superior Court of New Jersey, Appellate Division.

Argued May 25, 2011.
Decided July 11, 2011.

Mark M. Tallmadge argued the cause for appellant New Jersey Property-Liability Insurance Guaranty Association (Bressler, Amery & Ross, attorneys; Mr. Tallmadge and Richard J. Teer, on the brief).

Fredric P. Gallin argued the cause for respondent Farmers Mutual Fire Insurance Company of Salem (**Methfessel** & **Werbel**, attorneys; Mr. Gallin, on the brief).

Kearns & Duffy, P.C., attorneys for respondent State Farm Fire & Casualty Company as subrogee of Welz, join in the brief of respondent Farmers Mutual Fire Insurance Company of Salem.

Schenck, Price, Smith & King, LLP, attorneys for amicus curiae State Farm Fire & Casualty Company (John M. Bowens, of counsel and on the brief; Ryder T. Ulon and Laura K. Borth, on the brief).

Before Judges Axelrad, R. B. Coleman and J. N. Harris.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

In these consolidated appeals, we consider whether the New Jersey Property-Liability Insurance Guaranty Association (PLIGA) should indemnify solvent insurer, Farmers Mutual Fire Insurance Company of Salem (Farmers Mutual), for environmental cleanup costs where, according to the allocation method developed in Owens-Illinois, Inc., v. United Insurance Co., 138 N.J. 437 (1994), an insolvent insurance carrier is also partially responsible for the cleanup costs. We conclude that the issue is controlled by the 2004 amendment to the New Jersey Property-Liability Insurance Guaranty Association Act, N.J.S.A. 17:30A-1 to -20 (PLIGA Act) and that the policy behind the PLIGA Act requires the exhaustion of all insurance benefits from solvent insurers on the risk before PLIGA, standing in the shoes of an insolvent insurer, must pay statutory benefits.

The consolidated appeals involve disputes that arise out of the attempts by Farmers Mutual to recover cleanup costs it expended to remediate contamination at two residential sites, each of which was covered by an insurance policy issued by the insolvent carrier, Newark Insurance Company (Newark).

On August 19, 2003, environmental contamination was discovered on property owned by Ramnath and Ashmin Sookoo in Asbury Park. Farmers Mutual had issued Policy No. HOP20004540 to the Sookoo family for the period of December 13, 2002 to December 13, 2003 with $500,000 liability coverage limits. Previously, Newark had issued the following policies of insurance covering the same Sookoo property:

NKG 2383BZ, 12/13/98 to 12/13/99, $300,000 Personal Liability Coverage;

NKG 2383BZ, 12/13/99 to 12/13/00, $300,000 Personal Liability Coverage;

NKG 2383BZ, 12/13/00 to 12/13/01, $300,000 Personal Liability Coverage;

NKG 2383BZ, 12/13/01 to 12/13/02, $300,000 Personal Liability Coverage.

In accordance with its policy's coverage, Farmers Mutual paid $25,958.39 in remediation costs associated with the environmental contamination. Although the contamination was found at the time that Farmers Mutual was insuring the property, it is undisputed that the contamination began at some point in time when Newark was the sole insurer of the property.

The second site involved in this appeal is located in Linden. On March, 19, 2009, environmental contamination was discovered at the property owned by Edward and Carolyn O'Brien. Farmers Mutual had issued the O'Brien family Policy Number HOP20001889 for the period August 29, 2002 to July 29, 2003 with $500,000 liability coverage limits. Newark had previously issued the following policies of insurance to the O'Briens covering the same property:

NKG KV1959, 8/29/99 to 8/29/00, $300,000 Personal Liability Coverage;

NKG KV1959, 8/29/00 to 8/29/01, $300,000 Personal Liability Coverage;

NKG KV1959, 8/29/01 to 8/29/02, $300,000 Personal Liability Coverage.

In accordance with its policy coverage, Farmers Mutual paid $112,165.13 in remediation costs associated with the environmental contamination. As is the case of the Sookoo property, it is undisputed that the environmental contamination of the O'Brien property began at some point before Farmers Mutual's insurance coverage.[1]

Prior to the discovery of the environmental contamination, on August 9, 2007, an order of liquidation was entered for Newark by the Chancery Division, Mercer County. As a result of Newark's insolvency and its purported share of the environmental remediation costs, Farmers Mutual filed a complaint against PLIGA on February 13, 2009, seeking statutory benefits relating to environmental remediation costs in connection with the Linden property. On or about March 20, 2009, PLIGA filed an answer. On March 16, 2009, Farmers Mutual filed a separate complaint against PLIGA seeking statutory benefits relating to environmental remediation costs in connection with the Asbury Park property, and on or about April 27, 2009, PLIGA filed its answer.

As to both properties, Farmers Mutual submits that it is entitled to statutory benefits from PLIGA pursuant to the continuous-trigger theory articulated by Owens-Illinois. It contends that PLIGA is responsible for covering Newark's share of the remediation costs. State Farm Fire & Casualty Company (State Farm) intervened in the actions filed by Farmers Mutual seeking "a declaration that PLIGA is responsible to stand in the shoes of Newark [Insurance Company] and reimburse claimants for Newark's pro rata share of environmental clean-ups."

On April 27, 2009, PLIGA filed a motion for summary judgment associated with the Linden property. On May 18, 2009, PLIGA filed a motion for summary judgment associated with the Asbury Park property. In each motion for summary judgment, PLIGA contests liability to Farmers Mutual for reimbursement based on the language and 2004 amendment to the PLIGA Act.

On July 7, 2009, after conducting a hearing on the matter, the motion court denied PLIGA's motion for summary judgment in a written opinion. Following an assessment of both the language of the Spill Act and that of the PLIGA Act, the court found that since the Spill Act grants "a right of contribution against all other dischargers and persons in any way responsible for a discharged hazardous substance or other persons who are liable for the cost of the cleanup and removal of that discharge of a hazardous substance," N.J.S.A. 58:10-23.11, the Spill Act mandates PLIGA to reimburse Farmers Mutual and thereby supersedes the PLIGA Act's requirement that an insured exhaust all other solvent insurers on the claim before a disbursement of statutory benefits.

On July 16, 2010, the court entered consent orders for judgment setting forth PLIGA's share of the remediation costs. That same date, the court entered a separate consent order dismissing State Farm's rights as an intervenor without prejudice so that the legal issue presented could be addressed on appeal.

On or about August 30, 2010, PLIGA filed its Notice of Appeal as to both cases. On September 28, 2010, we granted PLIGA's motion to consolidate the two appeals.

I.

Both PLIGA and Farmers Mutual agree that despite the motion judge's indication in his written opinion, the PLIGA Act's exhaustion requirement is not in conflict with the language of the Spill Act. PLIGA contends that the Spill Act does not supersede the PLIGA Act since it only applies to parties that actually contaminated the property, not the insurers. Farmers Mutual also concedes this point, and explains that its position below was never that the Spill Act allocation of benefits supersedes the Owens-Illinois allocation of benefits and indicated that "[t]o the extent the Trial Court went on to base its decision on an analysis of the Spill Act, we agree with Appellant that the rationale is questionable." We agree with both Farmers Mutual and PLIGA that the Spill Act is inapplicable here and accordingly, we decline to address the position expressed by the motion judge.

II.

"An insurance carrier's responsibility to respond to a claim is `triggered' by an `event or events' determined by the terms of the insurance policy." Franklin Mut. Ins. Co. v. Metro. Prop. & Cas. Ins. Co., 406 N.J. Super. 586, 591 (App. Div. 2009) (quotation omitted) (quoting Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr, 172 N.J. 409, 416 (2002)). The problem with environmental contamination claims is that the damage that triggers insurance liability will not occur due to a single event, but "usually is attributable to events that begin, develop and intensify over a sustained period of time [and] [t]herefore, the damages ha[ve] occurred or been triggered along a continuous timeline during which several successive policies issued to the insured were in effect." Quincy, supra, 172 N.J. 416-17 (citations and internal quotation marks omitted).

In Owens-Illinois, supra, the Supreme Court developed a method to allocate damages between insurers responsible for the costs associated with an environmental incident if the date of the occurrence of the injury cannot be pinpointed. 138 N.J. at 472. There, the Court considered whether long-term exposure to an asbestos product "triggered" liability under comprehensive general liability (CGL) policies[2] in effect during the entire period of exposure. Id. at 444-45. The Supreme Court adopted the "continuous trigger" theory of liability, holding that

> when progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of a CGL policy. That is the continuous-trigger theory for activating the insurers' obligation to respond under the policies.
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> [Id. at 478-79.]

Although the Court's endorsement of the continuous-trigger theory occurred in the context of asbestos-related personal injury and property damage claims, the holding is applicable to progressive environmental property damage. See id. at 455 (noting that "[p]roperty-damage cases are analogous to the contraction of disease from exposure to toxic substances"). Moreover, since the adoption of the continuous-trigger theory meant that more than one insurance policy would bear the responsibility of providing coverage, the question in Owens-Illinois then turned to what the proper methodology would be in allocating responsibility among each of the triggered policies. Id. at 468-71. The Court determined that "any allocation should be in proportion to the degree of the risks transferred or retained during the years of exposure[.]" Id. at 475. The resolution of the issue was guided by the Court's concern for the efficient use of resources to address the problem of environmental disease. Id. at 472. The Court explained "[b]ecause insurance companies can spread costs throughout an industry and thus achieve cost efficiency, the law should, at a minimum, not provide disincentives to parties to acquire insurance when available to cover the risks." Id. at 472-73.

In Carter-Wallace, Inc. v. Admiral Insurance Company, 154 N.J. 312 (1998),[3] the Court extended the Owens-Illinois continuous-trigger rule to a case involving property damage resulting from the contamination of a landfill. The Court reaffirmed the continuous-trigger principle and held that all carriers on the risk from when environmental contamination commenced until its manifestation bear coverage obligations for such claims. Id. at 325.

PLIGA is a non-profit, unincorporated entity created by the Legislature to provide a mechanism to deal with the consequences of an insolvent insurer, "to protect policyholders of insurance companies which become insolvent." N.J. Property-Liability Ins. Guar. Ass'n v. Hill Int'l, Inc., 395 N.J. Super. 196, 204 (App. Div. 2007) (quoting Lehmann v. O'Brien, 240 N.J. Super. 242, 246 (App. Div. 1989)); N.J.S.A. 17:30A-1 to -20. In order to preserve its assets and provide recovery for the greatest number of persons affected by an insurer's insolvency, PLIGA's liability for a covered claim is capped at $300,000. N.J.S.A. 17:30A-

8(a)(1).

The PLIGA Act, N.J.S.A. 17:30A-1 to -20, was adopted by the Legislature to provide recovery to New Jersey residents after an insurer has been declared insolvent. The Legislature stated:

> The purpose of this act is to provide a mechanism for the payment of covered claims under certain insurance policies, to avoid excessive delay in payment, to minimize financial loss to claimants or policyholders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies, to provide an association to assess the cost of such protection among insurers[.]
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> [N.J.S.A. 17:30A-2(a).]

As defined by the statute, "covered claim" means

> an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage, and not in excess of the applicable limits of an insurance policy to which this act applies, issued by an insurer, if such insurer becomes an insolvent insurer after January 1, 1974, and (1) the claimant or insured is a resident of this State at the time of the insured event provided that for an entity other than an individual, the residence of the claimant or insured is the state in which its principal place of business was located at the time of the insured event; or (2) the claim is a first party claim made by an insured for damage to property with a permanent location in this State.
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> [N.J.S.A. 17:30A-5.]

The PLIGA Act excludes from the definition of a "covered claim," "any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise[,]" and a solvent insurer's claim for "subrogation recoveries or otherwise. . . ." N.J.S.A. 17:30A-5. Under the PLIGA Act, PLIGA is "deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." N.J.S.A. 17:30A-8(a)(2). However, we emphasize that the PLIGA Act was not designed to require PLIGA to assume all the obligations of an insolvent insurer, and we "recognize[] the legislative intent that conservation of PLIGA's resources is necessary to achieve the Act's stated goals." Carpenter Tech. Corp. v. Admiral Ins. Co., 172 N.J. 504, 516, 524 (2002).

Pursuant to N.J.S.A. 17:30A-12(b), a claimant must first exhaust all of its rights against solvent insurers prior to relying on PLIGA for statutory benefits: "Any person having a claim, except a claim for coverage for personal injury protection benefits . . . under an insurance policy other than a policy of an insolvent insurer, shall be required to exhaust first his right under that other policy." Effective December 22, 2004, for all claims arising out of insolvencies occurring after that date, the Legislature amended the definition of "Exhaust" to state that:

> "Exhaust" means with respect to other insurance, the application of a credit for the maximum limit under the policy, except that in any case in which continuous indivisible injury or property damage occurs over a period of years as a result of exposure to injurious conditions, exhaustion shall be deemed to have occurred only after a credit for the maximum limits under all other coverages, primary and excess, if applicable, issued in all other years has been applied.
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> [N.J.S.A. 17:30A-5.]

At the heart of this appeal is PLIGA's argument that the 2004 amendment to the PLIGA Act of the definition of "Exhaust" precludes a payout of statutory benefits to Farmers Mutual, prior to its limits being exhausted.

Prior to the exhaustion amendment, PLIGA's role in the Owens-Illinois allocation scheme was addressed in Sayre v. Insurance Company of North America, 305 N.J. Super. 209 (App. Div. 1997). There, an insolvent surplus lines insurer provided coverage for a ten-month period of progressive environmental injury lasting many years. Id. at 212. The New Jersey Surplus Lines Insurance Guaranty Fund Act (the Guaranty Fund), contended that the policies issued to plaintiff for other years that applied to the same environmental risk should be exhausted and a setoff allowed prior to any obligation on its part to pay statutory benefits. Ibid. We disagreed with the Guaranty Fund's position and concluded that there was no other insurer covering the damage assigned to the time period of the insolvent insurer's policy and as such, no "other insurance" to be exhausted.[4] Id. at

214. We observed that the "thrust of Owens-Illinois was to devise a fair method of allocation of the share of loss to be covered in continuous-trigger situations, not to make insurers guarantors of their predecessors or successors on the risk, nor to require them to pay for periods of non-insurance." Id. at 214.

Here, PLIGA argues that Sayre was superseded by the 2004 PLIGA Act amendment, N.J.S.A. 17:30A-5. We agree. As to the exhaustion issue, the motion court explained that:

> [T]he [exhaustion] amendment is in direct contrast from the holding in Sayre, thereby reflecting a legislative intent to preserve PLIGA's limited resources. However, not only is this argument unsubstantiated, it may not be ripe for the Court's determination. Allocation of responsibility should be determined before a claim for contribution is made. See Franklin Mutual Ins. Co. v. Metropolitan Property & Casualty Insurance Company, 406 N.J. Super. 586, 594 (App. Div. 2009). Allocation of responsibility has not been determined by the Court, meaning it is unknown if a credit can be given to PLIGA's share from any other potentially liable carriers. It is also not known if Farmers Mutual's policy, or other carrier's policies, was exceeded when paying the remediation costs for the insured parties upfront. If found that Farmers Mutual did not have a covered claim, such facts, while not exhaustive, are material in determining PLIGA's responsibility and whether the exhaustion provision can apply.

PLIGA submits that, based on the 2004 amendment, the application of the Owens-Illinois allocation of damages to the policy periods covered by Newark, the insolvent insurer, "may not occur until the limits of [Farmers Mutual's], policy are exhausted." Given that Farmers Mutual's policy limits were sufficient to cover the environmental remediation efforts of the entire continuous-trigger period for both properties, PLIGA argues that Farmers Mutual's policy limits were not exhausted within the meaning of the amendment.

PLIGA further asserts that the purpose of the amended exhaustion provision was to make it a payor of last resort and that "[i]n any continuous trigger matter involving both solvent and insolvent insurers, the periods of insolvent insurance should be removed from the Owens-Illinois allocation analysis and the damages allocated to periods of solvent insurance."

On the other hand, Farmers Mutual and amicus curiae State Farm submit that Farmers Mutual, as a solvent insurer of contaminated property for one year, does not assume the risk borne by Newark — the insurer of the properties for six years — and in light of the above case law, cannot be responsible for one-hundred percent of the costs associated with the environmental remediation. Farmers Mutual takes the position that the amendment evinces no legislative intent to overrule Sayre which would undermine Owens-Illinois in this context. Farmers Mutual urges us to look at the language of N.J.S.A. 17:30A-5 which indicates that "exhaustion shall be deemed to occur only after a credit for maximum limits under all other coverage, primary and excess, if applicable, issued in all other years" (emphasis added).

Farmers Mutual appears to be arguing that since Newark was the sole insurer of the property for all but one year of the continuous-trigger period, no other insurance in any other year is "applicable" to be exhausted, and as a result, PLIGA must reimburse it based on the Owens-Illinois allocation method, for those years. We disagree with Farmers Mutual's contention and in light of the plain language of the 2004 PLIGA Act amendment, in an environmental contamination case, the exhaustion requirement requires any solvent insurer on the risk to cover the liability until its limits have been exhausted. Only then is PLIGA required to disburse statutory benefits to protect the insured.

The resolution of the issue presented turns on statutory construction and interpretation. Courts are to presume that the legislative intent of a statute is expressed by the ordinary meaning of the words used. State v. Mortimer, 135 N.J. 517, 532 (1994), cert. denied, 513 U.S. 970, 115 S. Ct. 440, 130 L. Ed. 2d 351 (1994). "`Our duty is to construe and apply the statute as enacted. We are not at liberty to presume the legislature intended something other than what it expressed by its plain language. This Court will not engage in conjecture or surmise which will circumvent the plain meaning of the [A]ct.'" Lammers v. Bd. of Educ., 134 N.J. 264, 272 (1993) (citing Spiewak v. Bd. of Educ., 90 N.J. 63, 74 (1982)).

Since the PLIGA Act was amended in 2004, after Sayre was decided, we agree with PLIGA that the most logical interpretation of the exhaustion provision in N.J.S.A. 17:30A-12(b) is that in cases of environmental contamination, where Owens-Illinois is otherwise applicable, once a solvent insurer's policy limit is exhausted, the claimant may then seek payment of statutory benefits from PLIGA for amounts remaining unpaid.

The language of N.J.S.A. 17:30A-5 is clear that in continuous indivisible injury or cases when "property damage occurs over a

period of years as a result of exposure to injurious conditions, exhaustion shall be deemed to have occurred only after a credit for the maximum limits under all other coverages, primary and excess, if applicable, issued in all other years has been applied." Although Farmers Mutual was the insurer of both properties for only one year, its policy limit was $500,000. Farmers Mutual accepted a premium to cover the risk up to that limit. As to the Sookoo family, the remediation costs were $25,958.39 and for the O'Briens, the costs were $112,165.13. As the remediation costs associated with the environmental contamination did not exceed Farmers Mutual's policy limits, we conclude that PLIGA is not subject to sharing the costs of such remediation.

We briefly address Farmers Mutual's policy argument that if it is required to pay the entire risk, insurers will not "front[] a clean up because they have no guarantee that they are going to be reimbursed" when paying more than their allocated share.

We emphasize that the PLIGA Act is meant to protect insureds not insurers. N.J.S.A. 17:22-6.71. In discussing PLIGA, the Supreme Court in Carpenter, supra, 172 N.J. at 516 stated:

> Recovery against NJPLIGA is limited to unpaid claims that are either asserted by insureds or claimants who are residents of the State, or concern property permanently located in New Jersey. N.J.S.A. 17:30A-5. NJPLIGA is not responsible for assessments or charges for failure of [the] insolvent insurer to have expeditiously settled claims. N.J.S.A. 17:30A-5d. Further, where a claim is covered both by a solvent insurer's policy and an insolvent insurer's policy, a policyholder first must exhaust his or her policy with the solvent insurer before NJPLIGA has any statutory obligation to pay the policyholder. Therefore, until such exhaustion[,] [NJPLIGA], as the deemed insurer under the insolvent insurer's policy, has no obligation.
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> [(internal citations and quotation marks omitted).]

The PLIGA Act is remedial legislation deserving of liberal construction. Carpenter, supra, 172 N.J. at 514. Although requiring Farmers Mutual to pay the entire environmental contamination period due to Newark's insolvency may have the effect of making it a guarantor of its predecessor(s) on the risk, the solvent insurer's obligations are not disturbed insofar that it still is only required to pay up to its policy limits on risks covered under the terms of the policy.

We defer to the Legislature's determination that an allocation of statutory benefits to policy periods covered by an insolvent insurer shall not occur until the limits of the solvent insurer are exhausted. "`It is not the function of this Court to rewrite a plainly-written enactment of the Legislature or [] presume that the Legislature intended something other than that expressed by way of the plain language.'" State v. Smith, 197 N.J. 325, 332 (2009) (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005) (alteration in original)). Accordingly, the order for summary judgment is reversed and the consent orders are vacated.

Reversed.

[1] Although there is no proof in the record of the exact time period in which the environmental contamination started as to both properties, PLIGA has not contested that the contamination did indeed start during the period which Newark insured the properties.

[2] CGL policies provide coverage to third persons who suffer bodily injury or property damage.

[3] There, the case answered the question of how responsibility of primary and excess insurers is measured in the context of environmental damage over many years with a continuous trigger of liability. Id. at 317.

[4] The exhaustion requirement discussed in Sayre was prior to the 2004 amendment to include the definition of exhaustion.