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Door Closing On 'Unavailability' Insurance Exception: Part 2

By **Scott Seaman, Hinshaw & Culbertson LLP**

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The Limited Nature Of The "Unavailability Of Insurance" Exception

Scott M. Seaman

To be sure, decisions applying New Jersey law post-Owens-Illinois have applied the "unavailability of insurance" exception in the context of asbestos and environmental coverage claims by ending the coverage block (the allocation end-date) at the time when coverage for asbestos or pollution losses was unavailable in the market.

Outside the Garden State, however, very few decisions applying the law of a pro rata jurisdiction have recognized any "unavailability of insurance" exception. Some (but not all) federal court decisions purporting to apply New York law have applied the "unavailability of insurance" exception[8] as has the Minnesota Supreme Court.[9] But the tried and true requirement of policyholders bearing responsibility for uninsured periods has otherwise held firm in pro rata jurisdictions across the country.

Further, it bears emphasizing that, even in the couple of jurisdictions with decisions recognizing the "unavailability of insurance" exception, policyholders still bear responsibility where risks were not transferred for any other reason, including earlier self-insured periods, periods in which policyholders failed to obtain sufficient limits, purchased insurance from insolvent insurers, had deductibles, failed to comply with policy conditions, and otherwise.

Policyholders have not been hesitant in attempting to play the unavailability card. Courts, however, have repeatedly rejected efforts by policyholders to effectively undermine the consequences of a pro rata allocation by expanding the limited exception. See, e.g., Benjamin Moore & Co., v. Aetna Cas. and Sur. Co., 843 A.2d 1094, 1103, 1106 (N.J. 2004) (holding that the policyholder was responsible for the deductible on each triggered policy as agreed to in the insurance contract and recognizing policyholders "who chose to 'go bare' or underinsure must sustain the burden of those choices. Likewise, policyholders are required to underwrite the risk of insurer insolvency or bankruptcy."); H.B. Fuller Co. v. U.S. Fire Insurance Co., (D. Minn. 2011) (rejecting policyholder's argument that insurance was "unavailable" to it because the insurers had become insolvent); Crown Cork & Seal Co. Inc. v. Travelers Cas. & Sur. Co., No. 0074568-88 (N.J. Super. Ct. Aug. 11, 1997) (ruling that the inability to purchase insurance on same terms and rates does not equate to unavailability for purposes of allocation); NL Industries Inc. v. Commercial Union Insurance Co., 926 F. Supp. 446 (D. N.J. 1996) (applying New York law) (holding that the policyholder was responsible for injuries in years where lead paint coverage was

unavailable and for periods of missing insurance contracts); Fulton Boiler Works Inc. v. American Motorists Insurance Co., 828 F. Supp. 2d 481 (N.D. N.Y. 2011) (holding that policyholder is required to contribute to the allocation of asbestos-related losses for the period between 1949 and 1976 because the policyholder was unable to establish that it purchased liability insurance for that period) Olin Corp. v. Insurance Co. of North America, 986 F. Supp. 841 (S.D.N.Y. 1997), aff'd, 221 F.3d 307 (2d Cir. 2000) (holding that the policyholder must contribute for period of 1971 through 1985, the period of time in which coverage was barred by pollution exclusions in the subject general liability contracts, because the policyholder could have purchased Environmental Impairment Liability policies that would have been required to respond to the loss at issue); Foster Wheeler LLC v. Affiliated FM Insurance Co., 27 Misc. 3d 1223(A), 910 N.Y.S.2d 762 (Sup. Ct. 2010) (applying New Jersey law) (unreported decision) (holding that period of 1982 to 1985 was to be included in the allocation of asbestos liabilities even though coverage may not be collectible because of policyholder's misrepresentations/non-disclosures; the question for allocation to those years was not whether insurance was collectible but, rather, whether insurance was available); Domtar Inc. v. Niagara Fire Insurance Co., 563 N.W.2d 724 (Minn. 1997) (holding the policyholder responsible for impacted years where the policyholder's contracts were missing).

By deviating from the straightforward consequences of a pro rata allocation, the limited number of courts letting policyholders off the hook based upon the limited "unavailability of insurance" exception have added another phase to complex coverage litigation. The additional issues presented in litigating the "unavailability of insurance" exception include: (1) determining the proper standard governing unavailability (i.e., whether the standard of unavailability is "subjective" or "objective;" whether the inquiry is availability of insurance to a particular policyholder, a particular type of policyholder, or any policyholder); (2) who bears the burden of proof (i.e., whether the policyholder must prove unavailability or whether the insurer must prove availability); (3) what constitutes available insurance (i.e., whether claims-made coverage such as environmental impairment liability insurance constitutes available insurance; whether foreign markets as well as domestic markets may be considered; whether captives and alternative risk transfer devises may be considered; and (4) the date upon which insurance became "unavailable." Courts have reached different conclusions on each of these issues. In short, the "unavailability of insurance" exception has embroiled litigants and courts in expensive and time-consuming discovery, motion practice, and fact-finding. Court rulings on the issue of when insurance became "unavailable" in the context of asbestos and environmental losses have varied with results ranging from the mid-1980s to well into the 2000s.

The Potential Further Limiting Of The "Unavailability Of Insurance" Exception

As shown above, federal courts applying New York law have reached different conclusions as to whether there is any "unavailability of insurance" exception. The first recent development with respect to the exception was the September 2016 decision in Keyspan Gas East Corp. v. Munich Reinsurance America Inc., 143 A.D.3d 86 (N.Y. App. Div. 2016). In the first New York state appellate court decision to address the issue, the court flatly rejected the exception, holding there is no "unavailability of insurance" exception under New York law to allow the policyholder to avoid responsibility for uninsured periods. Id. at 95.

Keyspan sought coverage for its remediation costs at various former manufactured gas plants. Century issued 16 successive years of general liability insurance policies from 1953 to 1969. Keyspan's claim for indemnification by Century implicated not only the 16–year period that the policies were in effect, but also periods of time, both before 1953 and after 1969, when insurance covering this risk could not be purchased in the marketplace. The trial court, on Century's motion for summary judgment, held that a pro rata time-on-the-risk allocation formula is appropriate to determine the parties' respective

obligations for the loss; for periods when Keyspan did not purchase insurance that was otherwise available in the marketplace, Keyspan is responsible for a share of liability attributable to that period of time; and Keyspan is allocated liability for the time period between 1971 and 1982 when the New York Insurance Law expressly prohibited insurers from covering liability arising out of pollution or contamination (reasoning this result was consistent with the purpose of the insurance law to have companies, such as Keyspan, bear the full burden of their own actions affecting the environment). These holdings were not challenged on appeal.

The trial court's holding that Century, not Keyspan, should be allocated the other periods of time when insurance was unavailable in the marketplace was challenged on appeal. The appellate court noted that pro rata allocation typically includes apportioning some part of the risk to the policyholder in connection with periods of no insurance, self-insurance, insufficient limits, etc. The appellate court reversed the trial court and flatly refused to create an exception based upon unavailability of insurance.

We find that the policy language supports a conclusion that the unavailability exception to proration to the insured does not apply. As with the policies in Con. Edison, the "all sums" policy language in the policies at bar is qualified by other language. Each policy, despite some minor variations, provides the insured with coverage for occurrences, accidents and continuous and repeated exposure to conditions that result in damage "during the policy period." While none of the policies expressly address how to allocate liability in a situation where the underlying damage is long-term, continuous and indivisible, the fact that the policies require Century to indemnify Keyspan for occurrences, accidents, etc., 'during the policy period' is consistent with allocation for time on the risk. Unavailability is an exception to time on the risk, since it allocates responsibility for periods of time when no insurance was purchased and it is, therefore, inconsistent with policy language restricting coverage to the policy period. There is no other or additional contractual language in the policy justifying this exception. There are no express contract provisions requiring the insurer to cover damages outside of the policy period when insurance is otherwise unavailable in the marketplace.

Id. at 95 - 96.

The appellate court also rejected Keyspan's public policy arguments, noting that the court will not rewrite the terms of an insurance policy. The court aptly pointed out that "the spreading of industry risk through insurance is accomplished through the setting and payment of premiums for insurance, consistent with the parties' forward looking assessment of what that risk might entail. In the absence of a contract requiring such action, spreading risk should not by itself serve as a legal basis for providing free insurance to an insured." Id. at 97.

The second recent development illustrates the potential limited utility of the "unavailability of insurance" exception to the policyholder. In Continental Casualty Co. v. Indian Head Industries Inc. (6th Cir. Dec. 16, 2016) (applying Michigan law), the Sixth Circuit affirmed the district court's pro rata time-on-the-risk allocation of defense and indemnity costs for asbestos bodily injury claims.

The insured, Indian Head, argued that it was not required to reimburse Continental for damages and defense costs for years in which asbestos-related insurance was unavailable. It asserted that, once its insurer Continental barred asbestos-related claims from its coverage, it could no longer obtain coverage for such suits. The Sixth Circuit relied upon the district court decision in Decker Mfg. Corp. v. Travelers Indem. Co., 106 F.Supp.3d 892, 898 (W.D. Mich. 2015), which recognized an exception to the requirement that the policyholder bear responsibility for uninsured periods has to hold a policyholder liable for its own damages "where insurance is not available in the marketplace."

As a threshold matter, it is doubtful that any "unavailability of insurance" exception actually exists under Michigan law. The district court, in Decker, did not cite to a single case decided under Michigan law recognizing such an exception. Instead, the district court relied solely upon the Second Circuit decisions in Stonewall and Olin (neither of which purported to apply Michigan law) and the court decision in Keyspan, applying New York law, that subsequently was reversed. Keyspan Gas E. Corp. v. Munich Reinsurance Am. Inc., 46 Misc.3d 395 (N.Y. Sup. 2014), rev'd 143 A.D.3d 86 (N.Y. App. Div. 2016).

However, even if Michigan law recognized an "unavailability of insurance" exception, the Sixth Circuit imposed upon the policyholder the burden of proving that insurance was not reasonably available to it. Moreover, the court further explained that it is not enough that the "same policy type" was not available, but that the policyholder could not purchase coverage of any policy type that would have "provided similar coverage." Id. According to the Sixth Circuit,

> Indian Head has only asserted that asbestos-related coverage was no longer available to it after Continental added asbestos exclusions to its policies. We find this insufficient. Continental has pointed to instances where asbestos-related coverage continued to be available to companies until at least 2001. See John Crane, Inc. v. Admiral Ins. Co., 991 N.E.2d 474, 478 (Ill. App. Ct. 2013) (noting the insured had asbestos coverage through 2001). Based on this information, Indian Head has failed to show that asbestos-related coverage from any insurer was unavailable after 1987. The district court, therefore, did not err in allocating to Indian Head its share of damages incurred after 1987.

Id. at * 9.

Though accepting (perhaps wrongfully) the "unavailability exception," the court placed the burden of proof on the policyholder and ruled asbestos coverage was available through 2001.

The third significant recent development is the New Jersey Supreme Court's decision to grant the insurers' petition for certification in Continental Insurance Co. v. Honeywell International Inc.

Under New Jersey law, at a minimum, the policyholder is responsible for years in which insurance coverage for asbestos risks was available in the market. The appellate division's decision in Continental Insurance Co. v. Honeywell International Inc., (App. Div. July 20, 2016) is instructive on the minimum end point of the allocation point. In Honeywell, the appellate division affirmed the trial court's determination that excess insurance coverage was "reasonably available for purchase" well into 1987. Id. at *12-13. Properly viewed, Honeywell demonstrates the minimum (not the maximum) end date for the availability of coverage for asbestos risks.

In granting review, the New Jersey Supreme Court will have the opportunity to consider whether a policyholder may bear responsibility for periods beyond which insurance is "available" for a risk based upon principles articulated by the court in Owens-Illinois and its progeny, including assumption of risk, incentivizing responsible conduct by companies, simple justice and exceptional circumstances.

In seeking review, the insurers argued that Honeywell should be held liable regardless of whether the plaintiffs' claims involve pre-1987 exposures because Bendix (the Honeywell predecessor manufacturing and selling asbestos-containing brake and clutch parts) continued to manufacture and sell asbestos-containing products until 2001 knowing that it did not have insurance coverage. By inflexibly relieving

the policyholder of responsibility post-1987 when asbestos coverage ceased to be available to Honeywell, the insurers contend the appellate division violated other principles articulated in Owens-Illinois such as incentivizing responsible conduct, discouraging irresponsible risk taking and pricing products to reflect their true costs.

According to the insurers:

> Rather than encouraging responsible conduct, the Appellate Division has implicitly encouraged risk-taking and irresponsible conduct, and would signal to manufacturers that they can continue to engage in activities alleged to cause continuous and progressive injury without insurance coverage knowing they will be able to transfer losses to their prior insurers.

The insurers also point to the New Jersey Supreme Court decision in Carter-Wallace Inc. v. Admiral Insurance Co., 712 A.2d 1116 (N.J. 1998) in which the court indicated a departure from Owens-Illinois would be warranted under “exceptional circumstances” and argue that continuing to manufacture asbestos-containing products 14 years after commercial asbestos insurance was available constituted “exceptional circumstances.”

Honeywell resisted review arguing that it seeks coverage for only pre-1987 exposures to asbestos and there is no evidence to support the proposition that its post-1987 conduct increased its pre-1987 claims. Further, it claims nothing in Owens-Illinois or its progeny supports holding a policyholder responsible for periods in which insurance is unavailable. Argument and decision are likely several months away.

The hallmark of the New Jersey Supreme Court’s jurisprudence on allocation issues has been its recognition of the need for flexibility and its desire to interpose innovative approaches. It will be interesting to see what the court does in the Honeywell case.

Scott M. Seaman is a partner in Hinshaw & Culbertson LLP’s Chicago office, where he serves as national co-chair of the firm’s insurance services practice group.

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[1] Compare Stonewall Insurance Co. v. Asbestos Claims Management Corp., 73 F.3d 1178 (2d Cir. 1995), opinion modified on denial of reh’g, 85 F.3d 49 (2d Cir. 1996) (no proration to the insure for years after 1985, the “point at which asbestos liability insurance ceased to be available.”) and Olin Corp. v. Insurance Co. of North America, 986 F. Supp. 841 (S.D. N.Y. 1997), aff'd, 221 F.3d 307 (2d Cir. 2000) (the “unavailability” exception is to be interpreted in the generic sense to mean insurance not being available in the marketplace to policyholders of the same kind as opposed to insurance not being available to the particular policyholder or for the particular risk) with Sybron Transition Corp. v. Security Insurance of Hartford, 258 F.3d 595 (7th Cir. 2001) (holding that the policyholder must contribute to the pro rata time-on-the-risk allocation for periods without insurance, regardless of whether coverage for the risk at issue was available).

[2] Woodale Builders Inc. v. Maryland Cas. Co., 722 N.W.2d 283, 297-98 (Minn. 2008).

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