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COURT OF APPEALS

STATE OF NEW YORK

KEYSPAN GAS EAST CORPORATION,

Appellant,

-against-

NO. 20

MUNICH REINSURANCE AMERICA, INC.,
ET AL.,

Respondents.

20 Eagle Street
Albany, New York
February 6, 2018

Before:

ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Karen Schiffmiller
Official Court Transcriber



1 JUDGE RIVERA: Keyspan Gas East Corporation v.
2 Munich Reinsurance America.

3 MR. LONG: May it please the court, Robert Long
4 representing Keyspan. I'd like to reserve one minute for
5 rebuttal - - -

6 JUDGE RIVERA: Yes, counsel.

7 MR. LONG: - - - if I could. This appeal
8 presents two issues. First whether this court should
9 approve the availability approach to pro rata allocation
10 that has been applied in New York for more than twenty
11 years. And second, whether Century's policies contain an
12 anti-stacking provision that is inconsistent with pro rata
13 - - -

14 JUDGE STEIN: Can I - - -

15 MR. LONG: - - - allocation - - -

16 JUDGE STEIN: Can I start with that second
17 question?

18 MR. LONG: Certainly.

19 JUDGE STEIN: That argument was made in a prior
20 summary judgment motion involving other defendants,
21 correct?

22 MR. LONG: That's correct.

23 JUDGE STEIN: How could we possibly - - - and it
24 wasn't appealed - - -

25 MR. LONG: That's correct.



1 JUDGE STEIN: - - - and it still could be subject
2 to appeal from a final judgment, right, which - - -

3 MR. LONG: That's correct.

4 JUDGE STEIN: - - - which this is not. How could
5 we possibly address that issue without those other
6 defendants being heard?

7 MR. LONG: Well, the Appellate Division said in
8 its opinion that these policies do not contain anti-
9 stacking provisions of the kind that were present in Viking
10 Pump, so we think the Appellate Division injected the issue
11 into the case by putting it into its opinion.

12 JUDGE STEIN: But - - - but if we disagree with
13 that, we're - - - I'm mean, can't - - - can't we address
14 the first question without addressing the second question?

15 MR. LONG: Yeah, oh, yes.

16 JUDGE STEIN: Okay.

17 MR. LONG: I think you can address the first
18 question without addressing the second question. I think
19 to be clear, if you were to address the second question and
20 agree with us, then it would be all-sums allocation and the
21 question of how you do availability. Under pro rata, you
22 wouldn't even have to reach - - -

23 JUDGE STEIN: Let - - - let's assume, just for -
24 - - for now, that we're dealing with pro rata. That's - -
25 - that's - - -



1 MR. LONG: All right.

2 JUDGE STEIN: Okay.

3 MR. LONG: Well, I'm sorry to hear you say that -

4 - -

5 JUDGE STEIN: Well - - -

6 MR. LONG: - - - of course, Your Honor, but of
7 course I will assume that, so on - - -

8 JUDGE STEIN: For the sake of argument, we can
9 talk about all sums, if you want - - -

10 MR. LONG: Yeah, fine.

11 JUDGE STEIN: - - - but - - -

12 MR. LONG: I understand.

13 JUDGE STEIN: - - - but how - - - how is the
14 unavailability exception consistent with what we have said
15 about pro rata and about how we decide these issues based
16 on the policy language, given our decisions in Con Ed and
17 Viking Pump?

18 MR. LONG: So I think in Con Ed, this court said
19 that pro rata is consistent with the policy language and
20 that in Viking Pump the court went further and I think
21 effectively said, pro rata is not required by "during the
22 policy period" language if there's other policy language,
23 such as an anti-stacking provision that points in a
24 different direction, so - - -

25 JUDGE STEIN: How - - -



1 MR. LONG: - - - we think - - -

2 JUDGE STEIN: - - - how - - - how is the policy
3 language here different from Con Ed?

4 MR. LONG: So three of the policies, the earliest
5 three policies require only that an accident happen during
6 the policy period. So they don't require any damages
7 during the policy period. That's at A-359 and A-361 of the
8 appendix. Then some of the other policies have somewhat
9 different wording. They require an occurrence, and they
10 require damages during an occurrence, but they say an
11 occurrence could be "a continuous or repeated exposure to
12 conditions," and that could begin before and continue after
13 a policy period that's actually just the situation - - -

14 JUDGE RIVERA: But doesn't - - - but that - - -

15 MR. LONG: - - - we have here.

16 JUDGE RIVERA: You'll correct me if I'm wrong,
17 but doesn't that say results and injury in the policy
18 period?

19 MR. LONG: Yes, it does say - - -

20 JUDGE RIVERA: So aren't you still stuck with
21 that language - - -

22 MR. LONG: - - - yes, it must - - -

23 JUDGE RIVERA: - - - about the policy period?

24 MR. LONG: It must result in damage during the
25 policy period, but then most of these policies have



1 language that says all damages arising out of exposure to
2 the same general conditions shall be treated as one
3 occurrence. And it's different from the language that you
4 looked at in Con Ed, which said all damages arising out of
5 exposure to the same general conditions during the policy
6 period shall be treated as one occurrence. So when you add
7 that all up, plus, you know, now we say there is an anti-
8 stacking provision.

9 I think going back to your question, I think - -
10 -

11 JUDGE FAHEY: So - - - so - - -

12 MR. LONG: - - - you could look at that just a
13 little bit to see whether there's ambiguity - - -

14 JUDGE STEIN: If we look at that, then don't we
15 come back to Viking Pump, which said that, unless they
16 expressly contemplate those provisions, expressly com - - -
17 contemplate successive policies, then we only apply them to
18 concurrent policies?

19 MR. LONG: Well, I - - - I mean, what I would say
20 specifically about these - - - this provision that we think
21 is an anti-stacking policy. It says, if any other Century
22 policy covers the same loss, then you only get one limit.
23 So we think, at a minimum - - - we think, actually, that's
24 - - - any policy is unambiguous, but at a minimum, that's
25 another source of ambiguity. All we're trying to do here



1 is get the court to the point where it's - - -

2 JUDGE STEIN: But Viking Pump said ambiguity
3 doesn't do it. It has to be an expressed provision.

4 MR. LONG: Well, I - - - I mean, of course, you -
5 - - you are by far the expert on this, but as I read Viking
6 Pump, it's - - - it did not say, we have clear policy
7 language that's in conflict. On the one hand, we have a
8 "during the policy period" provision that limits damage to
9 the policy period. On the other hand, we have an anti-
10 stacking provision that clearly recognizes that successive
11 policies can cover - - -

12 JUDGE STEIN: That's - - - that's - - -

13 MR. LONG: - - - the same injury - - -

14 JUDGE STEIN: That's the point that I'm getting
15 at right there is - - -

16 MR. LONG: But - - - but in - - -

17 JUDGE STEIN: - - - is that.

18 MR. LONG: - - - in the court's opinion, they
19 didn't say these - - - these provisions are in conflict.
20 They said the "during the policy period" language, yes,
21 it's consistent with pro rata, but it's also consistent
22 with all sums of other language points.

23 JUDGE STEIN: So it seems like your argument
24 keeps coming back to the all sums versus the pro rata. So
25 does - - - does - - - does the application, or the - - -



1 even possibility of application of the unavailability
2 exception depend on our finding that this is all sums?

3 MR. LONG: No, no, I mean, what we're asking the
4 court to do under this pro rata argument - - - the first
5 question presented - - - is not to go all the way to all
6 sums, but simply to say, as you did say in Con Ed, the all-
7 sums language by itself is not enough to support all-sums
8 allocation. The "during the policy" language suggests and
9 is consistent with spreading their liability over triggered
10 policies, but this language does not require limiting the
11 policies to damage that happens during the policy.

12 If I could give a very simple example - - -

13 JUDGE FAHEY: Well, let me - - - let me stop you
14 for a second then, because your time is going to run out,
15 and I'm not going to be able to ask you a question at the
16 rate we're going here, so - - - respectfully, but we all
17 suffer from that.

18 But in the Appellate Division decision, I think
19 it was Judge Gische, who wrote the decision, she made
20 reference to - - - talked about availability. And she
21 said, availability is - - - I don't need to tell you guys -
22 - - comes in two forms and either comes - - - their
23 unavailability either comes as a result of legislative
24 action or market forces. We're not talking about
25 legislative action unavailability. We're talking about



1 market forces unavailability. We all agree on that. Is
2 that correct?

3 MR. LONG: Yes.

4 JUDGE FAHEY: Okay. So if we agree on that,
5 doesn't market force unavailability, in essence - - - and
6 she uses the phrase "amount to free insurance" for the
7 policy holder?

8 MR. LONG: No, I mean, no - - -

9 JUDGE FAHEY: Don't tell me - - - okay, tell me
10 why.

11 MR. LONG: Well, because, again, this comes back
12 to we think the court can and should find - - -

13 JUDGE FAHEY: Well - - -

14 MR. LONG: - - - ambiguity in these policies.

15 JUDGE FAHEY: The reason I ask the question is -
16 - - is - - - I recognize the - - - the value of the policy
17 to you, but why isn't it free insurance? It's coverage for
18 a period that wasn't paid for where there was not
19 legislative action saying that there is no insurance
20 available to you, so you're - - - you're going as a
21 standalone. You're going as a self-insured person.

22 MR. LONG: Let me answer with this simple
23 example. Suppose someone suffers bodily injury during the
24 policy period, but suppose after the policy period ends,
25 there's some further physical deterioration such as



1 scoliosis. I don't really think it's been seriously
2 contested over the years that the policy would pick up that
3 damage, even though it - - -

4 JUDGE FAHEY: Oh, we'd go back to the occurrences
5 during the policy period is what you would go, but the
6 policy period would still be applicable?

7 MR. LONG: Yes, and we're - - - but - - - but I
8 think that's very important, Your Honor. We've just
9 established that this policy language can and does - - -

10 JUDGE FAHEY: But the problem - - - no, no, the
11 problem with longtail claims is - - - across the board - -
12 - is that you can't establish the occurrences. That's why
13 you have this problem; otherwise, we wouldn't be here. If
14 this was your normal automobile accident, we'd - - - we'd
15 have a date of the accident; we'd be done with it. So a
16 longtail claim, as an environmental claim, you can't - - -
17 it's not you, but I mean - - - the - - - the - - - the
18 carrier can't identify the date of the occurrence, because
19 it happened over a half a century. It's a gradual
20 occurrence; it happens that way. It's impossible to
21 identify.

22 So then the question becomes, you either have po
23 - - - coverage during the whole period or you don't. And
24 where you don't have coverage, you don't get paid. And so
25 tell me why this isn't free insurance in that scenario?



1 MR. LONG: Well, again, these policies - - - and
2 this court's approach is very specific to the policies.
3 These policies say that all damages arising out of exposure
4 to the same general conditions are deemed to be one
5 occurrence, and they do not say, as some others do, all
6 damages during the policy period.

7 So I think we can look to policy language here to
8 say - - -

9 JUDGE RIVERA: But I - - - don't they say damages
10 arising from an injury that occurs that policy period, from
11 an occurrence that occurs during the policy period?

12 MR. LONG: That - - - that says - - - and there
13 may be slight variations - - -

14 JUDGE RIVERA: But that's not - - -

15 MR. LONG: - - - but the - - -

16 JUDGE RIVERA: It's not an amorphous damage,
17 right? It says that - - -

18 MR. LONG: It says damages arising out of
19 exposure to the same general conditions or a continuous or
20 repeated exposure to conditions. And a big part of our
21 submission is - - - I mean, the insurance knew about this
22 problem, and they tried to write a formula to allocate
23 liability. They couldn't agree on anything. They
24 deliberately left it out. So what we're debating here
25 today is whether language that was really not written to



1 cover this situation of the longtail indivisible damage,
2 not only does answer this question, but answers it
3 unambiguously and in a way that is devastating.

4 We - - - we give an example of asbestos
5 plaintiffs. If - - -

6 JUDGE STEIN: Well, you - - - you would agree
7 that there are some policy considerations both ways. You -
8 - - obviously, you feel that your policy considerations
9 outweigh the other side's, but - - -

10 MR. LONG: Well - - -

11 JUDGE STEIN: - - - but it's - - - it's not
12 completely one-sided.

13 MR. LONG: Well, very respectfully, I mean, we
14 feel that once you get to the point of saying, okay, the
15 policy language does not answer this unambiguously, the
16 public policy arguments very strongly favor sticking with
17 this availability approach. I would - - - the example of -
18 - - I mean, in terms of reasonable expectations of
19 policyholders, if your asbestos-caused disease manifests
20 thirty years later than somebody else's, nobody would
21 expect that your coverage - - -

22 JUDGE RIVERA: But - - - but it's for an injury
23 or - - -

24 MR. LONG: - - - gets cut by seventy-five
25 percent.



1 JUDGE RIVERA: Yes, but - - - but it's for an
2 injury or occurrence in the policy period, if that - - - if
3 that's what the policy says, which these say. Aren't you
4 still stuck with that?

5 MR. LONG: Well, we're stuck with it to the
6 extent that there must be an accident or occurrence during
7 the policy period. That's common ground. For most of
8 these policies, not all, but most, there must be damage
9 during the policy period. What we're saying is ambiguous
10 is this - - - the final step saying, and only damage during
11 the policy period, nothing outside. I think we just gave a
12 simple example of that the people accepted, that, look, if
13 the scoliosis continues outside the policy period. I mean,
14 in the environmental world, a simple example - - - these
15 are so complicated - - - suppose just one spill just
16 happens during one year that's clearly an accident, an
17 occurrence. There's damage; the policy is triggered.

18 Suppose then it takes ten years to clean up that
19 spill because you have to get the regulatory agencies
20 involved; you have to get a plan; it has to be signed off
21 on, public notice and comment. It takes time to do it. Is
22 it really consistent with the reasonable expectations of
23 policyholders and with 2,000 sites, as we understand it, in
24 New York that still need to be cleaned up. Is it sensible
25 to say that since ten years went by the insurer's going to



1 cover one-tenth of that and - - -

2 JUDGE RIVERA: All right. Thank you - - -

3 MR. LONG: - - - nine - - - and nine-tenths are
4 now - - - I mean, you know, it could be for the taxpayer if
5 there's - - -

6 JUDGE RIVERA: Thank - - - thank you, counselor;
7 you have rebuttal time. Thank you.

8 MR. HACKER: Good afternoon, Your Honors, John
9 Hacker for Century. As we've already discussed in, not
10 just Con Ed, but Viking, Global, Roman Catholic Diocese,
11 and many other decisions, this court has held time and
12 again that insurance policies, like other private
13 contracts, must be interpreted according to their plain
14 language.

15 JUDGE STEIN: How is this different from an auto
16 insurance policy that covers an accident and - - - and - -
17 - and the - - - the - - - the injuries - - - the damages go
18 on beyond the policy period? How is this different from
19 that?

20 MR. HACKER: So two points I would make. You'd
21 have to - - - it always is going to turn on the language.
22 So I can't say categorically when it's different from an
23 auto damage policy, so that's the first most important
24 point. Second, when you can attribute the damage - - - if
25 the damage all occurs at that accident, the fact that it



1 goes on and that there's treatment that happens later is a
2 remedy for the damage, but the damage occurred in that
3 policy year, so that would be another - - - at least, it
4 depends on the facts of the case.

5 But then the third is what is really relevant, I
6 guess - - - turning back to my first point - - - is
7 focusing on the language in this case. And a couple of
8 times, my friend, Mr. Long, quoted the relevant language
9 but then left off, every time - - - left off the most
10 important provision, and that is that the coverage
11 provision covers - - - a definition of occurrence - - -
12 it's the same words that this court construed in Con Ed.
13 The definition of occurrence is an accident or "continuous
14 or repeated exposure to conditions" - - - then he would
15 stop - - - "to conditions which result during the policy
16 period in damages."

17 So it's not just an occurrence or an accident.
18 The damages have to occur during the policy period, and
19 this court in Con Ed then reaffirmed in Roman Catholic
20 Diocese, then reaffirmed in Viking Pump, said that that
21 establishes a rule - - - that language establishes a rule
22 that the policy only covers damages that occur during the
23 policy period. It doesn't cover damages that occur outside
24 the policy period. And definitely Con Ed - - - and no
25 other decision with which I'm familiar says that the policy



1 - - - that the language means this policy might provide
2 coverage, depending on the reason that there's no other
3 coverage at all.

4 JUDGE FAHEY: That's not really the way I
5 understand their argument, though. The way I understand
6 their argument - - - I'm not saying I agree with it, but
7 the way I understand it is, is that there's an occurrence
8 during a policy period. Then there's a period where
9 insurance is unavailable. They can't get you; they can't
10 get somebody else. That coverage that they had when - - -
11 when the polluted - - - the polluting occasion occurred,
12 carries over across the period when it's unavailable, not
13 through fault of their own, but because the market isn't
14 providing insurance, or we assume - - - we're striking out
15 the legislative action.

16 MR. HACKER: I agree that that's their argument,
17 but the problem is it just doesn't - - -

18 JUDGE FAHEY: So how is that different from I
19 hurt myself in an automobile accident and my policy expires
20 a year afterwards and - - - but you're still responsible
21 for my medical costs?

22 MR. HACKER: Well, if the damage - - - again, it
23 would depend on the facts of the - - - the par - - - the
24 facts of the case and the policy, but if the damage
25 occurred in that accident - - -



1 JUDGE FAHEY: So the nature of a longtail claim,
2 though, is like - - -

3 MR. HACKER: - - - it's attributable to that
4 period.

5 JUDGE FAHEY: - - - like you have said, you've
6 articulated it. It's a gradual and continuous, usually,
7 exposure to polluting agents.

8 MR. HACKER: That's - - - that's correct.

9 JUDGE FAHEY: So inevitably, there's going to be
10 an occurrence during a policy period.

11 MR. HACKER: That's the assumption. When you
12 have longtail exposure and you can't figure out when the
13 occurrences are, what they are, and what the damages - - -

14 JUDGE FAHEY: So it's a given, that you - - - it
15 - - - it did occur during a policy period.

16 MR. HACKER: Yes.

17 JUDGE FAHEY: So if it occurs during any policy
18 period, why doesn't it carryover, then, under their
19 argument?

20 MR. HACKER: Well, because Con Ed says - - -
21 that's the whole point of - - - when you can't - - - when
22 you have an injury and you can't identify how much damage
23 occurred when, you know, what the actual incident was in
24 any given policy year, what you do is attribute - - - you
25 assume, absent contrary evidence; you can have fact-based



1 allocation - - - but you assume that the damage occurred
2 evenly throughout that period, and you attribute each
3 amount - - - each year's worth of damage to each policy
4 period.

5 JUDGE FAHEY: So I understand that.

6 MR. HACKER: So long as the policy say - - -

7 JUDGE FAHEY: I do understand that, but it
8 doesn't answer my question which is the occurrence problem.
9 If it happened during - - - if it ever happened during your
10 policy period, the theory is, does it carryover to the
11 uncovered periods?

12 MR. HACKER: And the answer is, it doesn't, I
13 think, because Con Ed says it doesn't, but also I think
14 Viking Pump says it doesn't, by negative inference. Viking
15 Pump says, here's a set of policies where it does carry
16 over because the policies explicitly said that they do,
17 right? There was a continuing coverage provision that
18 answered that question. In this policy there is a
19 continuing coverage provision for the advertising injury,
20 explicitly says - - -

21 JUDGE FAHEY: So the real answer is - - -

22 MR. HACKER: - - - for that particular type of
23 injury, it carries over.

24 JUDGE FAHEY: The real answer is these policies
25 are not like automobile policies.



1 MR. HACKER: In that respect. Again, that's - -
2 - that's why I didn't - - - you know, I don't want to
3 assume away all automobile policies, but in that respect -
4 - -

5 JUDGE FAHEY: The bottom line, though, is they're
6 not the same policies. The language is different, and the
7 language is key.

8 MR. HACKER: The language for sure is key. And
9 there's nothing in here, unlike in Viking Pump - - - that
10 was the expressed holding in the case, and Your Honor had
11 it exactly right. Viking Pump reaffirms Con Ed and says
12 that when you've - - -

13 JUDGE RIVERA: So - - -

14 MR. HACKER: - - - got - - -

15 JUDGE RIVERA: So let me ask a different - - - a
16 slightly different question here. So under your approach,
17 how are they incentivized to insure, which, of course,
18 society being concerned with environmental contamination,
19 wants these kinds of risks to end up being paid for in the
20 private market, through the insurance market. How does
21 your approach incentivize them to purchase something that
22 they cannot purchase? Because isn't that what the
23 unavailability doctrine is, in part, trying to deal with?
24 The fact that - - - there's nothing to incentivize them on,
25 because there's no insurance that they can purchase.



1 MR. HACKER: Unavailability in the New Jersey
2 Owens-Illinois case was basically invented because Owens-
3 Illinois adopted a completely different reason for pro
4 rata. It said, unlike this court in Con Ed, Owens-Illinois
5 says the policy language doesn't tell us anything
6 meaningful, so we have to literally make up a rule. We're
7 going to make up pro rata, because that will incentivize,
8 as Your Honor says, the purchase of insurance ex-ante, but
9 that incentive would only apply so long as it can be
10 purchased.

11 That's just not what we have here, given Con Ed's
12 construction of the contract language, which says it only
13 covers damage during the policy period, which means it
14 doesn't cover damage outside the policy period. And so
15 it's categorically irrelevant, as I say, what the reason
16 the insurer doesn't have coverage for is.

17 For example, the first part of the policy - - -
18 of the coverage of the - - - of the damage period here for
19 decades, insurance was illegal in New York. You couldn't
20 buy insurance if you wanted to. And insurers couldn't sell
21 it. And yet their theory would shift the liability to the
22 insurers for several decades, when we couldn't sell it if
23 we wanted, and they couldn't buy it if they wanted.

24 JUDGE RIVERA: And your approach shifts it to
25 them?



1 MR. HACKER: I'm sorry?

2 JUDGE RIVERA: And your approach shifts it to
3 them?

4 MR. HACKER: It doesn't shift - - -

5 JUDGE RIVERA: I mean, it doesn't go to somebody
6 else, right?

7 MR. HACKER: No, right, it's - - - they bear the
8 liability for that period. When they were operating and
9 dumping tar on the ground - - - two things that are
10 undisputed - - -

11 JUDGE RIVERA: So as a policy matter, your
12 argument is, well, since they're the polluter - - -

13 MR. HACKER: But it's not - - -

14 JUDGE RIVERA: - - - you shift it to them.

15 MR. HACKER: I's not from an equitable sense.

16 JUDGE RIVERA: I know your argument is on the
17 language of the policies, absolutely.

18 MR. HACKER: And - - -

19 JUDGE RIVERA: There's a different question I'm
20 asking.

21 MR. HACKER: A hundred percent, but not just as
22 an equitable matter. It's also the point that, when they
23 were operating and polluting, and they - - - they didn't
24 have insurance - - - the one thing they knew, is they
25 didn't have insurance. There was never going to be



1 coverage for what they did during their operations. It
2 doesn't mean they're bad people. They were operating
3 without insurance.

4 JUDGE WILSON: So for - - -

5 MR. HACKER: No reasonable insured ever could say
6 maybe - - -

7 JUDGE RIVERA: Well, then maybe take the risk of
8 that - - -

9 MR. HACKER: - - - someday I'll have insurance.

10 JUDGE RIVERA: - - - and the cost.

11 MR. HACKER: I'm sorry?

12 JUDGE RIVERA: They should assume then the risks
13 and costs of that.

14 MR. HACKER: They, by definition, they were
15 assuming the risk and the cost.

16 JUDGE WILSON: So is there a reason to think
17 about unavailability differently for the period a long time
18 ago when no one contemplated this sort of a risk and
19 unavailability after insurance had been available then
20 perhaps became unavailable? Is there a reason to think
21 about those differently?

22 MR. HACKER: I - - - I ultimately don't think so.
23 The - - - I think the answer is no, because, when insurance
24 is not - - - when insured - - - a company's operating
25 without insurance, there's only three reasons for that,



1 right? There's only three possible explanations for
2 operating without insurance. One is the company doesn't
3 want it, because it assumed the risk itself; doesn't think
4 the premiums are worth it. That's one explanation.

5 Another one is the insurers decided not to
6 provide it, that the risk was not something they wanted to
7 take on. And the third is that the state said, I don't
8 care what either of you wants to do; we're not going to let
9 you take on that risk. Those are the only three possible
10 explanations, and all of them are equally valid from the
11 prospective of the law.

12 JUDGE WILSON: Well, or that no one has
13 contemplated that there's a need for a particular type of
14 insurance. So for example, insurance for Internet-related
15 identity theft wouldn't have been contemplated a hundred
16 years ago.

17 MR. HACKER: Right, so it wasn't - - -

18 JUDGE WILSON: So that's - - - that's not - - -
19 that's a fourth reason.

20 MR. HACKER: Well, I think it's basically the
21 same as the point - - -

22 JUDGE WILSON: It's a market - - - it's a market-
23 type reason.

24 MR. HACKER: - - - of neither party thought it
25 was worth - - - that there was - - - neither party



1 perceived a risk that they wanted to - - - to take on.

2 JUDGE RIVERA: Well, I think it also - - - unless
3 I'm misunderstanding, am I - - - I think what he's asking
4 you about is there's a difference between no one
5 anticipating and contemplating that that this was a risk
6 that perhaps merited insurance versus there's a risk and -
7 - - and the market - - - the insurance - - - the insurers
8 say, we don't want to take on that risk; we're pulling out
9 of this business.

10 MR. HACKER: There may be a descriptive
11 difference, but I think, analytically, it's not, because,
12 on the first hand, you know, whether the - - - the
13 operating company understood the full range of risks, what
14 it knew is it was taking on the risks, and that's what
15 happens if you don't have insurance.

16 JUDGE RIVERA: They bargained for it.

17 MR. HACKER: That they - - - or they - - - they
18 chose - - - they didn't have insurance. They decided to
19 operate without it. I mean, that's - - - they knew that
20 there wasn't going to be coverage no matter what happened.
21 That's just has to be correct.

22 In the latter period, assuming the - - - the
23 insurance industry or the insurers decided not to provide,
24 you just have the flipside of the transaction. The insurer
25 said this is a risk we don't want to bear. It doesn't make



1 sense for us to take it on.

2 JUDGE FEINMAN: Your time's up. But if I may?

3 JUDGE RIVERA: Yes.

4 JUDGE FEINMAN: You suggest somewhere, I think,
5 that whatever we rule in this case, we don't have to worry
6 about what's going to happen with the asbestos cases, which
7 your adversary brings up as, you know, a scare.

8 MR. HACKER: Yes.

9 JUDGE FEINMAN: And how - - - how do we that?
10 How do we defer that and - - -

11 MR. HACKER: I - - -

12 JUDGE FEINMAN: - - - and not reach that? And
13 why isn't the rule going to be the same?

14 MR. HACKER: I think the rule is going to be
15 same, and we don't mean to suggest otherwise. Our point
16 simply is, given the language, given the contract bargain
17 that's struck here, the same rule does obtain. The only -
18 - - but I think it underscores the point that they're
19 arguing for an equitable exception. They're just seeking a
20 made-up rule for reasons that they think are good and sound
21 reasons, are focused on the asbestos problem.

22 If this court is going to depart from the
23 tradition of enforcing the language and promoting the
24 stability that comes along with that, if this court is
25 going to come up with a new and special rule, the time and



1 place to do that would be in a case that presents and
2 raises the asbestos problems, where there's a record that
3 shows what they assert, which is there would be problems -
4 - - you know, greater problems that we - - - as far as I
5 know, we have not seen Massachusetts, in South Carolina,
6 and in the other states that have adopted - - - that have
7 rejected the unavailability exception under pro rata
8 allocation.

9 I don't know that there's been some massively
10 exacerbated problem with asbestos like they say. But if
11 that's the reason to do this, to depart from the tradition
12 of enforcing contract language, the court ought to do it in
13 a case with a record on those kind of facts.

14 JUDGE FEINMAN: Okay.

15 MR. HACKER: Thank you.

16 JUDGE RIVERA: Thank you, counsel.

17 MR. LONG: If there's no ambiguity in this policy
18 language, then it's got to be the same answer for asbestos
19 and toxic torts that it is for environmental cases. We
20 agree the policies require an accident during the policy
21 period or some of them in occurrence during the policy
22 period. Many of them but not all do require damages during
23 the policy period. But we think there is ambiguity on this
24 final step of whether they cover only damages during the
25 policy period. We think, in fact, sometimes, they clearly



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cover damages that go beyond the policy period.

The insurers knew about this problem. They thought about writing language. They deliberately chose not to put a pro rata allocation formula into these policies. The - - - "during the policy period" language is being - - - they're trying to make it do just too much work here. And in these particular policies, they defined an occurrence as a continuing exposure to the same conditions. They didn't - - - and they said it shall be counted as one occurrence, and they did not limit it to one policy period.

I submit there's ambiguity here, and when you look at broader public policy concerns, there are overwhelming reasons to continue with the availability approach the New York courts have applied for more than two decades.

JUDGE RIVERA: Thank you, counsel.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Keyspan Gas East Corporation v. Munich Reinsurance America, Inc., Et Al., No. 20 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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