



# Case Alert

## New York Clarifies Continuous Trigger Coverage Where Not All Years Are Covered by Policies

The New York Appellate Division First Department recently ruled that insurers who are “on the risk” in extended environmental claims do not have to contribute to years when there was no coverage available on the marketplace for the insured to purchase.

The decision comes in a long line of decisions from the Keyspan Gas cases, which have been in litigation since 1997, involving pollution resulting from the operation of manufactured gas plants on Long Island.

Keyspan’s pollution potentially implicated policy periods from 1903 to 2012. Century Indemnity Co. (“Century”) insured Keyspan from 1953 to 1969. Coverage was not available on the market before 1953 or after 1986.

The court previously endorsed a pro rata allocation method, meaning that each insurer with an implicated policy period would be required to contribute to the claim in proportion to its “time on the risk,” or, essentially, the proportionate amount of time in relation to the claim that it was insuring Keyspan. This allocation method was previously adopted in 2002 by the New York Court of Appeals in *Consolidated Edison Co. of NY v. Allstate Ins. Co.*

Keyspan argued that Century, in conjunction with a pro rata allocation should contribute proportionally to the uncovered years when no coverage was available. Century, of course, argued that the plain language of the policy dictated that it only should pay for losses within its policy periods.

The court acknowledged that whether an insurer implicated in a pro rata allocation is required to contribute to years where no coverage is available is an issue of first impression.

The Appellate Division noted that *Consolidated Edison* was based predominantly on “the language of the partic-

ular insurance policy.” Acknowledging a split in authority in other jurisdictions and within the Second Circuit, the court adopted a strict “plain language” approach and determined there was no coverage under the policy for the years with no available coverage because “[t]here are no express contract provisions requiring the insurer to cover damages outside of the policy period when insurance is otherwise unavailable in the marketplace.”

Further emphasizing its rationale, the court explained: “Keyspan’s interpretations would expose Century to risks beyond those contemplated by the parties when the policies were purchased, as evidenced by the plain language of the policy.”

Although this is unfavorable to policyholders, it is important to remember that this issue represents a split in authority. Although you may not have coverage in New York in this situation, other jurisdictions may offer coverage where insurance was unavailable for some years in a partially insured long tail claim.

For more information about this case and how it may impact policyholders, please contact William S. Bennet at [wsb@sdvlaw.com](mailto:wsb@sdvlaw.com) or 203-287-2136 or Tracy Alan Saxe at [tas@sdvlaw.com](mailto:tas@sdvlaw.com) or 203-287-2101.

1. *Keyspan Gas E. Corp. v. Century Indem. Co.*, Index No. 604715/97 (1st Dept. Sept. 1, 2016)
2. For more discussion of the Keyspan litigation, <http://www.sdvlaw.com/new-york-court-provides-relief-to-policyholder-in-multiple-decade-pollution-case/>.
3. “Time on the risk is a simple calculation method, best expressed by a formula that multiplies the total risk by a fraction that has as its denominator the entire number of years of the claimant’s injury and as its numerator the number of years within which the policy was in effect.” *Keyspan Gas Corp.* (citing *Olin Corp. v. Ins. Co. of N. Am.*, 304 A.D.2d 167 (2d Dept. 2003)).
4. 98 N.Y.2d 208 (2002)).