New York's High Court Rejects "Unavailability Rule" for Pro Rata Longtail Allocations
March 28, 2018

In a significant victory for insurers, on March 27, 2018, the New York Court of Appeals held that policyholders are responsible for the pro rata share of losses allocable to years where they were uninsured, even if insurance for the loss was unavailable during those years, affirming the Appellate Division's decision in KeySpan Gas East Corporation v. Munich Reinsurance America, Inc. 37 N.Y.S.3d 85 (2016).

KeySpan was seeking coverage for environmental contamination from manufactured gas plants owned and operated by KeySpan's predecessor, Long Island Lighting Company (LILCO), which began operating in the 1880s and early 1900s. Although KeySpan did not dispute that it should bear the risk for those years where LILCO did not purchase property damage liability insurance when it was available to it, it argued that it should not be responsible for those years where such insurance was unobtainable, either because it had not yet been offered by the insurance industry or because the insurance industry had adopted pollution exclusions (the so-called "unavailability rule").

In this, its second major foray "into the complex realm of long-tail insurance claims" in as many years,[1] the New York Court of Appeals continued its policy-language focused approach to allocation issues. The Court focused on the policy language limiting coverage to losses and occurrences that happen "during the policy period". The Court noted that it had held in Consolidated Edison that because the same policy language "provide[s] indemnification for liability incurred as a result of an accident or occurrence during the policy period, not outside that period," it mandates pro rata allocation. (Consolidated Edison Co. of N.Y. v. Allstate Ins. Co., 98 N.Y. 208, 224 (2002)). Because the unavailability rule is inconsistent with that limitation against imposing liability for occurrences outside the policy period, the Court held that the unavailability rule is incompatible with both the specific policy language and with the very premise underlying pro rata allocation.

The Court noted that some other jurisdictions have adopted the unavailability rule in pro rata allocations, but distinguished those cases as "relying heavily on public policy concerns and a desire to maximize resources available to claimants against the policyholder" rather than on the policy language.

The Court concluded that "because 'the very essence of pro rata allocation is that the insurance policy language limits indemnification to losses and occurrences during the policy period' [citing Viking Pump and Consolidated Edison] the unavailability rule cannot be reconciled with the pro rata approach."

By making clear that the insured, rather than its insurers, is responsible for all uninsured periods, the KeySpan decision is a major victory for insurers with longtail claims governed by New York law. On this issue, the decision may have an impact in other jurisdictions, including Connecticut, where the Supreme Court has granted review of the Connecticut Appellate Court's adoption of the unavailability rule in R.T. Vanderbilt Company, Inc., v. Hartford Accident and Indemnity Company, 171 Conn. App. 61 (Conn. App. 2017), and New Jersey, where the Supreme Court is considering an equitable exception to New Jersey's unavailability rule in The Continental Insurance Company v. Honeywell International, Inc., 2016 N.J. Super Unpub. LEXIS 1685 (App. Div. July 20, 2016), cert. granted 228 N.J. 437 (2016). The decision is also

significant as a further demonstration of the New York Court of Appeals focus on policy language and its commitment to applying principles of contract interpretation to insurance disputes, rather than (as the Court put it) using “competing public policy concerns” to “make or vary a contract of insurance to accomplish its notions of abstract justice or moral obligation”.

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[1] The first being *In the Matter of Viking Pump, Inc.*, 27 N.Y.3d 244 (2016).