

N.J. Appellate Division Holds Insureds Remain Responsible for Sums Allocable to Insurers Who Became Insolvent Prior to December 22, 2004

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On January 12, 2016, the New Jersey Appellate Division ruled that an insured is responsible for sums otherwise allocable to insolvent insurers in cases where the insolvency took place prior to December 22, 2004. *Ward Sand & Materials Co. v. Transamerica Ins. Co.*, Docket No. A-1479-13T1 (App. Div. January 12, 2016).

The decision clarifies that the New Jersey Supreme Court's ruling in *Farmers Mut. Fire Ins. Co. v. N.J. Property-Liability Ins. Guar. Ass'n.*, 215 N.J. 522 (2013), that the 2004 amendments to the Property-Liability Insurance Guaranty Act (the "PLIGA Act," NJSA 17:30A-1 et seq.) requiring insolvent shares be removed from continuous-trigger allocation calculations, applies only to insolvencies that take place on or after the effective date of the amendments.

Ward Sand sought to recover environmental clean-up costs with respect to a hazardous waste site located on its property. Although it had purchased general liability insurance without absolute pollution exclusions from 1970 through 1986, a substantial portion of its insurance was with five insurers that became insolvent prior to December 22, 2004 (the effective date of the PLIGA Act amendments), including its primary policies from 1976 through 1983. Ward Sand had argued that, under *Farmers Mutual*, it was not responsible for the insolvent periods, and that amounts allocable to them should be reallocated to the solvent insurers. The trial court rejected that argument, holding that the 2004 amendments to the PLIGA Act that formed the basis for the *Farmers Mutual* decision did not apply to insolvencies that took place prior to their enactment.

On appeal, Ward Sand asserted arguments that have been made by policyholder counsel ever since the Supreme Court announced its decision in *Farmers Mutual*: that the decision broadly rejected allocation to the insured for insolvent shares; that the 2004 amendments were curative, and should be given retroactive effect; and that the *Farmers Mutual* rule should apply to all insolvencies, regardless of their date.

The Appellate Division rejected these arguments. It noted that New Jersey's allocation scheme is a creation of the common law, and that the New Jersey Supreme Court had previously stated in a pre-*Farmers Mutual* opinion that the insured is responsible for periods where it is uninsured, self-insured, or its coverage was exhausted or bankrupt. As the change in the common law was a result of superseding legislation, the court looked to the enacting legislation for the 2004 PLIGA Act amendments to determine its scope. That Act specifically states that it "shall take effect immediately and shall apply to covered claims resulting from insolvencies occurring on or after that date." Relying on this clear statement of prospective application and a prior Supreme Court ruling that other changes to the PLIGA Act included in the 2004 amendments were prospective only, the Appellate Division rejected Ward Sands' arguments for retroactive application.

Although the Ward Sand decision has not been approved for publication, it provides insurers with further support for the position that the general common law rule in New Jersey is that policyholders are

responsible for insolvent shares, and that application of the contrary rule in Farmers Mutual should be limited to insolvencies occurring on or after December 22, 2004. The decision should also assist insurers arguing other limitations to the Farmers Mutual rule based on the scope of the PLIGA Act as amended.