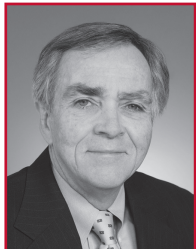


By A. Hugh Scott and James E. DiTullio

## *Boston Gas*: Massachusetts Chooses “Pro Rata” Allocation For “Long Tail” Claims



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This past summer, in *Boston Gas Co. v. Century Indemnity Co.*, 454 Mass. 337 (2009), the Supreme Judicial Court held that liability for claims involving damage that occurs over multiple years — “long tail” claims arising, for example, from environmental pollution and asbestos exposures — should be allocated to insurance policies on a “pro rata” basis. In doing so, the SJC rejected the policyholder’s argument — and two Appeals Court holdings — that allocation should be made using a “joint and several” approach, thus joining the majority of state supreme courts that have considered the issue and settling the law on this important issue in Massachusetts.

Boston Gas sued Century and other insurers to obtain insurance coverage for environmental damage caused by its operation of manufactured gas plants in the Boston area. A jury in federal court found Century liable for coverage for damage arising from the operation of a plant in Everett from 1908 to 1969. The federal trial court — adopting a joint and several allocation approach advocated by the policyholder — allowed Boston Gas to collect the full amount of its damage over the 61-year period from a single Century policy that covered the four-year period from 1966 to 1969, and declared that this policy was also obliged to pay all future cleanup costs for the site. Upon appeal to the First Circuit, that court certified to the SJC the question of whether a pro rata approach to allocation should have been used.

In a comprehensive and scholarly opinion by Justice Cordy, the SJC unanimously held that, where it is not feasible to determine by fact-based analysis what specific damage occurred during each year, the total damage should be apportioned among triggered insurance policies on a pro rata basis, based upon an insurer’s “time on the risk” relative to the total number of years during which the damage occurred. To reach this result, the Court engaged in classic contract construction by focusing on the plain language of the insurance policy and reading it as a whole. Here, the definition of a covered “occurrence” was limited to an accident which results in damage “during the policy period.” Thus, the Court rejected the notion that the policy provided coverage for damage occurring before and after the policy period, stating that “[n]o reasonable policyholder could have expected that a single one-year policy would cover all losses caused by toxic industrial wastes released into the environment over the course of several decades.” The Court indicated that, in making the pro rata allocation, periods during which there were no insurance — whether due to self-insurance or insurer insolvency or otherwise — should be the responsibility of the policyholder.

The SJC found that pro rata allocation serves important public policy objectives because it promotes efficiency by avoiding a second round of litigation in which an insurer, who has been required to pay the entire loss to the policyholder, seeks contribution from other insurers. It also avoids a “false equivalence between an insured who has purchased insurance coverage continuously for many years and an insured who has purchased only one year of insurance coverage,” thus “provid[ing] incentive for responsible commercial behavior.”

The Court acknowledged, but declined to follow, two Appeals Court decisions that had adopted joint and several allocation, *Rubenstein v. Royal Ins. Co.*, 44 Mass. App. Ct. 842 (1998), and *Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd’s, London*, 59 Mass. App. Ct. 646 (2003). The SJC noted that the Rubenstein court had employed “little express analysis” of the issue, and that the *Chicago Bridge* court had dealt with different policy language which it had construed under Illinois law. 454 Mass. 354.

In adopting pro rata allocation in *Boston Gas*, the SJC joined ten other state supreme courts in a 30-year national debate which has seen six states opt for the joint and several approach. Although *Boston Gas* has definitively resolved how damages for long tail claims should be allocated in Massachusetts, the SJC expressly noted that the case did not address the allocation of the costs of defending a policyholder, and it suggested that guidance on allocation of such defense costs may entail different analysis which awaits another day. ■