April 6, 2018

KEYSPAN OR CENTURY: WHO'S FRONTING THE BILL?

Natural Resource (/full-blog/category/Natural+Resource)

BY: SABRINA CASTILLE

In 1995, the New York Department of Environmental Conservation gave an order requiring Keyspan to clean up contamination at manufactured gas plants where hazardous waste gradually seeped into groundwater and soil over decades.[i] Consequently, Keyspan filed an indemnification claim against Century under 16 general liability policies issued between 1953 and 1969, as well as alleging that Century must pay costs for when no insurance covering pollution risks was available.[ii]

The district court ruled that under *Consolidated Edison Co. v. Allstate Insurance*, a pro rata allocation scheme is appropriate, requiring that an insurance company's obligations to cover a policyholder be allocated proportionally based on the insurer's time on risk—how long the policies were in place.[iii] Further, Century would be liable for Keyspan's cleanup costs during the periods where such insurance was unavailable except the period between 1971 and 1982, when insurers were barred from selling pollution liability insurance.[iv] In Century's appeal, the New York Appellate Division found that *Consolidated Edison* left the question open as to whether a policyholder's risk during periods when insurance was unavailable can be allocated to its existing, triggered policies.[v] The New York Court of Appeals heard oral arguments on February 6, 2018.

Credit (https://understandsolar.com/is-nuclear-energy-renewable/)

Keyspan argued that the Appellate Division decision deviates from the pro rata allocation formula approved in *Stonewall Insurance v. Asbestos Claims Management*.[vi] Specifically, the *Stonewall Insurance* allocation formula provided that "an insurer whose coverage obligation is triggered will be held responsible for a share of the policyholder's liability measured by the number of years in which the insurer's policies are triggered divided by the period of damage during which insurance was bought or available."[vii] Keyspan also argued that under *In re Viking Pump, Inc.*, Century's policies containing anti-stacking language permit an "all-sums" allocation where a policyholder can collect its total liability up to policy limits, which eliminates the unavailability exception issue.[viii] Keyspan claimed *Viking Pump* held that a policy including the same during the policy period limitation and an anti-stacking provision do not permit pro-rata allocation.[ix]

Century contends that the trial court's decision was properly reversed and Keyspan's new approach "would effectively rewrite the language in the insurer's policies to extend coverage for damages occurring during the policy period and any other period when insurance was or will become unavailable," something which the company never agreed to and would have had to charge higher premiums for.[x] Century insists that Keyspan's cited cases wouldn't support a finding that Century should be liable for cleanup costs attributable to periods before the earliest policy was issued. Additionally, Century urged the court to reject an "all sums" allocation formula, as the argument was waived by not raising it before the Appellate Division.

The most important consideration for this analysis is the language of the insurance policy.[xi] In *Consolidated Edison,* the Court of Appeals held that "where the insurance policies provide coverage for 'all sums' of liability that resulted from an accident occurring 'during the policy period,' a pro rata allocation based upon an insurer's time on the risk is consistent with the policy language."[xii] The "all sums" policy language at bar is qualified by other language restricting coverage to the policy period, which is consistent with time on risk.[xiii] In *Viking Pump*, the Court held that when a policy contains anti-stacking or non-cumulation provisions, pro rata allocation of risk is not consistent with the policy language, as Keyspan claimed.[xiv] However, the Appellate Division examined the language of the stipulated terms and conditions at issue and found that none of the policies contain anti-stacking provisions. [xv] This leaves Keyspan with the pro rata allocation. The unavailability exception is not consistent with the provisions of the policy, and there is no other language to justify the exception, which led to Appellate Division to conclude the *exception* does not apply.[xvi] If the language of the policy is the most significant consideration, there does not seem to be a reason for the Court of Appeals to reverse this decision, so it will likely be affirmed.

[i] Jeff Sistrunk, *NY Justice to Address Pollution Coverage Gap Question*, Law360 (Feb. 5, 2018, 8:48 PM), https://www.law360.com/articles/1008889/ny-justices-set-to-address-pollution-coverage-gap-question.

[ii] *Id*

[iii] *Id.*

[iv] *Id.*

[v] *Id.*

[vi] *Id.*

[vii] *Keyspan Gas E. Corp. v. Munich Reinsurance Am., Inc.*, 143 A.D.3d 86, 91 (N.Y. App. Div. 2016).

[viii] 52 N.E.3d 1144 (Del. 2016).

[ix] Sistrunk, *supra* note i.

[x] *Id.*

[xi] *Keyspan*, 143 A.D.3d at 91.

[xii] *Id.*

[xiii] *Viking Pump*, 52 N.E.3d at 1154.

[xiv] *Id.*

[xv] *Keyspan,* 143 A.D.3d at 95.

[xvi] *Id.* at 95-96.

Tagged: pollution (/full-blog/tag/pollution), insurance (/full-blog/tag/insurance), Keyspan (/full-blog/tag/Keyspan), Natural Gas (/full-blog/tag/Natural+Gas)

Newer Post
Open for Business in Uncharted Waters: Leasing the Outer Continental Shelf (/full-blog/romanoblog)

Older Post
Monsanto's Dicamba a Headache for Farmers (/full-blog/englishblog)

SEARCHABLE ARCHIVE (/PUBLICATION-ARCHIVE-1)

631 SOUTH LIMESTONE, LEXINGTON, KY
40508 (859) 257-4747 BLOG.KJEANRL@GMAIL.COM (MAILTO:BLOG.KJEANRL@GMAIL.COM)