3-13-2014

Pro-Rata Apportionment in “Long-Tail” Contamination Cases: Will Presumed Efficiencies Undercut Environmental Cleanups?

Benjamin S. Reilly
Boston College Law School, benjamin.reilly@bc.edu

Follow this and additional works at: http://lawdigitalcommons.bc.edu/ealr

Part of the Consumer Protection Law Commons, Energy and Utilities Law Commons, Environmental Law Commons, Insurance Law Commons, and the Torts Commons

Recommended Citation

This Comments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
PRO-RATA APPORTIONMENT IN "LONG-TAIL" CONTAMINATION CASES: WILL PRESUMED EFFICIENCIES UNDERCUT ENVIRONMENTAL CLEANUPS?

BENJAMIN S. REILLY*

Abstract: Environmental contamination often causes injuries that occur over long periods of time. These “long-tail” injuries, which tend to span periods during which a liable party was covered by multiple insurers, do not map neatly onto standard indemnification insurance policies. As a result, liable parties and their insurers frequently engage in protracted litigation to minimize the portion that they must contribute to environmental remediation projects. In Boston Gas Co. v. Century Indemnity, the U.S. Court of Appeals for the First Circuit upheld an application of Massachusetts’s recently announced pro rata apportionment rule, which greatly reduced the insurer’s liability. Proponents of pro rata apportionment argue that it lessens the burden that indemnification litigation puts on court dockets and that it promotes environmentally conscientious business practices. This Comment challenges those claims and argues that pro rata apportionment may actually undermine environmental remediation projects by limiting the amount of private resources available for them.

INTRODUCTION

Two miles south of downtown Boston sits Rainbow Swash, the world’s largest copyrighted art object.1 Since 1971, the Swash, featuring colorful abstract streaks adorning a 150-foot tall gas tank, has been a familiar landmark to commuters and others who regularly drive the stretch of I-93 that runs through the neighborhood of Dorchester.2 The Boston Gas Company (“Boston Gas”) commissioned the artwork on its tank to “symbolize[] the vitality of a company which shares both a proud history and an exciting future with the communi-


ties it serves.\(^3\) National Grid, an international utility conglomerate, now owns Boston Gas, the Rainbow Swash, and the land on which it sits (“Commercial Point”).\(^4\) In the past several years, National Grid has built a substantial solar power generation project at Commercial Point.\(^5\) Ironically, six acres of clean-energy producing solar panels now sit directly adjacent to the icon of fossil fuel usage.\(^6\)

The solar panel installation was developed at Commercial Point partly because the land there is significantly contaminated.\(^7\) Boston Gas’s operation of a manufactured gas plant (“MGP”) is responsible for the site’s toxic state.\(^8\) Manufactured gas, the precursor to natural gas, was widely used in homes and businesses throughout the United States during the nineteenth and early twentieth century,\(^9\) and Boston Gas operated MGPs throughout New England.\(^10\) Rendering gas fuel produces a number of carcinogenic byproducts, which now contaminate the land and water in the vicinity of many former MGP sites.\(^11\) The remediation of former MGP sites is a costly process.\(^12\) Generally, those liable for the costs of remediation look to their insurers to cover those costs.\(^13\) MGPs, however, frequently create injuries that occur over long periods of

---

\(^3\) Press Release, Boston Gas, supra note 2.


\(^6\) *Dorchester Solar Power Project*, supra note 5.

\(^7\) See id. (noting that the site’s contamination limits the potential for reuse by humans but makes it an ideal location for a solar power installation).

\(^8\) *Boston Gas Co. v. Century Indem. Co. (Boston Gas Commercial Point II)*, 708 F.3d 254, 257 (1st Cir. 2013).


\(^10\) See *Boston Gas Co. v. Century Indem. Co. (Boston Gas Everett II)*, 529 F.3d 8, 11 (1st Cir. 2008) (noting that prior to New England’s transition to natural gas use, Boston Gas operated twenty-nine MGPs).

\(^11\) Id.

\(^12\) *See Boston Gas Commercial Point II*, 708 F.3d at 257–58 (remediation costs of two sites totaled nearly $8 million).

time, known as “progressive injuries” or “long-tail injuries.”¹⁴ Many times, progressive environmental injuries occur over periods during which a liable party was insured under several different policies.¹⁵ Unsurprisingly, when there is a question as to when an environmental harm occurred, those who may be liable for costs of the recovery have an incentive to prove that the injury occurred outside the temporal scope of their insurance policy.¹⁶ This incentive often leads to costly, protracted litigation.¹⁷

Furthermore, when multiple insurers are present during the lifetime of a progressive environmental injury, allocating liability to the different policies can be “scientifically and administratively impossible.”¹⁸ When it is impossible to determine the proportion of damage that occurred during each policy period, the law allocates liability among the insurers.¹⁹ In *Boston Gas Co. v. Century Indemnity (Boston Gas Everett III)*, in the context of a dispute over the cleanup costs of a former Boston Gas MGP site, the Massachusetts Supreme Judicial Court (SJC) in 2009 clarified Massachusetts’s law on allocation and adopted the pro-rata approach in the context of long-tail environmental injuries.²⁰ In 2013, the U.S. Court of Appeals for the First Circuit, while hearing an appeal of an application of the pro-rata approach, affirmed the district court in *Boston Gas Co. v. Century Indemnity (Boston Gas Commercial Point II).*²¹

This Comment argues that the SJC’s decision in *Boston Gas Everett III* was rooted more in equitable and policy considerations than legal analysis.²² In adopting the pro-rata approach, the SJC hoped to promote judicial economy by reducing the amount of indemnification litigation stemming from long-tail injuries in Massachusetts.²³ The First Circuit’s subsequent decision in *Boston Gas Commercial Point II* shows that the court will afford the district courts

---


¹⁵ Doherty, supra note 14, at 257.

¹⁶ Injuries that occur completely outside the temporal scope of insurance policies do not trigger their coverage. Thus, in long-tail claims, insurance companies have an incentive to prove that an environmental injury occurred, in its entirety, outside the policy period. See Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1049 (D.C. Cir. 1981) (noting that the insured will not be covered if harm develops and manifests outside the policy period).

¹⁷ See Doherty, supra note 14, at 257–58 (explaining that uncertainty regarding which insurer will be liable for damage reduces settlement incentives and increases litigation costs).

¹⁸ *Boston Gas Commercial Point II*, 708 F.3d at 261 (quoting Doherty, supra note 14, at 257).


²⁰ Id. at 293, 312.

²¹ 708 F.3d at 258.

²² See infra notes 82–115 and accompanying text.

²³ See *Boston Gas Everett III*, 910 N.E.2d at 311 (noting that the joint and several method increases litigation by encouraging subsequent contribution lawsuits between insurers).
broad discretion in allocating liability based on time-on-the-risk. Thus, the SJC’s hope is likely to be realized, but it remains to be seen whether these benefits come at the cost of a reduction in private resources available for environmental remediation.

I. FACTS AND PROCEDURAL HISTORY

In 1995, an inspection revealed contamination at Boston Gas’s former MGP site in Everett, Massachusetts. Around that time, contamination was found at a number of other Boston Gas sites, including Commercial Point in Dorchester. Boston Gas was strictly liable under Massachusetts law for all costs associated with the cleanup of the contamination at the two sites. In accordance with the Massachusetts Oil and Hazardous Material Release Prevention Act (“Chapter 21E”), Boston Gas was required to pay investigation and cleanup costs around the Commercial Point site.

Between 1951 and 1969, Boston Gas’s MGPs were insured through Century with three different comprehensive general liability (CGL) insurance policies. CGL policies are standard form liability insurance agreements that insure companies for a broad range of liabilities. Like most CGL policies, Century’s agreed to indemnify Boston Gas for “the sum actually paid in cash in the settlement or satisfaction of losses for which [Boston Gas] is liable” stemming from “an accident happening during the policy period or a continuous or repeated exposure to conditions which unexpectedly and unintentionally causes injury to or destruction of property during the policy period.” After the discovery of contamination, Boston Gas put Century on notice that it might ask Century to indemnify the costs of the cleanup. Century responded by reserv-

---

24 See 708 F.3d at 258 (quoting Boston Gas Everett III, 910 N.E.2d at 316) (noting that the court would defer to the trial judge’s determination of allocation given the factual complexities of such cases).
25 See infra notes 110–115 and accompanying text.
26 Boston Gas Everett II, 529 F.3d at 11.
27 See Boston Gas Commercial Point II, 708 F.3d at 257.
28 See Massachusetts Oil and Hazardous Material Release Prevention Act, MASS. GEN. LAWS ch. 21E § 5 (2006) (noting that the owner of a vessel that has released hazardous material “shall be liable, without regard to fault”).
29 Brief for the Plaintiff-Appellant Boston Gas Co. at 7, Boston Gas Commercial Point II, 708 F.3d 254 (No. 11-1931).
30 Id. at 8.
31 See Rebecca M. Bratspies, Splitting the Baby: Apportioning Environmental Liability Among Triggered Insurance Policies, 4 B.Y.U. L. REV. 1215, 1221 (1999) (noting that CGL policies were touted “as meeting a business’s entire insurance needs under . . . a single policy”).
32 Boston Gas Everett III, 910 N.E.2d at 295.
33 Boston Gas Everett II, 529 F.3d at 11.
ing its rights, which signaled that it intended to challenge the claim. On October 22, 2002, Boston Gas sued Century and sought a declaratory judgment confirming Century’s indemnification responsibilities under the policies.

The dispute arising out of the Everett site was the first to go to trial—Boston Gas argued that Century was jointly and severally liable for the entire cost of the cleanup if any of the environmental injury occurred during Century’s policy period. Thus, Boston Gas tried to prove at trial that the contamination was ongoing, virtually from the day that the MGP opened to the time of litigation. Boston Gas was successful in both of these arguments. The U.S. District Court for the District of Massachusetts found Century liable and awarded Boston Gas $6,227,327.90 in damages for the expenses it had incurred during the cleanup of the environmental contamination. In a post-trial motion, Century requested that the district court certify the allocation question to the SJC. The district court denied the request and entered a separate and final judgment.

Century appealed and challenged the district court’s application of the joint and several allocation method. Century argued that it should not have been liable for the entire cost of the remediation. Specifically, Century contended that the joint and several approach was not the proper method for allocating liability in long-term environmental contamination suits where the CGL insurer had provided coverage for the risk for only a portion of the time during which the contamination took place. Noting Century’s motion for certification at the district court level, the First Circuit certified the question to the SJC.

34 When an insurance company sends a reservation of rights letter to a policy holder, the letter serves as a notice of the insurer’s intention not to waive its contractual rights to contest coverage or to apply an exclusion that negates an insured’s claim. BLACK’S LAW DICTIONARY 1422 (9th ed. 2009).
35 Boston Gas Everett II, 529 F.3d at 11.
36 Id.
38 See Boston Gas Commercial Point II, 708 F.3d at 258–59 (noting that the court decided that Boston Gas would be held to its argument that the damage was constant through the life of the plant).
39 Id. at 259, 261.
40 Boston Gas Everett II, 529 F.3d at 12.
41 Century Indem. Co.’s Motion to Certify the Question of Allocation to the Massachusetts Supreme Judicial Court at 1, Boston Gas Everett I, 2006 WL 1738312 (No. 02-12062-RWZ).
43 Boston Gas Everett II, 529 F.3d at 12.
44 Id.
45 Id. at 13.
46 Id. at 13 n.5; Order for the Certification of Questions to the Supreme Judicial Court of Massachusetts, Boston Gas Everett II, 529 F.3d 8 (No. 07-1452).
The SJC adopted the pro-rata approach. The court held that the preferred method for allocating damages on a pro-rata basis is a fact-based determination of the losses occurring during the individual policy periods. The court further held that if such a factual determination is impossible, liability should be allocated based on the insurer’s time-on-the-risk. Time-on-the-risk allocation takes the entire amount of damages and divides it among insurers based on the length of their policy. In light of the SJC’s decision, the First Circuit remanded to the trial judge, who found that a pro-rata allocation could not be determined by the jury’s factual determination, and new trial was ordered. The case subsequently settled.

While the trial and appeal of the Everett case was taking place, the Commercial Point case had gone to trial. Boston Gas and Century offered essentially the same arguments that they advanced in the Everett litigation. The jury returned a verdict finding that Century was obligated to indemnify Boston Gas for the $1,699,145 cost of the investigation and remediation. The trial judge, however, did not enter a judgment prior to the SJC’s ruling on allocation. Century, upon learning of the SJC’s adoption of the pro-rata approach, moved for judgment in its favor regarding the allocation. Century requested that the damage figure be spread equally from 1886 through 2007, the entire lifetime of the plant, based on the time-on-the-risk method. The trial court allocated the damages evenly across the 121-year period. This had the effect of reducing Century’s liability from just under $1.7 million to slightly more than $250,000.

---

47 Boston Gas Everett III, 910 N.E.2d at 312.
48 Id.
49 Id. at 316.
50 Id. (quoting Public Serv. Co. of Colo. v. Wallis & Cos., 986 P.2d 924, 941 (Colo. 1999)).
51 Boston Gas Commercial Point II, 708 F.3d at 258.
52 Id.
53 Id.
54 See id. at 261 (noting that Boston Gas was successful in arguing that contamination was continuous throughout the MGP’s operation).
56 Id. at 514.
57 Boston Gas Commercial Point II, 708 F.3d at 258.
58 Id. at 259.
59 See Boston Gas Commercial Point I, 793 F. Supp. 2d at 519 (deciding that Boston Gas, despite its incentive to argue otherwise, was bound by its argument that the site’s contamination was ongoing from the plant’s opening in 1886 to the time of trial in 2007).
60 See Boston Gas Commercial Point II, 708 F.3d at 259 (explaining that this decision reduced Century’s liability from 100% of the nearly $1.7 million damages to 15% of the damages).
On appeal, the First Circuit upheld the trial judge’s determination.\textsuperscript{61} It reasoned that the trial court did not abuse its discretion in determining that the verdict could not serve as a basis for a fact-based allocation.\textsuperscript{62} Thus, Boston Gas’s trial arguments prior to the SJC’s alteration of the allocation law in Massachusetts decreased Century’s liability from 100\% of the damages to less than 15\%.\textsuperscript{63}

\section*{II. Legal Background}

The Massachusetts Oil and Hazardous Material Release Prevention Act (“Chapter 21E”) authorizes the Massachusetts Department of Environmental Protection to order a potentially responsible party to clean up a contaminated site.\textsuperscript{64} By imposing retroactive liability, Chapter 21E and similar laws “mark[] a major commitment . . . to clean up the life-threatening residue of the now waning industrial age.”\textsuperscript{65} The retroactive liabilities that stem from environmental cleanup costs, however, present challenges when they are fit into existing insurance models.\textsuperscript{66} Courts remain divided on the question of how to allocate indemnity liability between insurers on the risk in long-tail claims.\textsuperscript{67}

The 1981 case of \textit{Keene Corp. v. Insurance Co. of North America} is considered the seminal case embracing joint and several liability for insurers.\textsuperscript{68} There, the U.S. Court of Appeals for the D.C. Circuit held that each insurer was jointly and severally liable for the entire indemnity costs of asbestos-related lawsuits.\textsuperscript{69} Thus, the insured could pick one from all of its triggered policies (generally the largest) to indemnify it up to the policy’s limits, and that insurer could then seek contribution from the issuers of other triggered policies.\textsuperscript{70}

\begin{thebibliography}{99}
\bibitem{61} Id. at 258.
\bibitem{62} Id. at 260.
\bibitem{63} Id. at 259.
\bibitem{64} Massachusetts Oil and Hazardous Material Release Prevention Act, MASS. GEN. LAWS ch. 21E § 5 (2006).
\bibitem{65} Peter K. Johnson, \textit{Mr. Smith Goes to Washington: 1997 Superfund Amendments, Will It Solve the Liability Problem and How Will This Affect Massachusetts?}, 31 NEW ENG. L. REV. 1269, 1270 (1997).
\bibitem{66} See infra notes 76, 83 and accompanying text.
\bibitem{67} See \textit{Boston Gas Co. v. Century Indem. Co. (Boston Gas Everett II)}, 529 F.3d 8, 13 (1st Cir. 2008) (citing William R. Hickman & Mary R. DeYoung, \textit{Allocation of Environmental Cleanup Liability Between Successive Insurers}, 17 N. KY. L. REV. 291, 292 (1990)) (noting that the language of CGL policies “does not neatly map onto these types of injuries”).
\bibitem{68} See \textit{id.} notes 76, 83 and accompanying text.
\bibitem{69} Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1050 (D.C. Cir. 1981).
\bibitem{70} See \textit{id.} (noting that issuers of triggered policies will be liable for the whole amount, but contribution actions among other insurers may keep the single insurer from being “saddled with full liability for any injury”).
\end{thebibliography}
Focusing on the plain language of the insurance contract, the Keene court found that the scope of the coverage clause required coverage for “all sums” that the insured must pay because of property damage, even if property damage persists beyond the policy period.\(^{71}\) The court reasoned that policies contain a “built-in trigger of coverage” that cover the policy holder’s entire liability once triggered.\(^{72}\) “There is nothing in the policies that provides for a reduction of the insurer’s liability if an injury occurs only in part during a policy period.”\(^ {73}\) Although Keene was decided in the context of asbestos-related litigation, the supreme courts of six states have followed the D.C. Circuit’s lead and adopted the joint and several approach in the context of long-tail environmental injury cases.\(^ {74}\)

Courts that have rejected the joint and several approach in favor of the pro-rata allocation method analyze the relationship between the trigger and scope of coverage clauses differently.\(^ {75}\) These courts take the view that when the two clauses are read in the context of the whole policy, the time limitation in the trigger clause (“during the policy period”) applies to the scope of the coverage.\(^ {76}\) Thus, the scope of the policy’s coverage only extends to the cleanup costs for property damage that is deemed to have arisen during the policy period.\(^ {77}\)

Prior to Massachusetts’s adoption of the pro-rata approach, ten other state high courts had done the same.\(^ {78}\) The New Hampshire Supreme Court adopted the pro-rata approach in *EnergyNorth Natural Gas, Inc., v. Certain Underwriters at Lloyd’s.*\(^ {79}\) The *EnergyNorth* court based its decision almost entirely on

\(^{71}\) Id. at 1047.

\(^{72}\) Id. at 1048.

\(^{73}\) Id.


\(^{75}\) See infra notes 91–98 and accompanying text.


\(^{77}\) Id.


\(^{79}\) 934 A.2d at 526.
policy objectives including, “(1) maximizing resources to cope with environmental injury or damage; (2) giving the greatest incentive to insureds to acquire insurance; and (3) achieving simple justice.” The court voiced particular concern that adoption of the joint and several method would encourage environmental carelessness on the part of actors who choose not to be insured for part of a long-tail injury period.

III. ANALYSIS

In *Boston Gas Co. v. Century Indemnity (Boston Gas Everett III)*, the Massachusetts Supreme Judicial Court (SJC) adopted the pro-rata allocation method in the context of long-tail environmental injury indemnification suits. According to the SJC, Massachusetts courts now “determine precisely what injury or damage took place during each contract period or uninsured period and allocate the losses accordingly.” If such a fact-based allocation is impossible, courts are to assign liability based on the insurer’s or uninsured’s time-on-the-risk. As a result of the new rule, comprehensive general liability (CGL) policy issuers will likely see their liability for long-tail environmental injuries reduced greatly because liability for injury resulting outside the temporal scope of their policies is placed on the insured.

In reaching this decision, the SJC followed the reasoning of the court in *EnergyNorth Natural Gas, Inc., v. Certain Underwriters at Lloyd’s* and found the language of the policy that declared “this policy applies to . . . property damage . . . which occurs anywhere during the policy period” to be controlling. It found that that Boston Gas put “undue emphasis on the phrase ‘ultimate net loss’” in arguing for the joint and several allocation and that “no reasonable policyholder” could expect its insurance to indemnify for all damages that occurred outside its policy period. This reasoning is unpersuasive in light of the fact that multiple other state high courts applied joint and several allocation in cases where the indemnification policy contained the same form lan-

---

80 *Id.* at 525 (citing Benjamin Moore & Co. v. Aetna Cas., 843 A.2d 1094, 1101 (N.J. 2004)).
81 See *id.* at 526 (citing Bratspies, *supra* note 31, at 1236–38 (noting that under joint and several liability, companies might not have an incentive to insure at all times because they could recover fully if an injury occurs even in part during a period of coverage)).
82 *Id.* at 526, 529 (Mass. 2009).
83 *Id.* (quoting SCOTT M. SEAMAN & JASON R. SCHULTZE, ALLOCATION OF LOSSES IN COMPLEX INSURANCE COVERAGE CLAIMS § 4.3[b], at 4–18 (2nd ed. 2008)).
84 *Id.* at 314.
85 *See* *Boston Gas Co. v. Century Indem. Co. (Boston Gas Everett III), 910 N.E.2d 290, 312 (Mass. 2009).
86 *Id.* at 314.
87 See *Boston Gas Everett III, 910 N.E.2d at 306–07 (citing EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd’s, 934 A.2d 517, 523 (N.H. 2007)).
88 *Id.* at 308–09 (emphasis added).
This reasoning is further undermined by the fact that drafters of the standard form CGL policy consciously omitted pro-rata allocation clauses from the policy. At least one court has considered the absence of a pro-rata clause proof that insurers intended to be responsible for the insureds’ entire loss up to the policy limit.

Given than numerous courts had interpreted the same language and come to differing results, the court’s decision appeared to hinge primarily on equitable considerations and policy rationales rather than contract interpretation. It noted that the “pro-rata allocation method promotes judicial efficiency, engenders stability and predictability in the insurance market, provides incentive for responsible commercial behavior and produces an equitable result.” There should be healthy skepticism of some of the court’s policy rationales. While it is likely that the pro-rata approach will reduce litigation, there is scant evidence that it will encourage more responsible commercial behavior. Furthermore, the pro-rata approach could have the effect of reducing private funding available for environmental remediation if responsible parties cannot pay the liabilities they expected to be covered by their CGL issuers.

The SJC noted that it believed the pro-rata approach would increase the incentive for commercial entities to purchase insurance rather than try to cut costs by going bare for periods in the hopes that their entire liability would be covered as long as one policy was triggered. However, this reasoning is undermined by the fact that companies still have a great incentive to insure in

---

89 See Owens-Illinois, Inc. v. United Ins. Co., 650 A2d 974, 990 (N.J. 1994) (quoting Gilbert L. Bean, a drafter of the CGL policy, as saying “there is no pro-ration formula in the policy, as it seemed impossible to develop a formula which would handle every possible situation with complete equity”).
90 See J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 508 (Pa. 1993) (noting that the CGL policy drafters failed to include pro-rata language despite contemplating that a progressive injury could trigger a policy if it occurred in part during the policy period).
91 See Boston Gas Everett III, 910 N.E.2d at 311 (supporting the court’s decision by noting that pro-rata allocation “also serves important public policy objectives”). The court, however, did not emphasize its policy rational as strongly as its New Jersey counterpart, which adopted pro-rata despite being “unable to find the answer to allocation in the language of the policies.” Owens-Illinois, 650 A.2d at 990.
92 Boston Gas Everett III, 910 N.E.2d at 311.
93 See infra notes 99–115 and accompanying text.
94 See infra notes 99–115 and accompanying text.
95 See infra notes 99–115 and accompanying text; see also Christopher R. Hermann et al., The Unanswered Question of Environmental Insurance Allocation in Oregon Law, 39 WILLAMETTE L. REV. 1131, 1132 (2003) (noting that strict liability pollution statutes bankrupted some companies, while others were unable to fund the work required by the EPA or corresponding state analog).
96 See Boston Gas Everett III, 910 N.E.2d at 311 (quoting Owens-Illinois, 650 A.2d at 992 (noting that joint and several allocation reduces the incentive to insure)).
case there is an injury that develops and manifests during a period of non-
coverage, such as an explosion that damages property or a pipe burst that leads
to a large, instantaneous toxic leak.97 Furthermore, the notion that companies
such as Boston Gas intentionally forwent insurance coverage for long periods
before buying a CGL to cover costs of a long-tail injury is false, as many such
long-tail injuries began before CGL polies were even issued.98

The decision might also have an effect of reducing private funds available
for remediation projects.99 It has been shown that the liabilities arising out of
strict liability environmental statutes can make parties insolvent.100 Although
the Massachusetts Oil and Hazardous Material Release Prevention Act (“Chap-
ter 21E”) has aggressive provisions to maximize private funding for remedia-
tion projects, it is possible that bankrupt companies will not be able to cover
the entire cost of remediating long-tail injuries that began prior to the issuance
of CGL policies.101 This undermines the SJC’s intention of maximizing r e-
sources available for remediation.102 It should be noted, too, that the pro-rata
scheme may also provide insureds the perverse incentive to conceal environ-
mental contamination for as long as possible to increase their policy issuer’s
time on the risk—delaying important cleanup efforts and further exposing the
public to toxics.103

One of the policy rationales that will likely be served is a reduction in the
amount of insurance indemnification litigation.104 In Boston Gas Co. v. Centu-
ry Indemnity (Boston Gas Commercial Point II), the U.S. Court of Appeals for
the First Circuit’s first appeal relating to the newly announced pro-rata rule, the
court upheld the trial judge’s determination to apply a time-on-the-risk alloca-
tion method to the verdict given by the jury.105 As seen in the Everett site liti-
gation, the judge could have just as easily ordered a retrial given the funda-
mental change in Massachusetts law on allocation.106 The court noted instead that the case was “precisely the sort of progressive environmental injury for which ‘it is both scientifically and administratively impossible to allocate to each policy the liability for injuries occurring only within its policy period’ and to which a time-on-the-risk calculation should therefore apply.”107 Thus, another trial was avoided.108 Significant in this determination was the court’s ruling that Boston Gas was judicially estopped from arguing on appeal that “the contamination was cabined in as narrow a period as possible (to maximize its recovery from Century).”109

By affirming the trial court’s ruling rather than ordering a new trial in light of the change in the law of allocation, the First Circuit showed its willingness to provide trial courts with broad discretion in determining issues of fact-based allocation.110 The First Circuit’s decision shows that time-on-the-risk allocation can serve to conserve judicial resources by disposing of long-tail indemnification cases where imperfect science could lead to further protracted litigation.111 The result of Boston Gas Commercial Point II was to shift eighty-five percent of Century’s liability to Boston Gas.112 Here, the insured party was a conglomerate with the resources to undertake and finish the remediation despite having only a small fraction of those costs indemnified.113 It remains to be seen whether the resources available for environmental cleanups are lessened as responsible parties become insolvent as a result of their drastically increased liability.114 At the end of the day, the only guaranteed winners will be the court dockets whose burdens are lessened by reduction of litigation resulting from the lack of clarity and the insurance companies, whose liabilities will reduce drastically.115

CONCLUSION

In Boston Gas Co. v. Century Indemnity (Boston Gas Everett III), the Massachusetts Supreme Judicial Court adopted the pro-rata approach to insur-
ance indemnification litigation. Subsequently, in *Boston Gas Co. v. Century Indemnity (Boston Gas Commercial Point II)*, the U.S. Court of Appeals for the First Circuit showed its willingness to allow the district courts broad discretion in applying pro-rata allocation to long-tail claims. The decisions likely will serve an important goal of reducing the burden that indemnification litigation puts on court dockets. Hopefully the decisions will not prove to lessen the private resources available for environmental cleanup projects.

**Preferred Citation:** Benjamin S. Reilly, Comment, *Pro-Rata Apportionment in “Long-Tail” Contamination Cases: Will Presumed Efficiencies Undercut Environmental Cleanups?*, 41 B.C. ENVTL. AFF. L. REV. E. SUPP. 91 (2014), http://lawdigitalcommons.bc.edu/ealr/vol41/iss3/.