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Law360 Asks Scott Seaman to Weigh-In on High Profile Insurance & Reinsurance Cases Pending before New York's High Court

September 20, 2017

Hinshaw attorney Scott Seaman, a Chicago-based partner and co-chair of the firm's national Insurance Services Practice Group, provided comments about two closely watched cases pending before the New York Court of Appeals.

The first case, *KeySpan Gas East Corp. v. Munich Re* is an environmental insurance coverage action in which the Appellate Division, in reversing the trial court, held that a pro rata time on the risk allocation was required. The court rejected the argument of the policyholder that no sums could be allocated to it after insurance coverage became unavailable in the market due to absolute pollution exclusions. Seaman has written extensively on allocation issues and the issue of unavailability. *See, e.g.*, S.M. Seaman & J.R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* (5th Ed. Thomsen Reuters 2016-2017).

The pro rata allocation applied by the Appellate Division was correct under *Con Ed* and remains correct post *Viking Pump* as the policies only provide coverage for injuries or damages "during the policy period" and do not contain "non-cumulation" clauses or other language warranting departure from New York's default rule requiring pro rata allocation.

Pro rata allocation and allocation to the policyholder for periods when there is no insurance for any reason go together like peanut butter and jelly. There is no express policy language requiring the insurer to cover damages outside of the policy period when insurance is otherwise unavailable in the marketplace. The Appellate Division's refusal to re-write the policy was cogent and consistent with New York Court of Appeal's jurisprudence. Contract terms should not be altered by judicial fiat to force insurers to pay for damages that took place outside of their policy period. During part of the period in question, New York insurance law expressly prohibited insurers from covering liability arising out of pollution or contamination. The purpose, or at least impact of that law, was to have companies, such as KeySpan, bear the full burden of their own actions affecting the environment.

The second case, *Global Re v. Century Indemnity Co*., is a reinsurance case before the New York Court of Appeals on a question certified by the United States Court of Appeals for the Second Circuit. The ultimate issue is whether the *Bellefonte* Cap—a short-hand reference to the "reinsurance accepted" limit in a facultative reinsurance certificate—constitutes the cap on reinsurers'

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obligations under facultative reinsurance certificates for both loss and expense.

The *Bellefonte* case was decided by the Second Circuit over a quarter of a century ago. Most, but not all cases within the Second Circuit have followed it, as have many courts in other jurisdictions. The New York Court of Appeals followed it in *Excess Insurance Co. Ltd. v. Factory Mutual Insurance Co*.

Over the past quarter of a century, reinsurers generally have fared well by focusing on the similarity of their contract language to that in Bellefonte, the important of adhering to precedent, and pointing out certificate pricing was based upon the reinsurance accepted amount capping liability.

Ceding companies look for ways to distinguish the contract language from *Bellefonte*, argue for concurrency between the facultative certificate and reinsured contract, and sometimes assert industry custom and practice support paying expenses in addition to the limits.

The arguments advanced in this case by the brokers about financial hardships presented by the *Bellefonte* cap seem out of place in a case between two sophisticated insurance companies. For background on the Bellefonte cap, read "The Bellefonte Cap Returns."

Read "3 Insurance Cases To Watch At NY's High Court" on the *Law360* website (*subscription required*)