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CORPORATE INSURANCE LAW

Expert Analysis

Court of Appeals Rejects Unavailability Of Insurance Exception

If a company did not have insurance for a period of time, does it matter why? Does it matter whether the company did not have insurance because the company chose not to purchase it or because it was not available in the marketplace? In a recent decision, the Court of Appeals answered this question with a resounding no, at least in the context of applying a pro rata allocation to loss arising out of environmental contamination that occurred continuously over a period of years. *Keyspan Gas East Corporation v. Munich Reinsurance America*, 31 N.Y.3d 51, 73 N.Y.S.3d 113 (2018). In *Keyspan*, the Court of Appeals rejected the unavailability of insurance exception and held that the policyholder is responsible for loss allocated to periods in which it was uninsured, regardless of whether insurance for the risk at issue was available during the relevant time period.

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Keyspan Case Background

Keyspan's predecessor, Long Island Lighting Company (LILCO), owned and operated manufactured gas plant sites in Rockaway Park and Hempstead, which began operating in the late 1880s and early 1900s. Decades of plant operations caused environmental damage including groundwater contamination from contaminants, such as tar, leaching into the groundwater gradually over a period of many years. Keyspan performed expensive remediation work at both sites and filed an action seeking to recover the costs under general liability insurance policies issued to LILCO, including under certain excess liability policies issued by Century Indemnity Company (Century).

Century had issued eight excess liability policies to LILCO for the 16-year period from 1953 to 1969. Century moved for partial summary judgment contending that any loss incurred by Keyspan for remediation costs must be allocated on a pro rata basis over the entire period of time that environmental damages occurred at each site. According to Century, property damage at the Hempstead site occurred from 1905 to 2001, and property damage at the Rockaway site took place between 1882 and 2012. Century asserted that it was not liable for any portion of the property damage that occurred before inception of the first Century policy in 1953 or after

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the expiration of the last Century policy in 1969.

In response, Keyspan did not dispute that damages should be allocated in accordance with a pro rata time-on-the-risk allocation. However, Keyspan argued that the period of allocation should not include the time period in which insurance was not available for property damage caused by environmental pollution. Keyspan argued, supported by expert testimony, that such insurance coverage was not available before 1925 and that after 1970, the sudden and accidental pollution exclusion would have barred coverage under standard general liability policies. Keyspan therefore asserted that, when calculating Century's pro rata share, the period of allocation should not include the years before 1925 or after 1970, effectively placing the risk of the uninsured years on the insurer by increasing Century's allocated share.

The trial court granted Century's motion for summary judgment in part, ruling that costs allocated to the years during which Keyspan did not have insurance coverage because it had elected to self-insure or because the legislature had mandated that general liability policies include a pollution exclusion, should be allocated to Keyspan. The trial court, however, also denied Century's motion in part, holding that the years in which the relevant insurance was unavailable in the market should not be allocated to Keyspan.

On appeal, the First Department reversed in part, ruling that Keyspan is responsible for all periods in which it was uninsured, and that Century has no obligation to pay loss allocated to time periods when insurance for property damage caused by pollution was unavailable in the market. The Appellate Division certified the case to the Court of Appeals, which affirmed, confirming that the Appellate Division's order was correct.

New York Allocation Law

Before addressing the unavailability of insurance issue, the Court of Appeals first provided a helpful review of New York law on allocation of long-tail insurance claims. As the court noted, in general, courts that have adjudicated insurance disputes over long-tail environmental claims have resolved the disputes by applying either a pro rata allocation method or an all sums approach. Under an all sums approach, the insured is permitted to recover all of its loss under any policy in effect during the period that the property damage occurred. In contrast, under a pro rata allocation, the loss is allocated pro rata to each year of the period in which property damage took place, and the insurer is responsible for the pro rata share allocable to each year in which it issued a policy.

New York has not strictly adopted either pro rata allocation or the all sums approach. Instead, Court of Appeals' precedent dictates that the appropriate allocation method is governed by the specific language of the insurance policies at issue. In general, where the policy language restricts coverage to the property damage that takes place during the policy period, pro rata time-on-the-risk allocation is the appropriate allocation method. *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208 (2002). Where, instead, the insurance policies contain language extending coverage to property damage that takes place outside the policy period—such as certain noncumulation and prior insurance clauses—the all sums approach is the appropriate method. *Matter of Viking Pump,* 27 N.Y.3d 244 (2016).

The Unavailability Exception

In cases like *Keyspan*, where pro rata allocation has been deemed applicable and where the years of property damage include periods where the policyholder did not have insurance, courts have had to address whether the insured or the insurer should bear the risk allocated to the uninsured years. The majority of courts have agreed that the insured is responsible for loss allocated to years where it elected not to purchase insurance. Courts are divided, however, with regard

to allocating loss for the years where insurance was unavailable for purchase. Some jurisdictions have recognized an "unavailability exception" to the rule that the policyholder bears the risk of uninsured years, shifting responsibility to the insurers for years where insurance was unavailable.

In *Keyspan*, the Court of Appeals rejected the unavailability exception, siding with courts that have held that loss allocated to uninsured years is to be allocated to the policyholder regardless of whether insurance was unavailable or the insured elected not to purchase insurance. The court identified several reasons that support its ruling. First, the court explained that the unavailability exception is inconsistent with the very premise of the court's decisions on pro rata allocation. The court has repeatedly held that pro rata allocation is appropriate where the policy language limits coverage to property damage that occurs during the policy period. Therefore, it would be inconsistent with the court's decisions interpreting that policy language to require an insurer to pay loss for property damage that occurs outside the years of coverage issued by the insurer.

The court noted that the unavailability exception could impose liability "in perpetuity (or retroactively to periods prior to coverage)" on an insurer that only issued coverage for a year or two, explaining that "it would be incongruous" to require such an insurer to pay loss "attributable to years of non-coverage." Such an approach, the court said, would eviscerate "much of the distinction between pro rata and all sums allocation."

The court further explained that the unavailability exception effectively provides insurance coverage to an insured for years in which no premiums were paid and in which the insurance industry collectively made the decision not to offer insurance for the risks at issue. Application of such an exception, the court said, would be contrary to the reasonable expectations of the insured.

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Finally, the court pointed out that many of the courts that have adopted the unavailability exception have relied on a public policy in favor of maximizing insurance recovery for policyholders and not on the interpretation of the applicable policy language. In contrast, the courts that have rejected the unavailability exception have more often relied on an analysis of the policy language, an approach more consistent with New York law.

Looking Forward

Courts across the country continue to wrestle with insurance coverage disputes over long-tail environmental claims with most courts applying either a pro rata allocation or the all sums approach. Later this year, the American Law Institute will publish the first Restatement of Insurance. Reportedly, the Restatement of Insurance will adopt pro rata allocation as the default methodology for allocation of loss arising from long-tail environmental claims.

To the extent that courts follow the Restatement and adopt pro rata allocation, judges will necessarily have to contend with the unavailability exception arguments addressed by the Court of Appeals in *Keyspan.* The court's opinion in *Keyspan* provides a well-reasoned path for other courts to follow on this issue.

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