

# BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



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## **New Jersey Appellate Division Tells Insurers to Mind Their Own Business**

### *At Issue -- Allocation for a Multiple Property Owner Environmental Claim*

When it comes to the Continuous Trigger and Allocation in environmental coverage, New Jersey courts are the original Platters. All other courts that have seriously addressed the issues are the World Famous Platters, the Amazing Platters, the Magic Platters or the Legendary Platters. When Jersey courts speak about trigger and allocation in environmental coverage, they are not the Great Pretender.

Earlier today the New Jersey Appellate Division issued a *published* opinion in *Franklin Mutual Insurance Company v. Metropolitan Property & Casualty Insurance Company* addressing an allocation issue that had somehow eluded the court until now. At issue was a dispute between two insurers over how to calculate their *Owens-Illinois* shares when their co-insured's contaminated property had also been contaminated during the period of a prior owner.

In other words, when calculating an *Owens-Illinois* share for a contaminated property that had more than one owner during the period of contamination, is the denominator all years during the period of contamination or simply the years when the insured owned the property.

The New Jersey Appellate Division held that the pro rata allocation principles established in *Owens-Illinois* apply to the carriers for each individual insured and not, as argued by one insurer, collectively to all of the triggered policies for all of the insureds who owned the property during the period of contamination. The court stated: "Simply put, the allocation is only among insurers that provide coverage to the same named insured, to indemnify that insured for its share of the cleanup costs." *Franklin Mutual* at 4.

Here's the money graph:

The allocation of an insured's proportionate share of liability among its insurers is a separate question from the insured's proportionate share of liability for the cleanup costs. The latter responsibility is joint and several. *N.J.S.A. 58:10-23.11g(c)(1)* (under the Spill Act, any

person or entity responsible for the discharge of a hazardous substance is held strictly liable for all cleanup and removal costs without regard to fault). The *Owens-Illinois* allocation formula does nothing more than allocate responsibility for the insured's share of cleanup costs when the insured has more than one carrier that provided coverage for the property during the period of contamination. That is because carriers are only responsible for defending and indemnifying their insureds, and the *Owens-Illinois* principles establish a means of allocating coverage among those carriers for their pro rata share of that obligation. *Benjamin Moore, supra*, 179 N.J. at 99 (insurers are allocated losses based on their undertakings; recovery is dependent upon the basic provisions of the insurance contract between insured and insurer). Thus, that others may also be responsible for a share of the cleanup costs is not a factor in the allocation of responsibility among an individual insured's carriers for their respective share of their insured's costs.

*Franklin Mutual* at 11-12.

The decision also includes a good overview of New Jersey trigger and allocation law in general.

Attached is a copy of today's decision in *Franklin Mutual Insurance Company v. Metropolitan Property & Casualty Insurance Company*.

Please let me know if you have any questions.

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