What is Required for a "Fact-Based Allocation" of Damages Among Years of Exposure Under Boston Gas v. Century Indemnity? Lessons from New Jersey

In *Boston Gas Co. v. Century Indemnity Co*., 454 Mass. 337 (2009), the Massachusetts Supreme Judicial Court ("SJC") rejected the position adopted by some jurisdictions that, where bodily injury or property damage occurs during several consecutive policy periods or continues into uninsured periods, any insurer on the risk is liable for the entire loss, up to its policy limit. Instead, the SJC adopted a "pro rata" allocation rule, holding that damages for long-term environmental damage must be prorated over the years of exposure, rather than "condensed" into a single year. In other words, an insured can only recover a portion of the losses under each consecutive policy, which can leave coverage gaps, such as where the insured did not have applicable coverage in each year when the injury occurred. However, a formulaic time on the risk calculation is allegedly only a default approach. According to the *Boston Gas* court, the "ideal method is a 'fact-based' allocation, under which a fact finder would determine precisely what injury or damage took place during each contract period or uninsured period and allocate the loss accordingly." *Id*. at 367. Undoubtedly, "such an allocation is the most consistent with the contract language"; however, "the inability to make such determinations or the litigation costs associated with such an exact allocation has caused courts to use various proxies for deriving fair apportionment." *Id*.

But is a "fact-based allocation" ever possible when a claim involves continuing injury during several years, such as from ongoing environmental contamination or exposure to asbestos or toxic substances?

In *BASF Catalysts, LLC v. Allstate Insurance Co*., 2025 WL 1276202 (N.J. App. Div. May 2, 2025), the policyholder tried to make that fact-based case. *BASF* involved the cleanup of a former industrial site in Plainville, Massachusetts. BASF sought reimbursement for some of those costs from its general liability insurers. After holding that Massachusetts law applied, the court appointed a special master to allocate loss among BASF's insurers and the uninsured periods. Before the special master, BASF took the position, supported by its expert hydrologists and hydrogeologists, that it could allocate the loss among the different historical locations at the site—the Areas of Concern or "AOCs." BASF's expert attempted to determine the time periods each AOC was operational, the nature of the pollutants discharged at each AOC, and how those discharges occurred, with direct releases below the water table given more weight and releases above the water table or "indirect" releases assigned a lower value, to come up with an overall "score" for each AOC. These "scores" were used to determine the portion of the overall damage attributable to each AOC and accordingly, in BASF's view, to the insurers on the risk at the time of each AOC's operations. *Id*. at *5-6.

This approach resulted in allocation to U.S. Fire Insurance Company of 25.84% of the damages, which the trial judge initially accepted. U.S. Fire moved for reconsideration, and a new trial judge granted that motion and instead applied a "time-on-the-risk" allocation method, reducing U.S. Fire's share to 6.4%.

The New Jersey Appellate Division upheld the time-on-the-risk allocation. The "critical problem" with BASF's methodology, in the court's view, was that it did not account for the year-over-year variation of discharges at the AOCs and therefore the variations in environmental harm. "Instead, the expert used a uniform approach that inherently assumed the harm was evenly caused in all policy periods, rather than attempting to identify for each period the levels of discharge that occurred." *Id*. at *6. "The crucial shortcoming of this mode of analysis is that it omits any fact-based consideration that the rates of discharge at a particular AOC can vary from year to year and from policy period to policy period." *Id*. at *7. While arguably BASF was able to determine over what years and from what locations the contamination originated, it was not able to assign an amount of pollution to each policy year. "[I]n order to depart from a time-on-the-risk allocation method, there must be an accurate estimation of how much property damage took place in each [policy] period. The BASF's expert presented no such period-based estimates. Although we do not fault the expert for lacking the data to so, this is manifestly the common situation in which it is both scientifically and administratively impossible to allocate to each policy period the liability for injuries occurring only within its policy period." *Id*.

The *BASF* court's ruling creates a significant bar for policyholders or insurers trying to overcome the default "time-on-the-risk" allocation in *Boston Gas*. In most cases, and especially in cases from the 1960s to 1980s where general liability policies often did not contain pollution exclusions, an annual assessment of the amount of discharges (or other measure of contamination) is going to be difficult to re-create so many years later. In some cases, it might be possible to estimate year-over-year contamination by looking to things like annual production or revenue figures. However, even in such cases, it will likely be a challenge to convert the available data into something that can be mapped on to the insurance policy periods, which may not follow the calendar year and in some cases may be less or more than twelve months. It seems unlikely that the data will line up precisely with the insurance program, meaning that any "fact-based allocation" is going to have to resolve some difficult factual issues.

This decision also raises the question of whether pro rata "time on the risk" is a default rule or an inexorable command. Or put another

way, do courts that have adopted pro rata "time on the risk" do so because the policies require it or because it is the fairest of imperfect options? If the former, then the Appellate Division was clearly right. If it is the latter, which is what *Boston Gas* seems to say ("If the evidence permits an accurate estimation of the quantum of property damage in each policy period, then proration by time on the risk may be inappropriate"), how high should the bar be for that evidence? That will probably not be resolved in this lawsuit, unless the New Jersey Supreme Court takes the case and then certifies a question to the SJC, but it is one worth answering.

Click the link to read the full decision: BASF Catalysts LLC v Allstate Insurance Company