

## New York Appellate Court Restores Insurer's Right to Seek Pro Rata Allocation of Settlements Between Insured and Uninsured Periods

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In *Liberty Mut. Ins. Co. v. Jenkins Bros.*, 2022 N.Y. App. Div. LEXIS 1846 (App.Div. 1<sup>st</sup> Dept. March 22, 2022), the New York Supreme Court, Appellate Division, First Department, issued a ruling reversing the trial court and holding that an insurer was entitled to allocate a portion of asbestos claim settlements it negotiated to time periods when its dissolved insured was without coverage.

The decision overturns a trial court ruling that the insurer was barred from denying liability for the full amount of the settlements because the insurer had become the "real party in interest" as a result of a prior court order directing it to accept service of process on behalf of a dissolved insured. The trial court held that the insurer stood in the shoes of the insured for all purposes by accepting service and negotiating settlements, and was therefore estopped from denying liability for the full amount of the settlements.

In a brief opinion, the Appellate Division held that the previous order directing substituted service on the insurer did not constitute a determination that the insurer was required to fund the entire amount of any potential settlement and did not make the insurer a party to those settlement agreements. Furthermore, the insurer was not estopped from asserting that it is not responsible for the full amount of the settlements, because defense counsel disclosed the insurer's position to the claimants, and the claimants could not establish any prejudicial reliance on the insurer's conduct. Holding that the policy language supported pro rata allocation and the insured bore the risk for those periods in which it did not have coverage (citing *Keyspan Gas East Corporation v Munich Reinsurance America, Incorporated*, 31 N.Y.3d 51 (2018)), the appellate court stated that its ruling placed the claimants in the same position they would have been in had they obtained judgments against the insured and sought to enforce those judgments against the insurer.

The Appellate Division's ruling should help to facilitate the orderly resolution of claims against insolvent, dissolved and defunct policyholders, by allowing insurers to accept service of process, manage and settle claims without thereby risking the loss of all defenses and limitations to coverage.

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