

# Sui Generis

Providing Insight into the  
Contours of Emerging Insurance Coverage  
and  
Environmental Issues



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## The New Jersey Appellate Division Holds that Absent Exhaustion of Solvent Insurer's Policies, PLIGA Not Obligated to Pay its *Owens-Illinois* Allocation.

Tuesday, July 12<sup>th</sup> – Just when you thought it was safe to swim in the *Owens-Illinois* pool, yesterday, the New Jersey Appellate Division slammed the door on a solvent insurer's attempts to have the New Jersey Property Liability Insurance Guarantee Association (PLIGA) pay its allocable share under *Owens-Illinois* in two cases involving progressive environmental property damage. As many readers of *Focus - Insurance* are aware, under an *Owens-Illinois* allocation methodology, an insolvent insurer *is* responsible for its allocable share of continuous, progressive environmental property damage. 138 N.J. 437 (1994).

Three years later, in *Sayer v. Ins. Co. of North Am.*, 305 N.J. Super. 209, 214 (App. Div. 1997), the Appellate Division rejected the argument that a state guaranty fund is not obligated to pay benefits until all other solvent insurers' policies are exhausted. At that time, the Appellate Division concluded that there was *no* other insurance on the risk during the period of the insolvent insurer's policy, and therefore no "other insurance" to be exhausted.

In yesterday's opinion, *Farmers Mut. Fire Ins. Co of Salem v. New Jersey PLIGA*, No. A-0015-10T3 (App. Div. Jul. 11, 2011) the Appellate Division revisited the exhaustion issue in light of a 2004 amendment to the New Jersey Property Liability Insurance Guarantee Association Act, *N.J.S.A.* 17:30A-1 to 20 (the "Exhaustion Amendment"). The court held that that until the policy limits of any solvent insurer on the risk is exhausted in a progressive environmental property damage claim, PLIGA is not obligated to pay its allocable share under *Owens-Illinois*. The Appellate Division agreed with PLIGA that the Exhaustion Amendment, *N.J.S.A.* 17:30A-5, supersedes *Sayer*. The Exhaustion Amendment states in part that:

[I]n 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.

*Farmers* involved claims for cleanup of environmental contamination at two sites. At both sites, Newark Insurance Company was on the risk for several years prior to one year of Farmer's coverage. The remedial costs at both sites were below the \$500,000 limits of Farmer's policies. For both sites, it was undisputed that the contamination began at some point prior to Farmer's policy period – it just so happened that Farmer's was on the risk when the contamination was discovered. Prior to discovery of the contamination, Newark became insolvent. Farmers paid each claim and then sought statutory benefits from PLIGA based upon an *Owens-Illinois* allocation.

The trial court had found that the New Jersey Spill Act, *N.J.S.A. 58:10-23.11* trumped the PLIGA Act, thereby requiring PLIGA to contribute its *Owens-Illinois* share. On appeal, since both parties agreed that the Spill Act was inapplicable to the exhaustion/allocation issue, the Appellate Division decided not to reach that issue. The court did find, however, that the plain language of the PLIGA Act mandated that Farmer's policies be exhausted before PLIGA would be obligated to pay statutory benefits. Since the remedial costs at both sites did not exceed Farmer's limits, the court found that PLIGA had no obligation to pay benefits.

What the court failed to address, however, is precisely how an allocation will play out where policies of certain solvent insurers **are** exhausted. If an insurance program consists of only a primary layer – an oddity – do those solvent insurers receive a credit for PLIGA's allocable share, or is PLIGA's share excess of those exhausted primary insurers? The court stated that after a solvent insurer's policy limit is exhausted, "the claimant may then seek payment of statutory benefits from PLIGA **for amounts remaining unpaid.**" Slip. Op. at 17 (emphasis added). Thus, it would seem that PLIGA's obligation is **excess** of any solvent insurer's limits.

In addition, the PLIGA Act refers to both primary and excess cover. Can the Exhaustion Amendment be read to require exhaustion of both solvent primary **and** excess layers before PLIGA is required to pay any benefits? It remains to be seen how far PLIGA will push the *Farmer's* envelope, and whether as Farmer's cautioned, solvent insurers will balk at fronting remediation costs where an insolvent insurer is on the risk for a portion of a coverage block.

A copy of the opinion can be found [here](#).



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