[* 1]
SCANNED ON 2/3/2012

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

P BARBARA R. KAPNICK

Index Number : 604715/1997

PART 39

LONGISLAND LIGHTING

VS

AETNA CASUALTY & SURETY

Sequence Number : 034

RENEWAL

INDEX NO. 604715/97

MOTION DATE

MOTION SEQ. NO. 034

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

FEB 02 2012

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/31/12

BARBARA R. KAPNICK J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 39

----------X

LONG ISLAND LIGHTING COMPANY and KEYSPAN CORPORATION,

Plaintiffs,

-against-

ALLIANZ UNDERWRITERS INSURANCE COMPANY, AMERICAN RE-INSURANCE COMPANY, ASSOCIATED ELECTRIC & GAS INSURANCE SERVICE LIMITED, CENTURY INDEMNITY COMPANY, CERTAIN UNDERWRITERS OF LLOYD'S AND LONDON MARKET INSURANCE COMPANIES, CONTINENTAL CASUALTY COMPANY, DAIRYLAND INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, GAN NATIONAL INSURANCE COMPANY, GENERAL REINSURANCE CORPORATION, HIGHLANDS INSURANCE COMPANY, HOME INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, NORTH STAR REINSURANCE CORPORATION, NORTHERN ASSURANCE COMPANY OF AMERICA, PROTECTIVE NATIONAL INSURANCE COMPANY OF OMAHA, REPUBLIC INSURANCE COMPANY, and UNITED STATES FIRE INSURANCE COMPANY,

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DECISION/ORDER
Index No. 604715/97
Motion Seq. No. 034

BARBARA R. KAPNICK, J.:

In this declaratory judgment action, plaintiffs Long Island Lighting Company ("LILCO") and KeySpan Corporation ("KeySpan")[1] seek a declaration that the defendant insurance carriers, which

[1] Originally LILCO alone brought this action to recover from its insurance carriers for environmental damage at certain Manufactured Gas Plant ("MGP") sites as well some Superfund sites. It then assigned its claims for MGP operations and the Syosset Superfund Site to KeySpan, but retained its rights to the Metal Bank claim. KeySpan was given the right to pursue this litigation, and was then added as a new party plaintiff.

issued LILCO excess comprehensive general liability ("CGL") policies from 1953 to 1969, have a duty under their excess CGL policies to defend and indemnify plaintiffs for the investigation and remediation of environmental damage arising from contamination caused by the operation of seven former MGPs. Defendants American Re-Insurance Company ("American Re"), Century Indemnity Company ("Century"), and The Northern Assurance Company of America ("Northern")[2] move, pursuant to CPLR 2221 and 3212, for leave to renew the prior motions and cross-motions for summary judgment declaring that they have no duty to defend and indemnify plaintiffs regarding environmental damage claims at seven MGPs for failure to provide timely notice under their respective policies.

Background

The MGP sites in issue were located on Long Island in Bay Shore, Hempstead, Glen Cove, Patchogue, Rockaway Park, Sag Harbor and Halesite. At the time this litigation was commenced, all the sites were owned by LILCO except for Patchogue, which was transferred in 1976. During the time that the MGP plants were operational, they utilized either coal carbonization, carburetted water gas, or oil gasification to manufacture and produce gas for light, heating and cooking. The processes undertaken produced

[2] The moving defendants listed are taken from the latest submission of defendants and reflect the parties still in the case after allocation and settlements.

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solid and liquid residues in addition to gas and other marketable by-products. Over time, the residues have dispersed and contaminated soil and groundwater at the plant properties, and the gradual discharge has spread pollutants to adjoining properties and waterways.

These plants became operational between 1859 for Sag Harbor and 1904 for Glen Cove. LILCO, or its predecessors, manufactured gas at these seven plants from the middle of the nineteenth century until the middle of the twentieth century. The plants were decommissioned, beginning with Glen Cove in 1917. Six of the plants were closed by the late 1950s, when gas became more widely available through cross-country pipelines; only the Bay Shore plant continued in operation, intermittently producing gas until 1973, when it, too, was closed.

Early History of the Manufactured Gas Plants

The gas industry has a long history of environmental problems arising from the creation and disposal of waste products produced by MGPs. Both LILCO, and its predecessors, were long aware of complaints made by their neighbors and governmental agencies about the dispersion of waste products from MGP sites, that affected adjoining properties, and, in general, damaged the environment.

As early as 1910, there are recorded complaints from local residents about wastes from the Patchogue gas plant spoiling fishing in the Patchogue River. In 1912, the State of New York brought an action against LILCO's predecessor, Sea Cliff and Glen Cove Gas Company, the then-owner of the Glen Cove gas plant. The complaint charged the company with violation of the New York Forest, Fish and Game Laws of 1909 for which they were fined (*People v Sea Cliff and Glen Cove Gas Co.*, [Sup Ct, Nassau Co 1912]).

Then, in 1919, the Rockaway Park MGP was found to be responsible for pollution of Jamaica Bay. A former LILCO employee, Vincent Carey, testified at a deposition that a government representative had observed that there was discharge from the Rockaway MGP into Jamaica Bay continuing in the 1950's as well, and that the official had threatened to shut the plant down (Deposition of Vincent Carey, at 112-113 and 156). LILCO responded by installing a separator at the site, as requested by the government.

In 1949 and for several years thereafter, LILCO received complaints from neighbors of the Bay Shore MGP concerning oils and odors entering their basements. LILCO addressed these problems by installing an oil recovery system, providing ventilation equipment

for their neighbors' basements and purchasing some neighboring residences.

In 1976, the Suffolk County Department of Environmental Control ("SCDEC") commenced an investigation at Bay Shore after sewer workers in the area discovered that the dry sewer lines placed in the area of the plant were full of odorous water. SCDEC conducted interviews and inspections in the area, and observed the presence of oil and odors reflective of the ongoing complaints of neighboring property owners, including that of Summers Lumber and Supply Corporation ("Summers"), that had previously had a ventilation system installed by LILCO.

In early 1977, SCDEC notified LILCO that they had discovered a gallery of leaching pits that illegally discharged wastes and caused groundwater pollution at the Bay Shore MGP. As a result of its investigation, SCDEC asked the New York State Department of Environmental Conservation ("DEC") to initiate an enforcement proceeding against LILCO. DEC weighed in on the problems at Bay Shore and advised LILCO that it had violated the State's Environmental Conservation Law at its Bay Shore plant.

DEC did not initiate a formal enforcement proceeding, but rather requested that LILCO come to an informal compliance

conference. At the conference, LILCO advised DEC that the leaching pit was constructed under a permit issued in 1926, and that the permit did not have an expiration date. LILCO provided a copy of the permit, and its legal counsel also indicated that under the State's water pollution statute passed in 1973, the DEC did not have authority to compel a cleanup of seepage from waste discharged prior to the date the statute took effect.[3]

Following these inquiries, DEC designated SCDEC as the principal agency responsible for the Bay Shore matter, and LILCO, at the request of the agency, voluntarily agreed to conduct a groundwater study at the Bay Shore plant. LILCO engaged the firm of Geraghty & Miller, Inc. ("G & M"), as a consultant to conduct the study. G & M produced two reports. The first report was the 'Phase I Study' in 1978 which found that "[t]here is a plume of contaminated ground water extending from the demolished plant southward toward Great South Bay," and that "[t]he contaminated plume appears to be moving into the aquifer as it migrates southward." (Ground Water Investigation at the LILCO Gas Plant Site, Bay Shore, Long Island, Phase I, September 1978, at 8).

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[3] This view was later confirmed in *State of New York v Schenectady Chems.*, 117 Misc2d 960, (Sup Ct, Rensselaer Co. 1983), *affd as mod* 103 AD2d 33 (3d Dept 1984).

The follow-up report provided additional details as to the off-site groundwater plume; it found that "[t]he plume of contaminated ground water appears to be discharging into Lawrence Creek" and was more than one-half mile long (Ground Water Investigation at the LILCO Gas Plant Site, Bay Shore, Long Island, June 1979, at 9-10).

On February 19, 1980, the Suffolk County Health Department ("SCDH"), formerly SCDEC, concluded that no further investigation was required and that no abatement measures were necessary. According to SCDH, the plume had minimal environmental impact, because it had low concentrations of chemicals, and did not affect local drinking water; nor was fishing a concern because the creek was previously closed to shellfishing for other reasons. The absence of appropriate technology for abatement made it reasonable to permit gradual groundwater movement to clear the area of contamination. SCDH indicated in its letter that "[t]he investigation of the plant site itself will remain open for the present with continuing measurement of the observation wells presently in place" (SCDH Letter, February 19, 1980). LILCO continued to voluntarily cooperate by inspecting and clearing the observation wells of any oil.

Subsequently, SCDH determined that LILCO no longer had to continue the monitoring. Although LILCO no longer had an obligation to monitor the observation wells, SCDH did not close out the Bay Shore matter. The file remained open into the 1990's when, eventually, DEC resumed interest in Bay Shore.

The 1980's and Early 1990's

In 1981, the United States Environmental Protection Agency ("EPA") made an inquiry under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), Section 103 (c), regarding LILCO's MGPs. LILCO responded by reporting that it, or its predecessors, operated six MGPs and named the Bay Shore, Hempstead, Rockaway Park, Glen Cove, Sag Harbor and Patchogue plants.[4] LILCO's notification letter also asserted that the sites were not hazardous waste sites, as defined by CERCLA Section 103 ©, so that notification was not required. The EPA took no action regarding the MGPs following LILCO's notification. There was no direction to investigate or clean up any property damage at any of the six sites.

In 1989, the EPA once again expressed interest in LILCO's MGPs. The agency wanted to conduct preliminary site assessments of

[4] At this point in time, LILCO was unaware that its Halesite property was also previously the site of an MGP.

LILCO's MGP sites, and hired NUS Corporation ("NUS") to conduct these assessments. LILCO, on its own, had conducted a review of historical information regarding the six sites, which review was provided to NUS. LILCO also informed NUS of the history of groundwater and soil contamination at Bay Shore and advised of neighbors' complaints. LILCO accompanied NUS representatives on the inspection of the sites. The NUS inspections revealed the presence of MGP wastes in the soil and groundwater at some of the sites.

NUS assigned a high priority for further investigation to the Bay Shore site. The Rockaway Park, Hempstead and Glen Cove sites were assigned a medium priority for further investigation. The Sag Harbor assessment revealed that the site had previously been named to the New York State Registry of Inactive Hazardous Waste Sites. While some more detailed studies occurred at some of the sites - for example, Rockaway Park - the EPA investigative process did not result in any regulatory demand for a full-blown investigation or order to remediate the properties; nor was an enforcement action commenced. The Preliminary Site Assessment functioned as a "screening tool[] to decide whether or not a site needed carrying on in the process" (Deposition of Ronald N. Naman, at 72).

In 1990, LILCO was considering constructing new facilities at the Hempstead MGP site. It hired Atlantic Environmental Services ("Atlantic") to conduct a detailed environmental investigation of the property before construction was to be undertaken, because the environmental conditions found on the property would impact on how it could best be redeveloped. Atlantic's investigation disclosed widespread MGP waste contamination throughout the site and Atlantic recommended a more extensive investigation. Plans for redevelopment were put on hold until the environmental issues were addressed.

On October 30, 1990, Long Island Fishermen ("LIF"), the owner of property adjoining the Sag Harbor MGP, made a claim that its property was contaminated by pollution emanating from the MGP plant. LIF's demand letter sought potential clean up costs ranging from $200,000 to $1,000,000. LILCO was aware that, through the mid-1980's, DEC and the Village of Sag Harbor had been looking at environmental issues at the Bridge Street site that included both LIF's property and that of LILCO. As a consequence, LILCO knew of the long history of spills by LIF on its property. LILCO evaluated the claim and concluded that it would not accept responsibility for LIF's environmental issues. LIF later dropped its claim.

In July 1991, DEC was examining its regulatory role regarding MGPs. Under the statutory framework existing at that time, coal

tar residues, the predominant waste found at MGP sites, were not considered hazardous wastes, but rather hazardous substances that were not within the jurisdiction of the state Superfund law. DEC was considering an expansion of its regulatory oversight that would put these sites under its regulatory umbrella by either changing the toxicity test employed to designate sites, or by sponsoring legislation to expand its authority.

In an attempt to determine the scope of the MGP problem statewide, DEC requested all utilities to report on their prior manufactured gas activities. In August 1991, LILCO responded to the DEC inquiry by providing material on its prior operations at the six sites previously reported to EPA. Madison Milhaus, the Manager of LILCO's Environmental Engineering Department, testified at his deposition (at 160, 163-164) that he believed this inquiry was the beginning step in the regulatory process whereby LILCO would be required to investigate and remediate its MGP sites. However, no immediate regulatory action followed.

In August 1991, LILCO received a demand from counsel for Bert Flamberg, the owner of Summers, claiming that groundwater pollution migrating from LILCO's Bay Shore property made it impossible to sell the adjoining Summers' property. The claim sought $1,305,000, representing the value of the land, buildings and business, in

exchange for Summers' transfer of the real property to LILCO; otherwise, Summers would take legal action and report the problem to state and federal regulatory agencies to obtain regulatory mandated remediation from LILCO. LILCO proceeded to investigate the claim of pollution and assess the market value of the Summers property with a view toward ultimately purchasing the property.

In December 1991, LILCO adopted a formal corporate policy to proactively investigate and, if needed, remediate its former MGP sites. LILCO thought that such approach would keep costs down by allowing LILCO to control the timing and spending on the program with minimal regulatory involvement. While the regulators, DEC and its designees at the county health departments were to be kept abreast of the work on the program, which was to be done up to regulatory standards, the voluntary program was not being actively supervised or directed by the regulatory agencies. The program was to sequence in the sites and stretch the period to conclude remediation, which would help with cash flow. In the meantime, remedial technologies were rapidly evolving, and LILCO believed there would thereby be a greater opportunity to partake of the new innovative and less expensive technologies. LILCO found further justification for the voluntary program in that it would allow LILCO to tailor its remediation activities with a view toward redevelopment of the MGP properties for planned specific new uses.

LILCO claims that the timing for such policy was optimal, because it was believed that DEC would look favorably on this proactive approach, since at that time, DEC was overburdened, and LILCO's approach would prevent the agency from having to expend its own limited resources pursuing such investigations. When DEC was initially informed of LILCO's plans to voluntarily investigate its MGP sites, it delegated principal responsibility to SCDH and its Nassau counterpart to follow the activities at the sites, confirming to LILCO that DEC was disinclined to take any active role.

As part of the proactive approach, in August 1991, LILCO decided to conduct more in-depth investigations of the MGP sites. The environmental engineering unit at LILCO put out requests for proposals with detailed technical specifications to solicit consultants for the investigation at the Hempstead plant. Roy F. Weston, Inc. ("Weston") was retained in November 1991 to conduct a full environmental assessment, including a risk analysis at the site before, during and after remediation, and a remedial alternative feasibility study to determine the preferred method of cleanup.

A field investigation was undertaken that confirmed the presence of MGP wastes and petroleum products in the soil and groundwater throughout the site and off-site. The levels of these

wastes were in excess of New York State standards and cleanup guidelines.

While LILCO had voluntarily adopted this proactive approach to the MGP sites, it also hoped to obtain rate relief from the Public Service Commission ("PSC") to cover the added expense that investigation and remediation of the MGP sites presented. To this end, in December 1991, LILCO applied to the PSC to obtain a gas rate increase of $1,047,000 for rate year 12/1/92 - 11/30/93 for the investigation/remediation of its MGP sites. PSC practice dictated that for the commission to consider these expenses, the amount to be included had to be "known and measurable." The amount that LILCO projected represented only the monies to be expended for the rate year, and not the entire cost of the program. LILCO legal personnel indicated in depositions that as a regulated entity it was highly concerned that any representation it made to the PSC be "accurate" (Depositions of Robert Grey, at 169-170, and Rhonda Amoroso, at 100-101).

At the same time that LILCO adopted its proactive approach to its MGP problems, DEC was beginning its pursuit of industry members, starting with Niagara Mohawk Power Corporation ("NIMO"). DEC and NIMO entered into negotiations for an Administrative Consent Order ("ACO") relating to NIMO's MGP sites. According to Charles Sullivan, the DEC attorney principally responsible for DEC's MGP enforcement program, the NIMO negotiations were to set

the pattern for DEC's negotiations regarding MGP sites with other New York utilities, including LILCO. In its annual report to then Governor Mario Cuomo, the DEC reported on its activities in the area of MGP sites, and in particular, announced its intention that it would seek NIMO-type ACOs "industry-wide" (Fourth Annual NYSDEC Report to Governor Mario Cuomo on Environmental Enforcement).

When the members of the New York Power Pool ("Power Pool"), a utility industry group that included LILCO, learned of the terms of the NIMO ACO, they were shocked at how onerous it was. The Industrial Waste Subcommittee ("IWSC") of the Power Pool Environmental Committee decided to form an MGP Task Force ("Task Force") to address their collective problem with the agency's new, more aggressive posture to the environmental issues presented by these sites. LILCO was an active member of the Power Pool project and attended IWSC and Task Force meetings.

In March 1992, LILCO turned its attention to the Bay Shore site. Once again, it issued a request for proposals, this time for a full environmental assessment of the Bay Shore site that would also include a review of the Summers adjoining property. LILCO engaged Malcolm Pirnie, Inc. Environmental Engineers, Scientists and Planners ("Malcolm Pirnie") to conduct the investigation and advised the DEC that it would be conducting an assessment of the Bay Shore site. DEC referred technical oversight to SCDH, which had never closed out its earlier Bay Shore investigation. SCDH

considered the Malcolm Pirnie investigation of the 1990's to be a continuation of the investigation begun by SCDEC, its predecessor, in the 1970's.

By letter dated April 16, 1992 to the PSC, LILCO senior attorney Rhonda Amoroso wrote in part:

> LILCO expects to incur costs for investigating and remediating six former manufactured gas plant sites. . . Under the current "no fault" retroactive superfund laws, LILCO, as a current owner of these properties is strictly liable for their cleanup. The preliminary cost estimates to investigate these sites have been calculated to range from $2 to $5 million for the years 1992 through 1994. Please bear in mind that this is merely an estimate and is certainly subject to change depending on further investigation. The cost of remediating the sites cannot be predicted until remedial investigations and feasibility studies have been completed, but preliminarily research indicates that the number could be in excess of $20 million. As you know, expenses associated with environmental compliance are extremely difficult to forecast with precision yet the magnitude of financial exposure easily reaches millions of dollars annually.

In July 1992, LILCO's legal department's weekly timesheets for senior attorney Donna Riccobono began to reflect work on the issue of insurance coverage for the MGP sites. A draft notice letter was prepared at that time. Meetings of legal, insurance and environmental personnel were held, where the issue of notice to LILCO's insurers of the environmental damage claim at the MGPs was discussed. The parties to the meetings concluded at that time that in the absence of a formal agency demand or third-party claim as to the MGP sites, notice was not necessary, and thus, no notification letters were sent to the insurers.

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As with Hempstead, the Bay Shore investigation confirmed both on and off-site soil and groundwater contamination with MGP wastes. These early reports prompted Steven Dalton of LILCO's Environmental Engineering Department to advise Donna Riccobono in an inter-office memorandum dated August 20, 1992, that "[o]ur investigations are beginning to show some disturbing results."

In August 1992, Steven Dalton provided the PSC with a Briefing Paper that contained detailed site information, operational history, regulatory and investigative status, cleanup timetables and cost projections for the then-known six MGP sites. The cover letter to the Briefing Paper, dated August 18, 1992, states that LILCO's program to "proactively address" the MGP sites was adopted "in anticipation of . . . a mandate" to address the problems at the MGP sites. The Briefing Paper projected investigation costs for each of the six sites totaling $2,025,000 with remediation costs projected at $1.8 million each for Hempstead and Bay Shore, and $1.75 million for Rockaway Park. The remediation of the three sites was scheduled to take place between 1993 and 1995. Peter Isaacson of the PSC testified at his deposition (at 39-40) that at a meeting with Dalton, he was led to understand that LILCO expected to have to remediate its MGPs. Isaacson informed Dalton that NIMO might spend from $400 to $600 million on its MGP sites.

In December 1992, LILCO filed another gas rate case (docketed as 93-G-002) with the PSC. Arthur Marquardt, LILCO's Vice

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President of Gas Operations, offered prepared testimony in early 1993 on the MGP situation as follows:

> The Company elected to proactively address the environmental concerns at [its MGP properties] by beginning an investigation program in 1992 to determine the extent to which remediation is required.
>
> * * *
>
> There is currently no regulatory mandate forcing the Company to immediately begin a clean up program . . . we anticipate that all of the sites will eventually be under the scrutiny of our state and federal environmental regulators, especially when considering the nature of the residues and materials that were generally found at these sites. Accordingly, the Company feels that a mandate to remediate these sites will be inevitable.
>
> The Company has elected to take action now for one reason: to save our customers money. Because environmental remediation conducted under the mandate and supervision of a regulatory agency is significantly more expensive than otherwise, the Company determined that it was far less expensive to address these problems ahead of the inevitable regulatory oversight and accompanying expense. Moreover, the cost of complying with environmental laws and regulations continues to escalate as new laws are enacted by both Congress and New York State....we believe that it is in the long-term best interests of our customers to act now.

LILCO reiterated in its reply brief for PSC 93-G-002 (pages 29-30) that "an inevitable regulatory mandate" to remediate the LILCO owned MGP sites "looms in the foreseeable future."

In early December 1992, Malcolm Pirnie provided Donna Riccobono with the requested estimates for remediating the site, ranging from $642,000 to $4,405,000 for soil cleanup, and

$5,674,000 for the groundwater cleanup. This resulted in an upward revision of LILCO's internal budget estimates for the MGP sites.

In addition, LILCO, in its Form 10-K for the year ending December 31, 1992, reported to the SEC and the investing public that LILCO was projecting investigative costs of $2.5 million for the MGP sites. Thomas Vallely, LILCO's Controller and Chief Accounting Officer, testified at his deposition that the disclosure was governed by Statement 5 of the Financial Accounting Standards Board ("FASB"). Statement 5 provides that "[d]isclosure of [a contingency that has not accrued] shall be made when there is at least a reasonable possibility that a loss or an additional loss may have been incurred." To provide the disclosure, LILCO had to believe that there was at least a "reasonable possibility" that the loss may have been incurred.

The investigation of the Bay Shore MGP continued, and in January 1993, Malcom Pirnie discussed doing a hazardous ranking system scoring for Bay Shore. LILCO authorized the consultant to go ahead with the ranking, and the following month Malcolm Pirnie reported that the Bay Shore MGP site could have a score in excess of 28.5, which score would likely lead to renewed EPA interest in the site.

In the Fall of 1993, the environmental regulators, both state and federal, became more actively involved with MGP sites. EPA

decided to reevaluate the rankings of the Bay Shore and Rockaway Park sites. To this end, EPA sought renewed access to Rockaway Park. This renewed interest on the part of the EPA raised concerns that the reevaluations could possibly result in full Superfund investigations at some of the sites, the average cost of which Malcolm Pirnie estimated to be more than $30 million per site.

The DEC then approached the New York Legislature to broaden its regulatory authority to include hazardous substances, thereby clarifying its jurisdiction to oversee coal tar sites, like the MGPs. This change in authority would give the agency added clout when it came to negotiating ACOs with the state's utilities.

Meanwhile, LILCO was carrying on settlement talks with the PSC regarding gas rate case 93-G-002. During the discussions, the PSC informed LILCO that the commission would only consider MGP expenses as rate recoverable if they were "net of any insurance proceeds." (Deposition of LILCO Senior Attorney Deaver at 88-90). Thus, LILCO was alerted in the fall of 1993 that rate relief was tied to insurance recoveries. LILCO still did not take any action to alert its insurance carriers.

In October 1993, LILCO confirmed the presence of contamination in the groundwater at the Sag Harbor site, when its workers who were installing gas mains at the site became ill. In a letter to the DEC dated October 18, 1993, LILCO reported the problem, sought

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assistance in completing the project, and complained that its neighbor LIF's spills on the adjoining property were to blame.

In November 1993, LILCO learned from the Task Force meeting that the DEC does not follow risk assessment in the same manner as the EPA, and that the DEC would require any cleanup to comply with New York's stringent groundwater standards. As a result, LILCO instructed Malcolm Pirnie to use the standards proposed by DEC in selecting criteria for use in the Bay Shore feasibility study.

By late 1993, the consultants (Malcolm Pirnie at Bay Shore and Weston at Hempstead) had completed their final feasibility studies. The Bay Shore feasibility study selected bioremediation as the preferred cleanup alternative, with a projected remediation cost of between $2,613,000 to $4,222,000. The Hempstead study presented two preferred remediation alternatives. The first alternative of bioremediation and bioventing was projected to cost between $754,890 and $871,140, while the second alternative, capping with selective excavation, was projected to range from $955,130 to $5,981,170.

In early 1994, LILCO recorded a $10 million liability for the estimated remediation of the Hempstead and Bay Shore MGP properties. The Hempstead liability was set at $4 million, and $6 million was attributed to Bay Shore. These figures were reflected in LILCO's Form 10Q for the quarter ending March 31, 1994 and filed

with the SEC. Anthony Nozzolillo, LILCO's Chief Financial Officer, called this accounting entry an accrual, because it had been quantified and would take place (Deposition of Anthony Nozzolillo, at 108-110).

In addition, LILCO's Form 10Q disclosed an estimate of $750,000 for investigation of the Rockaway Park site, to which Statement 5 also applied. LILCO had previously provided the same estimate for Rockaway Park to the PSC in the August 1992 Briefing Paper.

LILCO's Environmental Engineering and Legal Departments combined to present an MGP Investigation and Remediation Work Plan to the management of the company. This presentation estimated total outside costs just for investigation of the MGPs at $26,610,000.

In late May or early June 1994, LILCO commenced negotiations with DEC for Consent Orders for its MGPs. LILCO proposed that there be one ACO per site for a total of six ACOs. LILCO also requested that the remedial work stretch out to perhaps the year 2015. This plan was rejected by the agency. Charles Sullivan testified at his deposition (at 78-80) that the negotiations did not really begin until August 1995, when DEC threatened an enforcement action if LILCO did not return to the table. These

negotiations continued for several years until the ACOs were finally agreed upon and executed in 1999.

LILCO suggests that the DEC's refusal to accept LILCO's plan for remediation was prompted by the DEC's initiative to legislatively expand its authority under the state Superfund law. Both sides knew that under the new authority, a high proportion of MGP sites would be classified as requiring remediation.[5] Finally, in the latter part of 1994, DEC intimated that it could use existing CERCLA statutes to recover the cost of remediation at MGP sites. Given that DEC was underfunded, the prospect of CERCLA enforcement had previously seemed unlikely, since it would have required DEC to remediate the sites and then seek recovery of its costs from LILCO. However, this new threat seemed to indicate a hardening in the attitude of the DEC toward environmental problems caused by MGPs, which anticipated DEC's broader regulatory power.

On October 7, 1994, the PSC met with officials of LILCO's Environmental Engineering and Legal Departments, at which time the PSC admonished LILCO for not having notified its insurers of the MGP environmental problem. Shortly thereafter, Brian Mulcahy of LILCO's Legal Department was tasked to notify LILCO's insurers.

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[5] DEC was also looking to change the procedures for classifying hazardous waste by applying a different, more stringent, toxicity test that would result in including many coal tar wastes as hazardous wastes, rather than their former classification as hazardous substances, which were not within DEC's purview under the then-current state Superfund law.

The insurers were notified first of the Bay Shore plant on October 28, 1994. Notice for Hempstead followed on November 11, 1994, with notice for Rockaway Park four days later. On November 17, 1994, LILCO notified the insurers of the claim with respect to Sag Harbor. Notice for the Glen Cove site was made a week later, and finally, on December 8, 1994, notice for the Patchogue MGP was given.

The Bay Shore notice advises of the Summers claim, but does not provide the date when LILCO first became aware of its neighbor's demand. The Sag Harbor notice does not mention LIF's claim at all. All the notices indicate that there are no pending regulatory actions with respect to any of the MGP sites, but that the regulatory climate was changing and it was anticipated that such action might be forthcoming in the near future. They also indicate that the cost to remediate the sites was at that time unclear, and that for Hempstead and Bay Shore, such numbers would have to await the agency's concurrence on a remediation methodology selected from the alternatives in the feasibility studies. As to the other sites, they would have to await investigation and feasibility studies, and then agency agreement with the proposed preferred alternative remediation scheme.

None of the insurers responded to the notices by denying coverage based upon late notice. Instead, the insurers issued general reservation of rights letters that specifically reserved as

to the defense of late notice, but did not disclaim on any other grounds. The letters also indicated that no coverage decision was being made and requested further information from LILCO. LILCO provided supplemental material, including the investigative reports and feasibility studies of its consultants, and information on the settlement of the Summers claim. None of the insurers denied coverage predicated upon late notice even after receipt of the additional materials. Only General Reinsurance Corporation ("General Re"), requested detailed information from LILCO relating to the apparent late notice reporting of the Bay Shore site claim, but General Re has since settled with LILCO.

By letter dated August 11, 1995, approximately nine months after LILCO gave notice, DEC finally made a formal demand that LILCO investigate, and if necessary, remediate its MGP sites. A copy of the demand letter was provided by LILCO to its insurers.

Also in 1995, LILCO first learned that its facility at Halesite had previously been the site of a small manufactured gas plant. It was then included in LILCO's MGP Program. By February 1996, LILCO had estimated the cost of investigation and remediation at Halesite to be $4.8 million. By July 1996, LILCO's investigation of Halesite confirmed that the site contained soil and groundwater contamination, and LILCO notified the DEC of this finding. Defendants allege that LILCO commenced remediation of the Halesite property in the summer of 1996. LILCO concedes that, prior to

giving notice, it removed four small areas of surface tar that were outside the secured portion of the property and thus were subject to trespass.

Prior to the completion of the Phase I study in the middle of August 1997, LILCO determined that the Halesite MGP property did pose a potential insured liability, and gave notice to its insurers on January 23, 1997. Century is the remaining insurer on this claim and did not disclaim coverage, but rather reserved its rights specifically as to late notice.

Procedural History

Initially, LILCO brought this litigation in the United States District Court for the Southern District of New York, under the name *Long Island Lighting Co. v Aetna Cas. & Sur. Co.*, (96 Civ 9664 [MBM]) by filing a complaint on December 24, 1996. The London Market Insurers moved to dismiss the action for lack of subject matter jurisdiction. While the motion was sub judice, LILCO commenced the instant action in this Court on September 12, 1997. Upon the issuance of a decision dismissing the action as to the London Market Insurers, LILCO decided in favor of proceeding in this Court, and discontinued the federal action as to the remaining defendants.

The London Market Insurers, General Re and First State Insurance Company previously moved for summary judgment on the

grounds, *inter alia*, that the claims for the seven MGPs were barred because of late notice. The Hon. Ira Gammerman granted the motion in part by dismissing the claims with respect to the Bay Shore, Hempstead and Halesite properties, but denied the motions as to Glen Cove, Patchogue, Rockaway Park and Sag Harbor, without prejudice to renew upon completion of discovery (see decision on mot. seq. nos. 007 and 008, dated October 20, 2000.)

However, that decision relied heavily on a document, namely, a December 1993 internal report co-authored by LILCO's Environmental Engineering and Legal Departments, entitled "Manufactured Gas Plant Sites: Hempstead Gas Plant, Bay Shore Gas Plant - Investigation Summary and Remediation Strategy Recommendations" ("the December 1993 Report") which the Appellate Division later found to be privileged (*Long Island Lighting Co. v Allianz Underwriters Ins. Co.*, 301 AD2d 23 [1st Dept 2002]). That document was eventually returned to plaintiffs' counsel and all references to it were removed from counsel's current papers.

The Appellate Division did not, however, consider the merits of the late notice decision, because prior to its determination of the appeal, Justice Gammerman had entertained a motion by LILCO for reargument and renewal, and had granted that portion of the motion to renew as to the dismissal of the Bay Shore, Hempstead and Halesite claims with respect to the London Insurers and General Re on the question of late notice, whether defendants timely

disclaimed and whether there was a waiver of late notice. He determined that he would make one decision on these issues on a full record relating to all the defendants, and vacated his prior decision on that issue, in accordance with a decision dictated on the record on October 25, 2001.

Several of the defendants then brought a motion for summary judgment seeking to dismiss all or some of the claims on their policies as not justiciable, because, in accordance with the decision in *Consolidated Edison Co. of New York v Allstate Ins. Co.* 98 NY2d 208 (2002), after applying a particular allocation formula, the projected damages at particular sites would fail to reach their levels of coverage. By Decision/Order dated December 24, 2003, Justice Gammerman applied the allocation formula utilized by the Court of Appeals in *Con Edison, supra* and dismissed the action without prejudice, in whole or in part, against various defendants for lack of justiciability (see decision on mot. seq. no. 018 dated December 24, 2003).

Plaintiffs then moved to reargue and renew the determination, based upon updated and increased damage projections, and also challenged the formula for allocation that was applied. Justice Helen Freedman[6] granted the application to reargue and renew,

[6] When Justice Ira Gammerman became a JHO, this matter was transferred to Justice Helen Freedman. Upon Justice Freedman's appointment to the Appellate Division, First Department, the matter was transferred to this Court.

selected a different mode of allocation[7] and recomputed the levels for justiciability for each of the sites (see Justice Freedman's decision decided on January 11, 2005, 6 Misc 3d 1006[A], *affd* 35 AD3d 253 [1st Dept 2006], lv dism 9 NY3d 1003 [2007]). Justice Freedman again dismissed or limited claims against certain defendants for lack of justiciability based upon the failure of the newly projected damages to reach the levels of coverage of certain the excess insurers.

After this last decision as to allocation and justiciability, plaintiffs' claims against certain policies of defendants Century, American Re and Northern were found not to be part of the case, or the policies were limited as to specific sites.

During this time, the defendants also moved for summary judgment as to notice on another part of this case, the Sysosset Landfill, a Superfund site. Justice Gammerman, who was still handling the case at that time, granted summary judgment to the defendants, finding that notice as to the site was untimely (see decision in this case dated December 30, 2003, *aff'd* 24 AD3d 172 [1st Dep't 2005], *lv dism* 6 NY3d 844 [2006], *lv dism* 8 NY3d 956 [2007]). Justice Gammerman specifically found that an earlier

[7] The Court of Appeals in the *Con Edison* decision, *supra*, recognized that there are different methods of allocation and that they were not endorsing one method to the exclusion of any of the others. On the reargument and renewal motion in this case, Justice Freedman found that the facts and fairness warranted a different approach to allocation.

letter, dated September 3, 1993, from the Town of Oyster Bay, threatening legal action for the $26.2 million in remediation costs if the parties could not explore the possibility of resolving the Town's claims against LILCO, was the point at which notice should have been given, and that the critical letter was not disclosed to defendants pre-litigation. The Court concluded that the insured's argument of strict waiver of the right to disclaim based on the passage of time did not apply under *Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185 (2000),[8] that the insurers' reservation of rights letters were effective against the defense of waiver, since they did not contain any determination as to coverage, and that a knowing and intelligent waiver is not possible in the absence of full information. The Court also rejected the claim that the insured could reasonably consider allocation in determining the figure at which the excess insurance coverage would come into play as to each site, which would have required the defendants to show the presence of higher potential cost figures before notice was due.

An additional attempt to avert the outcome of this decision after being dismissed by the Court of Appeals twice, this time by reconfiguring the Complaint, was denied by Justice Freedman by Decision dated October 2, 2007 (2007 WL 6882202), *affd sum nom Long*

[8] Also cited were *Fairmont Funding v Utica Mut. Ins. Co.*, 264 AD2d 581 (1st Dept 1999) and *Merchants Mut. Ins. Co. v Allcity Ins. Co.*, 245 AD2d 590 (3d Dept 1997).

Island Lighting Co. v Century Indemnity Co., 52 AD3d 383 (1st Dept 2008). While all this was going on, the motion of AEGIS and the moving defendants' cross-motions as to late notice on the MGP plants were held in abeyance. When it became clear that there was going to be no further input from the Appellate Courts, the remaining moving defendants, minus AEGIS, which had by then settled, renoticed their motions, and that is what is before this Court now.

The Insurance Policies

Century's Policies

Plaintiffs are seeking coverage under eight excess general liability insurance policies issued by Century as successor to CCI Insurance Company, as successor to Insurance Company of North America ("INA") in its own right and as successor to Indemnity Insurance Company of North America ("IINA"). IINA issued four policies (XPL 3860, XCP 1086, XCP 3001 and XCP 1200) for excess general liability coverage to LILCO. The first policy, XPL 3860, provided coverage of $500,000 in excess of $25,000 per accident for the period of July 1, 1953 through July 1, 1957. The second policy, XCP 1086, provided coverage of $500,000 in excess of $4,525,000 per accident for the period from December 19, 1955 to July 1, 1957. The third policy, XCP 3001, provided the same coverage as the prior policy for the period commencing on July 1, 1957 until July 1, 1958. The policy was then renewed for another year, but provided coverage of 50% of $1,000,000 in excess of

[* 33]

$5,252,000 per accident. The fourth policy, XCP 1200, commenced on July 1, 1957 and ran until July 1, 1959 and provided $500,000 in excess of $25,000 per occurrence. It was renewed for two successive one-year terms, ending on July 1, 1961. The first renewal provided coverage of $1,000,000 in excess of $25,000 per occurrence. The second renewal increased the underlying limits to $50,000.

INA issued four policies (XBC-1097, XBC-40530, XBC 41176, and SRL 2220) for excess general liability coverage. The first policy, XBC-1097, provided coverage of $1,000,000 in excess of $100,000 per occurrence for the period of July 1, 1961 through July 1, 1962, and was renewed for two successive two-year terms ending on July 1, 1966. The first renewal increased the coverage to $2,000,000 and the second renewal brought the coverage up to $3,000,000, all the time keeping the underlying limit at $100,000 per occurrence. The second policy, XBC-40530, provided coverage of $25 million in excess of $100,000 for the period from July 1, 1966 to July 1, 1967. The third policy, XBC 41176, ran for the following year, and the fourth policy, SRL 2220, for the year after. These two policies had the same coverage of $25,000,000 in excess of $100,000 per occurrence. The Century policies, inclusive of both IINA and INA policies, provided continuous coverage to LILCO from July 1, 1953 to July 1, 1969.

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Six of the policies provided first-layer or lower-level excess coverage. These policies incepted at $25,000 for policies XPL 3860 and XCP1200. In July 1960, XCP 1200 was extended and carried a $50,000 inception point for one year. Thereafter, beginning in July 1961 with policy XBC-1097, and running through July 1, 1969 under policies XBC-40530, XBC 41176 and SRL 2220, the coverage was in excess of $100,000. Under the allocation formula enunciated by Justice Freedman, these lower-level policies that provide coverage inception points below $100,000, are applicable to the claims at all of the MGP sites.

IINA wrote two other policies for LILCO that provided higher-level excess insurance. Policies XCP 1086 and XCP 3001 were in excess of $4,525,000, and covered the period from December 19, 1955 through July 1, 1958. In July 1958, XCP 3001 was extended and the inception point was raised to $5,252,000 for one year. These policies are only available for the Bay Shore site; all claims for other sites were found to be not justiciable based on the allocation formula utilized by Justice Freedman.

The notice provisions of the Century (IINA) policies XPL 3860, XCP 1086 and XCP 3001 state as follows:

> Upon the happening of an occurrence or accident that appears reasonably likely to involve liability on the part of the company written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the

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> insured and also the fullest information obtainable at the time.

In policy XCP 1200, the notice provision is essentially the same, except that the words "or accident" have been deleted. The notice provisions of the four Century (INA) policies, XBC-1097, XBC-40350, XBC 41176 and SRL 2220, are similar.

In policies XBC-1097 and XBC-40530, the notice provision states:

> Upon the happening of an occurrence reasonably likely to involve the company hereunder, written notice shall be given as soon as practicable to the company or any of its authorized agents. Such notice shall contain particulars sufficient to identify the insured and the fullest information obtainable at the time.

The notice requirement of policies XBC 41176 and SRL 2220 provides as follows:

> In the event of an occurrence reasonably likely to involve INA hereunder, written notice containing particulars sufficient to identify the Insured and also the fullest information obtainable at that time shall be given by or for the Insured to INA or any of its authorized agents as soon as practicable. The Insured shall promptly take at his expense all reasonable steps to prevent other personal injury or property damage or advertising offense from arising out of the same or similar conditions, but such expense shall not be recoverable under this policy.

The American Re Policies

The plaintiffs seek to recover under five policies issued by American Re. The policies are M-3280, M-7048-02, M-7048-03, M-

7048-0001, and M-7048-0003. The first policy, M-3280, covered the period of July 1, 1954 to July 1, 1958, and provided coverage of $1,000,000 in excess of $1,525,000. Under the allocation formula, this policy would only come into play for the Bay Shore, Rockaway Park and Hempstead sites. The other four sites on this policy were deemed not justiciable in the allocation decision.

The second policy, M-7048-02, provided coverage of $1,000,000 in excess of $3,525,000 per accident or occurrence for the period from July 1, 1956 to July 1, 1958. The third policy, M-7048-03, initially provided coverage of $3,000,000 in excess of $2,525,000 per accident or occurrence for the period from July 1, 1958 to July 1, 1959. There were two subsequent one-year renewals where the underlying coverage was raised to $3,025,000 and $3,050,000 respectively. The fourth policy, M-7048-0001, provided coverage of $3,000,000 in excess of $3,100,000 for the period from July 1, 1961 to July 1, 1964. The fifth policy, M-7048-0003, provided the same coverage as part of a $10,000,000 excess layer and covered the period from July 1, 1964 to July 1, 1966. These four policies incept at over $2,000,000, and as a result of the allocation formula, they apply only to the Bay Shore site.

The notice provisions in all five policies are substantially the same. They require the insured to provide immediate notice of any accident or occurrence that "will probably" or "appears likely" to involve coverage under the policies.

[* 37]

Specifically, policies M-3280, M-7048-02 and M-7048-03 provide as follows:

> The Insured shall immediately advise the Company of any accident or occurrence which will probably result in liability under this Certificate.

Policies M-7048-0001 and M-7048-0003 read as follows:

> The Insured shall immediately advise the Company of any accident or occurrence which appears likely to result in liability under this Certificate and of subsequent developments likely to affect the Company's liability hereunder.

The Northern Policies

Plaintiffs seek coverage under four excess general liability policies issued by Employers' Surplus Lines Insurance Company ("ESLIC"), predecessor to Northern. The policies are S-10470, S-10905, S-11-00378 and S-11-00522. The first policy, S-10470. provides coverage of $1,000,000 in excess of $2,050,000 per occurrence or accident for the period from July 1, 1960 to July 1, 1961. The second policy, S-10905, provides coverage of $1,000,000 in excess of $2,100,000 for the period of July 1, 1961 to July 1, 1962. There is a one-year break in coverage and then coverage resumes with the third policy, S-11-00378, which provides coverage of $2,000,000, 20% of a $10 million excess layer above $3,100,000 for the period July 1, 1964 to July 1, 1965. The last policy, S-

11-00522, provides identical coverage for the period from July 1, 1965 till July 1, 1966.

All four of the policies provide upper-level excess coverage. Under the allocation formula, all four policies are available only for the Bay Shore site.

The notice provisions on these policies follow form to certain of the Century policies. Northern policy X-2386 follows form to Century (IINA) policy XCP-1200. The other three Northern policies follow form to Century (INA) policy XBC-1097.[9]

The Parties' Contentions

The Moving Defendants' Contentions:

Defendants contend that, based on the totality of facts, the notices provided by LILCO for the seven MGP sites in dispute were untimely. Defendants argue that: 1) LILCO knew that the MGP sites were contaminated from a long history of complaints and the investigative studies done; 2) as the owner of the sites, it admittedly had a statutory responsibility for remediating the pollution problems; 3) adjoining property owners at two of the sites had demanded damages in excess of the underlying coverages on most of the policies; 4) the investigative surveys, cost estimates and budgeted expenses brought the sites within the levels of

[9] The notice provisions in the Century policies are quoted in full above.

coverage of these excess insurers; and 5) LILCO had represented to the PSC in rate hearings that, while currently under no regulatory compulsion, a regulatory "mandate was inevitable" and that it would occur in the "foreseeable future."

Defendants point to LILCO's knowledge from industry sources that the DEC was expanding its powers and had already worked out ACOs with other utilities, such as NIMO and NYSEG, and was looking to do so with all utilities across the state that owned and operated MGPs. Defendants also indicate that for six months prior to providing notice to its insurers, LILCO was in discussions with the DEC for ACOs for its sites. Further, defendants assert that the PSC had taken the position that recovery of MGP costs through rate increases would be made net of insurance proceeds, and thereby had repeatedly alerted LILCO of the need to involve its carriers. In addition, two years prior to providing notice, LILCO had internal discussions on whether to notify Associated Electric & Gas Insurance Services Limited ("AEGIS"), its claims-made carrier. Defendants argue that all this indicates an awareness on LILCO's part that notice was required.

Defendants further argue that the strictures of Insurance Law Section 3420 (d) do not apply to this property damage coverage case, that they did not waive their rights by failing to disclaim when they first received notice or after plaintiffs' supplemental submissions, because the reservation of rights letters they issued

specifically preserved the notice defense without disclaiming on any other ground, which was found to be sufficient to defeat waiver by Justice Gammerman in his decision dated December 30, 2003, *supra*, which was affirmed (24 AD3d 173, *supra*) and that these decisions are binding, as they constitute law of the case. Further, as in the earlier motion on the Syosset Superfund site, defendants contend that there was no basis for a knowing and intelligent waiver, because the supplemental information provided by LILCO to the insurers did not contain critical facts necessary to support a disclaimer, and that relevant and significant facts were only provided post- litigation during the course of discovery.

Plaintiffs' Contentions

Plaintiffs argue that notice was not due until they were under a regulatory compulsion or there was a third-party claim, and that the DEC did not make a formal demand until nine months after notice was actually given. LILCO's combined insurance and legal departments in 1992 concluded that notice was not necessary in the absence of a regulatory mandate or demand, and that the purpose of its proactive approach of voluntarily investigating and remediating, if necessary, the MGP properties, was designed to avoid such an adversarial situation with its regulators from developing. Plaintiffs maintain that, under these circumstances, where there was no regulatory mandate and the cost estimates were

speculative, their conduct was reasonable in waiting to provide notice until the DEC indicated a more adversarial posture, which it did in late 1994, just before notice was given.

Plaintiffs further assert that the reasonableness of an insured's delay in providing notice is generally an issue of fact. They point to the factual similarity between this case and *Century Indemnity Co. v Keyspan Corp.* (15 Misc 3d 1132 [A], Sup Ct, NY Co 2007), *affd* 58 AD3d 573 (1st Dept 2009), in which Brooklyn Union Gas sought defense and coverage from its insurers for claims of environmental damage at its MGP sites. In that case, the Court found that there were issues of fact that precluded summary judgment on late notice, including whether with allocation, the coverages would be reached. In addition, plaintiffs urge that the motion be denied because the insurers waived their right to disclaim on late notice, based upon their inactivity after having sufficient facts to support a disclaimer, and that blanket reservation of rights letters are not enough to avoid waiver under recent case law, citing *Estee Lauder Inc. v OneBeacon Ins. Group, LLC*, 62 AD3d 33 (1st Dept. 2009).[10]

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[10] The plaintiffs initially also cited to the decision in *Travelers Indemnity Co. v Orange and Rockland Utilities, Inc.* 2009 WL 2599076 (Sup Ct., NY Co, Bransten, J.) for this proposition. However, that decision, which dealt with primary insurance coverage, and not excess coverage, as here, was reversed by the Appellate Division in 2010 (73 AD3d 576) *lv dism* 15 NY3d 834 (2010), which recognized "the much more lenient

Legal Discussion

The Century and Northern policies require notice when an "occurrence" or "accident" is "reasonably likely" to involve liability on the part of the insurance company under the policy, and then such notice must be given "as soon as practicable." American Re's policies require that the insured provide notice of "any accident or occurrence" that "will probably" or "appears likely" to involve coverage under the policies, and that such notice shall be given "immediately."

The duty to provide notice of an occurrence is a condition precedent under all of the subject policies issued by the three remaining defendants,[11] *White v City of New York*, 81 NY2d 955 (1993). While the specific notice provisions vary slightly as to their terms, the deviations are not critical on this application. "Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy", *Security Mut. Ins. Co. of NY v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 (1972). The insurers do not have to show prejudice in order to obtain such relief, *American Home Assur. Co. v International Ins. Co.*, 90 NY2d 433 (1997).

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standard for the timing of notice applicable in excess insurance cases".

[11] The Century policies and the Northern policies, that follow as to form, also require like notice of any claim arising from an occurrence.

"Immediate notice [as required under the American Re policy] has been interpreted to mean notice within a reasonable time" *Loblaw, Inc. v Employers' Liability Assur. Corp.*, 85 AD2d 880, 882 (4th Dept 1981), *affd* 57 NY2d 872 (1982), while notice "as soon as practicable [as required under the Century and Northern policies] mandates that notice be given within a reasonable time under the circumstances" *Heydt Contr. Corp. v American Home Assur. Co.*, 146 AD2d 497, 498 (1st Dept 1989), *app dism* 74 NY2d 651 (1989). "[T]he provision that notice be given as soon as practicable call[s] for a determination of what was within a reasonable time in the light of the facts and circumstances of the case at hand," *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 19 (1979).

LILCO, as the insured, has the burden of demonstrating that any delay in providing notice was reasonable, *Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748 (1995); *see also Security Mut. Ins. Co. v Acker-Fitzsimons, supra*). "[A] good faith belief of non-liability" can serve as a reasonable excuse or explanation for an insured's seeming failure to provide timely notice, *Empire City Subway Co. v Greater N.Y. Mut. Ins. Co.*, 35 NY2d 8, 13 (1974). Where the policies are excess policies, as here, a good faith belief that their coverage level would not be reached may also serve as a reasonable excuse or explanation for a delay in

providing notice, *Loblaw, Inc. v Employers' Liability Assur. Corp.*, *(supra)*.

Given the policies' requirement of notice whenever an occurrence may reasonably give rise to a claim against the policy, "[t]he fact that a particular occurrence may not in the end result in a ripened claim does not relieve the insured from advising the carrier of that event", *Heydt Contr. Corp. v American Home Assur. Co.*, (146 AD2d *supra*, at 499). The standard to be employed is not probability or certainty that a claim will be made. "[A] reasonable possibility - such that 'may exist even though there are some factors that tend to suggest the opposite' - of the policy's involvement is sufficient to trigger the duty [citation omitted]", *Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 240 (1st Dept 2002).

As Justice Stallman noted in his decision in *Century Indem. Co. v Keyspan Corp.*, 15 Misc3d supra, at *9

> the legal framework governing the timeliness of notice to excess insurers does not fit well in cases involving environmental contamination, where, as here, liability for cleanup is based in large measure on the involvement of a regulatory agency. One must keep in mind that, in the context of summary judgment, the "reasonable possibility" that an excess policy will be involved must be demonstrated as a matter of law. Put differently, Century must demonstrate such a reasonable possibility

> exists with a certainty that would warrant judgment as a matter of law.
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> * * *
>
> it becomes very difficult to determine whether a "reasonable possibility" exists as a matter of law if the evidence of environmental contamination is unclear, if the likelihood that a regulatory agency will impose cleanup is uncertain, and if the extent of remediation is not then known.

Thus, this Court must determine whether, under all the circumstances presented, notice was required at an earlier time than the fall of 1994 for six of the sites, and 1997 for Halesite.[12] To do this, the Court must examine the facts in light of what was known by LILCO about the sites concerning the type and scope of the damage, the costs of investigation and remediation of the problem, and the position of the regulators or third-party claimants. Further, each of the sites must be considered separately as a distinct claim.

Defendants argue that by the end of 1992, LILCO had sufficient knowledge regarding the residual contamination at its MGP sites and

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[12] While plaintiffs argue that the Appellate Division, First Department, in affirming Justice Stallman's decision, (*see* 58 AD3d at 574) established a "three-prong test" to be used in making such a determination, this Court agrees with defendants' position that the Appellate Division was just listing the factors that raised issues of fact precluding summary judgment in that case.

the costs incident to investigation and remediation of those sites to implicate the levels of defendants' excess policies. Defendants point to LILCO's own admissions to other regulatory agencies (PSC and SEC) that demonstrate: 1) that LILCO was long aware of the existence of the environmental damage at the sites due to MGP activities, and that it knew that under CERCLA, it was liable for such damage; 2) that the company knew that the costs to investigate and remediate were in the multimillions; 3) that LILCO was aware that regulatory agencies (DEC and EPA) were bearing down on the industry and that the company repeatedly represented that a regulatory mandate was inevitable and imminent; and 4) that third parties had made claims that residual wastes from the Bay Shore and Sag Harbor sites had polluted their property and demanded damages that were greater than the attachment points of most of the excess policies.

Defendants maintain that even if notice was not required by late 1992, then certainly it should have been given by late 1993, or earlier in 1994, and that the delay in giving notice was a breach of the notice provisions of their respective policies.

Plaintiffs argue that for there to be an occurrence, there must have been either a third-party claim or significant regulatory activity. In fact, there was no definitive action by any of the

environmental regulators, local, state or federal, evidencing a level of compulsion or formality that necessitated notice to insurers. Plaintiffs further argue that LILCO's proactive approach to its MGP properties was designed to avert such regulatory mandate. Plaintiffs maintain that, in this instance, an occurrence did not happen until DEC issued its formal demand letter on the six known gas plants in August 1995, nine months after LILCO had given notice. As to the third-party complaints made against the Bay Shore and Sag Harbor sites, LILCO claims that it had a reasonable belief in its non-liability so as to excuse its late notice.

By the end of 1992, there had been third-party claims from neighboring property owners against LILCO for the Bay Shore and Sag Harbor sites. Both claimants were demanding recovery in excess of the underlying self-insured retentions of the lower-level excess policies, which ran from $25,000 to $525,000. Both these sites had some regulatory involvement as well, but that involvement was in an investigative stage, and at this point, the regulators had not brought an enforcement proceeding or a demand for remediation.

Bay Shore

Bay Shore was LILCO's largest MGP site and the last site to be decommissioned in the 1970's. It also had a long history of complaints from adjoining property owners, as discussed supra.

The Summers demand was a third-party claim, akin to the demand by the Town of Oyster Bay in the Syosset Superfund site litigation, that was previously determined in this action to constitute "an occurrence" for which excess coverage may apply, since that claim exceeded the underlying coverage. The demand letter from Summers' counsel, sent in August 1991, together with all the other information discussed herein in detail, certainly constituted "an occurrence" which was "reasonably likely" or "will probably result in liability" or which "appears likely to result in liability" so as to involve the relevant polices.

As the Appellate Division already held in this case:

> Such occurrence happened not when plaintiff was sued in the underlying action some five weeks before giving defendants notice of the Syosset claim, but almost six months earlier, when plaintiff received a letter from the underlying plaintiff's lawyer threatening a lawsuit over the Syosset site (citation omitted). We reject plaintiff's argument that there was a reasonable possibility that the subject policies, both excess, would not be reached by the Syosset claim, where plaintiff offers no evidence that the timing of its notice was the result of a deliberate determination to that effect, and not, as the record suggests, the belief that it was not responsible for the Syosset cleanup costs. Nor does it avail plaintiff to argue that defendants were not prejudiced by the late notice (*see Great Canal Realty Corp. v Seneca Ins. Co.*, 5 NY3d 742, ... [2005]; *Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339, ... [2005]; *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, *supra* at 440; *see also Matter of Brandon* [*Nationwide Mut. Ins. Co.*], 97 NY2d 491, 496 n. 3, ... [2002]).

24 AD3d *supra* at 173.

Sag Harbor

The Sag Harbor MGP property is part of a larger area known as the Bridge Street site that also included the adjoining LIF property. The Bridge Street site came to the attention of the DEC upon a complaint from the Mayor of Sag Harbor in the 1980's. During this investigation, LIF was required to remediate oil spills on its property. No such action was required of LILCO.

In 1990, LIF made a claim that its property was damaged by contaminants from LILCO's neighboring plant and demanded clean-up costs ranging from $200,000 up to $1,000,000. LILCO, because of the past history of contamination by LIF of its own property, believed that it was not responsible for this problem and refused to pay. LIF dropped the demand, and it was not even mentioned in the notice to the insurers or in the subsequent submissions. The existence of the LIF demand only appears to have been revealed during the course of discovery.

LILCO has presented sufficient facts to raise a question of fact as to its good faith belief in its non-liability, as to the Sag Harbor cite, and whether it may serve as a reasonable excuse or explanation for its failure to provide notice of LIF's demand.

The regulatory activity at the Sag Harbor site was investigatory, and prior to notice there were no demands or mandates made by the DEC upon LILCO to undertake any significant activity. In addition, there was no Phase I study at this site until 1995, so that the extent of the contamination at Sag Harbor was not known prior to notice, and thus, the costs for investigation and remediation were purely speculative projections extrapolated from data at Bay Shore and Hempstead. Accordingly, it cannot be determined as a matter of law that the regulatory situation at Sag Harbor warranted notice at an earlier time, or whether any delay was reasonable under the facts presented, *Century Indemnity Company v Brooklyn Union Gas Co., supra; Reynolds Metal Co. v Aetna Cas. & Sur. Co.*, 259 AD2d 195 (3rd Dep't 1999).

Hempstead

There were no third-party claims regarding the Hempstead site. While Nassau County provided technical oversight of the Weston Phase II study of the Hempstead property, there was no pre-existing investigation by the County or DEC, like there was with Bay Shore and Sag Harbor. This study was undertaken by LILCO voluntarily as part of its plan to redevelop the site. LILCO maintains that its costs at Hempstead were speculative until DEC made a determination of the appropriate cleanup remedy to be employed. Once again, there was no significant regulatory mandate that would provide "an occurrence" for notice purposes so as to warrant notice at an

earlier time as a matter of law, and whether LILCO's delay was reasonable presents a factual issue.

Halesite

This site was only discovered to be an MGP property in late 1995. Shortly thereafter, LILCO commenced a Phase I site investigation. At the time of notice in 1997, it was determined that a follow-up field investigation was required, but had not been completed. There were no third-party demands or lawsuits. As for regulatory involvement, there were no formal site inspections by either DEC or EPA. DEC had visited the site and collected shallow surface soil and groundwater samples for visual observation only. DEC had requested analytical data for groundwater and waste characterization for the site, and LILCO, at the time of notice, was in the process of compiling said data.

The DEC's formal demand as to the other six sites predates the discovery of this site by a few months. While DEC was aware of the site, it does not appear to have formally brought this site into the mandated process existing for the other six sites. Since the investigative studies were still underway when the notice was provided, the scope of the contamination was not fully known and any cost figures would be speculative projections based upon extrapolation from data at the other sites. While LILCO conducted

a limited remediation of small areas that were subject to trespass to prevent injuries, no evidence is submitted that this action was undertaken as part of a DEC order or mandate, or that the cost of this limited remediation was disclosed as reaching the appropriate coverage levels. Under these circumstances, it cannot be said as a matter of law that notice was warranted at an earlier time than January 1997. Whether under these circumstances it was reasonable for LILCO to delay giving notice of the Halesite MGP presents a question of fact.

The Other Three Sites:

As to Rockaway Park, Glen Cove, and Patchogue, LILCO had not conducted site investigations that would provide any information as to the scope of the contaminants at the respective sites prior to giving notice. Whatever projections of investigation and remediation costs that were made for LILCO's internal purposes were not derived from actual investigations at these particular sites, but were extrapolated from the sites that had undergone more extensive studies. These projections were speculative. There were no third-party demands or claims prior to notice.[13] There was no

[13] Post-notice there was a third party claim at Rockaway Park made regarding a neighboring property by Mobil, who was leasing the adjoining property to use as a gas station. During the course of construction at Mobil's site, it learned that the property was contaminated allegedly with MGP residues. The DEC was conducting an investigation of this situation, but no results were in at the time of the supplemental submission to the insurers noted above.

regulatory involvement of any kind, except that the EPA conducted two screening site inspections of the Rockaway Park site since 1989, upon which no action was taken. Under these circumstances, defendants have not demonstrated that as a matter of law notice should have been provided at an earlier time.

Conclusion as to Notice

There are factual issues as to each site, except for Bay Shore, concerning the reasonableness of LILCO's delay in providing notice considering the level of regulatory activity, whether the cost estimates reached the coverage levels and whether LILCO had a good faith belief of non-liability based on the third party claims.[14] Consequently, the motion for summary judgment declaring that notice was untimely is denied as to all the sites except Bay Shore for which it is granted.

Waiver

Finally, plaintiffs argue that the defendants waived the defense of untimely notice by not disclaiming coverage at a time

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[14] As for whether allocation should be considered in assessing whether projected costs have reached the excess levels, so as to create an additional issue of fact, this issue is controlled by law of the case based upon the decision and affirmance of the motion directed to the Syosset Superfund site discussed infra. Allocation does not apply herein, although other courts have permitted its consideration *(contrast Century Indemnity Co. v KeySpan Corp., supra)*.

prior to the interposition of their answers, because they had the facts necessary to do so, based upon the notices and the supplemental submissions. Defendants maintain that this case does not fall under the strict guidelines for disclaimers stated in Insurance Law Section 3420 (d), which applies only to claims for death and bodily injury (*Fairmont Funding v Utica Mut. Ins. Co., supra*) and not to pollution insurance, and that in order to establish common-law waiver, plaintiffs must allege prejudice, which they have not done. Further, they claim that the ruling on Syosset as to waiver is law of the case and controlling on this question, because of the similarity of the facts alleged on both motions.

The analysis of the waiver issue in the decision on the Syosset motion is law of the case and controlling. The later cases cited by plaintiffs on this issue are distinguishable because they present different factual situations. In *Estee Lauder Inc. v OneBeacon Ins. Group, supra,* the insurer first disclaimed coverage on other grounds, when they had the necessary facts that would suggest a late notice disclaimer, and then tried to first raise the late notice defense in the context of the litigation. This kind of piecemeal disclaimer is frowned upon and can be found to be prejudicial, *General Accident Ins. Group v Cirucci*, 46 NY2d 862 (1979).

The moving insurers herein did not disclaim on other grounds, but specifically reserved their rights as to a late notice defense, and solicited additional information on what LILCO knew about the damage at the sites and when it knew it. The facts LILCO provided were to some extent sketchy and incomplete; for instance, it did not provide any information as to the LIF demand as to the Sag Harbor site, which was learned about later in discovery.

Under common law, a waiver is "a voluntary and intentional relinquishment of a known right", *Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 698 (1980). The failure of LILCO to provide clear, complete information on the notice issue is further support that waiver of the right to disclaim on the basis of late notice will not lie in this instance, particularly where the insurers specifically reserved their rights on the subject.

Accordingly, it is hereby

ORDERED that the defendants' motion to renew and reargue is granted, and on renewal the prior motion and cross-motions for summary judgment are denied, except as to the Bay Shore site as to which the motion is granted.

It is hereby ADJUDGED and DECLARED that defendants American Re-Insurance Company, Century Indemnity Company and Northern Assurance Company of America have no duty to defend or indemnify

the plaintiffs regarding environmental damage claims on the Bay Shore MGP site only for failure to provide timely notice under their respective policies.

Since Northern's policies are only involved with the Bay Shore site, the action is dismissed against Northern Assurance Company of America with prejudice and without costs or disbursements.

The remaining causes of action as to the other six sites are severed and continued as to defendants American Re-Insurance Company and Century Indemnity Company.

This constitutes the decision and order of this Court.

FILED

Dated: January 31, 2012

BARBARA R. KAPNICK
J.S.C.

FEB 02 2012

NEW YORK
COUNTY CLERK'S OFFICE

BARBARA R. KAPNICK