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An Overview of Key New Jersey Decisions:

(1) Insurer Insolvency in Long Tail Claims; and (2) Insurance Coverage issues involving Sexual Molestation Claims

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Introduction and Overview

- Part 1 – Sexual Molestation Claims
- Part 2 - Recent Developments in New Jersey Law: *Farmers Mutual* and *Potomac*
- Part 3 – Strategic Decision Making In Claims Handling and Declaratory Litigation for Asbestos and Environmental Matters

Part 1

Sexual Molestation Claims

Increase in Sexual Molestation Claims

- By the late 1970's reports of sexual abuse of children and claims seeking coverage for such abuse increased sharply, especially against the Catholic Church.
- A wide range of institutions are affected by sexual molestation claims:
  - Religious Organizations
  - Universities and Colleges
  - High Schools and Elementary Schools
  - Day Care Centers
- Forty years later, claims are still being made in connection with sexual molestation cases, *e.g.* the Penn State/Jerry Sandusky scandal (To date, Penn State has paid $59.9 million in settlements and over $50 million in defense and investigation costs, expenses and fines).

Duty to Defend

- Duty to defend under commercial general liability policies is very broad in all jurisdictions
- No coverage for the intentional acts of abuse under commercial general liability coverage
- Causes of action based on negligence, however, such as negligence supervision and negligent hiring, can trigger coverage in some jurisdictions
  - Pa. = generally coverage for negligence based causes of action predicated on intentional acts
  - N.Y. = generally no coverage for negligence based causes of action predicated on intentional acts, i.e. “but for” test
- Some policies’ personal injury grant provides limited coverage for sexual molestation

Occurrence

- Traditional Definition
  - An accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally result in personal injury, or damage to property during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one location shall be deemed one occurrence.

Trigger of Coverage Theories

- Exposure Theory
  - Followed by most jurisdictions.
  - All occurrence-based policies during the period of actual abuse are triggered.
  - Recent New York case:
    - Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pitt., Pa., 21 N.Y.3d 808 (N.Y. 2013)
      - Court of Appeals applied a form of the exposure theory, the "unfortunate events" test, to find multiple occurrences when a young girl was continuously abused by a priest over a six-year period.

Trigger of Coverage Theories

- Hot issue: Does latent injury trigger coverage under exposure theory?
- For example, is a victim's emotional distress years after the actual abuse occurred sufficient to trigger coverage?

Trigger of Coverage Theories

- First Encounter Theory
  - First instance of abuse is the only occurrence, even if abuse continued into other policy periods.
  - Minority theory, jurisdictions applying some form of first encounter theory include Hawaii, Missouri and Pennsylvania.

Occurrence Language Specifically Addressing Sexual Molestation

- Example 1:
  - "Any incidents related to or arising out of Sexual Molestation, sexual or physical assault, or abuse, irrespective of the number of incidents or injuries or the time period or area over which incidents or injuries occur, shall be treated as one Occurrence for each perpetrator."

Occurrence Language Specifically Addressing Sexual Molestation

- Example 2 (more restrictive):
  - "All acts of "sexual abuse occurrence" by an actual or alleged perpetrator or perpetrators … shall be deemed and construed as one occurrence which takes place when the first act of sexual abuse or molestation occurs, regardless of the number of persons involved, or the number of incidents or locations involved, or the period of time during which the acts of sexual abuse or molestation took place."
  - Specifically states it applies to multiple victims unlike Example 1.

Allocation

- Pro-Rata Allocation
  - Multi-year loss is divided among all insurance policies that are triggered.
    - See, e.g., Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pitt., Pa., 21 N.Y.3d 808 (N.Y. 2013) (policyholder must satisfy SIR in each policy triggered).
  - If the policyholder decides not to purchase insurance for a portion of the loss period, pro-rata allocation requires the policyholder to pay its proportionate share of the loss.

Allocation

- "All Sums" Allocation
  - Policyholder may direct all losses caused by multi-year claim to a single policy, up to that policy's limits.
    - Commonly applied to long-term environmental and property damage claims.
  - Policyholders have argued this allocation method should also apply in cases involving multi-year sexual molestation claims.
    - See, e.g., Pa. Mfr.'s Ass. Ins. Co. v. Penn State litigation in the Middle District of Pennsylvania.

Coverage Defenses

- Sexual Molestation Exclusions
  - Example:

1) … [T]his insurance does not apply to "bodily injury," "property damage," "personal and advertising injury," or any other "injury," arising out of:

(a) the actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured, or

(b) the negligent

(i) employment; (ii) investigation; (iii) supervision; (iv) reporting to the proper authorities, or failure to so report; or (v) retention;

of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by (a) above.

Coverage Defenses

- Common-law Known Loss / Prior Knowledge Exclusions
  - Insurance policies do not provide coverage for known loss.
  - These defenses apply to policyholders who cover-up abuse or do not act on information and allow abuse to continue.
    - Catholic Church scandals involving relocating known pedophiles to other churches.
    - Penn State scandal where Penn State allegedly permitted Jerry Sandusky to continue to operate his charity at Penn State after two investigations allegedly revealed that Jerry Sandusky inappropriately touched at least two minors.

Defense Related Issues

- Evaluating Severity of a Claim
  - Placing claims into categories:

    I. Touching, hugging, rubbing, kissing
    II. Single or limited instances of sexual molestation
    III. Repeated sexual molestation
    IV. Repeated sexual molestation by force or coercion

Defense Related Issues

- Factors to consider when establishing indemnity reserve:
  - Severity of the abuse
  - Number of incidents
  - Number of other cases against the alleged abuser
  - Relationship between the victim and the abuser
  - Age of the victim
  - Victim's manifested injuries
  - Strength of defenses, such as statute of limitation issues, known loss issues, etc.

Defense Related Issues

- Statute of Limitations
  - Most states have a “discovery rule” which tolls the statute of limitations until a victim reaches the age of majority.
  - State laws vary significantly with respect to the number of years a victim has to report an injury after reaching the age of majority.
    - W.V. = 2 years, Ga. = 5 years, Md. = 7 years, Pa. = 12 years, Conn. = 30 years.

Resolution Strategies

- Alternative dispute resolution?
- Litigate?
- Key factor: what jurisdiction's law applies?
  - Affects occurrence issues, allocation issues and coverage/defense strategy.

Part 2

Recent Developments in New Jersey Law: *Farmers Mutual* and *Potomac*

New Jersey's *Owens-Illinois/Carter-Wallace* Allocation Scheme

- Continuous trigger
- Allocation is pro-rata by time and policy limits
- No joint and several liability
- Allocation to insured for periods for uninsured and underinsured periods (if insurance was available)
- Vertical exhaustion
- Historically, the insured was responsible for insolvent shares

Recent Developments

- Two September 2013, N.J. Supreme Court decisions impact allocation governed by New Jersey law:
  - *Farmers Mutual Fire Ins. Co. of Salem v. New Jersey Property-Liability Ins. Guar. Ass'n*, 215 *N.J.* 522 (2013)
  - *Potomac Ins. Co. of Ill. ex. rel. One Beacon Ins. Co. v. Pennsylvania Mfrs. Ass'n Ins. Co.* 215 *N.J.* 409 (2013)

Farmers Mutual Fire Ins. Co. of Salem v. New Jersey Property-Liability Ins. Guar. Ass'n, 215 *N.J.* 522 (2013)

No Allocation to NJPLIGA Until All Other Insurance Is Exhausted; Insured Does Not Pick Up The Insolvent Share

Farmers Mutual: Overview

- Prior N.J. Supreme Court precedent stated that the insured, and not its solvent insurers, bore the risk of insurer insolvency. *Spaulding Composites* Co. v. *Aetna Cas. & Sur. Co.,* 176 *N.J.* 25 (2003); *Benjamin Moore* & Co. *v. Aetna Cas. & Sur. Co.,* 179 *N.J.* 87 (2004)
- In *Chemical Leahman Tank Lines v. Aetna Cas. & Sur. Co.,* 978 *F.Supp.* 589 (D.N.J. 1997), the District Court held that insolvent limits should be included in the *Owens-Illinois* allocation
- In *Sayre v. Insurance Co. of North America*, 305 *N.J.Super.* 209 (App.Div. 1997), the Appellate Division held that insolvent policy limits were to be included in the *Owens-Illinois/Carter-Wallace* allocation, and that the NJ Surplus Lines Guaranty Fund must pick up any covered share
  - Court stated that *Owens-Illinois* did not suggest “that it would be fair or proper to burden the solvent carriers” with exposure for years that they were not on the risk.
- In 2004, the Legislature Amended the NJ Property-Liability Insurance Guaranty Act to make exhaustion of all other insurance in all triggered years a precondition to recovery from the NJ Property-Liability Insurance Guaranty Association (“NJPLIGA”)
- In *Farmers Mutual*, the NJ Supreme Court held that if the insolvency implicates NJPLIGA, NJPLIGA does not pay until all other solvent insurers in all other years have exhausted, and that the insured is not required to pick up the insolvent share

Farmers Mutual

Facts:

- Farmers Mutual and Newark Insurance Company issued homeowner's insurance policies for two separate residential properties
  - Each property was insured by Newark for multiple years, and by Farmers Mutual for one year
  - All of the policies had annual limits of $300,000
- During Farmers Mutual's policy period, soil and groundwater contamination from leaking underground fuel tanks was discovered on each property
- Although Newark had the larger *Owens-Illinois* share for each property, Farmers Mutual paid the entire remediation costs for both sites, and the costs incurred for each were within its respective policy limits
- The cost of the remediation at one site was $112,165.13. The cost of the remediation at the other site was $25,958.39

(Cont.)

Farmers Mutual

- When Newark was declared insolvent before it reimbursed Farmers Mutual for its share of the remediation costs, Farmers sought recovery from NJPLIGA
- NJPLIGA denied the claim, arguing that under a 2004 amendment to the PLIGA Act, its obligation to pay statutory benefits was not triggered until all available insurance in all other years was exhausted, and Farmers Mutual had limits remaining on both of its policies
- The 2004 amendment to the PLIGA Act added a definition of exhaust:
  - "Exhaust means with respect to other insurance… 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"

Farmers Mutual

- Proceedings below
  - Farmers Mutual filed suit against NJPLIGA, and prevailed in the Law Division
  - In an unpublished decision, the Appellate Division Reversed, based on the 2004 amendment to the PLIGA Act.
    - In addition to holding that the 2004 Amendment meant that NJPLIGA was not required to pay the claim, the Appellate Division's opinion stated that in light of the 2004 amendment, the insolvent period should be removed from the *Owens-Illinois* Allocation

PLIGA's Arguments

- 2004 amendment does not "scuttle" the *Owens-Illinois* allocation methodology, but it requires that the periods of insolvent coverage should be disregarded until solvent coverage is exhausted
- The 2004 amendment was intended to modify the *Owens-Illinois* allocation scheme by rendering PLIGA as a payor of last resort
- The Legislature is authorized to direct public policy and the *Owens-Illinois* allocation methodology, which was devised by the Court through its common law powers, is not "sacrosanct"

Farmers Mutual's Arguments

- The 2004 PLIGA Act amendment should be construed in accordance with the allocation methodology of *Owens-Illinois*
- A solvent carrier's coverage is inapplicable to years that its policies do not cover
- If PLIGA does not have to pay shares allocated to the PLIGA-covered insolvent periods under the *Owens-Illinois* allocation methodology, Farmers Mutual will have to pay those shares in contravention of *Owens-Illinois*
  - Solvent insurers will essentially become the guarantors for the insolvent insurer

Farmers Mutual
The Supreme Court's Decision

- The Court stated that *Owens-Illinois* and subsequent decisions adjusted common-law continuous trigger and proration doctrines enunciated in *Owens-Illinois*
- The Court discussed the purposes of the PLIGA Act and PLIGA
  - Mitigates financial distress to insureds and claimants due to an insurer's insolvency
  - PLIGA stands in shoes of insolvent insurers and pays certain claims up to $300K
  - PLIGA's resources must be preserved to achieve the PLIGA Act's core purpose

Farmers Mutual
The Supreme Court's Decision

- The Court noted that the exhaustion language in PLIGA is the same as that reviewed in *Sayre v. Insurance Company of North America*, 305 N.J. Super. 209 (App. Div. 1997) (addressing insolvencies covered by the NJ Surplus Lines Insurance Guaranty Fund):
  - "Any person having a claim… under an insurance policy other than a policy of an insolvent insurer, shall be required to exhaust first his right under that other policy." *Farmers Mutual*, 215 N.J. at 542 (*citing* N.J.S.A. 17:30A-12(b) & N.J.S.A. N.J.S.A. 17:22-6.79(b))
  - Observes that *Sayre's* holding that this language does not require exhaustion of solvent insurers before the Guaranty Fund pays may have had resonance if the PLIGA Act was not modified in 2004

Farmers Mutual The Supreme Court's Decision

- 2004 PLIGA Act amendment added a definition of exhaust:
  - "Exhaust means with respect to other insurance… 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"
- The Court held that pursuant to this language, when one insurer in a continuous trigger case is insolvent, the limits of policies issued by solvent insurers in all other years must first be exhausted before PLIGA is obligated to pay
- The Court presumed that the Legislature was aware of the *Sayre* decision and meant to overturn it with the 2004 amendment
  - Noted that the definition of exhaustion is virtually identical to language used in *Owens-Illinois* to describe continuous trigger

Farmers Mutual
The Supreme Court's Decision

- The Court further held that the PLIGA Act trumps the common-law proration scheme espoused in *Owens-Illinois:*
  - Common law governs matters that do not fall within the realm occupied by the legislature
  - Legislation has primacy over areas formerly within the domain of the common law
  - Legislative enactments are never subservient to the common law, especially when the two are in conflict with one another

Farmers Mutual
The Supreme Court's Decision

- The Court also rejected the argument that its interpretation of the 2004 amendment to the PLIGA Act impairs Farmers Mutual's pre-existing contract rights:
  - *Owens-Illinois* was not the "last word" on allocation in long tail, continuous trigger cases
  - *Farmers Mutual* decision is the first time the Court spoke on the intersection of the PLIGA Act and the allocation scheme of long tail, continuous trigger cases
  - 2004 amendments were a clarification of the PLIGA Act's exhaustion provisions
  - Farmers Mutual was not required to pay more than its maximum policy limits

Ward Sand: Interpreting the *Farmers Mutual* Decision

In *Ward Sand & Materials Co. v. Transamerica Ins. Co., et al*. (CAM-L-4130-09), the New Jersey Superior Court, Camden County, issued the first decision interpreting the *Farmers Mutual* decision

- The policyholder argued that:
  - (1) the 2004 amendments to the PLIGA Act applied retroactively
  - (2) that even if the 2004 amendments did not apply retroactively, the reasoning of *Farmers Mutual* clarified principles that predate the amendment such that all coverage available from insolvent carriers must be exhausted prior to a policyholder's obligation to pay the insolvent share
- The Camden Superior Court rejected both arguments:
  - The 2004 PLIGA amendments can only be given prospective effect
  - The reasoning in the *Farmers Mutual* decision could not pre-date the 2004 PLIGA Act amendments because the *Farmers Mutual* decision endorsed the established precedents and "in no way suggested" that the precedents were infirm with regard to insolvencies that pre-date the 2004 PLIGA Act amendment
- The Court's opinion tracks arguments presented by Coughlin Duffy Attorneys in a Law 360 Article dated November 5, 2013
- Ward Sand filed a Notice of Appeal on November 22, 2013

Unanswered Questions

- When there is a solvent excess insurer sitting above a PLIGA-covered insolvent insurer:
  - How should the amount attributable to each period be calculated? Should the limits of a solvent excess insurer above a PLIGA-covered insolvency be included in the allocation calculation?
  - Does a solvent excess insurer above a PLIGA-covered insolvency have to drop down?
  - Does a solvent excess insurer above a PLIGA-covered insolvency not have to pay until after PLIGA has paid its $300K limit and the insured has paid the difference between the PLIGA limit and the policy limits?
- When there is a PLIGA-covered insolvency sitting above a solvent primary insurer:
  - How should the amount attributable to each period be calculated?

Unanswered Questions

- For example, assume:
  - Four years of triggered coverage
  - $500K in primary limits and $500K in umbrella limits in each year, for a total of $4M in limits
- Under *Carter-Wallace*, each year would be allocated 25% of the loss

Unanswered Questions

- Now assume that PLIGA is covering the primary policy in the third year
  - Is the year with the PLIGA-covered insolvency not attributed anything while the other years are attributed 33.3% each?
    - For a $3M loss, this would mean the primary and excess policies in the years without the PLIGA-covered insolvency would pay their entire limits
    - Under a straight *Carter-Wallace* allocation, each primary insurer would have paid its entire limits and each excess insurer (including the excess insurer in the third year) would have paid $250K
  - The solvent insurers may have an argument that such an allocation violates the principle of "simple fairness" that underpins New Jersey's allocation law

Unanswered Questions

Continue to assume that PLIGA is covering the primary policy in the third year

- How is a $3.6M loss allocated?
  - The primary and umbrella policies in the years without the PLIGA-covered insolvency should pay first. Once they exhaust, $600K will remain to be paid
    - The insured will argue that it should not have to pay first because, under *Farmers Mutual*, it should not have to bear the financial burden of an insolvent insurer
  - Once the solvent insurers in other years have exhausted, PLIGA should pay its $300K share
  - After PLIGA pays its $300K share, the insured should pay $200K to exhaust the PLIGA-covered insolvent policy
  - After PLIGA and the insured have paid the $500K limits of the PLIGA-covered insolvency, the solvent umbrella insurer should pay the remaining $100K
  - Amounts PLIGA pays in defense erode limits leaving a larger shortfall for insured to pay

Unanswered Questions

- Now assume that PLIGA is covering the umbrella policy in the third year
  - Is the year with the PLIGA-covered insolvency attributed 14.3% while the other years are attributed 28.6% each?
    - For a $1M loss, this would mean the primary policies in the years without the PLIGA-covered insolvency would pay $286K, and the primary policy in the year with the PLIGA-covered insolvency would pay $143K
    - Under a straight *Carter-Wallace* allocation, each primary insurer would have paid $250K of the $1M loss
  - This may provide a windfall to the primary insurer below the PLIGA-covered insolvency because the loss does not exceed the primary level

Unanswered Questions

Additional problems arise if a PLIGA-covered insolvency participates in a layer of insurance on a quota-share basis with solvent insurers

- Are the full limits of the layer used in calculating the amount allocated to each year, or are only the limits of the solvent insurer used in the calculation?

Policyholders' Interpretations of *Farmers Mutual*

- Policyholders focus on the Court's statement that the goal of minimizing the financial loss to a policyholder from an insured's insolvency "would be defeated by making the insured bear the loss for the carrier's insolvency"
  - Policyholders believe that this means that whenever there is an insolvency, the first place to look is to the solvent carriers, without regard to PLIGA
  - Policyholders believe that the duty of paying for *any* insolvent insurer's share has now shifted from the insured to the insurer
  - Policyholders also believe that the *Farmers Mutual* decision comports with their reading of *Owens-Illinois* that insureds are only liable if they forego insurance. According to policyholders, *Farmers Mutual* confirms that since the policyholder has not foregone insurance when its insurer becomes insolvent, it should not be liable for the insolvency.

Takeaways for Insurers

- The *Farmers Mutual* decision leaves undisturbed the court's prior holdings that the insured is responsible for periods in which it chose not to obtain insurance
- The Court's focus was on statutory construction, and the supremacy of legislative enactments over the common law; therefore, if a coverage dispute involving an insolvent insurer does not implicate the 2004 amendments to the PLIGA Act, the *Farmers Mutual* decision is not controlling
  - In such situations, courts should apply prior precedent, which the *Farmers* court left undisturbed
- If the insolvent insurer was an unauthorized or nonadmitted insurer when the policy was issued, the PLIGA Act does not apply, and the *Farmers* decision is not implicated

Takeaways for Insurers

- With respect to non-first-party property damage claims, the insured or claimant must be a New Jersey resident at the time of the insurable event. Corporations are considered residents of New Jersey if their principal place of business is in New Jersey at the time of the insurable event. If the insured or claimant is not a New Jersey resident, the PLIGA Act, and *Farmers Mutual*, are not applicable
- The *Farmers* decision should be limited to insolvencies after the effective date of the relevant statutory amendments, December 22, 2004. *See, Ward Sand, supra.*
- When an insurer was declared insolvent prior to December 22, 2004, the insolvent share should be allocated to PLIGA up to PLIGA's $300K statutory limit, and then the remainder allocated to the policyholder up to the policy's limits
- There are certain time limits for insureds and claimants to file claims with PLIGA after an insurer is declared insolvent. PLIGA should not have to pay, and therefore *Farmers Mutual* should not be applicable, to claims filed after that time expires

Potomac Ins. Co. of Ill. ex. rel. One Beacon Ins. Co. v. Pennsylvania Mfrs. Ass'n Ins. Co. 215 *N.J.* 409 (2013)

Settlement With Insured Provides No Protection Against Contribution Claim By Co-Insurer

Potomac

- Issue: Whether a settlement and release between an insurer and its policyholder bars a contribution action by a co-insurer against the settling insurer for defense costs.
- Result: The non-settling insurer's contribution claim was affirmed.
  - Recognizes a direct action by one insurer against a co-insurer for contribution with respect to defense costs arising from long-tail claims.

Potomac

- Facts:
  - Construction defect case alleging damage taking place over a period of years after completion of a school building
  - Policyholder (Aristone) had CGL policies issued by 5 different insurers over the relevant multi-year period
  - PMA settled coverage DJ with Aristone
    - PMA paid $150,000
    - Aristone released its claims against PMA, including its claims for defense costs.
  - After PMA/Aristone settlement, OneBeacon filed a contribution action against PMA seeking contribution for a portion of Aristone's defense costs paid by OneBeacon.

Potomac

- Decision:
  - Recognizes new direct cause of action between co-insurers in different years in continuous exposure cases
    - Factually limited to defense costs, but rationale extends to indemnity as well
  - PMA's settlement with insured and its release of its claims for defense costs had no effect on co-insurer's right to contribution against settling insurer
    - Follows rule applied in *Fireman's Fund Ins. Co. v. Maryland Casualty Co*., 77 Cal. Rptr. 2d 296 (Cal. App. 1998)
    - N.J. Supreme Court stated that the equity principles upon which the California rule are based are similar to principles expressed in *Owens-Illinois*.
  - Right to contribution only applies to defense costs incurred prior to settlement.
  - Applies *Owens-Illinois* allocation to construction defect case
    - Parties below had assumed the applicability of *Owens-Illinois*, so it was not at issue or discussed; nevertheless, the court assumed the application of the allocation scheme and applied the principles behind it to reach its conclusion; therefore policyholders will point to this decision as authority for applying long-tail allocations to construction defect cases.

Implications of *Potomac*

- The decision may make it more difficult to settle multi-insurer allocation cases, at least where a non-settling insurer paid some of the defense or indemnity
- In order to protect itself, a settling insurer should consider one or more of the following:
  - a global settlement in which all insurers waive their contribution claims
    - Often impractical
  - Insisting that the settlement agreement provide that the insured indemnify it against contribution claims
    - Policyholders often reject or cap
    - No protection if insured becomes insolvent
  - Insisting that the settlement agreement include both:
    - A judgment reduction clause, requiring the insured to reduce any judgment it obtains against a non-settling insurer by the amount of any contribution award the non-settling insurer obtains against the settling insurer; and
    - A provision requiring the insured to use “best efforts” to include contribution waivers in any settlement agreements with other insurers

Reading the Tea Leaves: *Potomac's* Footnote 6

- " . . . we need not reach the issue of allocation of defense costs when a litigant is uninsured or underinsured for a portion of the relevant time period or address the obligations of excess carriers with respect to defense costs."
  - This footnote, together with the Court's decision in *Farmer's Mutual,* is being cited by policyholder counsel as evidence that the current Supreme Court is becoming hostile to allocating any defense costs to the insured.
  - Alternatively, it can be viewed simply as leaving the door open for the Court's subsequent decision in *Farmer's Mutual* and a reluctance to comment on the applicability of the Appellate Division's decision in *Firemen's Insurance Co. of Newark v. National Union Fire Insurance Co.*, 387 *N.J.* Super. 434 (App. Div. 2006).

Part 3

Strategic Decision Making In Claims Handling and Declaratory Litigation for Asbestos and Environmental Matters

Strategies for Successful Claims Handling

- Identify Key Claim Information
  - Who is the claimant?
  - What is the nature of the claim?
  - What events/accidents gave rise to the claim?
    - What was the policyholder’s role, if any?
  - What are the injuries or damages?
  - How much is the claim?
  - Who tendered the claim?

Strategies for Successful Claims Handling

- Identify the Applicable Coverage
  - What policies are at issue?
  - What is the relevant policy language?
  - Are there any ambiguities or other issues with policy language?
  - Are there any lost or incomplete policies?
  - Are there any underwriting issues?

Strategies for Successful Claims Handling

Goal: Adopt a Successful Resolution Strategy

- Evaluate to determine if active claim handling or monitoring is appropriate
- Discuss with policyholder to resolve
- Discuss with other insurers
- Has coverage litigation been filed?
  - Litigate to summary judgment?
  - Attempt to resolve?
  - Risks?
  - Expenses?

Strategies for Successful Claims Handling

- Other Important Considerations When Developing a Resolution Strategy
  - What law applies?
  - What are key legal issues?
  - Enough information to make a coverage determination?
  - How much is at issue?
  - Who is the adversary?
  - Recurring issues?
  - Portfolio Issues?

Strategies for Successful Claims Handling

Claims Handling Considerations:

- Reserve Your Rights
- Learn and Track Basic Information About the Claimants
  - The earlier the better
  - For allocation purposes, date of first exposure, particularly to the insured's product, is key
- Other Insurers and the Insured
  - Get them to contribute
  - Get them to agree to a coverage block methodology
- Appropriate Coverage Block
  - May be different for defense and indemnity
  - May be different for individual claimants
  - May change due to new information, exhaustion, etc.

Strategies for Successful Claims Handling

- Track Payments
  - Including amounts, dates paid, claimant
- Exhaustion of Policies
  - Be aware of when your policies and other insurer's policies are about to exhaust and actually exhaust
- Recalcitrant Insureds and Insurers, and Other Gaps in Coverage
  - Develop a methodology for how to deal with these periods with other participating insurers
  - Reserve rights against other parties for amounts paid for gap periods