

NY Court of Appeals Ruling - No Unavailability Exception to Policyholder's Responsibility for Uninsured Periods in Long-tail Environmental Claims

The New York Court of Appeals has ruled that, where indemnity expenses for long-tail injury or damage are allocated on a pro rata basis, the policyholder bears responsibility for all periods of no coverage, including periods for which coverage for the risk in question was not available to the policyholder. Keyspan Gas E. Corp. v. Munich Re. Am., Inc., No. 20 (Mar. 27, 2018).

The policyholder's predecessor had operated manufactured gas plants for many decades. The New York Department of Environmental Conservation required the policyholder to remediate long-term, gradual environmental contamination resulting from those operations. The policyholder sought coverage under liability policies issued to the policyholder's predecessor between 1953 and 1969. The policyholder and the insurer did not dispute that the remediation expenses were subject to allocation to relevant time periods on a pro rata, time-on-risk basis. The policyholder asserted that time periods prior to 1925 and from 1970 should not be considered in the allocation calculations, because insurance coverage for environmental property damage allegedly was not available during those time periods. The insurer contended that the entire period during which property damage took place should be used, regardless of whether or not environmental property damage insurance coverage was available.

The Court of Appeals noted that it had previously held that, unless policies contain prior insurance or continuing coverage provisions, pro rata allocation was more consistent with provisions in insurance policies restricting coverage to injury or damage taking place "during the policy period". Consolidated Edison Co. of N.Y. v Allstate Ins. Co., 98 N.Y.2d 208 (1992); Matter of Viking Pump, Inc., 27 N.Y.3d 244 (2016). The court concluded that the removal of time periods of insurance unavailability would be inconsistent with the premise of pro rata allocation, because it could "impose liability in perpetuity (or retroactively to periods prior to coverage) on an insurer who issued insurance coverage for only a limited number of years." The court reasoned that an unavailability exception would in effect afford the policyholder coverage for time periods when risk created by the policyholder resulted in damage, and insurers did not afford coverage and collect premiums. The court concluded this would be contrary to the policyholder's reasonable expectations.

The Massachusetts Supreme Judicial Court also has rejected an "unavailability exception" to pro rata allocation. Boston Gas Co. v. Century Indem. Co., 910 N.E.2d 290 (Mass. 2009). The question currently is under consideration by the New Jersey Supreme Court and the Connecticut Supreme Court. Continental Ins. Co. v. Honeywell Int'l, Inc., 2016 N.J. Super. Unpub. LEXIS 1685 (App. Div. July 20, 2016), certif. granted, 228 N.J. 437 (2016); R.T. Vanderbilt Co., Inc. v Hartford Acc. & Indem. Co., 156 A.3d 539 (Conn App. Ct.), cert. granted, 171 A.3d 63 (Conn. 2017).