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Justices Tackled Consumer Fraud, Just Compensation and Insurance This Year

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The New Jersey Supreme Court addressed several issues involving commercial law this past term. The court dealt with four cases involving the Consumer Fraud Act (CFA), testing the limits of what constitutes unlawful conduct, determining whether ascertainable loss had been demonstrated in order to warrant an award of attorney fees, calculating damages under the CFA and determining whether attorney fee provisions in landlord/tenant leases were in violation of the CFA. The court also addressed just compensation calculation when a potential zoning change is at issue. Finally, the court addressed two issues affecting insurers. In one case, the court considered the allocation of cleanup costs between solvent and insolvent insurers. In the other case, it considered whether an insurer had a direct contribution claim against a co-insurer for defense costs.

Consumer Fraud Act

Addressing the interplay of the CFA and certain nursing home agreements, the court considered in *Manahawkin*

Convalescent v. O'Neill, 217 N.J. 99 (2014), whether a collection provision in a nursing home agreement violated the Nursing Home Act (NHA), the CFA, or the Truth-in-Consumer Contract, Warranty,

care directly rather than assigning Hopkins' Social Security benefits to MCC. As part of MCC's admission agreement, O'Neill agreed to be a "responsible party," meaning that she, along with Hopkins,

unclear whether that included any property owned by O'Neill or was limited to the property of Hopkins.

Federal and state laws prohibit making admission to a nursing home contingent



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and Notice Act (TCCWNA).

According to court documents, Elise Hopkins was a resident of Manahawkin Convalescent Center (MCC) from 2007 until her death in June 2008. Before Hopkins became a resident, her daughter, Frances O'Neill, had obtained a durable power of attorney. O'Neill arranged for Hopkins' residency at MCC and opted to pay for Hopkins'

was responsible for any debts incurred by Hopkins.

The admission agreement contained a collection provision that held both O'Neill and Hopkins responsible for all amounts due, according to court documents. No distinction was made between O'Neill and Hopkins, including a sentence that declared a lien would be placed on any "owned properties." It was

upon a third-party guarantee of payment. The admission agreement advised of this prohibition. It also noted that a third party who is in control of a resident's finances may be compelled to pay the resident's debts out of the resident's finances.

After Hopkins' death, MCC advised O'Neill of an \$878.20 debt, according to court documents. MCC's col-

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lection department advised O'Neill that as a "responsible party," she was obligated to pay the debt. O'Neill was also advised that if she did not pay, she would be "reported to the credit rating agencies." Finally, O'Neill was advised that failure to pay would result in legal proceedings.

The matter was then launched into a series of convoluted legal proceedings. MCC filed a lawsuit against O'Neill in her individual capacity for the debt. O'Neill denied the allegations and filed various counterclaims and third-party claims in her individual capacity, on behalf of Hopkins' estate—of which she was the executrix—and as a representative of a putative class of similarly harmed plaintiffs. Eventually, MCC dismissed its complaint and apparently the debt went unpaid.

Although MCC dismissed its complaint, O'Neill's counterclaims and third-party claims remained. The court noted that although claims were labeled as third-party claims, O'Neill, as executrix of Hopkins' estate, was not properly a third-party plaintiff, as she had not been a defendant in that role. After MCC dismissed its complaint, O'Neill filed an amended complaint, in which she named various new defendants alleged to own or operate MCC. O'Neill focused on claims under the NHA, CFA and TCCWNA. The crux of these claims was that MCC was attempting to compel O'Neill to pay for Hopkins' debt out of O'Neill's own personal assets. The putative class was supposed to be others who were also allegedly so compelled.

At the end of discovery, all parties moved for summary judgment. The trial court found in favor of the defendants, MCC and various entities alleged to own or operate MCC, holding that nothing in the admission agreement or the letter from MCC's collection department compelled O'Neill to pay for Hopkins' debt from O'Neill's own assets. Instead, MCC only sought payment out of Hopkins' finances, of which O'Neill was in control.

O'Neill appealed the trial court's decision but the Appellate Division affirmed. In regard to the NHA claim, the court agreed with the trial court that MCC only sought to compel payment by O'Neill of Hopkins' debt from Hopkins' own finances. On the CFA claim, the court held that since the NHA was not violated, O'Neill had failed

to demonstrate any unlawful conduct that would form the basis for a CFA claim. Although the parties had not briefed the issue, the appellate court also held that the CFA did not govern nursing homes based upon the learned professional exception to the CFA. The court did not address the TCCWNA. O'Neill again appealed, and the Supreme Court granted certification.

The court first addressed the NHA claim. Analyzing the admission agreement using traditional principles of contract interpretation, the Supreme Court agreed with the lower courts that the agreement did not unlawfully compel O'Neill to make payments out of her own assets for Hopkins' care. The court noted that although there was a provision in the admission agreement that "suggest[ed] such an obligation," it had not been applied to O'Neill and she had not signed that provision. The court also noted that the agreement contained a provision expressly stating that federal and state law prohibited third-party guarantees, demonstrating that the parties intended to comply with the applicable federal and state law.

The court next addressed the CFA claim. Since O'Neill's CFA claim was premised upon a violation of the NHA (as well the TCCWNA), and the court had already found that MCC's conduct was lawful in regard to the admission agreement, O'Neill's claim failed to meet the first element of a CFA claim—demonstrating unlawful conduct. The court departed from the Appellate Division's decision by refusing to decide the threshold issue of whether the CFA governs the conduct of a nursing home under the learned professional exception.

Although the Appellate Division had not addressed O'Neill's TCCWNA claim, the Supreme Court dispensed with it quickly, noting that O'Neill's TCCWNA claim, like her CFA claim, was premised upon a violation of the NHA. Thus, as there was no violation of the NHA, O'Neill's TCCWNA claim likewise failed, the court said.

The court ended its opinion by cautioning counsel for the nursing home industry "to ensure that nursing home contracts are prepared—and collection practices conducted—in a manner that fosters a clear understanding of each party's rights and

remedies as it complies with the law."

The Supreme Court also dealt with the CFA in *Perez v. Professionally Green*, 215 N.J. 388 (2013). In *Perez*, the issue presented to the court was whether plaintiffs had demonstrated a bona fide claim for ascertainable loss such that attorney fees were permitted under N.J.S.A. 56:8-19, where their ascertainable loss claim had been dismissed at trial on the defendant's motion for involuntary dismissal. The court held that the plaintiffs' claim for attorney fees was properly denied since their ascertainable loss claim was dismissed before reaching a fact-finder.

Plaintiffs Alex and Cathy Perez hired defendants—various contractors—to install a swimming pool at their home along with various accompaniments, including landscaping and a patio. The project allegedly went astray in many aspects. Relevant to the court's ultimate holding, plaintiffs asserted various claims against defendant Swim-Well Pools Inc., including claims for negligence and violation of the CFA. The CFA violations were premised upon three alleged contractual deficiencies: (1) lack of project start and end dates; (2) absence of guarantees and warranties; and (3) lack of a cancellation provision.

The plaintiffs and Swim-Well both moved for partial summary judgment. Based on a record that the court noted several times was not complete, the plaintiffs' motion was apparently based on the three CFA violations. The plaintiffs also alleged they had demonstrated an ascertainable loss. Swim-Well's cross-motion only concerned two of the CFA violations; it did not move for summary judgment on the allegation that the contract failed to state start and end dates for the project, and it did not move for summary judgment on the plaintiffs' ascertainable loss claim.

Swim-Well won its motion, but the plaintiffs won their motion insofar as summary judgment was granted on the contract's failure to state start and end dates for the project. However, the trial court denied the plaintiffs' motion regarding ascertainable loss, stating that there was an issue of fact as to whether the plaintiffs had suffered an ascertainable loss. The matter proceeded to trial and after the plaintiffs rested their case, Swim-Well moved for involuntary dismissal of the CFA claim under

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Rule 4:37-2(b), arguing that the plaintiffs had failed to demonstrate any ascertainable loss. The trial court granted Swim-Well's motion. After trial, the plaintiffs moved for attorney fees under N.J.S.A. 56:8-19 and the trial court denied the motion on the grounds that the involuntary dismissal meant there was no bona fide ascertainable loss claim.

Prior case law held that a plaintiff's ascertainable loss claim must survive summary judgment in order for a CFA claim to proceed to trial. Since Swim-Well had failed to move for summary judgment on the issue of ascertainable loss, the only pre-trial test the claim underwent was the plaintiffs' summary judgment motion, which the trial court denied. However, the trial court did not rule that there was no ascertainable loss claim, instead only ruling that an issue of fact existed as to whether there was such a claim.

The plaintiffs only appealed the trial court's denial of their attorney fees motion. The appellate court reversed the trial court's denial, holding that a plaintiff need not prevail on both a summary judgment motion and a motion for involuntary dismissal in order to state a bona fide claim for ascertainable loss. Swim-Well then appealed that decision.

The appeals court reinstated the decision of the trial court. The appeals court held that the involuntary dismissal standard was similar to the summary judgment standard and, therefore, the plaintiffs had failed to demonstrate a bona fide ascertainable loss claim that is a prerequisite for attorney fees under the CFA. The court noted that although the plaintiffs had moved for summary judgment on the issue of ascertainable loss, and the trial court found there was an issue of fact, Swim-Well had not moved for summary judgment on the ascertainable loss claim. Therefore, the plaintiffs' claim had not been opposed until trial, when Swim-Well moved for involuntary dismissal. The court thus considered the plaintiffs' ascertainable loss claim "untested" before trial.

Once Swim-Well moved for involuntary dismissal after the plaintiffs presented their case, the ascertainable loss claim was properly tested, according to the appeals court. The trial court determined (and the plaintiffs did not appeal) that no rational

fact-finder could find in plaintiffs' favor on the ascertainable loss claim. The court noted that in *Weinberg v. Sprint Corp.*, 173 N.J. 233 (2002), it held that an ascertainable loss claim must survive summary judgment in order to entitle a plaintiff to attorney fees. Even though that case dealt only with the failure of an ascertainable loss claim on a motion for summary judgment, the court held that the involuntary dismissal standard was analogous to the summary judgment standard and thus *Weinberg* controlled. If it has been determined that there is no issue of fact as to a plaintiff's ascertainable loss claim, then a plaintiff is not entitled to attorney fees under the CFA.

The Supreme Court addressed the calculation of damages in a CFA case involving an equitable remedy. In *D'Agostino v. Maldonado*, 216 N.J. 168 (2013), plaintiffs Anthony and Denise D'Agostino owned property in Garfield, N.J., which Anthony D'Agostino had inherited unencumbered. There were two buildings on the property and several residential units. The plaintiffs and their children lived in one of the residential units until 2005, when the plaintiffs separated. Denise D'Agostino continued to live at the property with their children, while Anthony D'Agostino moved out, according to the court's opinion.

Later that same year, Anthony D'Agostino began having financial troubles. He executed a \$252,000 mortgage on the property to ease his financial distress, but by 2007 he claimed further debts. Additionally, local authorities cited the property for housing code violations. Anthony D'Agostino convinced Denise D'Agostino to apply for a mortgage by herself and the property was transferred into her name. When payments on that mortgage were not made, the property went into foreclosure, according to the opinion.

The plaintiffs contacted defendant Ricardo Maldonado in an attempt to save the property from foreclosure. Maldonado had a part-time business whereby he would purchase financially distressed homes and sell them for a profit after working on them. The plaintiffs testified that the parties orally agreed that the plaintiffs would pay Maldonado \$40,000, and Maldonado would fix up the property and get up to speed with the mortgage through the property's rental income. However, when the

agreement was put in writing, it became significantly more complex, including the creation of a trust and transfer of property to Maldonado as trustee. The plaintiffs, who, according to the trial court's findings, did not review the documents or consult with an attorney before signing them, were left with a one-year option to recover title to the property if they paid Maldonado \$400,000.

Maldonado soon realized that he could not cover the mortgage payments through rental income alone. He had the plaintiffs execute a quitclaim deed that fully transferred interest in the property to him. Although the quitclaim deed stated that Maldonado had paid the plaintiffs \$360,000, he had not. Maldonado then claimed that he subsequently spent approximately \$50,000 on repairs, mortgage payments and property taxes. At some point, Anthony D'Agostino attempted to buy back the property for \$40,000, but Maldonado insisted upon the \$400,000 as provided for in the option to purchase. The plaintiffs refused and filed this lawsuit, alleging violation of the CFA, among other claims.

The trial court conducted a bench trial. All of the plaintiffs' claims, except for the CFA claim, were dismissed at the conclusion of the trial. The judge ruled there was a CFA violation, voided the transfer of the property to Maldonado and calculated damages, after crediting Maldonado \$150,694 for the cost of improvements. The trial court awarded attorney fees and costs. The Appellate Division also held that Maldonado had violated the CFA, but found that the plaintiffs had suffered no ascertainable loss since restoration of their ownership of the property effectively restored them to their position prior to Maldonado's involvement. The Appellate Division did uphold an award of attorney fees and costs award to plaintiffs. Both parties appealed.

The plaintiffs argued that, in calculating their damages, Maldonado was not entitled to any set-off for improvements he made to the property. Maldonado argued that the transaction did not even fall within the CFA. If the court were to agree that the situation fell within the CFA, Maldonado next argued that the Appellate Division had appropriately awarded no damages to the

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plaintiffs because they were restored title to the property. He also argued that the plaintiffs should be equitably estopped from any recovery because the trial court had noted their lack of credibility, and they failed to assert a claim until after Maldonado had, at his own expense, performed his end of the bargain for over a year.

The Supreme Court agreed that Maldonado's actions fell within the CFA, but disagreed with the Appellate Division's finding that the plaintiffs lacked ascertainable loss. The court noted that even though the transfer of title was voided, courts should look at a plaintiff's position when they come to the court, not after an equitable remedy has been applied. The focus should be on the ascertainable loss stemming from a defendant's unlawful commercial practice, not whether there is any ascertainable loss after application of a judicial remedy, the court said.

In addition, the court easily dispensed with Maldonado's argument that the plaintiffs were barred by equitable estoppel. There was simply no evidence of reliance by Maldonado on anything said by either plaintiff, the court said, reinstating the trial court's calculation of damages.

Another CFA issue was presented in *Green v. Morgan Properties*, 215 N.J. 431 (2013), where the Supreme Court considered attorney fees provisions in landlord/tenant leases. The plaintiffs, tenants of apartment complexes owned or operated by the corporate defendants, sued on behalf of themselves, individually and as a class. The plaintiffs also sued the corporate defendants' in-house counsel.

The plaintiffs were each subjected to eviction proceedings for nonpayment of rent, according to court documents. They claimed that, in order to avoid eviction, they were each forced to pay defendants' attorney fees in accordance with an amount fixed by each of their leases. One version of the lease specified two tiers of attorney fees depending on whether a court appearance was required. A later version required only one fee regardless of whether a court appearance was required.

There were three counts in the plaintiffs' complaint, asserting the following: (1) the attorney fees provisions violated the Anti-Eviction Act; (2) the provisions violated the CFA; and (3) negligent mis-

representation against the corporate defendants and an apparent malpractice claim against their in-house counsel. The defendants filed a motion to dismiss, which the trial court granted with prejudice. The trial court held that the attorney fees provisions were a form of liquidated damages and the fees were reasonable.

The Appellate Division reversed the trial court. It converted the with-prejudice dismissal of the first count, under the Anti-Eviction Act, into a dismissal without prejudice and reinstated the other two counts, including against the corporate defendants' in-house attorney. Viewing the complaint through the lens of the motion to dismiss standard, the appellate court found that the complaint had alleged viable claims that fees were charged that were higher than those actually incurred by the defendants, and that the defendants had engaged in improper fee-sharing.

The defendants sought certification (although the plaintiffs did not seek cross-certification of the dismissal of their Anti-Eviction Act claim), and the Supreme Court granted it.

The crux of the defendants' argument on appeal was that the attorney fee provision was simply a liquidated damages clause. According to the defendants, since attorney fee provisions had been accepted by the court in residential leases in the past as additional rent, the plaintiffs should have the burden of proving that they are unreasonable. Furthermore, argued defendants, the provisions did not constitute improper fee sharing and there was no misrepresentation. The defendants also focused on the individual attorney defendant and argued that ruling that the plaintiffs' claims against her could survive the motion to dismiss would improperly expose attorneys to "specious third-party claims."

The plaintiffs made four arguments on appeal: that the attorney fee provision was not a liquidated damages clause; that the court improperly failed to consider the factors in RPC 1.5 regarding the reasonableness of the attorney fees; that their allegation that the corporate defendants improperly shared in the attorney fees with the individual defendant is enough to make out a claim under the CFA; and that their claim against the corporate defendants' in-house attorney should survive because,

even if there was no attorney-client relationship, they were "invited" to rely on the individual defendant's statements, in her role as attorney for the corporate defendants.

The court began its analysis of the issues by describing the protections for both landlords and tenants under the Anti-Eviction Act, even though that claim was not before the court. The court noted that the complaint form for eviction available through the judiciary website and the Rules of Court allows for a landlord to recoup attorney fees in the form of "additional rent."

The court first addressed the CFA claim as alleged against the corporate defendants, finding that it survived the defendants' motion to dismiss. The court disagreed with the defendants' argument that the attorney fee provision was a liquidated damages clause, instead holding that it was an additional rent term. Furthermore, the court held, even if it were not additional rent, the provision was not a liquidated damages clause because it did not set a liquidated sum. The court noted that there were two provisions at issue, each potentially flawed. One provision set two different levels of fees, but allowed for an even greater amount of attorney fees if the actual fee were more than \$400. The other provision charged one fee irrespective of the amount of time an attorney spent on the matter. Also, the attorney fee provision was not something that the parties negotiated. The court stated that the plaintiffs' leases, "like most residential leases, are contracts of adhesion," and thus are not negotiated. Finally, the court held that even though the plaintiffs paid the attorney fees, they may still challenge them in a corollary proceeding, and since the landlord bears the burden of demonstrating a residential lease term is reasonable, the attorney fee provision may not be characterized as a liquidated damages clause, thereby shifting the burden to plaintiffs to prove it is unreasonable.

Although the court upheld the plaintiffs' CFA claim against the corporate defendants, it reversed the appellate court's finding on the CFA claim as against their attorney. The court found that plaintiffs had not stated a viable claim against the defendant attorney. The plaintiffs alleged no action on behalf of the defendant attorney,

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such as in drafting the leases, that would fall within the ambit of the CFA. The court drew comparison with a situation where an employee uses a corporate form in a transaction with a plaintiff that alleges the corporate form violated the CFA. In that situation, the employee does not become individually liable.

Similarly, the court upheld the third count of plaintiffs' complaint against the corporate defendants, but not the individual defendant attorney. Reading the latter claim as a malpractice claim, the court first held that the claim could not survive on the plaintiffs' theory that there was improper fee sharing because an ethical violation cannot form the basis for a cause of action by an adversary. Additionally, since there was no attorney-client relationship, there are only a narrow set of circumstances under which a third party, such as the plaintiffs, can maintain a claim. After noting several instances where such a claim may exist, the court held that none was present in this case. In regard to the negligent misrepresentation claim against the corporate defendants, the court upheld the appellate court's finding that such a claim may exist based upon the plaintiffs' allegations that the fees were misrepresented and/or may have constituted more than the actual costs.

Just Compensation

In *Borough of Saddle River v. 66 East Allendale*, 216 N.J. 115 (2013), the Supreme Court addressed the issue of when a trial court must determine that there exists sufficient evidence of a reasonable probability of a zoning change before the jury may consider whether that zoning affects just compensation. The borough of Saddle River sought to obtain, by use of eminent domain, property owned by 66 East Allendale LLC, according to the opinion. The parties disagreed over just compensation for the property, the majority of which was a residential zone, while the remaining part was an office zone. Specifically, the parties disagreed over the size of the proposed use, and whether East Allendale would be able to obtain a bulk variance that would allow it 42 percent of improved lot coverage, where only 30 percent was allowed under the local ordinance. This disagreement led to Saddle

River filing a condemnation action.

A pretrial appraisal determined the just compensation to be \$1,593,625. Both parties appealed and Saddle River sought a jury trial. Before trial began, Saddle River filed a motion in limine to bar East Allendale's experts' opinions as a net opinion. Saddle River argued that their opinions of a reasonable probability of a zoning change lacked foundation. Alternatively, Saddle River suggested that the trial court conduct a Rule 104 hearing to determine the threshold issue of whether there was a reasonable probability of a zoning change. The trial court denied the motion and the matter proceeded to jury trial.

At trial, each side presented expert testimony regarding what the highest and best use of the property would be. East Allendale proposed a bank/office building and had various experts present testimony regarding different options for the size and scope of the project. Each plan rested on the assumption that East Allendale would be able to obtain the necessary variance to allow increased lot coverage over what the ordinance allowed.

Saddle River, by contrast, presented expert testimony that the use of the land would be considerably smaller than the projects proposed by East Allendale. Although Saddle River did concede that a variance would be granted to allow the building of a parking lot in the residential zone, it hotly contested that the bulk variance allowing increased lot coverage would be granted. Before the case went to the jury, Saddle River again moved to bar the testimony of East Allendale's experts. At that point, the trial court determined that there was a reasonable probability that the zoning would be changed. The jury ultimately determined just compensation in the amount of \$5.25 million.

Saddle River filed a motion for a new trial or, in the alternative, a motion for remittitur, arguing that the trial court erred by not deciding before trial whether there was, as a matter of law, a reasonable probability of a zoning change. The trial court denied the motions and appeal was taken.

In regard to Saddle River's arguments on appeal, the appellate court held that the judge had properly made the decision as to whether there was a reasonable probability of a zoning change after trial had begun

and before closing arguments. That court also held that the jury instructions properly allowed the jury to consider the issue of whether a zoning change would have in fact occurred. The court reasoned that prior case law did not require that the judge make that determination. Saddle River's petition for certification to the Supreme Court was granted.

The high court began its analysis by highlighting the importance of just compensation in any taking. In determining just compensation, the "highest and best use" of property is considered. However, the court went on, consideration must be given to any zoning restrictions and their effect on fair-market value. The court looked to two prior cases, *State by Highway Commissioner v. Gorga*, 26 N.J. 113 (1958) and *State by Commissioner of Transportation v. Caoili*, 135 N.J. 252 (1994), to determine how to consider a possible zoning change in a just compensation case.

Gorga required that a judge first determine whether there is a reasonable probability of a zoning change before the jury may then consider how that potential zoning change affects just compensation. The court clarified the process in *Caoili*, creating the following two-step process: (1) trial court determines whether there is a reasonable probability of a zoning change and places its reasoning on the record; and (2) if the trial court has determined there is a reasonable probability of a zoning change, then the jury determines whether that would affect the fair-market value of the property.

The court interpreted *Gorga* and *Caoili* as requiring a trial court to first make the decision whether there existed sufficient evidence of a reasonable probability of a zoning change before the issue could be presented to the jury. Therefore, the trial court had erred even though it eventually made the decision, before jury deliberation, that sufficient evidence had been presented regarding a possible zoning change. The court made clear that a trial court must exercise its "gate-keeping function" before the jury is allowed to hear any testimony regarding a potential zoning change. Requiring the judge to make this determination early "screen[s] the jury from hearing mere speculation," the court said.

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Despite ruling that the trial court erred by not holding a Rule 104 hearing in this case to determine whether there was a reasonable probability of a zoning change, the Supreme Court held that such a hearing is not always required. A trial court may make its determination on the papers so long as it determines whether there is a reasonable probability of a zoning change under the same standard that would be utilized to make the zoning change by a zoning board. A determination cannot be based simply on the notion that there would be a change—all of the criteria that would have been considered before a zoning board must also be considered by the trial court. The court noted that the expert testimony presented in this matter failed to examine fully those criteria.

Justice Barry Albin filed a dissenting opinion, in which Chief Justice Stuart Rabner joined, suggesting that the court failed to defer to findings of the trial court and jury. The dissent disagreed that there was a difference between the judge making the determination before trial or after the evidence had been presented at trial. In fact, according to the dissent, it was reasonable to save the expense and time of a Rule 104 hearing and instead allow the expert witnesses to testify at trial and wait until after that to determine admissibility. According to the dissent, the majority failed to give proper deference to the trial court's evidentiary findings and improperly overturned the jury verdict.

Insurance

The Supreme Court issued two opinions on insurance issues that may have a significant impact on insurers. In *Farmers Mutual Fire Insurance Company of Salem v. New Jersey Property-Liability Insurance Guaranty Association*, 215 N.J. 522 (2013), the court addressed the allocation of clean-up costs in environmental pollution cases where an insured sought coverage from both solvent and insolvent carriers. In two consolidated cases, the court's analysis focused on the issue of whether the exhaustion requirement in the New Jersey Property-Liability Insurance Guaranty Association Act, and a 2004 amendment to the Association Act defining "exhaust," exempted the New Jersey

Property-Liability Insurance Guaranty Association (PLIGA) from the allocation methodology in *Owens-Illinois v. United Insurance Co.*, 138 N.J. 437 (1994).

PLIGA provides insurance coverage for individuals and businesses who had policies with insurers that have since become insolvent. PLIGA's coverage is not without limitation though. For example, PLIGA will not provide more than \$300,000 per claim, even if the original policy had a higher policy limit.

In the first case, according to the opinion, residential property owners Carolyn and Edward O'Brien had obtained homeowner's insurance policies from Newark Insurance Company (Newark) for three years, with a policy limit each year of \$300,000. For the fourth year, the O'Briens obtained a homeowner's policy from Farmers Mutual Fire Insurance Company of Salem that had a policy limit of \$500,000. During the year of Farmers Mutual's coverage, the O'Briens discovered a fuel oil leak from an underground storage tank on their property. There was no dispute that the leak had begun during Newark's period of coverage. The total cleanup costs were over \$100,000.

In the second case, according to the opinion, residential property owners Ramnath and Ashmin Sookoo had obtained homeowner's insurance policies from Newark for four years, with a policy limit each year of \$300,000. For the fifth year, the Sookoos obtained a homeowner's policy from Farmers Mutual Fire Insurance Company of Salem that had a policy limit of \$500,000. Just as with the O'Briens' property, during the year of Farmers Mutual's coverage, the Sookoos also discovered a fuel oil leak. There was no dispute that the leak had begun during Newark's period of coverage. The total cleanup costs were over \$25,000.

In 2007, Newark was declared insolvent and PLIGA took over Newark's claims. In 2009, Farmers Mutual filed separate complaints regarding the O'Brien and the Sookoo remediations, seeking reimbursement from PLIGA for the years of Newark's coverage under *Owens-Illinois*. The trial court found in favor of Farmers Mutual, finding that the exhaustion requirement in the Association Act, which required exhaustion of all benefits

from solvent insurers before PLIGA would have to pay, did not exempt PLIGA from contributing to the clean-up costs. Rather than have the trial court allocate the remediation costs under *Owens-Illinois*, the parties drafted their own consent order, with the understanding that PLIGA was filing an appeal.

The Appellate Division reversed the trial court, and held that the exhaustion requirement in the Association Act required a solvent carrier to first exhaust its policy limits before seeking reimbursement from PLIGA. Farmers Mutual then appealed to the Supreme Court. The court granted certification.

Farmers Mutual made several arguments on appeal. The crux of the arguments was that Farmers Mutual, by virtue of being the only solvent carrier, should not be responsible for years it did not provide coverage. Farmers Mutual argued that to hold otherwise would impair its preexisting contractual rights under the federal and state constitutions. Furthermore, allowing the 2004 amendment to the Association Act, which defined "exhaust" under the statute, to alter Farmers Mutual's insurance policies and fail to allocate clean-up costs as dictated by *Owens-Illinois* was unconstitutional. Finally, Farmers Mutual relied on a prior appellate ruling, *Sayre v. Insurance Co. of North America*, 305 N.J. Super. 209 (App. Div. 1997).

The appellate court in *Sayre* had addressed a similar issue under the New Jersey Surplus Lines Insurance Guaranty Fund Act. Utilizing the *Owens-Illinois* allocation methodology, the court held that the Guaranty Fund had to pay the insolvent carrier's allocated share under *Owens-Illinois*. This was the opposite result reached by the Appellate Division in this matter.

PLIGA relied on its statutory position as "a payor of last resort" and argued that *Owens-Illinois*, by its own pronouncement, was not the final word on the issue of allocation of remediation costs. PLIGA argued that the appellate ruling protected insureds, because in the event policies from solvent carriers were exhausted, they could still seek recovery from PLIGA. As for the solvent insurer, PLIGA argued it could still seek reimbursement from the liquidator for the insolvent carrier. Finally, in regard

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to Farmers Mutual, PLIGA argued that the ruling was not unconstitutional since Farmers Mutual was not required to go beyond its policy limits or pay for a claim outside the policy. Since any allocation itself is not accurate, because it is impossible to scientifically determine how much contamination occurred under each policy, the allocation dictated by *Owens-Illinois* is not inviolate, PLIGA argued.

The Supreme Court affirmed the appellate ruling, finding in favor of PLIGA and holding that *Owens-Illinois* did not supersede the exhaustion requirement under the Association Act. The court began its ruling by reviewing how to interpret a statute and how to reconcile the 2004 amendment to the Association Act with its prior ruling in *Owens-Illinois*. *Owens-Illinois* allocated clean-up costs based upon policy limits and the years during which coverage was provided. Under *Owens-Illinois*, insureds are liable for any periods during which they had no coverage. The court also addressed PLIGA's need to conserve resources and its limited role in paying insolvent claims by noting various examples of circumstances under which PLIGA would not pay, such as the overall cap of \$300,000.

The court noted that since its 1994 ruling in *Owens-Illinois*, the case had been shaped over the years as different issues arose regarding allocation of cleanup costs. *Sayre*, relied upon by Farmers Mutual and decided after *Owens-Illinois*, had produced the opposite ruling from that which the court had arrived at, but the court noted that it predated the 2004 amendment to the Association Act (and an identical amendment to the Guaranty Fund Act). Previously, both statutes required exhaustion of solvent policies before coverage could be sought under the insolvent policies. According to the court, the 2004 amendment to both statutes defining 'exhaust' copied language from *Owens-Illinois* "almost verbatim" and thus refers to the continuous trigger doctrine. The court found that the Legislature must have considered and rejected *Sayre* in enacting the 2004 amendments.

The court also rejected the argument that the insured should be personally responsible instead of PLIGA or Farmers Mutual under the *Owens-Illinois* allocation scheme. The court noted that this argument

goes directly against the very purpose of the Association Act—to protect insureds who had lost coverage due to the insolvency of their carriers and through no fault of their own.

The court also rejected Farmers Mutual's argument that, assuming the 2004 amendment to the Association Act is in conflict with the *Owens-Illinois* allocation methodology, then *Owens-Illinois* should control. A basic tenet of law, according to the court, is that the common law does not trump legislation, assuming the legislation is constitutional.

Finally, the court addressed and rejected Farmers Mutual's argument that its pre-existing contractual rights were impaired by the 2004 amendment. The court, citing to its prior decision in *State Farm Mutual Automobile Insurance Co. v. State*, 124 N.J. 32 (1991), laid out the three-part test for determining whether there has been an unconstitutional impairment of contractual rights: (1) the contractual relationship itself must have been substantially impaired; (2) the legislation allegedly causing the impairment must have no legitimate or significant public purpose; and (3) the legislation is not based upon reasonable conditions and is not related to any appropriate governmental objectives. As Farmers Mutual had failed to demonstrate the 2004 amendment met any of these elements, Farmers Mutual failed to show its contractual rights had been unconstitutionally impaired, the court said.

The Supreme Court's other insurance decision was *Potomac Insurance Company of Illinois ex rel. OneBeacon Insurance Company v. Pennsylvania Manufacturers' Association Insurance Company*, 215 N.J. 409 (2013). In *Potomac*, the court was asked to decide two issues regarding a continuous trigger matter: (1) does an insurer that has an obligation to indemnify and defend its insured have a direct contribution claim for defense costs against a co-insurer; and (2) if such a claim exists, was it extinguished when the insured and the co-insurer signed a release whereby the insured gave up its claims against that co-insurer. The court found that such a contribution claim exists and that it is not extinguished by a release signed only by the co-insurer and the insured.

This case stemmed from two other lawsuits. In the first, the Township of Evesham brought suit against Roland Aristone Inc., over an allegedly botched school construction project. Aristone had served as general contractor on the construction of a new school in Evesham. Evesham alleged that the roof was defective and caused leaks. Aristone brought a third-party complaint against its subcontractor responsible for construction of the roof.

For the relevant time period, Aristone had insurance policies through five different carriers. The first two policies were from Pennsylvania Manufacturers' Association Insurance Company (PMA), followed by one policy each from Newark Insurance Company and Royal Insurance Company of America. Newark was a former subsidiary of Royal and, by the time of the lawsuit, Royal had assumed its obligations. Plaintiff Potomac Insurance Company of Illinois, by its transferee OneBeacon Insurance Company, had one policy and Selective Way Insurance Company had five policies. Thus Selective provided coverage for half of the relevant time period, with the other three insurance companies making up the balance.

Selective and OneBeacon paid the litigation costs in the Evesham lawsuit, while PMA and Royal refused to pay based upon their interpretation of language in their policies. This prompted a second lawsuit, a declaratory judgment action by Aristone against PMA and Royal. After a confidential arbitration award, Aristone and PMA settled, with PMA agreeing to pay \$150,000 toward the Evesham lawsuit in exchange for a release from Aristone for all claims, including any claim for attorney fees and costs in the Evesham lawsuit.

A few days after settling and signing a release with PMA, Aristone settled the Evesham lawsuit for \$700,000. PMA's \$150,000 was put toward the \$700,000, with OneBeacon, Selective and Royal contributing the balance. However, over \$500,000 in attorney fees and costs was paid for solely by Selective and OneBeacon, with each contributing 50 percent. OneBeacon proposed that PMA and Royal should each pay 20 percent of the fees and costs, while it would assume 10 percent. PMA and Royal refused and this lawsuit was

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launched.

OneBeacon sued PMA and Royal (as well as Newark, but Newark was dismissed because Royal answered on Newark's behalf) for not paying their fair share of the attorney fees and costs. PMA claimed the release between itself and Aristone as one of its affirmative defenses. All parties ultimately moved for summary judgment, but all motions were denied due to factual issues regarding the settlement of the underlying lawsuit. OneBeacon then settled with Royal. PMA sought appellate review of its denial of summary judgment but was not successful and filed a second summary judgment motion, which it again lost.

In 2009, a bench trial took place on the remaining claim between OneBeacon and PMA. Aristone's counsel testified regarding the release and claimed that it was not supposed to limit other claims against PMA and did not include defense costs. The trial court found that OneBeacon had a contribution claim against PMA that survived the release between Aristone and PMA because OneBeacon was not a party to that release. According to the trial court, the \$700,000 settlement did not include defense costs. The trial court, relying on the Supreme Court's decision in *Carter-Wallace v. Admiral Insurance Co.*, 154 N.J. 312 (1998), allocated the defenses costs owed by OneBeacon and PMA. The trial court also awarded OneBeacon attorney fees and costs, and prejudgment interest, for its action against PMA.

The Appellate Division affirmed the trial court's ruling, except for the attorney fees and costs awarded to OneBeacon. Finding that the issue of OneBeacon's contribution claim against PMA was an issue of first impression, the appellate court looked to a California case that had found in a similar situation that an insurer had a claim against another insurer of the same insured for defenses costs that arose from the same risk. The appellate court found that the California decision was in accord with the New Jersey decision in *Owens-Illinois v. United Insurance Co.*, 138 N.J. 437 (1994), and therefore OneBeacon

could seek defenses costs from PMA. The appellate court also agreed with the trial court that the release between Aristone and PMA did not include OneBeacon's claim.

Both parties appealed, and the Supreme Court granted PMA's certification but denied OneBeacon's cross-certification regarding the Appellate Division's ruling reversing the award of attorney fees and costs in the matter.

PMA argued that the Appellate Division erred by creating a new cause of action by allowing a settling insurer to be sued by a co-insurer. According to PMA, a prior decision of the court, *Childs v. New Jersey Manufacturers Insurance Co.*, 108 N.J. 506 (1987), barred a direct contribution claim between insurers. PMA also argued that the Appellate Division's reliance on a California case was misplaced because the allocation law in California differs from that of New Jersey. Finally, PMA argued that the only right to contribution in New Jersey was based upon subrogation, not an independent claim by an insurer.

OneBeacon, seeking affirmance of the appellate decision, argued that a right to recover by a co-insurer was consistent with New Jersey case law that allowed allocation of costs among insurance carriers for a common insured. According to OneBeacon, it was only seeking PMA's proportionate share of the costs as calculated by *Owens-Illinois*. Finally, OneBeacon agreed with the courts below that the release between PMA and Aristone did not affect its rights.

The court reviewed the decision regarding the contribution claim de novo, while reviewing the testimony and factual findings regarding the release with deference toward the trial court's factual findings. The court began by addressing the holdings in *Owens-Illinois* and *Carter-Wallace*. In *Owens-Illinois*, joint-and-several liability, where an insurer under one policy would have to sue a co-insurer in a separate lawsuit, was expressly rejected. Instead, the court in *Owens-Illinois* chose a pro rata formula that would apportion liability

among the insurers. According to the court, *Owens-Illinois* envisions direct claims between co-insurers. *Carter-Wallace* also addressed allocation, but between primary and excess insurers for a given year.

The court held that OneBeacon properly asserted a contribution claim against PMA. According to the court, allowing such claims for defense costs encourages "prompt and proactive involvement" on the part of insurers. Allowing such claims also encourages early settlement to lower litigation costs, although the court noted that once an insurer settled, it would not have to share in further defense costs by insurers who proceeded on with the litigation. The court also noted that its holding encouraged individuals and businesses to purchase sufficient insurance coverage. Finally, the court cited to basic fairness in allowing a contribution claim for defense costs, because to rule otherwise would reward a party for not participating in litigation.

Although the appellate court had relied on a California decision, the court held that was not improper, even though California had adopted a "horizontal" method of pro rata allocation, requiring the exhaustion of all primary insurance before secondary insurance can be utilized. New Jersey has adopted a "vertical" method of pro rata allocation "by which coverage for a particular year is allocated first to the primary carrier for that year and then through each succeeding excess layer." Yet the court noted that the principle underlying both methods is the same and allows for a contribution claim for defense costs.

Finally, the court addressed the release between PMA and Aristone. Deferring to the trial court's factual findings, the court held that the trial court properly found that based on testimony, PMA knew OneBeacon would not sign such a release and thus there was no meeting of the minds between PMA and OneBeacon regarding the alleged release of a contribution claim by OneBeacon against PMA. Thus, the appellate opinion was affirmed in its entirety. ■