New York Court of Appeals Rejects Unavailability Exception to Pro Rata Allocation

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Insurance Coverage and Bad Faith Alert
3.28.18

On March 27, 2018, the New York Court of Appeals issued its widely anticipated decision in *Keyspan Gas East Corp. v. Munich Reinsurance America, Inc.* The issue before the court was whether New York law supports the adoption of the so-called "unavailability" exception to pro rata allocation, under which the damage in cases involving "long-tail" injury or damage is not allocated to the periods in which insurance was "unavailable" to the policyholder and instead is allocated to the insurers on the risk. The court decisively rejected the proposed adoption of an unavailability exception and adhered to the long-standing rule in New York that, under pro rata allocation, insurers are responsible only for the portion of the damage that occurred during their policy periods.

Keyspan is a long-pending case regarding insurance coverage for former manufactured gas plant (MGP) sites. Although each site is different, the evidence in MGP cases tends to show that the environmental damage at issue occurred over decades, often from the 1800s to the present. Under the Court of Appeals' decision in *ConEdison v. Allstate Ins. Co.,* 774 N.E.2d 687 (NY 2002), New York applies pro rata allocation where policies, such as the ones at issue in *Keyspan*, provide coverage only for injury that occurs "during the policy period." The only time New York courts have recognized "all sums" allocation in a continuous injury case involved policies that contain "non-cumulation" provisions. *See In re Viking Pump, Inc.,* 52 N.E.3d 1144 (NY 2016). Relying on decisions by federal courts and other state courts, the plaintiff-policyholder, Keyspan, persuaded the trial court to rule that the damages at certain MGP sites would not be allocated to periods in which insurance was "unavailable" in the marketplace for such risks. The defendant-insurer, Century Indemnity Company, appealed that ruling to the Appellate Division. The Appellate Division reversed, unanimously rejecting Keyspan's arguments. The Appellate Division then granted Keyspan leave to appeal to the Court of Appeals.

In its March 27, 2018 decision, the Court of Appeals unanimously affirmed the Appellate Division's decision (with two judges not participating). The court noted that the policies at issue contained language "limiting the insurer's liability to losses and occurrences happening 'during the policy period.'" *Op.* at 8. The court held that adoption of an unavailability exception would be "inconsistent with the contract language that provides the foundation for the pro rata approach – namely the 'during the policy period' limitation – and that to allocate risks to the insurer for years outside the policy period would be to ignore the very premise underlying pro rata allocation." *Id.* at 9. The court emphasized that recognizing an unavailability exception "would effectively provide insurance coverage to policyholders for years in which no premiums were paid and in which insurers made the calculated choice not to assume or accept premiums for the risk in question." *Id.*

The court also noted that other courts that have adopted an unavailability exception "have done so by relying heavily on public policy concerns and a desire to maximize resources available to claimants against the policyholder." *Id.* at 10 (citations omitted). The approach of other courts that have rejected an unavailability exception, however, "is more consistent with New York law," which gives full effect to the plain meaning of the insurance policy language. *Id.* The court also held that, to the extent there are competing public policy concerns, New York courts "may not make or vary the contract of insurance to accomplish its notions of abstract justice or moral obligation." *Id.* at 11 (citation omitted).

A final point: In its decision in *Viking Pump*, the Court of Appeals ruled that "all sums" allocation will apply to policies containing non-cumulation provisions. Keyspan argued that a provision in the policies at issue should be interpreted to operate as a non-cumulation clause and therefore supported "all sums" allocation. The court did not reach the issue because it was not properly before the court on

appeal. *Id.* at 8 n.1

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