Case Alert

New York Court Provides Relief to Policyholder in Multiple Decade Pollution Case

Decisions your company and its predecessors made over 100 years ago, which were considered environmentally sound at the time, can still force you into an insurance coverage fight that could last through multiple decades. This is the lesson Long Island Lighting Company[1] ("LILCO") has been learning since 1997. In the early 1990's, LILCO became aware that it could potentially face pollution liability resulting from former community gasworks facilities located across Long Island[2], dating back to as early as 1859 and all of which had been closed by 1930. At the time they were closed, the coal tar left behind at the facilities was not considered a cause for concern and was left sitting in the ground. Unfortunately for LILCO, federal EPA and New York state environmental regulations evolved to support strict enforcement against polluters, regardless of their knowledge at the time the pollution occurred.

Around the turn of the 20th century, LILCO manufactured gas used for lighting in the time between candles and electricity. An abundance of coal tar was produced as a result of the manufacturing process. Although the company knew at the time that the coal tar should not be disposed of in the water, it did not realize the pollution effects of the tar if left in the ground near the facilities. This tar leached into the surrounding groundwater over the course of many decades. During this time, LILCO obtained policies with Century Indemnity ("Century") that did not exclude pollution[3]. When Century refused to provide coverage, LILCO sued. The litigation has been ongoing since 1997.

This litigation has involved several trials, multiple trips to New York's Appellate Division and Court of Appeals, and more than 60 motions. In the most recent decision, *Keyspan Gas E. Corp. v. Munich Reins. Am., Inc., 2016 N.Y. Misc. LEXIS 839* (N.Y. Sup. Ct. 2016), the principal issues were: 1) whether LILCO properly gave notice to Century when it became aware of potential liability in the early 1990's, 2) how to allocate coverage across several decades of policies and absence of policies, and 3) how to determine during which years there was property damage to trigger the policies.

Notice

In the fall of 1994, LILCO notified Century by letter about environmental concerns surrounding the various locations of its manufactured gas facilities. At that time, although no regulatory proceedings had begun, LILCO anticipated they would be forthcoming. LILCO had been aware of the pollution at all but one of the facilities for years, some dating several decades prior to 1994[4]. The Century policies implicated by the contamination required written notice "upon the happening of an occurrence that appears reasonably likely to involve liability on the part of the [insured] company." LILCO was proactively working to mitigate potential liability and monitoring the development of New York State's environmental agency's power, such that LILCO contended it was not actually certain of an occurrence that was "reasonably likely to involve liability" until 1994.

At trial[5], Century argued that the notice provision of the policies required notice upon a "reasonable possibility" of an occurrence. This would have triggered the notice requirement many years before 1994. The court disagreed, siding with LILCO, and found that LILCO "was required to provide notice when an occurrence was 'reasonably likely' to involve liability, not when there was merely a 'reasonable possibility' of an occurrence." The court determined that a jury could have rationally concluded from the evidence that LILCO had provided timely notice.

Allocation of Liability

The court was also tasked with deciding the allocation of liability for progressive environmental damage spanning many policy periods and many years where there was no policy covering pollution[6]. A pro rata time on the risk[7] allocation of liability, under New York law, requires that time when there was no insurance available is not included in the allocation. Therefore, more liability was imposed on Century, because LILCO's lack of coverage for some years when property damage was occurring meant that fewer years were included in the pro rata allocation.

The framework for allocating liability involves dividing proportionally across all years governed by insurance policies in which pollution traveled to a third party. Allocation also included those years when there were no insurance policies in effect, but coverage for this type of loss was available to the insured. The court reiterated that alternating burdens existed. Century had the initial burden to prove that insurance was generally available in the marketplace. The burden then shifted to LILCO to prove that insurance for the particular risk was not reasonably available to it during the subject years. The court explained that "the relevant inquiry is not limited to whether an insured was able to continue obtaining coverage for the particular risk in the same policy type, but may take into account whether the insured could purchase coverage of another policy type that would have provided similar coverage."

For the contested years from 1923-1932, Century utilized piecemeal evidence such as an insurer's newsletter and a magazine article to show that coverage was available. For the later years 1987-1995, the issue was whether the advent of the absolute pollution exclusion meant that there was no coverage for this risk available to LILCO. The decision came down to a question of fact for the jury to decide. The jury favored LILCO's expert, who testified that there was no insurance coverage available for the particular liabilities at issue during the two periods of time. On motion to vacate the jury's decision, the court found that the jury was reasonable in finding for LILCO that coverage was not available. Therefore, the court's allocation of time on the risk did not include those time periods.

Progressive Environmental Property Damage

This case, like many other environmental coverage cases, involves environmental damage that occurred progressively over multiple decades. Coverage is only triggered, however, for years when there was "property damage" within the meaning of the applicable policies. Century contended that many of the policy years were not implicated because there was no "increase in the contamination footprint or groundwater plume." The court adhered to its earlier decision in the case[8], finding that "property damage is not limited to damage that physically, geographically and horizontally spreads during the policy period." This ruling is very favorable for policyholders. Under this interpretation of "property damage," a policy may be triggered even if the "footprint" of the pollution does not actually spread during the policy period.

Conclusion

After nearly 20 years of litigation, LILCO has obtained favorable rulings for two of its implicated sites, a settlement for three more, and is awaiting a result on two others. As a policyholder, it is crucial to understand that you can be subject to insurance coverage issues based on decisions your company made decades ago. A litany of problems can arise in the course of a coverage dispute based on old policies. From missing policies to progressive damage spanning many policy periods, these cases can present novel issues that require a sophisticated understanding of the issues and a nuanced approach to resolving them. In the event that your company is forced to deal with pollution liability, make sure you work with someone who is adequately informed and experienced to handle these issues in order to maximize your coverage while avoiding unexpected pitfalls.

For further information, or to discuss the possible ramifications of this case, please contact Tracy Alan Saxe at tas@sdvlaw.com or 203-287-2101, or William S. Bennett at wsb@sdvlaw.com or (203) 287-2136.

1. LILCO has since been purchased by Keyspan, who was, in turn, purchased by National Grid.
2. Site locations included Bayshore, Hempstead, Rockaway Park, Patchogue, Sag Harbor, Halesite, and Glen Cove. The parties settled with respect to the Sag Harbor, Halesite and Glen Cove sites recently, the Hempstead and Bay Shore sites are still pending after the case was remitted to the appellate division, and the Rockaway Park and Patchogue sites were resolved at trial.
3. Prior to the initiation of litigation, members of SDV were involved in the preliminary stages of analyzing what coverage could be available to LILCO.
4. There had been several third party pollution claims. The EPA had been informally looking into their sites after CERCLA was passed in 1980. LILCO was monitoring the progression of New York's state environmental regulatory agency. Additionally, it had undertaken a proactive approach to mitigation in an attempt to avoid as much liability as possible. Ultimately, LILCO's position was that there had been nothing, until the DEC finally issued formal demands in 1995, that required it to give notice.
5. This focuses on the trial regarding the Patchogue and Rockaway Park sites, but many issues are similar across the different sites. Keyspan Gas E. Corp. v. Munich Reins. Am., Inc., 2016 N.Y. Misc. LEXIS 839 (N.Y. Sup. Ct. 2016).
6. The years subject to dispute over whether insurance covering pollution liability was available were from 1923 to 1932 and from 1987 to 1995.
7. In a pro rata time on the risk analysis, the court looks at the proportion of time in which property damage occurred that each policy was in place and allocated proportionally on that basis.
8. Keyspan Gas E. Corp. v Munich Reins. Am., Inc, 46 Misc. 3d 395 (N.Y. Sup. Ct. 2014).

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