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New Jersey Superior Court Clarifies Limitation To The Farmers Mutual Decision and The Applicability of the 2004 Amendment to the PLIGA Act

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On November 13, 2013, in *Ward Sand & Materials Co. v. Transamerica Ins. Co., et als.* (CAM-L-4130-09), Judge Robert G. Millenky of the Superior Court of New Jersey issued the first known written opinion interpreting the New Jersey Supreme Court's recent decision in *Farmers Mutual Fire Ins. Co. of Salem v. NJPLIGA*, ** N.J. ***, 2013 N.J. LEXIS 902 (September 24, 2013).

At issue before the Superior Court in *Ward Sand* was whether the *Farmers* decision and the 2004 amendment to the New Jersey Property-Liability Insurance Guaranty Association Act ("PLIGA Act"), *N.J.S.A.* 17:30A-1 *et. seq*., applied to allocation of long-tail claims involving an insurer that was declared insolvent prior to December 22, 2004.

The issue was before the *Ward Sand* court on the policyholder's motion for reconsideration of the court's prior allocation ruling in a long-tail environmental contamination claim. In the motion, the policyholder sought to have the allocation revised based on the Supreme Court's decision in *Farmers*. In *Farmers*, the Supreme Court held that a 2004 amendment to the PLIGA Act required solvent insurers to pay within their policy limits for the share of any long-tail claim otherwise covered by an insolvent insurer. In the *Ward Sand* case, there were five insolvent insurers on the risk. Significantly, it was undisputed that these insurers were declared insolvent prior to the effective date of the 2004 amendment to the PLIGA Act, December 22, 2004.

In support of the motion, the policyholder argued that (1) the 2004 amendment to the PLIGA Act, understood in light of *Farmers*, had retroactive effect and (2) even if the 2004 amendment was not retroactive, the reasoning of the *Farmers* Court clarifies principles that predate the amendment such that all coverage available from a solvent carrier must be exhausted prior to the policyholders' obligation to pay the insolvent share.

The *Ward Sand* court rejected both arguments. Relying on the text of the legislation and another decision by the New Jersey Supreme Court in *Thomsen v. Mercer-Charles*, 187 N.J. 197, 205 n.2

(2006), the *Ward Sand* court held that the 2004 amendment to the PLIGA Act could only be given prospective effect. Moreover, the court held that the reasoning of the *Farmers* decision could not predate the 2004 amendment because the reasoning was in stark contrast to the precedents enunciated in *Benjamin Moore & Co. v. Aetna Cas. & Surety Co.*, 179 N.J. 87 (2004), *Spaulding Composites Co. v. Aetna Cas. & Surety Co.*, 176 N.J. 25 (2003), *Sayre v. Ins. Co. of North America*, 305 N.J. Super. 209 (App. Div. 1997). These precedents made insurer insolvency the responsibility of the policyholder. According to the *Ward Sand* court, the *Farmers* decision endorsed these precedents and "in no way suggested" that the precedents were infirm with respect to insolvencies predating the 2004 amendment. In this regard, the *Ward Sand* court also rejected the policyholders' argument that these precedents should be disregarded in light of the *Farmers* Court's discussion of the purposes of the PLIGA Act as having always required the maximum protection of its insureds.

The *Ward Sand* ruling makes clear that the *Farmers* decision is significantly limited to insurers that became insolvent on or after December 22, 2004.

Should you have any questions or comments regarding this matter, please feel free to contact Coughlin Midlige & Garland LLP.