New York Supreme Court
Appellate Division – First Department

KEYSPAN GAS EAST CORPORATION,
Plaintiff-Respondent,

—against—

MUNICH REINSURANCE AMERICA, INC. and
NORTHERN ASSURANCE COMPANY OF AMERICA,
Defendants,

—and—

CENTURY INDEMNITY COMPANY,
Defendant-Appellant.

BRIEF IN SUPPORT OF UNITED POLICYHOLDERS' MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

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United Policyholders submits this brief as *amicus curiae* in support of plaintiff Keyspan Gas East Corporation's motion for reconsideration or leave to appeal.

PRELIMINARY STATEMENT

United Policyholders is a non-profit 501(c)(3) organization that provides resources for consumers of all types of insurance in all 50 states. United Policyholders' "Advocacy and Action" program advances pro-consumer laws and public policy related to insurance matters. It advocates on behalf of policyholders of all types, ranging from low income individuals to domestic and international companies. The organization has filed more than 350 *amicus curiae* briefs in state and federal cases and in U.S. Supreme Court matters.

United Policyholders moves for leave to file this *amicus curiae* brief because of the potentially seriously adverse consequences for policyholders stemming from this Court's ruling in *Keyspan Gas East Corp. v. Munich Reinsurance America, Inc.*, 37 N.Y.S.3d 85 (1st Dep't 2016). *Keyspan* misapplies the plain language of the policies and upends two decades of heretofore well-settled New York law and practice on insurance allocation of loss for latent, or long-tail, liabilities. Since the Second Circuit's decision in *Stonewall Insurance Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178 (2d Cir. 1995) in 1995, New York law has been generally recognized as allocating long-tail losses only to periods for which

insurance for such losses was generally available in the marketplace. *Keyspan* rejects that aspect of the *Stonewall* decision, and if *Keyspan* were followed and applied to all long-tail claims – not just environmental liabilities – the impact on many New York insureds would be devastating. *Keyspan* drastically reduces coverage for a wide variety of losses, exposing policyholders to significant direct financial liability previously covered by insurance.

Keyspan also runs the risk of creating two parallel allocation tracks in New York – state and federal. The federal courts have long maintained the allocation model adopted by *Stonewall*. Although federal courts may take guidance from the Appellate Division, federal courts are only bound to apply the law as determined by the Court of Appeals. Absent a ruling by the Court of Appeals, federal courts may legitimately continue to predict that New York's highest court will not allocate losses to periods of unavailability, affording policyholders in federal court greater protection than policyholders in state court. A policyholder's ability to invoke diversity jurisdiction to litigate in federal court should not be the dividing line between full and partial coverage under New York law. If the Appellate Division is unwilling to reconsider and reverse its ruling in *Keyspan*, it should certify the allocation question to the Court of Appeals to bring clarity to this issue and resolve the potential for confusion and inequity in the administration of New York allocation law.

Further, the recent Court of Appeals decision in *In re Viking Pumps, Inc.*, 27 N.Y.3d 244 (2016), which permits all sums allocation for policyholders with non-cumulation clauses, draws a stark contrast with the *Keyspan* allocation, suggesting that *Keyspan* is, in fact, inconsistent with *Viking Pump*.

United Policyholders agrees with the textual and policy analyses set forth in the brief of Plaintiff-Respondent establishing that pro rata allocation is not mandated by the language of the policies; is contrary to the holding of *Consolidated Edison Co. of New York v. Allstate Insurance Co.*, 98 N.Y.2d 208 (2002); and violates the policyholder's reasonable expectations of coverage. United Policyholders does not intend to repeat these well-reasoned arguments, but rather asks this Court, in deciding whether to grant reargument or leave to appeal, to consider the actual impact of the *Keyspan* decision on policyholders of all stripes who face liabilities that extend over multiple years and have insurance policies subject to New York law. As discussed below, the impact on many such policyholders will be severe and risks driving individuals and companies – including small mom-and-pop companies - into bankruptcy, thereby depriving claimants recompense for their alleged injuries.

INTEREST OF AMICUS CURIAE

United Policyholders respectfully requests leave to file this brief amicus curiae in support of Appellants. United Policyholders is a non-profit organization

founded in 1991 and dedicated to educating the public on insurance issues and consumer rights. United Policyholders serves as an information resource and a voice for a diverse range of insurance consumers across the United States, from low income homeowners to international businesses. Donations, foundation grants and volunteer labor support the organization's work, which is divided into three program areas: *Roadmap to Recovery* (helping disaster victims navigate the insurance claim process and recover fair settlements), *Roadmap to Preparedness* (promoting disaster preparedness and insurance literacy for homeowners and businesses), and *Advocacy and Action* (advancing the interests of insurance consumers in courts of law and before regulators).

United Policyholders serves an important purpose by representing the interests of policyholders. Most consumers can scarcely afford legal counsel to pursue their rights under their insurance policies, whereas insurance companies have extensive resources to retain lawyers at major law firms to oppose providing coverage to their policyholders. In coverage disputes, insurers also enjoy a significant advantage because their policies are written on standardized forms that individual policyholders have no power to revise. United Policyholders seeks to level the playing field by offering similar resources and comparable counsel to represent otherwise vulnerable policyholders in cases raising important insurance coverage and allocation issues.

United Policyholders educates and advocates on behalf of a diverse range of commercial and individual policyholders in a variety of forums throughout the United States. United Policyholders' Executive Director has been appointed for six consecutive terms as an official consumer representative to the National Association of Insurance Commissioners, and works closely with the New York Department of Financial Services and Superintendent Vullo on issues affecting insurance consumers. United Policyholders' Executive Director is an Advisor to the American Law Institute's Restatement of the Law of the Liability Insurance Project. Media and academics also regularly seek United Policyholders' input on insurance consumer issues. Since 1991, United Policyholders has filed *amicus curiae* briefs in numerous federal and state courts, including New York, in over 415 cases.[1]

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[1] United Policyholders' arguments were adopted by the Texas Supreme Court in *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools Inc.*, 246 S.W.3d 42 (Tex. 2008), as well as by the California Supreme Court in *Vandenberg v. Superior Court*, 88 Cal. Rptr. 2d 366 (1999), and numerous other proceedings including *TRB Investments, Inc. v. Fireman's Fund Insurance Co.*, 145 P.3d 472 (Cal. 2006), and *In Re Salem Suede, Inc.*, 221 B.R. 586 (D. Mass. 1998). United Policyholders has also been granted leave to file briefs as an *amicus curiae* in numerous U.S. Supreme Court cases, including the following: *Heimeshoff v. Hartford Life & Accident Insurance Co.*, 134 S. Ct. 604 (2013); *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013); *Hardt v. Reliance Standard Life Insurance Co.*, 130 S. Ct. 2149 (2010); *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. 105 (2008); *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004); and *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002).

ARGUMENT

I. This Court Should Grant The Motion of United Policyholders To Appear As *Amicus Curiae*

Leave to appeal to the Court of Appeals is appropriate if "the issues are novel or of public importance," N.Y. COMP. CODES R. & REGS. tit. 22, § 500.22, and present a question of "state-wide interest and application." *Smithtown v. Moore*, 11 N.Y.2d 238, 241 (1962). The issue in *Keyspan* indisputably meets these standards: it is an issue of first-impression for the state's appellate courts, and it will have a significant impact on policyholders with long-tail and other multi-year claims involving coverage governed by New York law. The Appellate Division here declined to follow long-standing federal predictions of New York law on this issue; instead, *Keyspan* represents a sharp break with two decades of federal interpretation of New York law that has guided policyholders and insurers alike since the 1990s. An issue with such enormous consequences should be fully and finally decided by the Court of Appeals.

Leave to appear as *amicus curiae* should be granted here because United Policyholders will "identify law or arguments that might otherwise escape the Court's consideration." N.Y. COMP. CODES R. & REGS. tit. 22, § 500.23(a)(4). As a non-profit consumer advocacy organization with no financial stake in the outcome of this litigation, United Policyholders' perspective on the issues in the

case clearly differs from those of the parties. United Policyholders also shares a genuine and unique concern about the impact of an adverse decision on New York policyholders. As a voice and information resource for insurance consumers, United Policyholders plainly possesses the expertise required to provide a meaningful contribution to the briefing on the certified questions before the Court. (See Statement of Interest, *supra*.)

Accordingly, United Policyholders respectfully requests that this Court grant its motion to appear as *amicus curiae* in this appeal and accept this memorandum of law.

II. The Consequences Of *Keyspan* On New York Allocation Disputes Are Sufficiently Significant And Far-Reaching That They Compel Review By The Court Of Appeals.

If the Appellate Division reconsiders and reverses its decision requiring allocation of long-tail losses to periods of unavailability, the Appellate Division will restore the status quo, reaffirm the expectations of policyholders, and re-establish the basic stability of New York allocation law, rendering elevation of this issue to the Court of Appeals unnecessary. Confirming the *Keyspan* decision, however, which is no less than a seismic shift in long-standing allocation law, should be reserved for the Court of Appeals alone.

III. Keyspan May Be Applied To All Long-Tail Liability Claims

It is important to recognize that the *Keyspan* decision may impact policyholders well-beyond businesses involved in large environmental contamination matters. For example, individual homeowners who responsibly purchased third party liability insurance over many years, and in 2016 first learn – perhaps when they prepare to sell their homes – that there is a concealed oil tank on their property that has been leaking over many years, contaminating the groundwater and adjacent properties, may be harmed significantly by the *Keyspan* allocation ruling. At various points in the 1980s and 1990s, however, insurers began inserting absolute pollution exclusions in their policies, and these homeowners were no longer able to purchase liability insurance to cover potential environmental losses. It is the rare homeowner who has the means to pay the costs of remediating environmental damage absent insurance coverage. Allocating costs to the responsible homeowner beyond the date when coverage was available may lead to financial ruin, and likely bankruptcy, for many.

In addition, much of the import of *Keyspan* flows from the likelihood that insurers will argue for its application beyond the confines of coverage for environmental liabilities. Insurers will press vigorously for the application of *Keyspan* in all manner of disputes regarding coverage for long-tail claims, including asbestos, silica, and other mass torts. Even the largest of companies may

be significantly impacted, or even bankrupted, by arguments that asbestos or other claims must be allocated to literally decades after the inclusion of asbestos exclusions in most insurance policies in the mid-1980s. Extension of the unavailability ruling beyond the environmental context to these types of cases will magnify its impact on allocation law, as mass torts – and asbestos in particular – represent a very significant portion of the civil docket in New York. The broader the range of underlying cases to which *Keyspan* applies, the more extensive will be the harm it visits upon policyholders, large and small alike.

IV. Policy Language And Drafting History Run Contrary To *Keyspan*

This Court's decision on unavailability drags New York insurance law further from the actual policy language, and further from the insurance industry's understanding of the coverage provided. Plaintiff-Respondent disputed this Court's ruling that the policyholder should be responsible for periods of unavailability and United Policyholders will not reargue the same points. Rather, United Policyholders takes a more focused approach on the language relied upon by the *Keyspan* decision and compare it to the contemporaneous understanding of the policy coverage as expressed by the insurers themselves.

The sole basis in the policy language for this Court's unavailability ruling is the "during the policy period" language utilized by the policies at issue in *Keyspan*. *Keyspan*, 37 N.Y.S.3d at 92. The decision does not consider, however, the

placement of that language in the policies. The first three policies, covering the years 1953 to 1959, which don't define "occurrence," state that the policy "applies ***only*** to occurrences or accidents which happen during the policy period." *Id.* (emphasis added). It is beyond dispute that an occurrence can result in property damage for years after the occurrence. Yet, nothing in the policy language cited by the court restricts the timeframe of the damage covered by the policy, only the timeframe for the occurrence. There is simply no textual basis for excusing these policies from covering damage that occurred after the policy ended and saddling the policyholder with those damages.

Notably, these policies provide coverage for "all sums" the policyholder becomes legally obligated to pay as property damage caused by an occurrence.[2] Absent a temporal limitation on damages, the first three policies in *Keyspan* should cover "all sums" owed for damages flowing from an occurrence during the policy period, regardless of whether those damages occur during a period when insurance was unavailable. Otherwise, to limit coverage to property damage occurring

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[2] The *Keyspan* decision does not quote the "all sums" language from the policies at issue before it. However, the standard form policy language for 1955, 1966, and 1973 obligated the insurer to "pay on behalf of the insured *all sums* which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies caused by an occurrence." Lorelie S. Masters, Jordan S. Stanzler & Eugene R. Anderson, *Insurance Coverage Litigation* at § 4.07[A], at 4-123 n.524 (citing 1 Jack P. Gibson, et al., Commercial General Liability at IV.T.1, IV.T.11, and IV.T.19 (2005)); *see also Consolidated Edison*, 98 N.Y.2d at 222.

during the policy period,[3] would be to read into the policies terms and conditions that simply are not present.

The second three policies analyzed in *Keyspan*, covering 1957 to 1967, provide the same result, despite different wording. These policies "appl[y] ***only*** to occurrences . . . during the policy period." *Keyspan*, 37 N.Y.S.3d at 92 (emphasis added) (ellipses in original). Unlike the first three policies, however, these three define occurrence: "either an accident or a continuous or repeated exposure to conditions which result during the policy period in injury to or destruction of property . . . ."[4] *Id.* This Court relied on the language regarding property damage "during the policy period" to extend the allocation to periods of unavailability, concluding that the language restricts coverage to the policy period. A plain reading of this language, however, contradicts this Court's conclusion. Notably, the 1957 to 1967 policies state that they apply "***only***" to occurrences during the policy period, but does ***not*** say coverage applies "***only***" to damages that occur during the policy period. To the contrary, damages "during the policy period" are referenced only in the definition of "occurrence" as one of the conditions for an

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[3] The allocation of long-tail injury to particular time periods is itself a legal fiction, rather than a factual determination. *In re Viking Pumps, Inc.*, 27 N.Y.3d 244, 261.

[4] The latter two of the three policies use a slightly different definition, though with substantially the same meaning for purposes of this analysis: "either an accident or happening during the policy period or a continuous or repeated exposure to conditions which . . . causes injury to or destruction of property during the policy period." *Keyspan*, 37 N.Y.S.3d at 92.

accident or event meeting the definition of occurrence. In other words, having some damage during the policy period is necessary to trigger coverage, but the policy does not also limit its coverage only to damages during the policy period. If that had been the intent of the insurer, it could have inserted the word "only" regarding property damage during the policy in the definition of occurrence. The insurer did not do so, and the courts should not do so either. To reach such a limitation into the policy and thereby cut off coverage for damages outside the policy period would be to write for the insurers a better contract than the one they agreed to, and, indeed, drafted.

The interpretation of the policy language allowing coverage for damage outside the policy period is consistent with the contemporaneous understanding of the insurance industry of the coverage afforded under the policy language. In the 1970s, in discussing coverage for asbestos claims, the majority of insurers concluded that an insurer, once triggered, could be responsible for damage occurring outside the policy period:

> The majority view was that coverage existed for each carrier throughout the period of time the asbestosis condition developed—i.e., from the first exposure through the discovery and diagnosis. The majority also contended that each carrier on [the] risk during any part of that period could be fully responsible for the cost of defense and loss.

Masters, *supra*, at 4-130 (quoting Charles Berryman & Richard Ingegnesi, Memorandum of Meeting of Discussion Group—Asbestosis 1 (May 20, 1977)). Thus, the insurers' own contemporaneous understanding of the policies supports the plain reading of the policy language that only the occurrence, not the damages, must occur during the policy period.

Finally, the last two policies analyzed in the *Keyspan* decision, in effect from 1967 to 1969, apply "to property damage . . . which occurs anywhere during the policy period." *Keyspan*, 37 N.Y.S.3d at 92. Much like the first two sets of policy language, and also contrary to the *Keyspan* court's reasoning, this provision does not limit coverage to property damage occurring during the policy period. Rather, the policy simply is triggered by property damage during the policy period. If the insurer had intended to so limit the coverage only to damage occurring during the policy period, it could have done so. Indeed, the insurer already showed its dexterity with the use of the word "only" in the earlier policies to limit covered occurrences to "only" those that happen during the policy period. *Id.* The conspicuous absence of the word "only" from the application of the policy to property damage during the policy period undermines the *Keyspan* decision that such language precludes coverage for loss occurring outside the policy period.

The plain language of the policies contradicts this Court's conclusion that excluding periods of unavailability from the allocation is consistent with policy

language. To the contrary, none of the policy language cited by this Court explicitly limits coverage to damages occurring during the policy period. At the very least, the lack of a clear restriction on damages (as opposed to the "occurrence") to the policy period (and the conspicuous failure of the insurer to so limit the coverage), renders the "during the policy period" provision ambiguous. Under the basic principles of *contra proferentem*, the ambiguity should be resolved in favor of the policyholder and coverage.

V. Keyspan Breaks With Decades Of Well-Settled New York Law

As this Court stated in *Keyspan*, the legal matter addressed is an issue of first impression for New York appellate courts – "proper allocation . . . of risk of loss attributable to a continuous harm occurring, in part, during periods when liability insurance was unavailable in the marketplace." *Keyspan*, 37 N.Y.S.3d at 87. The issue, however, is not new. For over 20 years, various courts have addressed the allocation of long-tail claims to periods for which coverage for those long-tail claims was generally unavailable in the marketplace. *See, e.g.*, *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 995 (N.J. 1994); *Stonewall*, 73 F.3d at 1203-04; *Security Ins. Co. of Hartford v. Lumbermens Mut. Ins. Co.*, 826 A.2d 107, 114 n.13, 120-21 (Conn. 2003); *Mayor & City Council of Balt. v. Utica Mut. Ins. Co.*, 302 A.2d 1070, 1104 n.54 (Md. Ct. App. 2002).

In 1995, the Second Circuit's *Stonewall* decision, predicting New York law, adopted the unavailability ruling first articulated by the New Jersey Supreme Court the year before in *Owens-Illinois*, 650 A.2d at 995, which held that policyholders could be allocated losses for periods when they elected not to purchase insurance although it was available; however any periods for which insurance was unavailable would not be included in the allocation. *Stonewall*, 73 F.3d at 1204. Several years later, the Second Circuit extended its allocation ruling to environmental claims. *Olin Corp. v. Ins. Co. of N. Am.*, 221 F.3d 307, 326-27 (2d Cir. 2000). The *Stonewall* ruling, including the unavailability ruling, has been generally accepted as settled law in New York, both by the federal district courts and by state trial courts. In fact, even insurers litigating coverage matters in New York generally have not questioned the applicability of *Stonewall*'s unavailability ruling. For example, in *Fulton Boiler Works, Inc. v. American Motorists Insurance Co.*, 828 F. Supp. 2d 481 (N.D.N.Y. 2011), an insurance coverage action regarding asbestos bodily injury claims, the court noted specifically that the insurers did not even challenge the assumption that the asbestos losses would not be allocated to periods for which insurance was unavailable. *Id.* at 494. The only challenge came from one of the insurers that alleged insurance ***was*** available (an allegation rejected by the court as factually unsubstantiated). *Id.*

In *Nomet Management Corp. v. Virginia Surety Co.*, 2012 N.Y. Slip. Op 33697 (N.Y. Sup. Ct. 2012), the court noted that "[i]n determining allocation, the court must also inquire whether during periods of no insurance, there was appropriate insurance available in the marketplace." *Id.* at 6. The only challenge to this principle noted by the court came from an insurer alleging that insurance coverage for lead exposure ***was*** available during periods in which the policyholder was uninsured, but that the policyholder had elected not to purchase it.

Fulton and *Nomet* are not the only examples in the case law of the general acceptance of *Stonewall* as settled New York law. Multiple courts outside New York have treated the unavailability ruling as New York law. *See, e.g.*, *Uniroyal Inc. v. Am. Reinsurance Co.*, 2005 WL 4934215, at *22 n.5 (N.J. Super. Ct. App. Div. Sept. 13, 2005); *Security Ins*., 826 A.2d at 114 n.13; *Gould Pumps, Inc. v. Travelers Cas. & Sur. Co.*, 2016 WL 3564244, *9 (Cat. Ct. App. June 22, 2016); *Pneumo Abex Corp. v. Md. Cas. Co.*, 2001 WL 37111434, *10 (D.D.C. Oct. 9, 2001). And as many New York policyholders can attest, insurers generally have treated the unavailability rule as settled law in New York, a concession that has been crucial in allowing numerous policyholders to settle claims with their insurers and to avoid litigating this and other issues with their insurance carriers. *Keyspan* breaks with New York law as understood by New York policyholders and insurers,

New York courts, and the courts of other jurisdictions, and its impact on policyholders will be significant.

VI. Affirmance Of *Keyspan* Results In A Split Among The State And Federal Courts Of New York.

As noted above, the federal courts in New York – both the Second Circuit and U.S. District Courts – have applied the unavailability rule in allocation of long-tail claims. Federal courts, sitting in diversity jurisdiction, are tasked with applying established state law, or predicting how the state's highest court would rule. In applying or predicting state law, federal courts can look to trial and mid-level appellate courts for guidance, but they are bound only by the pronouncements of the state's highest court. Unless and until the Court of Appeals hears the *Keyspan* matter, the Second Circuit is not bound to abandon its prior jurisprudence. While it is hard to predict how the Second Circuit will react to *Keyspan*, the drastic change brought about by *Keyspan* and its inconsistency with *Con Ed* and other principles of insurance law, as discussed in Plaintiff-Respondent's brief, may well persuade the Second Circuit to hold fast to the unavailability rule pending a decision by the Court of Appeals. Should the Second Circuit stay the course, the New York federal district courts will be bound to follow the Second Circuit, creating parallel legal tracks.

Further, the disruption in New York of the *Keyspan* ruling may dissuade the other departments of the Appellate Division from abandoning long-settled allocation principles in favor of *Keyspan*. Indeed, the decision has the potential to instigate a conflict in decisions by the Departments, a conflict that can be resolved only the Court of Appeals.

VII. The Financial Impact Of Keyspan Will Harm Both Policyholders And Environmental And Mass Tort Claimants.

By extending the allocation for long-tail losses to include periods in which insurance was unavailable, *Keyspan* has slashed the value of policyholders' insurance assets and shifted massive financial obligations from insurers to policyholders and, in the environmental and mass tort context, to claimants.

By increasing the allocation period by 30 years or more, *Keyspan*'s rejection of *Stonewall*'s unavailability ruling could reduce significantly the amount of insurance coverage available to each environmental or mass tort claimant. Before *Keyspan*, the allocation period for long-tail claims would stretch from the claimant's first exposure through the early 1970s when pollution exclusions first were added to general liability policies, or to the mid-1980s when coverage for asbestos became generally unavailable and insurers added absolute pollution exclusions to their general liability policies. Under *Keyspan*, insurers will argue that the allocation period should stretch to the date the underlying claim was

asserted, adding 30 to 45 years (and growing) to the allocation to the policyholder,[5] and diluting to an inconsequential level the contribution of the years of coverage the policyholder purchased.

For example, suppose a policyholder with asbestos liabilities had dutifully purchased insurance from 1956 through the present, but beginning in 1986, was unable to purchase general liability insurance without an effective absolute asbestos exclusion. Accordingly, the policyholder had no coverage (and could get no coverage) for asbestos claims after 1985. Under the *Stonewall* allocation method, the claim of an individual alleging first exposure to asbestos in 1956 would be fully covered by the policyholder's insurance, with each policy on the risk from 1956 to 1985 contributing a pro-rata share to any settlement or judgment. Under *Keyspan*, insurers will argue that indemnity payments would be allocated from 1956 to the present, with roughly half the loss being allocated to the 1986 to 2016 period. Under this theory, to the extent insurance coverage was unavailable for asbestos during that time period, fully half the loss could fall directly on the policyholder, despite having purchased liability insurance when it was available. The more time passes, the greater the share borne by the policyholder.

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[5] *Keyspan* does not resolve the issue of the trigger period for such cases. Indeed, the decision may enkindle new litigation over that issue.

For many policyholders, having their long-tail liabilities shifted directly onto the policyholder during periods of unavailability will wreak financial havoc. It could dramatically reduce (even nearly eliminate) the obligations of the insurers and shift those responsibilities directly onto the policyholder. More than 100 asbestos defendants have been forced into bankruptcy by asbestos claims, *see* https://www.crowell.com/files/List-of-Asbestos-Bankruptcy-Cases-Chronological-Order.pdf, and *Keyspan* may force even more into insolvency by diluting the value and availability of their insurance coverage. The issue is not limited to asbestos or environmental claims but arises with respect to other long-tail products claims like silica, medical, pharmaceuticals, toxic tort and other claims as well.

It is also important to remember that *Keyspan* will have a detrimental impact not only on the policyholders but on the mass tort and environmental claimants as well. Even if a tort or environmental defendant is on shaky financial footing, claimants could still be assured of receiving compensation if the defendant's insurers remained solvent and responsible to pay the claims. Allocating part of the claimants' losses to periods for which there is no insurance greatly increases the risk that the asbestos defendants may be forced into bankruptcy, after which the claimant may receive only a fraction of the compensation it previously would have received under *Stonewall* as there is no policyholder left to pay the *Keyspan* share.

The radically shifted financial dynamic under *Keyspan* will affect policyholders (and insurers) in multiple ways. Because the rule on unavailability had been settled and unchallenged for over 20 years, policyholders, claimants, and insurers alike have relied on prevailing law in organizing their affairs. The *Stonewall* rule on unavailability has informed calculations of reserves, by both policyholders and insurers who have incorporated those assumptions into their litigation budgets and settlement strategies. Some policyholders depend on the comprehensiveness of coverage simply to remain in business and continue to pay long-tail claims.

The magnitude of the impact of *Keyspan* on policyholders cannot be overstated. Insurance coverage for certain long-tail liabilities has not been available for decades. Asbestos exclusions achieved near-universal adoption in the mid-1980s. *See Stonewall*, 73 F.3d at 1204. Pollution exclusions were added to insurance policies beginning in the 1970s, and the absolute pollution exclusion was introduced in 1985 and became widely adopted shortly thereafter. *See Am. States Ins. Co. v. Koloms*, 687 N.E.2d 72, 80-81 (Ill. 1997). Silica and other exclusions eliminating coverage for specific toxic torts have become permanent in general liability policies. Most policyholders facing long-tail claims whose policies are governed by New York law – through no fault of their own – have long periods beginning in the 1970s for pollution, or the 1980s for asbestos when the purchase

of additional insurance policies was impossible. By imposing losses on the policyholder for the decision of the insurance industry not to offer coverage, the court would penalize policyholders by reducing or refusing to enforce the insurance coverage they bought, on the grounds that the insurance industry stopped selling that coverage.

VIII. The *Viking Pump* Allocation Highlights Inconsistencies With *Keyspan*

The recent Court of Appeals decision authorizing an "all sums" allocation for insureds with policies containing non-cumulation clauses, *In re Viking Pump, Inc.*, 27 N.Y.3d 244 (2016), illuminates the inconsistencies created by the *Keyspan* ruling. In *Viking Pump*, the Court of Appeals analyzed policies containing non-cumulation language, the purpose of which is to prevent the stacking of multiple years of policy limits to cover a single loss. *Id.* at 259. The court concluded that the clauses were inconsistent with a pro rata allocation, which, the court correctly stated, is itself a legal fiction for dividing indivisible injury into specific policy periods.

The inconsistencies between the rulings in *Viking Pump* and *Keyspan* are addressed in Plaintiff-Respondent's brief and will not be repeated here. Rather, United Policyholders addresses the enormous disparity between allocations under *Keyspan* and *Stonewall* in light of *Viking Pump*. The difference between a *Stonewall* allocation and a *Viking Pump* allocation is relatively limited. *Viking*

Pump allows the policyholder to select a policy with a non-cumulation clause in which to allocate all losses for a particular claim (up to the policy limit), and the selected insurer can seek contribution from the other insurers on the risk. The primary effect of this allocation method is that the policyholder does not share in the loss due to insurer insolvencies or gaps in insurance, and potentially reduces the number of deductibles or self-insured retentions the policyholder must satisfy. The difference in allocation outcomes between *Stonewall* and *Viking Pump* depends on how many gaps, insolvent insurers, or deductibles or self-insured retentions the policyholder has in its coverage profile. Both the *Stonewall* and *Viking Pump* allocations distribute losses across the same allocation period – first exposure of the claimant to the period of unavailability (1970s for pollution or 1980s for asbestos). Under *Viking Pump*, if a single year of coverage is required to pay an entire long tail loss, the insurer in that year would have a contribution claim against all other triggered years of coverage. But, because no policies would be triggered after unavailability, there would be no allocation past that point because settled New York law does not allow subrogation (or contribution) against the policyholder.

In contrast, the result of a *Keyspan* allocation is significantly different. Under *Keyspan*, losses are allocated from the years of first exposure to years after insurance is no longer available – essentially forever. Thus, instead of having its

claim covered in full under *Viking Pump*, only half of its losses or loss would be covered under *Keyspan*, with the percentage of coverage decreasing with each passing day as the endless allocation period expands. This striking disparity in policyholder outcomes of *Keyspan* and *Viking Pump* allocations provides further evidence that the *Keyspan* ruling is inconsistent with New York insurance principles.

CONCLUSION

The *Keyspan* decision upends decades of New York insurance coverage law and works substantial harm on policyholders facing long-tail liability claims. Such a significant change to well-settled allocation law should be within the province of the Court of Appeals. This Court should either reconsider and reverse its decision in *Keyspan*, or grant leave to appeal to the Court of Appeals to allow for clarity, uniformity, and finality in the law governing allocation of long-tail claims.

Respectfully submitted,

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